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THE PAYCHECK FAIRNESS ACT (H.R. 1338)

HEARING

BEFORE THE

SUBCOMMITTEE ON WORKFORCE PROTECTIONS

COMMITTEE ON

EDUCATION AND LABOR

U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

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THE PAYCHECK FAIRNESS ACT (H.R. 1338)

Wednesday, July 11, 2007
U.S. House of Representatives
Subcommittee on Workforce Protections
Committee on Education and Labor
Washington, DC

The subcommittee met, pursuant to call, at 10:31 a.m., in Room 2175, Rayburn House Office Building, Hon. Lynn Woolsey [chairwoman of the subcommittee] presiding.

Present: Representatives Woolsey, Payne, Hare, Wilson, Price, and Kline.

Staff present: Aaron Albright, Press Secretary; Tylease Alli, Hearing Clerk; Jody Calemine, Labor Policy Deputy Director; Lynn Dondis, Senior Policy Advisor for Subcommittee on Workforce Protections; Michael Gaffin, Staff Assistant, Labor; Jeffrey Hancuff, Staff Assistant, Labor; Brian Kennedy, General Counsel; Joe Novotny, Chief Clerk; Megan O'Reilly, Labor Policy Advisor; Dray Thorne, Senior Systems Administrator; Michele Varnhagen, Labor Policy Director; Cameron Coursen, Assistant Communications Director; Rob Gregg, Legislative Assistant; Richard Hoar, Professional Staff Member; Victor Klatt, Minority Staff Director; Jim Paretti, Minority Workforce Policy Counsel; Molly McLaughlin Salmi, Minority Deputy Director of Workforce Policy; Ken Serafin, Minority Professional Staff Member; Linda Stevens, Minority Chief Clerk/Assistant to the General Counsel; and Loren Sweatt, Minority Professional Staff Member.

Chairwoman WOOLSEY [presiding]. A quorum is present. The hearing of the Workforce Protection Subcommittee on The Paycheck Fairness Act, H.R. 1338, will come to order.

Pursuant to committee rule 12-A, any member may submit an opening statement in writing which will be made part of the permanent record.

I now recognize myself followed by Ranking Member Joe Wilson for an opening statement.

I thank you all for coming. This is going to be a hearing on H.R. 1338, the Paycheck Fairness Act, sponsored by Representative Rosa DeLauro of Connecticut.

Representative DeLauro first introduced this bill about 10 years ago. And she has not stopped working on it from the moment she introduced it. And I am proud to be one of the over 200 co-sponsors of this legislation which strengthens the existing Equal Pay Act to ensure that women make equal pay for equal work.

This is important because in the 43 years since the passage of the Equal Pay Act, women still make less than men doing the same work. In April the full Education and Labor Committee held a hearing on equal pay, and our witnesses confirmed this.

And although most women are in the labor force, including 70 percent of all moms, on the average, they earn only 77 percent of their male counterparts. This translates into lost income anywhere from $400,000 to $2 million over a lifetime of work. This gap exists at the beginning of a woman's career, and it grows wider over time.

Dr. Catherine Hill from the Association of American University Women was one of our witnesses at the April hearing. She testified that a recently published study conducted by the AAUW found that 1 year out of college women make only 80 percent of what men earn, and that the gap exists in every career field and in every occupation.

The study also found that 10 years later a woman makes only 69 percent of a man's salary. This study looked at a full range of other factors that could explain this difference between men and women 10 years down the road and discovered that a full 12 percent of the gap was attributable to wage discrimination.

This wage gap is grossly unfair to women. And it affects not only their weekly paycheck, but also their prospects at retirement.

Older women are less likely than older men to receive pension income. And when they do, they receive one-half the benefits that men do. The median income for an older woman is about $15,000 a year compared to $29,000 for an older man. And 70 percent of older adults living in poverty are female.

But not only is unequal pay bad for women, it is particularly bad for their families. Currently the average woman's paycheck makes up about one-third of a family's total income. And for many families, having a working wife can make the difference between being in the middle class or being poor.

This is even true for single women who are heads of their households. They are twice as likely to be in poverty as a single dad.

The goal of the Equal Pay Act to eliminate pay disparities for women is more than a laudable goal. However, it has never lived up to its full promise. But H.R. 1338, the Paycheck Fairness Act, does just that.

It imposes a stricter burden on an employer who wishes to affirmatively defend its actions by citing non-gender reasons for the difference in pay between a man and a woman. It expands the remedies for victims of pay discrimination beyond back pay to compensatory and punitive damage.

It prohibits employer retaliation if workers share salary information with each other. It improves the collection of pay information. And it creates a grant program for the establishment of negotiation skills, training programs for women and girls.

There is much that we need to do to make workplaces more friendly for women and their families. Equal pay is a crucial part of that change.

We have a very distinguished panel of witnesses today who will elaborate on this very important bill. And I look forward to their testimony.

Now I yield to Mr. Wilson.

[The statement of Ms. Woolsey follows:]

Prepared Statement of Hon. Lynn C. Woolsey, Chairwoman, Subcommittee on Workforce Protections

Thank you all for coming today for this hearing on H.R. 1338, the Paycheck Fairness Act, sponsored by Representative Rose DeLauro of Connecticut.

Representative DeLauro first introduced this bill some ten years ago and has been introducing it ever since.

I am proud to be one of over 200 co-sponsors of this legislation, which strengthens the existing Equal Pay Act to ensure that women make equal pay for equal work.

This is important because in the 43 years since passage of the Equal Pay Act, women still make less than a man.

In April, the Full Education and Labor Committee held a hearing on equal pay and our witnesses confirmed this.

Although most women are in the labor force—including 70 percent of all mothers—on average they earn only 77 percent of what their male counterparts make.

This translates into lost income of anywhere from $400,000 to $2 million over a lifetime of work.

This gap exists at the beginning of a woman's career and grows even wider over time.

Dr. Catherine Hill from the Association of American University of Women was one of our witnesses at the April hearing, and she testified about a recently published study conducted by the AAUW.

What this study found was that one year out of college, women make only 80 percent of what men make, and that the gap exists in every career field and in every occupation.

The study also found that 10 years later, a woman makes only 69 percent of a man's salary.

This study looked at a full range of other factors that could explain this difference between men and women 10 years down the road and discovered that a full 12 percent of the gap was attributable to wage discrimination

This wage gap is grossly unfair to women and affects not only their weekly pay check but also their prospects at retirement.Older women are less likely than older men to receive pension income, and when they do, they only receive one-half the benefits that men do.

The median income for an older woman is about $15,000 compared to $29,000 for an older man. And 70 percent of older adults living in poverty are women.

But not only is unequal pay bad for women, it is bad for their families as well. Currently, the average woman's paycheck makes up about one-third of a family's total income.And for many families, having a working wife can make the difference between being in the middle class or being poor.This is also very true for single women who are the heads of their households. They are twice as likely to be in poverty as single dads.The goal of the Equal Pay Act—to eliminate pay disparities for women—is a laudable goal. However it has never lived up to its full promise.

H.R. 1338, the Paycheck Fairness Act does just that.

It imposes a stricter burden on an employer who wishes to affirmatively defend its actions by citing non-gender reasons for the difference in pay between a man and a woman.It expands the remedies for victims of pay discrimination beyond backpay to compensatory and punitive damages.

It prohibits employer retaliation if workers share salary information with each other.It improves the collection of pay information.And it creates a grant program for the establishment of negotiation skills training programs for women and girls.

There is so much that we need to do to make the workplace a friendly place for women and their families.And equal pay is crucial.We have a very distinguished panel of witnesses today who will elaborate on this very important bill, and I look forward to their testimony.

Mr. WILSON. Thank you, Madam Chairman.

Good morning. And welcome to our witnesses.

I appreciate the chair calling this legislative hearing this morning to examine H.R. 1338. I would hope this marks the start of a commitment to regular order and of giving respect and meaning to the deliberative process that this committee, at least for the proceeding 12 years, has come to know.

I choose my words here advisedly. As members well know, too often in the last 7 months regular order has not been the order of the day. As recently as 2 weeks ago, our committee was presented with a markup of complicated legislation that will have profound effects on workers and employees with little time for analysis and no consideration of the bill through the hearing process. So I am glad we are at least starting the process of regular order today.

The comparison I make is very much on point because I think the bill before us today, despite its attractive title, similarly has the potential to radically change more than 40 years of well-settled anti-discrimination law under the Equal Pay Act and to tip the careful balance embodied in the law without significant or meaningful evidence indicating that such change is necessary. Make no mistake. As we will hear today, that is what H.R. 1338 does.

Now, I am deeply concerned with the effects this bill will have on workers, employers, and others. I am troubled that H.R. 1338, for the first time, would provide unlimited compensatory and punitive damages for employers who had absolutely no intention of discrimination, a remedy not available to victims of intentional discrimination on the basis of race, color or even gender under Title 7.

As we will hear, H.R. 1338 will essentially gut the ability of employers to defend differences in pay among employees based on legitimate and nondiscriminatory factors other than sex. The bill eliminates the ability of employers to defend pay differentials based on different locations, enterprises or geographical regions. It reverses well-settled law under the Fair Labor Standards Act regarding class action lawsuits solely with the result of expanding frivolous litigation.

And finally, the bill attempts via so-called voluntary guidelines, to revive a doctrine of comparable worth that most right-thinking policy makers on both sides of the aisle have wisely considered dead.

In closing, let me say I appreciate the opportunity to examine this legislation in our subcommittee this morning because I think the more closely we look at it, the more flawed we will reveal it to be.

I thank the Chair, welcome our witnesses, and yield back my time.

[The statement of Mr. Wilson follows:]

Prepared Statement of Hon. Joe Wilson, Ranking Republican, Subcommittee on Workforce Protections

Good morning, and welcome to our witnesses.

I appreciate the Chair calling this legislative hearing this morning to examine H.R. 1338. I would hope that this marks the start of a commitment to regular order, and of giving respect and meaning to the deliberative process that this Committee—at least for the preceding twelve years—had come to be known.

I choose my words here advisedly. As Members well know, too often in the last seven months, "regular order" has not been the order of the day. As recently as two weeks ago, our Committee was presented with a markup of complicated legislation that will have profound effects on workers and employees, with little time for analysis, and no consideration of the bill through the hearing process. So I am glad we are at least starting the process of regular order today.

The comparison I make is very much on point, because I think the bill before us today—despite its clever title—similarly has the potential to radically change more than 40 years of well-settled anti-discrimination law under the Equal Pay Act, and

to tip the careful balance embodied in the law without significant or meaningful evidence indicating that such change is necessary.

Make no mistake, and as we will hear today, that is what H.R. 1338 does, and I am deeply concerned with the effects this bill will have on workers, employers, and others.

I am troubled that H.R. 1338, for the first time, would provide unlimited compensatory and punitive damages for employers who had absolutely no intention of discrimination—a remedy not available to victims of intentional discrimination on the basis of race, or color, or even gender under Title VII.

As we will hear, H.R. 1338 will essentially gut the ability of employers to defend differences in pay among employees based on legitimate and non-discriminatory factors other than sex. The bill eliminates the ability of employers to defend pay differentials based on different locations, enterprises, or geographical regions. It reverses well-settled law under the Fair Labor Standards Act regarding class action lawsuits, solely with the result of expanding frivolous litigation. And finally, the bill attempts, via so-called "voluntarily" guidelines, to revive a doctrine of "comparable worth" that most right-thinking policymakers on both sides of the aisle have wisely considered dead.

In closing, let me say again—I appreciate the opportunity to examine this legislation in our Subcommittee this morning, because I think the more closely we look at it, the more flawed we will reveal it to be. I thank the Chair, welcome our witnesses, and yield back my time.

Chairwoman WOOLSEY. Thank you, Mr. Wilson.

I would like to introduce the very distinguished panel of witnesses before us. And I will introduce them in the order that they will be speaking.

First, Dr. Evelyn Murphy, who is an economist and the president of the Wage Project, a national organization to end wage discrimination in the workplace. She is also the author of "Getting Even: Why Women Still Don't Get Paid Like Men and What To Do About It," which was published in the year 2005. In 1986 Dr. Murphy was elected lieutenant governor of Massachusetts. She was the first woman in the state's history ever to serve in any constitutional office. After that, she entered the private sector as executive vice president of Blue Cross Blue Shield. She is now a resident scholar at the Women's Research Center at Brandeis University. She received her B.A. and Ph.D. from Duke University and her M.A. from Columbia University.

Thank you for coming, Dr. Murphy.

Marcia Greenberger—Marcia is the founder and co-president of National Women's Law Center, an organization that has worked to expand possibilities for women and girls. For over 30 years Ms. Greenberger has been an advocate for women and has been a leader in developing strategies to secure the successful passage of legislation protecting women and counsel in landmark litigation establishing new legal precedents for women. She has received numerous honors for her work, including being recognized by Working Woman Magazine as one of the 25 heroines who actively over the last 25 years has helped women in the workplace. She received her B.A. and law degrees from the University of Pennsylvania.

Thank you for coming, Marcia.

Camille Olson—Camille is a partner in the law firm of Seyfarth Shaw located in Chicago. She is a member of the firm's labor and employment law's steering committee, chair of its class action discrimination practice group, and a key member of its interdisciplinary task force on fair labor standards. Ms. Olson has 20 years of experience representing employers in all areas of labor and employ-

ment law. She received her B.A. and law degrees at the University of Michigan.

Thank you for coming, Ms. Olson.

Joseph Sellers—Mr. Sellers is a partner at the law firm of Cohen, Milstein and is head of the firm's civil rights and employment practice group. In this capacity he represents victims of discrimination and illegal employment practices individually and through class actions. Prior to that, he served as head of the employment discrimination project at the Washington Lawyer's Committee for Civil Rights and Urban Affairs for over 15 years. Mr. Sellers has also been active in legislative matters and worked on the passage of the Civil Rights Act of 1991 and the Americans for Disabilities Act of 1990. He received his B.A. from Brown University, and his law degree from Case Western Reserve School of Law.

I welcome all of you. And you are going to be wonderful witnesses.

For those of you who have not testified before the committee before, let me explain the lighting system. We have a 5-minute rule. Everyone, including the members, are limited to 5 minutes of presentation or questioning or a combination.

The green light is illuminated when you begin to speak. When you see the yellow light, it means you have 1 minute remaining. And when you see the red light, it is time to conclude.

Be certain that as you testify nobody is going to cut you off in mid-sentence. But please turn on the microphone in front of you.

And we will begin with you, Dr. Murphy.

STATEMENT OF EVELYN MURPHY, PRESIDENT, WAGE PROJECT

Ms. MURPHY. Thank you, Chairwoman Woolsey.

Members of the committee, thank you very much for the opportunity to testify before you in the House on the Paycheck Fairness Act. As an economist, I have been interested in the gender wage gap for over four decades. Over those years as I watched more and more women graduating from college and entering and working all of their lives, I just assumed that we would catch up with men's wages.

So in the mid-1990s when we had not, it shocked me. I have been single-mindedly scrutinizing the wage gap ever since.

My book, "Getting Even," reveals the extent to which this discrimination permeates the entire United States economy. You can read about employers of all kinds who in recent years had to pay women employees to settle—or former employees—to settle claims of gender discrimination. Even with those consequences, our current laws have not ended workplace discrimination.

There continue to be barriers to hiring and promoting qualified women, financial penalties imposed arbitrarily on pregnant women, sexual harassment by bosses and co-workers, failure to pay women for the same job as much as men, and biases and stereotyping, which may seem slight at the moment when it sets back a women, yet also cuts into her paycheck. Inequitable treatment takes money out of a woman's paycheck, which accumulates over years into serious financial losses.

The young woman who graduates from high school last spring will make $700,000 less than the young man standing next to her getting his high school diploma. A woman who graduated from college will miss $1.2 million over her working life. And a woman with an MBA, a law degree or a medical degree will miss $2 million compared to the man getting his degree with her.

You in Congress, policy analysts, researchers, all of us have yet to adequately understand and address the gender wage gap. Statisticians, try as they might, have not been able to fully "explain" the gap. Why is that after all this time? Isn't it time to conclude that we are looking at inadequate data to explain the gap?

The gender gap is not just about worker characteristics that we get from the Bureau of Labor, Statistics and the Census Bureau. It is about workplace characteristics. And it is time to collect data as extensively about workplaces as about workers.

This bill is important because it finally points public attention in the right place, the American workplace, and initiates an expanded collection of workplace data. Prompt passage is important.

Recently the wage project did a survey. And it used the national women's groups, the National Committee on Pay Equity, the BPW, the YWCA, the AAUW and used their outlets. Eight hundred women responded to this survey.

And while this is not a random survey I will tell you that their voices give you a window into what they are experiencing today and the kind of discrimination and pay inequities. The loudest message in that survey is that women fear retaliation when they talk about their pay at work. The non-retaliation clause in section three will help many women who now fear firing or demotion.

One college-educated woman in her late 40s said, "About 3 years ago I worked for a major corporation in a supervisory capacity. My staff was 47 people, and my colleague's staff was 12. The salary he made was $28,000, and mine was $22,500. The vice president advised me that if I told what I found out, I could be fired." The fear factor is real.

This bill will help women now silenced by the fear of retaliation. And besides, fair minded employers should want employees who suspect that their pay is unfair to raise the questions now before suspicion hardens into grievances and lawsuits and erodes their productivity.

Three out of four women in this survey reported that they had recently had some experience with unfair treatment or pay. Passage of this bill will give them a sense that, in fact, the inequities in their workplace may get better and improve so they don't have to leave their jobs.

A 37-year-old caseworker in a non-profit organization said they hired a man whom they paid more, and she was to train that man. She decided to do that and left her job afterwards discouraged.

It costs women money when they have to leave their jobs because they are not paid or treated fairly. They lose their seniority. And they may take a pay cut in order to get their salaries.

For women whose employers adopt the guidelines from the Secretary of Labor, these are women who will know that not only is unequal pay now not the law and not sanctioned by law, but also

pay equity will be ingrained in the workplace and the culture of their workplace as well as the practices.

Every employer should adopt these regulations. That is the surest way to get from here to every American workplace having pay equity in the near future.

And speaking of the future and since I have got a red light, let me just say this. I hope you pass this bill soon because of the unintended legacy if we don't. That is if we don't do something.

I mean, it is clear after all these years that we haven't eliminated the pay gap and can't with the laws that we now have. If we don't do something, we pass on what women now lose to your daughters and granddaughters. It is a lousy legacy. It is one you don't and we don't want. But if we don't do something about it, that is the legacy we will pass on.

[The statement of Ms. Murphy follows:]

Prepared Statement of Evelyn F. Murphy, President, WAGE Project

Chairwoman Woolsey, Congresswoman DeLauro, members of the House Subcommittee on Workforce Protections, thank you for the opportunity to testify on H.1338, the Paycheck Fairness Act.

I am Evelyn Murphy, a Ph. D. economist, President of The WAGE Project, a national nonprofit organization dedicated to eliminating the gender wage gap, author of Getting Even: Why Women Don't Get Paid Like Men and What To Do About It, Resident Scholar at the Women's Studies Research Center at Brandeis University, a corporate director, and former Lt. Governor of Massachusetts.

Gender Discrimination in Today's Workplaces and Its Cost to Working Women.

As an economist, I have been interested in the gender wage gap for almost four decades. Over those years, as I watched more women graduating from college, and more women working throughout their lives, I just assumed that we would catch up with men's wages. I was startled in the mid-1990s when I realized that we were nowhere near parity. I have been single-mindedly scrutinizing this wage gap ever since.

My book, Getting Even—the result of eight years of research accumulating evidence of gender wage discrimination never before assembled—reveals the extent to which this discrimination permeates the entire United States economy.

You can read about employers of all kinds who, in recent years, had to pay women employees or former employees to settle claims of gender discrimination; or judges and juries ordered them to pay up. These consequences and our current laws have not ended workplace discrimination. There continue to be barriers to hiring and promoting qualified women; financial penalties imposed arbitrarily on pregnant women; sexual harassment by bosses and co-workers; failure to pay women the same money as men for doing the same jobs; and biases and stereotyping which may seem slight or aggravating setbacks to a woman at the time, yet also cut into her paycheck.

Inequitable treatment takes money out of a woman's paycheck, which accumulates into serious financial losses over the 35 years that she typically works: the young woman graduating from high school this spring will make $700,000 less than the young man receiving his high school diploma at the same time; the woman graduating from college this spring will lose $1.2 million compared to the man getting his degree along with her; and the woman with the newly minted MBA, law degree or medical degree will make $2 million less.

Women don't realize the enormous sums that they lose to wage discrimination because they never see big bites taken out of their paychecks at any one time. Instead, little nicks in a paycheck—a promotion delayed because she is pregnant and her boss guesses (wrongly) that she intends to shift to part-time work, a sales call she misses because her boss assumes she's going home to cook dinner for her family, her request for a different shift to escape a sexual harasser—all add up, over time to become: $700,000, $1.2 million and $2 million.

Also, women do not realize how much wage discrimination hurts them because we—Congress, policy analysts, researchers—have yet to adequately understand and address the gender wage gap. Statisticians, try as they might, have not been able to fully "explain" the gap. Why? Isn't it time to conclude that we are looking at inadequate data to explain this gap? The gender wage gap is not just about worker characteristics, ie. the data provided by the Bureau of Labor Statistics and Census Bu-

reau; it's about workplace characteristics, too. It's time to collect data as extensively about workplaces as workers.

H. 1338 is important because it finally points public attention to the right place: the American workplace, and initiates an expanded collection of workplace data. This bill, with its emphasis on altering workplace pay practices, creates the appropriate conditions for American women to achieve gender pay equity. Working women are not looking for pay equity to be handed to them. Women can and will take responsibility for ensuring they're paid and treated fairly. Yet employers must also take responsibility to ensure that their pay policies and practices are fair and equitable. H. 1338 helps women and employers achieve these common goals and initiates the collection of workplace pay data essential to eliminating workplace discrimination.

Prompt Action Is Important.

Prompt passage of H 1338 is very important to working women. Here's why.

The WAGE Project surveyed working women through collaborations with several national women's organizations—the National Committee on Pay Equity, The Business and Professional Women, The Young Women's Christian Association, the American Association of University Women, and the National Organization for Women. Almost 800 working women responded. These women work in every state in the nation and in every sector of the economy. They take home small paychecks as waitresses, modest paychecks as office managers and technicians, and relatively large paychecks as senior executives, professors and physicians. While this is not a random sample of working women, their voices offer a candid window into today's working conditions and their recent experiences with pay inequity.

The loudest message of this survey is that women fear retaliation if they talk about their pay at work. The nonretaliation clause in Section 3 will help many women who fear firing or demotion. One college educated woman in her late 40's said: "About three years ago I worked for a major corporation in a supervisory capacity. My staff was 47 people and my male colleague's staff was 12. His salary was $28,000, mine was $22,500 * * * The Vice President advised me that if I told what I found out I could be fired."

The fear factor is real. This bill will help women now silenced by fear of retaliation. Besides, fair-minded employers should want employees who suspect unfair pay to raise their questions before suspicion hardens into grievances and lawsuits and erodes their productivity.

Three out of four survey respondents reported some recent experience with unfair treatment or pay. Passage of H.1338 will give those women and others hope that working conditions will become more equitable where they now work and that they don't have to leave their jobs. A 37 year old case worker in a nonprofit organization said "They just hired a male and asked me to train him. He is starting out making more than me. There is (sic) certain criteria you must meet for this position which he does not meet. Then they want me to train him to do the same job I am doing." She did nothing about this "because I have to keep my job to feed my children. I am, however, looking for another job." Typically, when women encountered blatant pay inequity, they said they decided to leave: "I quit." "I gave notice and left one month later." "I used up my vacation time and never went back."

Don't miss the financial point: it costs women money when they have to leave a job in order to be paid and treated fairly. They may lose months of income until they find another job. They lost whatever seniority they had built up with the last employer. They may have to take a pay cut if pressure to bring in a paycheck forces them to settle for a lesser position.

For women whose employers adopt and enforce the Secretary's guidelines for pay equity, they will be working in a workplace where pay equity is not only the law, but also, engrained in the practices of the employer and the culture of their workplace. Every employer should adopt the guidelines to be developed by the Secretary of Labor. That is the surest way to establish pay equity in every American workplace in the near future.

Passage of H. 1338 will send working women an important message: Congress recognizes their situation, is taking action to bring them data with which they can safely raise pay equity concerns with their employers, and is pressing employers to be more accountable for pay equity among their employees. In the absence of pay equity hearings, much less legislation, over the last decade, many women have lost hope that their employers feel pressure to exercise oversight and vigilance about compliance with Title VII of the Civil Rights Act and the Equal Pay Act.

Finally, there's the future. I urge you to pass H.1338 to avoid an unwanted, painful legacy. We couldn't close the wage gap even one penny from 1994 to 2004, even with the boom years of the late 1990s! The fact that the gender wage gap has been

stuck tells us that there is nothing inevitable about the wage gap going away on its own if we continue to rely only on current laws and their implementation. If we do not act, we will pass on to the next generation, and the next after that—to your daughters, and your granddaughters, nieces, aunts, and all the younger women in your families whom you love and respect—the same financial losses working women face today. Is that a legacy you want to pass on to them? Of course not. None of us wants to. But that will happen if no action is taken to address today's discriminatory treatment of women at work.

Some Important Recommended Changes to Specific Language in the Bill.

Section 3. Enhanced Enforcement of Equal Pay Requirements. (d) Nonretaliation provision.

I have already illustrated how important this provision is to help working women act on their own behalf without fear of retaliation. Some employers may resist open discussion among employees about their salaries and pay scales as this woman confirms: "my employer intimidates us. We don't dare talk about what we earn while we're working." But those employers who do treat and pay women equitably have nothing to hide. Open discussions among employees and their employer about pay and pay scales can enable all employees to feel fairly and adequately compensated. As I have listened to working women, they are thoughtful and fair minded about pay. More transparency about pay and pay scales in America's workplaces would be beneficial for employers and employees alike. H. 1338 promises to open up workplaces to healthy discussions about who gets paid what and why. I urge the committee to insist on this language in the final bill.

Section 5. Negotiation Skills Training for Girls and Women.

Here are my concerns. I leave to staff to wordsmith this section.

First, I would urge language which clarifies that Congressional intent is to focus on negotiation skills directly related to salary and total compensation matters, including not only skills in bargaining and communicating, but also, benchmarking techniques. It would be easy for rules and regulations to interpret the current language of this section to permit a broader set of negotiating skills in financial planning, flex time and other workplace conditions. These are important matters. But the key here is to maintain the priority and focus on negotiations skills training which bear directly on a woman's earnings. Clarifying language to this section might not necessarily exclude these other topics involving a woman's finances, but rather, establish that priority funding goes to training which bears directly on women's paychecks.

Secondly, in (a) (5) Use of Funds. In the second sentence, I would suggest substituting the words "equitable salaries and fair, equitable compensation packages for themselves" for the current language "higher salaries and the best compensation packages possible for themselves". The purpose of this bill is to establish pay equity. Training which focuses on women getting paid what they should, what is fair compared with others where they work given their job, experience, responsibility, etc fits with the purpose of the bill. The current language suggests training women to get promotions (higher salaries) and the most money (compensation package) they can. I have no doubt that once women get trained to negotiate for fair pay they will have the necessary skills for gaining more pay. The intent of this bill, as I understand it, is to help women achieve pay equity. That, in itself, will be a significant outcome.

Finally, (c) Report. I recommend that the report include not only "describing activities conducted under this section" but also "and an evaluation of the effectiveness of these activities in enhancing equity in women's paychecks". An assessment of which training programs actually advance women's earnings and which do not is essential.

Section 7. Technical Assistance and Employer Recognition Program.

(a) Guidelines. Voluntary guidelines are just that: voluntary. The adoption of such guidelines by every employer would dramatically advance pay equity. I urge the committee to strengthen language in this section such that employers are incentivized to adopt these guidelines and conversely, disincentivized for not adopting these guidelines after some specified period of time.

(b) (2) Please insert "or layoffs of employees" after men in the clause "* * * lowering wages paid to men". Women need men as allies in achieving fair and equitable treatment where they work. This clause is intended to make clear that neither layoffs nor lowered wages are an acceptable means for employers to achieve pay equity. The experience of the State of Minnesota validates this point. Minnesota achieved pay equity—women employees are now paid 97 cents for every dollar men employ-

ees earn—without one man losing a job or losing money in his paycheck. Pay equity can be achieved not a men's expense.

Section 8. Establishment of the National Award for Pay Equity in the Workplace. (b)(1)

I urge the committee to add language which requires applicants for this award to disclose the salaries by gender and job category which were made more equitable. The language now makes it possible for an employer to describe worthy efforts but not report what, if any, actual effects its pay equity initiative had. Without documented advances, no applicant should be eligible to receive this prestigious award.

Section 9. Collection of Pay Information by the Equal Opportunity Employment Commission.

This section of the bill is extremely important. It has the potential to provide breakthroughs in the nation's understanding of pay inequities in today's workplaces and in the nation's capability to eliminate the discrimination which underlies pay inequity.

I urge the committee to specifically guarantee access and availability of the pay information gathered under this section to researchers, public policy analysts, and social service organizations. These professionals need this data to advance our understanding of workplace discrimination and what to do about it. While the Secretary of Labor may perform studies and inform the public under Section 6, broad based access to pay data collected in Section 9 would stimulate the cross checks and debates of data which only develop when many and varied professionals look at the same data. The standard here ought to be the accessibility that professionals now have to data gathered by Census Bureau and the Bureau of Labor Statistics.

The designation of the EEOC as lead agency for surveying available data and determining data needed to enhance their enforcement activities is appropriate. Anticipating that some adaptation of the EEO-1 form appears the most likely means to collect pay information by gender and job title, I call to your attention how limited the availability of EEO-1 data has been to this larger community of interests. Until 2000, EEO-1 data was unavailable to almost everyone and even now, only a handful of academics have access. The need for confidentiality concerning company specific data must be respected, but, with adequate resources, the EEOC can devise ways to enable more researchers and practitioners to access EEO-1 data. Limited access to EEO-1 data has seriously limited public debate and policy formulation about the gender wage gap. I have tremendous sympathy for extensive enforcement mandate the EEOC implements and I do not intend this as criticism of the agency. Rather I want to ensure that, if the EEOC becomes the collector of pay information, that the agency has not only the mandate but also the resources to make this data available to a large community of analysts and practitioners.

In summary.

Forty years ago, Title VII of the Civil Rights Act and the Equal Pay Act made gender discrimination illegal in America's workplaces and embraced the principle that women should be paid like men when they do the same work. In the last decade, our nation's progress toward reaching these goals has stalled. Prompt passage of The Paycheck Fairness Act can and will reactivate momentum.

The Paycheck Fairness Act sends a strong message to working women that this nation intends to eliminate paycheck discrimination in the foreseeable future. At the same time, the Paycheck Fairness Act sends just as strong a message to employers that they can and should pay for the job, not who does the job. If employers do that—pay for the job, not who does the job—we will eliminate pay discrimination not just for women, but for minorities, older workers, and handicapped workers. That is the promise contained in this bill.

I commend you on your leadership on this bill and offer to help in whatever you wish.

Thank you.

Chairwoman WOOLSEY. Thank you, Dr. Murphy.

Ms. MURPHY. Thank you.

Chairwoman WOOLSEY. Ms. Greenberger?

STATEMENT OF MARCIA D. GREENBERGER, FOUNDER AND CO-PRESIDENT, NATIONAL WOMEN'S LAW CENTER

Ms. GREENBERGER. Thank you very much for the opportunity to testify here today and on behalf of the National Women's Law Center. And I am very happy to testify in support of the Paycheck Fairness Act. And I ask that my full written remarks be included in the record and will just briefly summarize then in the period that I have.

And I do want to say at the outset that it is vitally important, as Dr. Murphy has said, that this piece of legislation is enacted into law along with the Ledbetter Fair Pay Act, which is pending in Congress now. Unless we have strong laws on the books that reflect a determination on the part of this country that women be paid fairly for their hard work and the skills that they bring and the contributions that they make in the workplace, then we are not living up to our deal, ideals or the promises that we have made to women and the daughters of this country that we stand for equal pay for equal work.

I would like to talk for a moment or two about why the current Equal Pay Act has not lived up to its promise and why the law needs to be strengthened. Passed in 1963, it was seen as a landmark breakthrough, to be sure, that women who are working will get equal pay. But for several reasons it has over the years not met the needs that the law was intended to address.

First courts, unfortunately, have interpreted the law in such stringent ways, certainly some courts, that it has been exceptionally difficult for a woman to demonstrate a violation, even when she is clearly paid less on the basis of her sex. And with courts these days asking the legislature to be extremely explicit in the way that it writes our laws, it is up to Congress now to amplify on the Equal Pay Act to be sure that courts are not going to get it wrong in the future.

In particular, we have seen with some courts an argument that even though under the Equal Pay Act regulations, when comparing the job that a woman has to a man's job, it doesn't have to be identical and that minor differences shouldn't defeat a claim for equal pay. Some courts have allowed those minor differences to justify an employer's paying women less.

As one commentator stated, there is now a point where with some courts, virtually identical jobs are being required but even more than that. And it has provided women with a very limited substantive right to equal pay as a result.

In addition, under the Equal Pay Act, in contrast to Title 7's prohibition against pay discrimination, there is a defense of a factor other than sex which employers are allowed to bring to bear when defending against an Equal Pay Act claim. And the factor other than sex by some courts, again, has been allowed to be advanced when that factor has nothing to do with the business justification for the pay differential. And as a result, all kinds of inappropriate and unconvincing factors have been allowed to be advanced as a way of keeping an employer legally able to pay women less, again, completely unacceptable.

Further, the Equal Pay Act's procedures and remedies have not been sufficient as it has turned out in practice. In particular—and

I know, Mr. Wilson, you mentioned the damages issues—under our law in general when there is an intentional violation—and that is what has to be shown in order to get damages. And for punitive damages, an even more stringent standard would have to be shown. Under the Equal Pay Act, that traditional remedy is not available.

As a result, for all too many employers in this country pay discrimination can be simply a cost of doing business. And if that employer isn't caught until many years go by without a compensatory damage and without a punitive damage remedy, it can actually be cost-effective for an employer to simply pay women less year after year after year.

And the Equal Pay Act damages that are available under the law now will not fully compensate a woman for the damage that she suffers. And that is a damage that can go not only for herself and her family during her work life, but for pensions also during retirement. But it won't serve as a deterrent, either.

I know that my time is up. And as a result, I can't go through some of the other very important provisions in the bill that help with remedies, including the class action provision, which is important, the information provisions, which are important.

And just to conclude, the Paycheck Fairness Act is a very balanced approach. It helps with legal enforcement. It helps with voluntary, working together and facilitates that for employees and their employers. It helps for government enforcement. So it brings all of the private sector resources and public sector resources and the promise of this nation to bear to finally tackle the job of equal pay.

Thank you.

[The statement of Ms. Greenberger follows:]

Prepared Statement of Marcia D. Greenberger, Co-President, National Women's Law Center

Chairman Woolsey, Ranking Member Wilson and members of the Committee, thank you for this opportunity to testify on behalf of the National Women's Law Center on "The Paycheck Fairness Act (H.R. 1338)." More than forty years after enactment of the Equal Pay Act of 1963, equal pay for women is not yet a reality in our country. While progress toward that goal has been made, women working full-time year-round still earn only about 77 cents for every dollar earned by men—and women of color fare significantly worse. There is not a single state in which women have gained economic equality with men, and gender-based wage gaps persist across every educational level.

The evidence shows that these gaps cannot be dismissed simply as the result of women's choices or qualifications. Indeed, substantial evidence demonstrates that discrimination and barriers that women face in the workforce must shoulder blame for the wage disparities women endure. And the recent Supreme Court decision in Ledbetter v. Goodyear Tire & Rubber Co. underscores the problems of equal pay that plague all too many women in this country.

Congress should promptly enact the Paycheck Fairness Act, introduced by Representative DeLauro and Senator Clinton and the subject of today's hearing. In addition, as the Supreme Court's damaging decision in Ledbetter demonstrated, Title VII must be strengthened. Further, Congress should enact the Fair Pay Act to address the damaging and pervasive impact of occupational sex segregation on fair wages for women.

I am delighted to be here today to talk about ways in which the Paycheck Fairness Act would strengthen current laws against wage discrimination and require the government to step up to its responsibility to prevent and address pay disparities. Enactment of this Act is critical to ensure that women have the tools necessary to achieve equal pay that has too long been denied them.

The Wage Gap Reflects Sex Discrimination

The wage gap cannot be dismissed simply as the result of "women's choices" in career and family matters. In fact, recent authoritative studies show that even when all relevant career and family attributes are taken into account—attributes that themselves could reflect underlying discrimination—these factors explain at best a minor portion of the gap in men's and women's earnings.

A 2003 study by U.S. Government Accountability Office (then the General Accounting Office) found that, even when all the key factors that influence earnings are controlled for—demographic factors such as marital status, race, number and age of children, and income, as well as work patterns such as years of work, hours worked, and job tenure—women still earned, on average, only 80% of what men earned in 2000.[1] That is, there remains a 20 cents on the dollar pay gap between women and men that cannot be explained or justified by such factors.

• One extensive study that examined occupational segregation and the pay gap between women and men found that, after controlling for occupational segregation by industry, occupation, place of work, and the jobs held within that place of work (as well as for education, age, and other demographic characteristics), about one-half of the wage gap is due solely to the individual's sex.[2]

• A recent study by the American Association of University Women found that, just one year out of college, women working fulltime earn only 80 percent of what their male counterparts earn. Indeed, even women who make the same choices as men in terms of fields of study and occupation earn less than their male counterparts. And the pay gap widens further ten years after graduation—women earn 69% of what their male counterparts earn. Even after controlling for factors known to affect earnings, a portion of these pay gaps remains "unexplained," though countless women, like Lilly Ledbetter—and their families—know discrimination is the cause.[3]

Studies like these are borne out by case after case, in the courts and in the news, of suits brought by women charging their employers with wage discrimination. The evidence shows that sex discrimination in the workplace is still all too prevalent. Recent examples of pay discrimination cases include:

• In the largest employment discrimination suit ever filed, female employees have sued Wal-Mart for paying women less than men for similar work and using an old boys' network for promotions that prevented women's career advancement. One woman alleged that when she complained of the pay disparity, her manager said that women would never make as much as men because "God made Adam first." Another woman alleged that when she applied for a raise, her manager said, "Men are here to make a career, and women aren't. Retail is for housewives who just need to earn extra money."[4] The panel of the Ninth Circuit recently reaffirmed the case as a class action on behalf of more than 1.5 million women who are current and former employees of Wal-Mart.[5] A petition for rehearing by the entire Ninth Circuit is currently pending.

• In February 2007, a federal judge approved a $2.6 million settlement against Woodward Governor Company for gender discrimination with respect to pay, promotions and training. The EEOC sued the global engine systems and parts company on behalf of female employees working at two of the company's plants. Pursuant to the terms of the agreement, an outside individual will oversee the company's implementation and compliance, including the development of written job descriptions for the positions at issue as well as performance appraisals and a compensation review process.[6]

• In 2004, on the eve of trial, investment house Morgan Stanley agreed to settle a sex discrimination class action filed by the Equal Employment Opportunity Commission alleging that the investment firm paid women in mid- and upper-level jobs less than men, passed women over for promotions, and committed other discriminatory acts. Although it denied the allegations, Morgan Stanley did agree to pay $54 million to the plaintiffs and to take numerous other actions to prevent discrimination in the future.[7]

• In 2004, Wachovia Corporation admitted no wrongdoing but agreed to pay $5.5 million to settle allegations by the U.S. Office of Federal Contract Compliance Programs that it engaged in compensation discrimination against more than 2,000 current and former female employees over six years.[8]

• Lilly Ledbetter was one of the few female supervisors at the Goodyear plant in Gadsden, Alabama, and worked there for close to two decades. She faced sexual harassment at the plant and was told by her boss that he didn't think a woman should be working there. She suspected that she was getting fewer and lower pay raises than the male supervisors, but Goodyear did not allow its employees to discuss their pay, and Ms. Ledbetter had no proof until she received an anonymous note revealing the salaries of three of the male managers. After she filed a complaint with the EEOC, her case went to trial, and the jury awarded her backpay and approximately

$3.3 million in compensatory and punitive damages for the pay discrimination to which she had been subject. Because of the arbitrary limits on damages under Title VII, however, the court was forced to cut her damages to only about one-tenth of the amount the jury felt she was owed, or $300,000. The Supreme Court took even those damages away in Ledbetter v. Goodyear Tire & Rubber Co., Inc., holding that she had filed her case too long after the company unlawfully decided to pay her less, even though Ledbetter continued to receive discriminatorily reduced paychecks because of the earlier decisions.

Clearly, sex discrimination plays a major role in producing and sustaining the wage gap for women. It is thus hardly surprising that public opinion surveys consistently show that ensuring equal pay is among women's top work-related priorities. For instance, nine in 10 women responding to the "Ask a Working Women Survey" conducted by the AFL-CIO in 2004 rated "stronger equal pay laws" as a "very important" or "somewhat important" legislative priority for them.[9] Similarly, a January 2007 national survey of 1000 unmarried adult women by Women's Voices Women Vote found that 73% of respondents said that support for pay equity legislation would make them "much more likely" to support a Congressional candidate.[10]

Current Law Is Inadequate to Address the Wage Gap

In 1963, President Kennedy signed the Equal Pay Act into law, making it illegal for employers to pay unequal wages to men and women who perform substantially equal work. At its core, the Equal Pay Act bars employers from paying wages to an employee at an establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions * * *[11]

Under the EPA, a plaintiff must establish a prima facie case by showing that "(1) the employer pays different wages to employees of the opposite sex; (2) the employees perform equal work on jobs requiring equal skill, effort and responsibility; and (3) the jobs are performed under similar working conditions."[12] If the plaintiff succeeds in demonstrating each of these requirements, the defendant employer may avoid liability by proving that the wage disparity is justified by one of four affirmative defenses—that is, that it has set the challenged wages pursuant to "(1) a seniority system; (2) a merit system; (3) a system which measures earnings by quantity or quality of production; or (4) a differential based on any other factor other than sex."[13]

Congress intended the Equal Pay Act to serve sweeping remedial purposes. As the Supreme Court has recognized, the Act was designed: to remedy what was perceived to be a serious and endemic problem of employment discrimination in private industry—the fact that the wage structure of "many segments of American industry has been based on an ancient but out-moded belief that a man, because of his role in society, should be paid more than a woman even though his duties are the same."[14]

Unfortunately, and for several reasons, the Equal Pay Act has failed to meet Congress' remedial goals. First, the substantive standards of the law—both with regard to a plaintiff's prima facie case and with regard to an employer's affirmative defenses—have been applied by courts in ways that make it difficult to demonstrate a violation of the law, even in cases where wage disparities are actually based on sex. Second, the remedies and procedures available to plaintiffs under the Equal Pay Act are insufficient to ensure the effective protection of this critical anti-discrimination law. Finally, both because employers often fail to disclose—and because the government refuses to collect—information on pay disparities, it is exceedingly difficult for individuals or enforcement agencies to take effective enforcement action against discriminating businesses.

Plaintiffs Must Meet an Inappropriate Burden to Make Out a Prima Facie Case

The plaintiff's prima facie burden is not only demanding, but can operate in a way that allows actual pay discrimination to continue. For example, plaintiffs must demonstrate that the pay disparity exists between employees of the same "establishment"—that is, "a distinct physical place of business rather than * * * an entire business or 'enterprise' which may include several separate places of business."[15] Indeed, courts "presume that multiple offices are not a 'single establishment' unless unusual circumstances are demonstrated."[16]

In addition, as one court recently noted, the plaintiff's showing under the Equal Pay Act: is harder to make than the prima facie showing [in other cases] * * * because it requires the plaintiff to identify specific employees of the opposite sex holding positions requiring equal skill, effort and responsibility under similar working positions [sic] who were more generously compensated.[17]

Although the jobs for which wages are compared need not be identical, moreover, they must be substantially equal—a comparison which typically can be satisfied only after courts have performed what one commentator has called a "very exacting inquiry."[18] Notwithstanding the remedial purposes of the law, courts have narrowly defined what they will consider to be "equal" work. In Angelo v. Bacharach Instrument Company,[19] for example, female "bench assemblers" in light assembly alleged they were paid less than their male counterparts who were classified as "heavy assemblers."[20] Both the women and men, as well as an industrial engineering expert, testified that the men's and women's jobs at the plant were substantially the same with respect to skill, effort, and responsibility.[21] Despite this testimony, the court held that the positions were "comparable," but not equal.[22] As one commentator has stated, therefore, despite the admonition contained in the federal regulations that "insubstantial differences" should not prevent a finding of equal work, the courts have not "reach[ed] beyond comparisons of virtually identical jobs, which in a workforce substantially segregated by gender, provides women with a very limited substantive right indeed."[23]

For all of these reasons, plaintiffs must meet an inappropriate and counterproductive burden to proceed with an Equal Pay Act claim. But even plaintiffs who successfully make out a prima facie case of unequal pay for equal work face challenges from courts that have construed an employer's affirmative defenses in ways that defeat the basic purposes of the law.

Interpretation of the "Factor Other Than Sex" Defense Has Created Loopholes in the Law

The Equal Pay Act provides four affirmative defenses through which an employer may justify a wage disparity between substantially equal jobs. As a commentator has noted, the first three of these defenses—that a pay disparity is based on a seniority system, a merit system, or a system that bases wages on the quantity or quality of production—are relatively straightforward ones applied with reasonable consistency by the courts.[24] Court interpretations of the last of the affirmative defenses, however—the defense that a pay differential between equal jobs is based on a "factor other than sex"—have in some instances opened the door to a perpetuation of the very sex discrimination the Equal Pay Act was designed to outlaw.

In 1974, the Supreme Court rejected the argument that "market forces"—that is, the value assigned by the market to men's and women's work, or the greater bargaining power that men have historically commanded—can constitute a "factor other than sex," since sex is precisely what those forces have been based upon.[25] Despite this unequivocal holding, however, courts in the Seventh Circuit recited a "market forces" defense as recently as last year.[26]

At the same time, moreover, some courts have accepted as "factors other than sex" arguments that seriously undermine the principles of the Equal Pay Act. Some courts have, for example, authorized employers to pay male employees more than similarly situated female employees based on the higher prior salaries enjoyed by those male workers. In a case decided in March of this year, for example, one federal district court accepted the argument that higher pay for the male comparator was necessary to "lure him away from his prior employer." According to the court, "salary matching and experience-based compensation are reasonable, gender-neutral business tactics, and therefore qualify as 'a factor other than sex.'"[27] Similarly, another district court stated that

> [O]ffering a higher starting salary in order to induce a candidate to accept the employer's offer over competing offers has been recognized as a valid factor other than sex justifying a wage disparity.[28]

Indeed, that court has also stated that "[i]t is widely recognized that an employer may continue to pay a transferred or reassigned employee his or her previous higher wage without violating the EPA, even though the current work may not justify the higher wage" (emphasis added).[29]

The problem with these cases is their failure to recognize that the prior salary earned by a male comparator may itself be the product of sex discrimination or may simply reflect the residual effects of the traditionally enhanced value attached to work performed by men. Some courts have applied a similarly blinkered approach to evaluating the legitimacy of an employer's claim that a man's greater experience or education justifies a higher salary. In Boriss v. Addison Farmers Insurance Company,[30] for example, the court accepted the male comparators' purportedly superior qualifications as a factor other than sex justifying their higher salaries without any examination of whether those qualifications were in fact necessary for the job. According to the court, it "need not explore this issue [of whether a college degree was a prerequisite for the position] as the Seventh Circuit has ruled that a 'factor other than sex' need not be related to the 'requirements of a particular position in ques-

tion, nor that it be a 'business-related reason.'"[31] In fact, at least two circuits have accepted the argument that "any" factor other than sex should be interpreted literally and that employers need not show that those factors are in any way related to a legitimate business purpose.[32]

Cases such as these undermine both the spirit and analytical approach of the Equal Pay Act. What was intended to be an affirmative defense for an employer—a defense that demands that the employer carry the burden of proving that its failure to pay equal wages for equal work is based on a legitimate reason—has instead been converted by these courts into a requirement merely that an employer articulate some ostensibly nondiscriminatory basis for its decision-making. Because these bases can so easily mask criteria that are at bottom based on sex, the courts' failure to engage in searching analysis circumvents the burden Congress intended employers to bear.

The Equal Pay Act's Procedures and Remedies Offer Insufficient Protection for Women Subjected to Wage Discrimination

Unlike those who challenge wage disparities based on race or ethnicity, who are entitled to receive full compensatory and punitive damages, successful plaintiffs who challenge sex-based wage discrimination under the Equal Pay Act may receive only back pay and, in limited cases, an equal amount as liquidated damages. Even where liquidated damages are available, moreover—in cases in which the employer acted intentionally and not in good faith—the amounts available to compensate plaintiffs tend to be insubstantial.

These limitations on remedies not only deprive women subjected to wage discrimination of full relief—they also substantially limit the deterrent effect of the Equal Pay Act. Employers can refrain from addressing, or even examining, pay disparities in their workforces without fear of substantial penalties for this failure. The class action currently pending against Wal-Mart illustrates precisely this problem. In that case, Wal-Mart refrained from any examination of the pay of its male and female employees, even though a discrete inquiry into the pay for male and female occupants of a mid-level management job revealed disparities that the company elected not to evaluate further. While such conduct would certainly be taken into account in assessing the availability of punitive damages under statutes that permitted such relief, it is largely irrelevant in calculating remedies under the Equal Pay Act.

Procedures for enforcing the Equal Pay Act also hamstring plaintiffs attempting to prove systemic wage discrimination through the use of class actions. Class actions are important because they ensure that relief will be provided to all who are injured by the unlawful practice. But the Equal Pay Act, which was enacted prior to adoption of the current federal rule governing class actions,[33] requires that all plaintiffs opt in to a suit. Unlike in other civil rights claims, in which class members are automatically considered part of the class until they choose to opt out, Equal Pay Act plaintiffs are subjected to a substantial burden that can dramatically reduce participation in wage discrimination cases.

Current Sources of Information on Wage Disparities are Inadequate to Identify, Target or Remedy Problems

Individuals are significantly handicapped in their ability to enforce their rights under the Equal Pay Act by the inaccessibility of information about the wages paid to their coworkers. Far from making such information readily available, in fact, numerous employers penalize employees who attempt to discuss their salaries or otherwise glean information about their colleagues' pay.

Relevant federal enforcement agencies have not only failed to fill this gap, but have, in the case of the Department of Labor, affirmatively undermined the government's ability to identify and remedy systemic wage discrimination. In September of last year, the Department's Office of Federal Contract Compliance Programs (OFCCP) published a final rule that guts the Equal Opportunity Survey, a critical enforcement tool developed over the course of two decades and three administrations to better allow OFCCP to identify and investigate federal contractors most likely to be engaging in pay discrimination. Without the Equal Opportunity Survey—the only enforcement tool for the collection of wage data by sex—the federal government now requires no submission of pay information. This refusal to collect relevant data deprives the government of any means to systematically monitor pay disparities or efficiently enforce the anti-discrimination laws.[34]

The Paycheck Fairness Act Would Remedy the Deficiencies of Current Law

The Paycheck Fairness Act would respond, in appropriate and targeted ways, to precisely the problems discussed previously in this testimony that have undermined the effectiveness of current law. Among other provisions, the Paycheck Fairness Act would:

• *Improve Equal Pay Act Remedies*

The Act improves the remedy provisions of the Equal Pay Act by allowing prevailing plaintiffs to recover compensatory and punitive damages. The change will put gender-based wage discrimination on an equal footing with wage discrimination based on race or ethnicity, for which full compensatory and punitive damages are already available. It will also eliminate the unacceptable situation of an employer defending a denial of equal pay to a woman of color as based on her gender rather than her race.

• *Facilitate Class Action Equal Pay Act Claims*

The Act allows an Equal Pay Act lawsuit to proceed as a class action in conformity with the Federal Rules of Civil Procedure. This would conform Equal Pay Act procedures to those available for other civil rights claims.

• *Improve Collection of Pay Information by the EEOC*

The Act requires the EEOC to survey pay data already available and issue regulations within 18 months that require employers to submit any needed pay data identified by the race, sex, and national origin of employees. These data will enhance the EEOC's ability to detect violations of law and improve its enforcement of the laws against pay discrimination.

• *Prohibit Employer Retaliation*

The Act prohibits employers from punishing employees for sharing salary information with their co-workers. This change will greatly enhance employees' ability to learn about wage disparities and to evaluate whether they are experiencing wage discrimination. Had this provision been the law at the time that Lilly Ledbetter was working for Goodyear, for example, she might have been able sooner to identify and challenge the sex discrimination to which she was subject.

• *Close the "Factor Other Than Sex" Loophole in the Equal Pay Act*

The Act would tighten the "factor other than sex" affirmative defense so that it can excuse a pay differential for men and women only where the employer can show that the differential is truly caused by something other than sex and is related to job performance—such as differences in education, training, or experience.

• *Eliminate the "Establishment" Requirement*

The Act clarifies that a comparison need not be between employees in the same physical place of business.

• *Reinstate Pay Equity Programs and Enforcement at the Department of Labor*

The Act reinstates the collection of gender-based data in the Current Employment Statistics survey. It sets standards for conducting systematic wage discrimination analyses by the Office for Federal Contract Compliance Programs.[35] The Act also directs implementation of the Equal Opportunity Survey.[36]

Conclusion

In sum, the wage gap is real and cannot be dismissed as the result of women's choices in career and family matters. Even when women make the same career choices as men and work the same hours, they still earn less. The consequences of this wage discrimination are profound and far-reaching. Pay disparities cost women and their families thousands of dollars each year while they are working and thousands in retirement income when they leave the workforce. It is long past time for Congress to act to ensure that the promise of equal pay becomes a reality.

ENDNOTES

[1] U.S. General Accounting Office, Women's Earnings: Work Patterns Partially Explain Difference between Men's and Women's Earnings 2, GAO-04-35 (Oct. 2003), available at *http://www.gao.gov/cgi-bin/getrpt?GAO-04-35* (last visited Feb. 26, 2007).

[2] See Kimberly Bayard, Judith Hellerstein, et al., New Evidence on Sex Segregation and Sex Differences in Wages from Matched Employee-Employer Data, 21 J. Labor Economics 887, 904 (2003).

[3] American Association of University Women Educational Fund, Behind the Pay Gap (April 23, 2007), available at *http://www.aauw.org/research/behindPayGap.cfm* (last visited July 8, 2007).

[4] Bob Egelko, Sex Discrimination Cited at Wal-Mart: Women Accuse Wal-Mart, Lawyers Seek OK for Class-Action Suit, San Francisco Chronicle, Apr. 29, 2003, at B1, available at sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2003/04/29/BU303648.DTL (last visited Feb. 26, 2007).

[5] Dukes v. Wal-Mart, Inc., 474 F.3d 1214 (9th Cir. 2007), available at *http://www.ca9.uscourts.gov/ca9/newopinions.nsf/D12BAFD84138E886882572790082A486/$file/0416688.pdf?openelement* (last visited Feb. 26, 2007).

[6] The court consolidated the EEOC's case with a class action by employees alleging race discrimination against African Americans, Hispanics, and Asians with regards to pay, promotions, and training. The terms of the settlement provide that $2.4 million will go to plaintiffs with race-based claims. Press Release, Judge Approves $5 Million Settlement of Job Bias Lawsuits Against Woodward Governor (Feb. 20, 2007), available at *http://www.eeoc.gov/press/2-20-07.html* (last visited Mar. 27, 2007).

[7] Press Release, EEOC and Morgan Stanley Announce Settlement of Sex Discrimination Lawsuit (July 12, 2004), available at *http://www.eeoc.gov/press/7-12-04.html* (last visited Feb. 25, 2007).

[8] See Office of Federal Contract Compliance Programs, U.S. Dep't of Labor v. Wachovia Corp., Case No. 2001-OFC-0004 (U.S. Dep't of Labor Office of Admin. Law Judges, Sept. 21, 2004), available at *http://www.oalj.dol.gov/DMSSEARCH/CASEDETAILS.CFM?CaseId=205183* (last visited Feb. 26, 2007); Wachovia to Pay $5.5M in Discrimination Case, Tampa Bay Business Journal, Sept. 24, 2004, available at *http://tampabay.bizjournals.com/tampabay/stories/2004/09/20/daily37.html* (last visited Feb. 26, 2007).

[9] AFL-CIO, Ask a Working Woman Survey Report, 9 (2004) available at *http://www.aflcio.org/issues/jobseconomy/women/speakout/upload/aawwreport.pdf* (last visited Feb. 23, 2007).

[10] Memorandum from Greenberg Quinlan Rosner Research to Women's Voices Women Vote, 13 (Feb. 12, 2007) (on file with the National Women's Law Center).

[11] 29 U.S.C. § 206(d).

[12] Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974).

[13] 29 U.S.C. § 206(d)(1).

[14] Corning Glass Works, 417 U.S. at 195.

[15] Ingrams v. Brink's, Inc., 414 F.3d 222, 232 (1st Cir. 2005) (citing 29 C.F.R. § 1620.9).

[16] Meeks v. Computer Ass'n Int'l, 15 F.3d 1013, 1017 (11th Cir. 1994), (citing 29 C.F.R. Sec. 1620.9(a)).

[17] Ingram v. Brink's, Inc., 414 F.3d at 232 (citations omitted).

[18] Peter Avery, Note, The Diluted Equal Pay Act: How Was It Broken? How Can It be Fixed?, 56 Rutgers L. Rev. 849, 858 (Spring 2004).

[19] 555 F.2d 1164 (3d Cir. 1977).

[20] Id. at 1166.

[21] Id. at 1167-1170.

[22] Id. at 1176.

[23] Elizabeth J. Wyman, The Unenforced Promise of Equal Pay Acts: A National Problem and Possible Solution from Maine, 55 Me. L. Rev. 23, 34 (2003) (quoting Jennifer M. Quinn, Visibility and Value: The Role of Job Evaluation in Assuring Equal Pay for Women, 25 LAW & POL'Y INT'L BUS. 1403, 1439 (1994)).

[24] Avery, supra note 17, at 868.

[25] Corning Glass Works, 417 U.S. at 205 (noting that the company's decision to pay women less for the same work men performed "took advantage" of the market and was illegal under the EPA). See also Siler-Khodr v. Univ. of Texas Health Science Ctr. San Antonio, 261 F.3d 542, 549 (5th Cir. 2001) (noting that "This court has previously stated that the University's market forces argument is not tenable and simply perpetuates the discrimination that Congress wanted to alleviate when it enacted the EPA." (citations omitted).)

[26] Merillat v. Metal Spinners, Inc., 470 F.3d 685, 697, n6 (7th Cir. 2006) (noting that the court has "held that an employer may take into account market forces when determining the salary of an employee," although cautioning in a footnote against employers taking advantage of market forces to justify discrimination).

[27] Drury v. Waterfront Media, Inc., No. 05 Civ. 10646, 2007 WL 737486, at *9 (S.D.N.Y. Mar. 8, 2007).

[28] Glunt v. GES Exposition Services, Inc., 123 F. Supp. 2d 847, 859 (D. Md. 2000) (citing Mazzella v. RCA Global Comm, Inc., 814 F.2d 653 (2d.Cir.1987); Walter v. KFGO Radio, 518 F.Supp. 1309 (D.N.D.1981)).

[29] Glunt v. GES Exposition Services, 123 F. Supp. 2d at 859. But see Lenihan v. The Boeing Co., 994 F. Supp. 776, 798 (S. D. Tex. 1998) ("prior salary, standing alone, cannot justify a disparity in pay"); Equal Employment Opportunity Commission, Compliance Manual Section 10: Compensation Discrimination, at 10-IV(F)(2)(g) (2000), available at *http://www.eeoc.gov/policy/docs/compensation.html#10-IV%20COMPENSATION%20DISCRIMINATION* (last visited April 10, 2007).

[30] No. 91 C 3144, 1993 WL 284331 (N.D. Ill. July 26, 1993).

[31] Id. at *9, (quoting Fallon v. State of IL, 882 F.2d 1206, 1211 (7th Cir.1989) (citing Covington v. SIU, 816 F.2D 317, 321-22 (7th Cir.1987)).

[32] See Wernsing v. Dep't of Human Servs., 427 F.3d 466, 470 (7th Cir. 2005) ("The disagreement between this circuit (plus the eighth) and those that required an 'acceptable business reason' is established, and we are not even slightly tempted to change sides.").

[33] FED. R. CIV. P. 23.

[34] In addition, current law does not address wage disparities that are premised on occupational sex segregation. Many occupations today remain dominated by one gender, and many that are dominated by women still pay artificially depressed wages. But courts have refused to use existing laws to address this continuing devaluation of traditionally female fields. The Fair Pay Act would ensure that continued occupational sex segregation does not perpetuate the suppressed wages usually paid for typically female jobs.

[35] The Paycheck Fairness Act would overturn the DOL's 2006 decision to narrow the scope of its investigations into systematic wage discrimination. See DOL, Interpreting Nondiscrimination Requirements of Executive Order 11246 with Respect to Systemic Compensation Discrimination, 71 Fed. Reg. 35,124 (June 16, 2006).

[36] The Act refers to a regulation the Office of Federal Contract Compliance Programs (OFCCP) rescinded on September 8, 2006. See DOL, Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors; Equal Opportunity Survey, 41 C.F.R. § 60.2.

Chairwoman WOOLSEY. Thank you, Ms. Greenberger.

Ms. Olson?

STATEMENT OF CAMILLE OLSON, PARTNER, SEYFARTH SHAW LLP

Ms. OLSON. Good morning. Thank you, Madam Chairperson.

I appear before you today on behalf of the U.S. Chamber of Commerce, the world's largest business federation. I am a member of its labor relations committee, as well as its subcommittee on employment non-discrimination issues.

As set forth in my written testimony presented to the subcommittee, the United States Chamber of Commerce strongly opposes the Paycheck Fairness Act. If passed it would amend the Equal Pay Act in significant substantive as well as procedural ways upon the unsubstantiated premise that any differences in wages between men and women are the result of intentional discrimination by employers.

Yet, in fact, the Equal Pay Act is not an intentional discrimination statute. It imposes what has been called by commentators and judges strict liability on employers upon a showing of unequal pay for unequal work without a finding of intentional discrimination.

In addition, once a plaintiff can show a disparity in pay, the employer has the burden of producing not just evidence, but retains the ultimate burden of persuading a jury that, in fact, the difference was based on one of the factors enumerated in the statute or a factor other than sex.

The Paycheck Fairness Act is fundamentally flawed, as is some of the testimony that you have heard in the underpinnings of this act in that it imposes harsh, lottery-type penalties upon employers. It lowers the applicable standards of proof for employees and provides plaintiffs' class action attorneys with class action devices to be applied, which are much more lenient than the current ones that exist under the statute.

It also reinvigorates, as you have heard today through the testimony that has already been presented, the concept of comparable work directly the OFCCPs and the Department of Labor's directive to issue guidelines to focus on the comparisons of jobs that are not equal to determine in the minds of the government as opposed to the market forces whether or not the difference in pay between jobs that are not equal is in their minds fair.

What I would like to do is describe for you just briefly today under the Equal Pay Act and Title 7 what remedies do exist for women who claim sex discrimination in pay. Women bringing claims of pay discrimination based on their sex have the following remedies under the Equal Pay Act: back pay, as well as an adjustment of pay going forward; interest, a concept also that hasn't been mentioned here yet today; liquidated damages, meaning a doubling of any damages that are found in terms of back pay as well as attorneys' fees and costs.

And because it is part of the Fair Labor Standard Act's procedures, there is also a potential for individual liability for defend-

ants, including to up to $10,000 in fines and up to 6 months in prison.

In addition, under Title 7, women are also currently entitled to up to $300,000 in compensatory and punitive damages, depending on the size of the employer, upon a showing of intentional discrimination. That is not available under Title 7 with respect to a disparate impact finding. Nor is it with respect to other findings, for example, under the Americans with Disabilities Act in connection with the reasonable accommodation issues if there is not a finding of intentional discrimination.

In addition, under the Equal Pay Act and Title 7 as it currently exists, plaintiffs also have the right to bring collective actions. Basically what a plaintiff has a right to do is bring an action on behalf of anyone who is similarly situated who is interested in joining the action. All they must do is file a written consent that they are interested in joining.

There is no charge-filing requirement of 180 or 300 days. In addition, there is a longer statute of limitations. That claim is filed directly with the court system and can be filed up to 2 to 3 years if there is a willful finding in connection with a finding of a violation.

As mentioned earlier, the requirement for a plaintiff under the Equal Pay Act is to show a difference in wages not to show intentional discrimination. At no time does the plaintiff bear this burden.

Instead the burden shifts to the employer under the current law to show a legitimate factor other than sex, as enumerated in the statute or as otherwise considered by the employer is the reason for the disparity. Courts have widely recalled the fact that if you compare Title 7 to the statute's current requirements under the Equal Pay Act that, in fact, under the Equal Pay Act it is much more difficult for an employer to get summary judgments so that more plaintiffs' claims go to juries.

I don't have time to discuss the significant concerns with the Paycheck Fairness Act that exist, but let me at least name the categories for you so you have them: the issue of uncapped punitive and compensatory damages unrelated to a finding of intentional discrimination; a substantial change to a factor other than sex affirmative defense; as well as directing the Department of Labor and the OFCCP to issue guidelines which basically import comparable worth analysis into the equation, guidelines that generally under other laws have been viewed and provided to juries as strong evidence of what the agency that is responsible for enforcing that statute believes is the law; and finally, as mentioned earlier, changing the class action procedures to one that would include many more potential plaintiffs.

In summary, the chamber strongly opposes the Paycheck Fairness Act and requests the subcommittee proceed very cautiously with its review of its provisions.

[The statement of Ms. Olson follows:]

TESTIMONY OF CAMILLE A. OLSON

BEFORE THE HOUSE SUBCOMMITTEE ON WORKFORCE PROTECTIONS

THE PAYCHECK FAIRNESS ACT

JULY 11, 2007

Good morning Mr. Chairman and members of the Subcommittee. I am pleased to appear this morning to testify on H.R. 1338, the Paycheck Fairness Act. I am a Partner with the national law firm of Seyfarth Shaw LLP, where I am Chairperson of the Labor and Employment Department's Complex Discrimination Litigation Practice Group. In addition to my private law practice, which has focused on employment discrimination issues involving class, collective, and single plaintiff actions for over twenty years, I also regularly teach employment discrimination to law students at DePaul University and Loyola University in Chicago, Illinois.

I am testifying today on behalf of the United States Chamber of Commerce. The Chamber is the world's largest business federation, representing more than three million businesses and organizations of every size, industry sector, and geographical region. I serve on the Chamber's Labor Relations Committee as well as its subcommittee focused on employment nondiscrimination issues.

Today we are here to discuss the meaning and impact of the Paycheck Fairness Act (the "Act"). If enacted, the Act would amend the Equal Pay Act of 1963[1] ("EPA") in significant substantive and procedural ways, all upon a unsubstantiated, premise that throughout the United States of America, all unexplained wage disparities existing between men and women are necessarily the result of intentional discrimination by employers.[2]

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[1] 29 U.S.C. § 206(d)(1).

[2] The proponents of the Act have not cited any evidence establishing that the existing wage gap is actually caused by employer discrimination. They essentially propose acceptance of the existence of the gap as definitive proof of employer discrimination. However, this unsubstantiated and faulty syllogism does not withstand scrutiny, or common sense. As labor economists and feminist scholars, alike, have proven and observed, the existing wage gap between men and women is attributable to a number of factors bearing no relationship whatsoever to alleged employer discrimination. *See, e.g.*, Council of Economic Advisers, *Explaining Trends in The Gender Wage Gap* (June 1998); Bureau of Labor Statistics, U.S. Dept. of Labor, Highlights of Women's Earnings (August 2000, Report 952); and Sara L. Zeigler, *Litigating Equality: The Limits of the Equal Pay Act*, 26 Review of Pub. Pers. Admin. 199 (Sept. 2006). Logically, these factors include: personal choice; women's disproportionate responsibilities as caregivers and other family obligations; education; self-selection for promotions and the attendant status and monetary awards; and other "human capital" factors.

On that assumption, the Act would impose harsher, "lottery-type" penalties upon all employers, lower the applicable standards for claims, and make available a more attorney-friendly class action device (among other suggested changes). The Act's proponents contend these changes are necessary to ensure equal pay for women. Nothing could be farther from the truth. In reality, the Act would expand litigation opportunities for class action lawyers seeking millions of dollars from companies without ever having to prove that the companies intentionally discriminated against women.

The proposed changes to the EPA are also contrary to the most fundamental underpinnings of that Act - the requirement of *equal pay for equal work* balanced against the mandate that government not interfere with private companies' valuation of the work performed for them and more generally, the setting of wages. The proposed changes are also inappropriate given the EPA's distinguishing features, relative to other nondiscrimination legislation. Perhaps the most notable difference to note is the lack of any requirement to prove intentional discrimination under the EPA. This feature separates the EPA from Title VII of the Civil Rights Act of 1964, as amended,[3] the Age Discrimination in Employment Act,[4] the Americans with Disabilities Act,[5] as well as Section 1981 of the Civil Rights Act of 1866 and Section 1983 of the Civil Rights Act of 1871.[6] These statutes allow for the imposition of compensatory and punitive damages, but only upon a finding of intentional discrimination by the employer. Unlike these statutes, the EPA currently imposes liability on employers without any required showing that the employer intended to discriminate against the worker.

Commentators and courts have often referred to this leniency in the EPA as rendering employers "strictly liable" for any pay disparity between women and men for equal work unless the employer meets its burden of proving that the rate differential was due to: a seniority system, a merit system, a system measuring quality or quantity of work, or any other factor other than sex. The irrelevancy of an employer's intent is a defining feature of the EPA, and must be remembered as the significant amendments to the EPA suggested by the Paycheck Fairness Act are debated.

For these reasons, and all of the reasons set forth below, the Chamber strongly opposes the Paycheck Fairness Act. We urge the Subcommittee to carefully consider the issues raised by the Chamber and proceed cautiously in considering the Act.

Current Protections Against Sex-Based Wage Discrimination

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[3] Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq*, as amended by the Civil Rights Act of 1991, Pub.L. No. 102-166, 105 Stat. 1071. *See* 42 U.S.C. §§ 12117(a), 1981a(2) ("Title VII").
[4] 29 U.S.C. § 621 *et seq*.
[5] Title I of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12101, *et seq*. Like Title VII, under the ADA, punitive and compensatory damages are only available where intentional disability discrimination is shown. *See* 42 U.S.C. §§ 12117(a), 1981a(2) Similarly, disparate impact claims under Title VII do not subject an employer to punitive or compensatory damage claims.
[6] 42 U.S.C. §§ 1981 and 1983, respectively.

Overview

Since 1963, even prior to the passage of Title VII, it has been unlawful under the Equal Pay Act for an employer to pay a female employee less than a male employee for equal work. Today, employees enjoy a substantial assortment of protections against wage discrimination. Since 1979, the EPA has been enforced by the Equal Employment Opportunity Commission.[7] In addition to the protections against wage discrimination based on sex afforded by the EPA, sex discrimination in wages is also prohibited by Title VII, many state antidiscrimination statutes, and, for employees of federal contractors and subcontractors, Executive Order 11,246.[8]

Today, the EPA and Title VII provide a woman who prevails on her wage discrimination claim a collection of favorable and effective remedies. Those combined remedies include: back pay; front pay; liquidated damages; attorneys' fees; costs; affirmative injunctive relief in the nature of an increase in wages on a going forward basis; prejudgment interest; up to $300,000 in punitive and compensatory damages; an additional $10,000 in penalties, and the sentencing of an individual willful violator for up to six months in jail. If an employer is a government contractor, as many are, it may also face sanctions (including, for example, the cancellation, termination or suspension of any existing contract or debarment from future contracts) and remedies (such as elimination of practices, seniority relief, monetary and equitable relief to identified class members, and accelerated training). These remedies exceed those available to victims of intentional discrimination under Title VII generally, the ADA, and the ADEA.

Mechanics of the EPA and Title VII

The EPA

The EPA provides that no employer shall pay employees of one sex at a rate less than the rate at which the employer pays employees of the opposite sex for equal work.[9] An employee may assert an EPA claim either by filing a charge of discrimination with EEOC or by proceeding directly to federal court and filing a lawsuit there.

To prevail under the EPA, an employee must make a *prima facie* showing of discrimination by presenting evidence that: (1) different wages were paid to employees of the opposite sex; (2) the employees performed equal work requiring equal skill, effort, and responsibility; and (3) the employees shared similar working conditions.[10] If the employee makes that showing, she has established a presumption of discrimination. The burden of persuasion then shifts to the defendant, who can only avoid liability by proving that the wage differential is pursuant to: (1) a seniority system; (2) a merit system; (3) a system which measures earnings by quantity or quality of production; or (4) any factor other than sex.[11]

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[7] In 1986, the EEOC issued detailed regulations entitled "EEOC's Interpretations of the Equal Pay Act," 29 CFR § 1620, as amended. In 2006, the EEOC issued regulations under the EPA, 29 CFR § 1621, as amended.
[8] Exec. Order No. 11,246, Section 202(1), 30 Fed. Reg. 12,319 (Sept. 24, 1965), as amended by Exec. Order No. 11,375, 32 Fed. Reg. 14,303 (Oct. 17, 1967).
[9] 29 U.S.C. § 206(d).
[10] 29 U.S.C. § 206(d)(1); *Fallon v. Illinois*, 882 F.2d 1206, 1208 (7th Cir. 1989).
[11] 29 U.S.C. § 206(d)(1).

Critically, there is no requirement for a plaintiff to prove any discriminatory intent or animus on the part of the employer. That element is not present in the liability scheme under the EPA.[12]

The EPA is contained within the Fair Labor Standards Act ("FLSA").[13] Under the FLSA, a successful EPA plaintiff may recover back pay, front pay, prejudgment interest, and attorneys' fees and costs. Where willfulness is shown, a plaintiff may also recover an additional amount of back pay as liquidated damages, and defendant may also be fined up to $10,000 and imprisoned for up to six months.[14]

Title VII

Similarly, under Title VII, it is "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to [her] compensation . . . because of such individual's . . . sex. . . ."[15] An employee may assert a claim for sex-based pay discrimination by filing a charge of discrimination with EEOC and then, upon receipt of her notice of right to sue (and regardless of whether EEOC finds "cause" for concluding that discrimination occurred), may file a lawsuit in federal court. Further, an employee need not engage an attorney to participate in the EEOC processes, including investigation of their allegations of discrimination under the EPA and Title VII, as well as conciliation and litigation of their claim in federal court (if the EEOC determines to file suit on the employee's behalf).

To establish that similarly-situated males were more favorably compensated, as is necessary to prevail in a disparate treatment pay claim under Title VII, a plaintiff must provide evidence of a *prima facie* case of discrimination. Once she has done so, the employer must articulate a legitimate, non-discriminatory reason for the wage differential. At that juncture, the plaintiff has an opportunity to prove that the proffered reason is a pretext for unlawful employment discrimination. The plaintiff's burden is higher under Title VII in connection with discrimination-based pay claims than under the EPA, where establishment of a disparity in pay for equal work obligates the employer to prove that the disparity is for a reason other than sex to avoid strict liability.

Comparison of EPA and Title VII

Both the EPA and Title VII provide remedies for women who believe they have been subjected to sex discrimination in pay, and we have included examples below demonstrating that both serve as effective mechanisms for women to redress alleged claims of sex-based pay discrimination. From an employee's perspective, the EPA is the more favorable and lenient of the two statutes with respect to both the ease of pursuing a claim against an employer and the relatively low standard for establishing liability. For example:

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[12] *See* 29 U.S.C. § 206(d)(1) (making clear only relevant inquiry is whether alleged disparity resulted from "any factor other than sex"); *Mickelson v. New York Life Ins. Co.*, 460 F.3d 1304, 1310-11 (10th Cir. 2006).
[13] 29 U.S.C. 201 *et seq.*
[14] 29 U.S.C. § 216(b).
[15] 42 U.S.C. § 2000e-2(a). *See also* 42 U.S.C. § 2000e-2(h).

- Under the EPA, an "employer" includes entities and individuals. An employer employing as few as two employees is included within its coverage (whereas Title VII covers employers of 15 or more employees);

- Establishment of the *prima facie* case of pay discrimination under the EPA entitles an employee to a legal presumption of discrimination, with the burden of production and persuasion moving to the employer. In contrast, under Title VII, even where a plaintiff establishes a *prima facie* case of pay discrimination, she at all times retains the burden of persuasion as to discrimination. To avoid the imposition of liability, an employer must prove that the disparity was caused by one of four permissible reasons. As a result, under the EPA, plaintiffs are much more successful in defeating employer's motions for summary judgment and having their claims heard by a jury;[16]

- The EPA provides for strict liability, meaning that a plaintiff need not show discriminatory intent on the part of the employer to prevail, whereas a disparate treatment plaintiff under Title VII must show the existence of discriminatory intent on the part of the employer to prevail;

- There is a much longer limitations period (2 years for a general violation, 3 years for a violation found to be willful) under the EPA as opposed to at most 300 days for the filing of an administrative charge of discrimination with the EEOC under Title VII (which is a prerequisite to suit in federal court); and

- Under the EPA there is no charge filing requirement with an administrative agency.

The EPA also shares many of the advantages accorded to claimants under Title VII, including:

- Plaintiffs may recover attorneys' fees and costs;

- The EEOC may bring public suits to enforce the EPA, including seeking injunctive and other remedies; and

- Plaintiffs may file a charge alleging a violation of the EPA and request the EEOC investigate the violation.

In the aggregate, these overlapping non-discrimination statutes provide employees multiple avenues for pursuing claims of unequal pay for equal work. They also provide employees with multiple forms of redress with respect to alleged pay discrimination, including: a direct right to a jury trial on their own behalf in federal court, the filing of a charge of discrimination with the EEOC, the right to have the EEOC pursue a claim on their behalf in federal court, and the right to bring a collective action or class action on behalf of other similarly-situated employees who choose to participate in an action under the EPA or Title VII,

[16] *See Mickelson*, 460 F.3d at 1311 ("This is not to say that an employer may never be entitled to summary judgment on an EPA claim if the plaintiff establishes a prima facie case. But, because the employer's burden in an EPA claim is one of ultimate persuasion, 'in order to prevail at the summary judgment stage, the employer must prove at least one affirmative defense so clearly that no rational jury could find to the contrary'") (internal citation omitted).

respectively (on their own or by their attorney of choice). It is not uncommon for a worker suing to enforce his or her rights to equal pay under the EPA to also file a charge of discrimination with the Equal Employment Opportunity Commission, file a lawsuit in federal or state court, and, if their employer is a federal contractor, raise a claim under Executive Order 11,246 with the Office of Federal Contract Compliance and Procedure (or do all of the above).

And, of course, notwithstanding the differences between the statutes, claimants may bring parallel claims under the EPA and Title VII to ensure that they receive the fullest protection under the law. Indeed, they may recover under both statutes for the same period of time provided they do not receive a double or duplicative recovery for the same "wrong." As such, a prevailing plaintiff may recover back pay, a front pay adjustment, compensatory damages, punitive damages, liquidated damages, and injunctive relief, among other relief. Put simply, women who believe that they suffer wage discrimination as a result of their sex have available to them federal statutes that provide significant remedies.[17]

Concerns Regarding Proposed Changes to the Equal Pay Act

Inappropriate Expansion of EPA Remedies For Unintentional Wage Discrimination to Include Unlimited Compensatory and Punitive Damages

Critics of the EPA in its current form have observed that it is not a "lottery."[18] Indeed, it is not intended to be. Rather, its remedial provisions are intended to compensate employees for sex-based pay inequities, whether inadvertent (which is sufficient for the imposition of liability) or not. Awarding compensatory and punitive damages where no showing of intent is required would be inappropriate and contrary to the purposes behind the allowance for compensatory and punitive damages in cases of *intentional* discrimination.

In passing the Civil Rights Act of 1991, Congress expanded the forms of relief available to an individual who is the victim of *intentional discrimination* under Title VII so as to include compensatory and punitive damages. Prior to passage of that Act, 42 U.S.C. § 1981 "permitted the recovery of unlimited compensatory and punitive damages in cases of intentional race and ethnic discrimination, but no similar remedy existed in cases of intentional sex, religious, or disability discrimination.[19] As then-Congresswoman Pat Schroeder from Colorado explained in her statement during the Congressional floor debate from August 2, 1990 regarding punitive damages for Civil Rights Act:

> Mrs. SCHROEDER. Mr. Chairman, I want to answer some of the things that we have just heard. We are hearing here that there is something wrong with this bill because there are remedies....Let me tell Members one more thing about punitive damages. *You do not get punitive damages unless there was intent. It is all equitable, unless there is intent.* It seems to me in this country that if there is intent to discriminate, then we certainly should be out trying to assess some kind

[17] Barbara Lindemann and Paul Grossman, *Employment Discrimination Law*, Ch. 15 (3d ed. 1996)
[18] Sara L. Zeigler, *Litigating Equality: The Limits of the Equal Pay Act*, 26 Review of Pub. Pers. Admin. 199, 204 (2006).
[19] *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 851, 121 S. Ct. 1946 (2001).

of punitive damages. Otherwise, someone just assigns it as a cost of doing business.

As evidenced by the above, compensatory and punitive damages serve distinct and specific purposes. Compensatory damages are "intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct."[20] Punitive damages are "intended to punish the defendant and to deter future wrongdoing."[21] Under Title VII, "[A] finding of liability does not of itself entitle a plaintiff to an award of punitive damages."[22] "The purpose of awarding punitive damages is to 'punish a wrongdoer for his outrageous conduct and to deter others from engaging in similar conduct.'").[23] "Such an award must be supported by the record, and may not constitute merely a windfall for the plaintiff.[24] It strains logic and flouts the entire body of federal anti-discrimination law to suggest – or, as the Act would do, to mandate – that damages conceived and intended to punish and deter wrongful conduct should apply to claims of inadvertent, unintentional conduct that has the effect of violating the EPA.

In sum, it is inappropriate here to amend the EPA, a strict liability statute that requires no showing of discriminatory intent, to facilitate the imposition of unlimited punitive and compensatory damages. It would serve no legitimate purpose, and it would serve the illegitimate purposes of both turning the EPA into a lottery for plaintiffs willing to roll the dice to capitalize on likely legitimate wage differentials and to unjustly enrich plaintiffs' attorneys.

De Facto Elimination of the "Factor Other Than Sex" Affirmative Defense

One of the most significant substantive revisions to the EPA contemplated by the Paycheck Fairness Act is found in its re-writing of the "factor other than sex" affirmative defense. Quite simply, if enacted, it would be nearly impossible for an employer to defend against a claim that a wage differential existed by explaining that the differential was based upon a factor other than sex. As such, the affirmative defense of "factor other than sex" would be essentially gutted, and judges and juries would be placed into the human resources offices of all American businesses to determine whether the sex-neutral factor was an appropriate consideration – and was appropriately considered – in an employer's decision-making.

The "factor other than sex" affirmative defense forms the crux of the EPA. It provides that, where a wage differential exists, the employer has not engaged in sex discrimination under the EPA if the reason for the wage differential is a gender-neutral factor other than sex.[25] This affirmative defense enables employers to consider a wide range of permissible, *i.e.*, non-

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[20] *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432, 121 S. Ct. 1678, 1683 (2001).
[21] *Id.* (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350, 94 S. Ct. 2997, (1974) ("[Punitive damages] are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence") and *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 554, 111 S. Ct. 1032, 1062 (U.S. 1991) (O'CONNOR, J., dissenting) ("[P]unitive damages are specifically designed to exact punishment in excess of actual harm to make clear that the defendant's misconduct was especially reprehensible").
[22] *Yarbrough v. Tower Oldsmobile, Inc.*, 789 F.2d 508, 514 (7th Cir. 1986).
[23] *Id.* (internal citations omitted).
[24] *Id.* (internal citations omitted).
[25] *See, e.g., Fallon v. State of Illinois*, 882 F.2d 1206, 1211-212 (7th Cir. 1989) (ruling that the district court prematurely rejected the State's asserted affirmative defense that Veterans Service Officers' requisite war-time veteran status was a factor other than sex justifying the pay differential).

discriminatory, factors in setting salaries. For example, employers may consider an applicant's or employee's education, experience, special skills, seniority, and expertise, as well as other external factors such as marketplace conditions, in setting salaries. Although some circuit courts have attempted to read a "business justification" or "business necessity" element into this affirmative defense,[26] the Supreme Court, quite prudently, has never endorsed such a reading and has made clear that the affirmative defense means what it says – any factor other than sex .[27]

The factor other than sex affirmative defense was explained by the EPA's primary sponsor in the House of Representatives, Representative Charles E. Goodell, back in 1963, as follows: "We want the private enterprise system, employer and employees and a union . . . to have a maximum degree of discretion in working out the evaluation of the employee's work and how much he should be paid for it. . . . Yes, as long as it is not based on sex. That is the sole factor that we are inserting here as a restriction."[28] So, clearly, just as important to the EPA's sponsors of the legislation as the goal of eliminating sex-based pay differentials was the bedrock of free enterprise. Given how critical that concept is to the EPA – and the fundamental importance of the factor other than sex affirmative defense in achieving it – it is clear that this Act would not actually "amend" the EPA. Instead, what the Paycheck Fairness Act seeks to do is require employers to justify individualized pay decisions on a case-by-case basis based on vague, but clearly onerous, standards.

Section 3(a) of the Act would alter the "factor other than sex" affirmative defense – and, by extension, the EPA – beyond recognition. This provision would impose an extremely heavy burden upon employers asserting the defense. Employers would be required to *prove*, in order to counter the presumption of wage discrimination, that the factor responsible for a wage differential not only is something other than sex, but also meets a higher standard of "job relatedness" or "legitimate business purpose." Furthermore, employers would be required to show that the factor other than sex was "used reasonably." What those standards actually mean is left undefined (and would likely be the subject of significant litigation) – but one alarming implication of their adoption could not be any more clear: The court system, including judges and juries, would invade the province of the free market system, with near unfettered authority and discretion over how American businesses are run, what decisions do and do not make sense, and what wages individual American employees should receive.

Moreover, under this provision, even if non-discriminating employers could still meet these heightened burdens, employees would still prevail if they could show that there is an "alternative employment practice" not implemented by the employer that would serve the same business purpose the employer intended to achieve through reliance upon the factor other than sex without producing the same wage differential. This provision not only unduly and unreasonably stacks the decks against employers under the strict liability model of the EPA, but also would lead to endless second-guessing of the individualized decisions made by employers. Again, American companies and their managers would no longer make business decisions regarding relevant factors used in the setting of starting wages as well as incremental increases to those wages, without fear of being second-guessed. As such, the Paycheck Fairness Act would

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[26] *See, e.g.*, *Aldrich v. Randolph Cent. School Dist.*, 963 F.2d 520, 525 (2d Cir. 1992); *EEOC v. J.C. Penney Co.*, 843 F.2d 249, 253 (6th Cir. 1988); *Glenn v. General Motors Corp.*, 841 F.2d 1567, 1571 (11th Cir. 1988).
[27] *See Smith v. City of Jackson*, 544 U.S. 228, 239 n.11 (2005).
[28] 109 CONG. REC. 9198 (1963).

interfere with an employer's business discretion, and more broadly, the free-market system. If implemented, it would also lead to an inefficient, cumbersome, and costly salary-setting process (administered by the federal judicial branch).

For example, under this replacement for the factor other than sex affirmative defense, an employer who wishes to pay a higher wage to an employee who has five years more experience than another employee may not be able to do so because a court finds that the differential in experience could be overcome by in-house training over an extended period of time. That is a judgment that employers should have an ability to retain in order to have an effective, efficient workforce and in order to achieve their own specific business objectives and priorities.

Involvement by Government in Setting Wages -- Excluding Consideration of Marketplace Demands – and *De Facto* Incorporation of the Consistently-Rejected and Ill-Founded Comparable Worth Theory

As explained above, at its core, the Equal Pay Act requires *equal pay for equal work. That is why the EPA was enacted and what it requires.* As the Seventh Circuit explained recently: "The proper domain of the Equal Pay Act consists of standardized jobs in which a man is paid significantly more than a woman (or anything more, if the jobs are truly identical) and there are no skill differences."[29] And, until now, aside from prohibiting sex-based wage differentials, the EPA has left the determination of the value brought to a particular employer by the performance of a particular position and its duties to the employer, the employee, and the market. Section 7 of the Act, however, calls upon the Department of Labor to issue "Guidelines" to compare wages for "different jobs" in order to determine if the pay scales are "adequate" and "fair" – based on an outsider looking in. Also problematic is that these Guidelines would effectively preclude consideration of many of the factors that quite legitimately and necessarily drive salary decisions, including, most notably, marketplace factors. The "Guidelines" would be accorded the same deference as other guidelines promulgated by administrative agencies in the employment context, from great deference to, in effect, the law.[30]

In short, the Paycheck Fairness Act's Section 7, like Section 3 discussed above, would directly involve the Department of Labor in the wage-setting process of employers, and, just as problematic, inject the widely-rejected theory of "comparable worth" into that process. And in deciding what jobs are worth to individual employers, the Government would apparently exclude consideration of some of the factors most relevant to that highly individualized determination, such as: marketplace value and supply and demand; the nature of a position *vis-à-vis* whether it involves physical labor; a company's position in the marketplace; employers' varying business needs and priorities; employees' educational backgrounds; employees' experience, both qualitatively and quantitatively; and regional differences.

Proponents of the "comparable worth" theory, and, it appears, proponents of the Paycheck Fairness Act, attempt to expand the EPA (as well as Title VII) to redress wage disparities where employees of one sex receive lower wages for performing jobs and work different from and not equal to the jobs and work performed by the opposite sex but, are

[29] *Sims-Fingers v. City of Indianapolis*, No. 06-2198, 2007 U.S. App. LEXIS 15253, at *7 (7th Cir. 2007).
[30] *See Griggs v. Duke Power Co.*, 401 U.S. 424, 433-434, 91 S.Ct. 849, 884-885 (1971).

arguably and theoretically, "comparable in value." Courts and, in fact, this legislative body, have repeatedly rejected application of this theory, largely because they view the valuation of the relative worth of one job as compared to another to be within the province of the employer offering the opportunities to workers.[31] For instance, the Sixth Circuit rejected this theory stating, "Title VII is not a substitute for the free market, which historically determines labor rates."[32] Likewise, the Ninth Circuit rejected the theory on the grounds that it found "nothing in the language of Title VII or its legislative history to indicate Congress intended to abrogate fundamental economic principles such the laws of supply and demand or to prevent employers from competing in the labor market."[33] As the Seventh Circuit aptly observed just a couple of weeks ago with respect to questions of relative job valuation, "Our society leaves such decisions to the market, to the forces of supply and demand, because there are no good answers to the normative question, or at least no good answers that are within the competence of judges to give."[34]

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[31] In the 1960s, the Kennedy Administration proposed a ban on sex discrimination in wages "for work of comparable character on jobs the performance of which requires comparable skills," with the assumption that job evaluation systems were available to evaluate the comparative worth of different jobs. *Equal Pay Act of 1963: Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare,* 88th Cong., 1st Sess. 2 (1963) (quoting S. 882, 88th Cong., 1st Sess., 109 CONG. REC. 2770 (1963) and S. 910. 88th Cong., 1st Sess., 109 CONG. REC. 2886 (1963)). Congress resisted the proposal for the simple reason that it did not want the government or judges to invade the workplace and tell employers what to pay their employees.

> As Representative Goodell stated during the hearings:
>
> Last year when the House changed the word "comparable" to "equal" the clear intention was to narrow the whole concept. We went from "comparable" to "equal" meaning that the jobs involved should be virtually identical, that is, they would be very much alike or closely related to each other.
>
> We do not expect the Labor Department people to go into an establishment and attempt to rate jobs that are not equal. We do not want to hear the Department say, "Well, they amount to the same thing," and evaluate them so they come up to the same skill or point. . . .
>
> [W]e want the private enterprise system . . . to have a maximum degree of discretion in working out the evaluation of the employee's work and how much he should be paid for it.

109 CONG. REC. 9197-98 (1963).

Congress enacted the EPA which, of course, requires equal pay for "equal work." *See* Section 206(d). When Title VII went to the Senate, concern arose that a Title VII plaintiff could bring a pay discrimination claim without the need to show "equal pay for equal work" as required by the EPA. To prevent erosion of that well-conceived standard, Congress enacted the Bennett Amendment, which incorporated the EPA's four affirmative defenses into Title VII. The Bennett Amendment stated that it would not be a violation of Title VII "to differentiate upon the basis of sex in . . . the wages or compensation paid . . . if such differentiation is authorized by the provisions of [the Equal Pay Act.]." Civil Rights Act of 1964, § 703(h), 42 U.S.C. § 2000e-2(h).

Relying on the Bennett Amendment, courts have consistently rejected claims of comparable worth by construing Title VII to parallel the EPA standard. In rejecting comparable worth claims, courts have reiterated Congress's fear of having the government and judges dictate what employers have to pay their employee – rather than letting the market decide.

[32] *Int'l Union v. Michigan*, 886 F.2d 766, 769 (6th Cir. 1989).

[33] *AFSCME v. Washington*, 770 F.2d 1401, 1407 (9th Cir. 1985)

[34] *Sims-Fingers*, 2007 U.S. App. LEXIS 15253, at *7.

And, indeed, given the robust, living menu of federal and state remedial schemes discussed earlier, there is no justification for interjecting the Government into the unprecedented role of establishing the appropriate rate of pay for employees of private companies. To do so in the form of these "Guidelines" would amount to social and economic engineering under the imprudent and unsubstantiated guise of "curing" employer discrimination in the setting of wages.[35] If implemented, the legislature, the DOL, and the Courts would necessarily invade, in fact, permanently reside in, the setting of wages and salaries of employees throughout the United States – a dangerous development that should be prevented by rejection of the Paycheck Fairness Act.

The EPA's Collective Action Mechanism in Section 216(b) Should Not be Amended to Incorporate Fed. R. Civ. P. 23

Like multi-plaintiff actions under the FLSA and the ADEA, EPA actions brought by women on behalf of themselves and others similarly situated under the collective action mechanism of Section 216(b) require interested parties to file with the court a consent that they wish to "opt-in" to the case before becoming part of the action, including before becoming affirmatively bound by any adverse rulings against the employees' interests adjudicated in the case. FLSA, ADEA, and EPA collective actions, as they are known under Section 216(b), provide employees with a generally more lenient standard with respect to a plaintiff's initial showing of being similarly situated to fellow employees than that required under Federal Rule of Civil Procedure 23(a), which is applicable to class actions sought under Title VII, and proposed by the proponents of the Paycheck Fairness Act as the applicable new class action mechanism to apply to EPA claims. The Chamber submits that the Act's proponents have not articulated a compelling reason for any change in the current collective action mechanism available to plaintiffs under the EPA.

Under Rule 23, to bring a class action a plaintiff must first meet all of the "strict requirements" of Rule 23(a) and at least one of the alternative requirements of Rule 23(b). Under Rule 23(a) a plaintiff must show: the class is too numerous to join all members; there exist common questions of law or fact; the claims or defenses of representative parties are typical of those of the class members; and the representative parties will fairly and adequately represent the class. Once these requirements are satisfied, a plaintiff must also satisfy one of the subsections of Rule 23(b). Rule 23(b) requires that a plaintiff show either: that prosecution of individual actions would result in inconsistent holdings or that adjudications would be dispositive of the interests of those not named in the lawsuit, that the party opposing the class has acted on grounds applicable to the entire class making relief appropriate for the class as a whole, or that questions of law or fact common to the members of the class predominate over questions affecting only the individual members of the class and that certification is superior to other available methods for fairness and efficiency purposes. When conducting the required analysis

[35] That is especially so given that, as labor economists have well established and documented, the average disparity is in fact the result of a myriad of societal and individualized factors – and not discrimination. *See* n. 2.

under Rule 23, courts must perform a "rigorous analysis" of plaintiff's ability to meet each of Rule 23's requirements.[36]

Conversely, under Section 216(b), while some courts use the Rule 23 approach to the extent those elements do not conflict with Section 216 (such as numerosity, commonality, typicality and adequacy of representation), many courts use a less stringent standard, requiring plaintiff to show only that she is similarly situated to other employees.[37] The similarly situated requirement is met through allegations and evidence of class wide discrimination. Courts generally apply a lenient standard to conditional certification of an EPA claim. A person is considered a member of a collective action under Section 216(b) and is bound by and will benefit from any court judgment upon merely filing a written consent with the court and affirmatively "opting into" the suit. This requirement was added to collective actions under Section 216(b) to ensure that a defendant would not be surprised by their testimony or evidence at trial.[38]

Courts regularly face and grant requests to certify both Federal Rule of Civil Procedure 23(a) class actions alleging wage disparity based on sex, as well as Rule 216(b) collective actions under the EPA.[39] When faced by facts presenting a close call as to whether a purported class of workers is similarly situated under the EPA's Section 216(b) and Title VII's Rule 23 mechanisms, and otherwise appropriate for mass action treatment, it is generally the EPA collective claim that survives opposition to a motion to certify a class alleging sex discrimination in pay.[40] The reason is clear -- Section 216(b) contains a more lenient standard for a plaintiff who is attempting to bring a claim on behalf of herself and other similarly-situated women for unequal pay. Specifically, it is viewed by many courts as encompassing a more liberal standard for conditional certification relative to Rule 23. For all of these reasons, the Chambers submits that this collective action mechanism should not be amended to conform to Rule 23 requirements as proposed by the Paycheck Fairness Act.

OFCCP Initiatives

Under the innocuous title "Reinstatement of pay equity programs and pay equity data collection," section 10 of the bill directs the OFCCP, in a convoluted manner, to make several unjustifiable changes to the manner in which it examines and assesses compensation discrimination. Much of section 10's language is hard to decipher, for example, since it attempts

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[36] *Rhodes v. Cracker Barrel Old Country Store, Inc.*, 213 F.R.D. 619, 671 (N.D. Ga. 2003).

[37] *See Hipp v. Liberty Nat'l Life Ins. Co.*, 252 F.3d 1208, 1217 (11th Cir. 2001) (at the notice stage, the court makes a decision using a fairly lenient standard that typically results in "conditional certification" of a collective or representative action); *Grayson v. K-Mart Corp.*, 79 F.3d 1086 (11th Cir. 1996); *Garza v. Chicago Transit Auth.*, No. 00 C 0438, 2001 U.S. Dist. LEXIS 6132, at *5 (N.D. Ill. 2001), citing *Woods v. New York Life Ins. Co.*, 686 F.2d 578 (7th Cir. 1982).

[38] Portal-to-Portal Pay Act, 29 U.S.C. §256(b); *Allen v. Atl. Richfield Co.*, 724 F.2d 1131, 1134 (5th Cir. 1984).

[39] *See, e.g.*, *Jarvaise v. Rand Corp.*, No.96-2680 (RWR), 2002 U.S. Dist. LEXIS 6096, at *5 (D.C.C. Feb. 19, 2002) (class certification granted under EPA and Title VII to all female employees in exempt positions who did not make compensation decisions); *Garner v. G.D. Searle Pharm. & Co.*, 802 F. Supp. 418, 422-24 (M.D. Ala. 1991) (EPA collective action motion granted on behalf of female medical sales representatives).

[40] *See, e.g.*, *Rochlin v. Cincinnati Insurance Co.*, No. IP 00-1898-C H/K, 2003 U.S. Dist. LEXIS 13759, at *49-51, 64 (S.D. Ind. July 8, 2003) (Rule 23 class certification of sex discrimination in pay claim denied, but Section 16(b) collection action claim allowed to proceed as a class action as the standard is more lenient under the EPA).

to relate to no-longer extant sections of regulations,[41] but for the purposes of this testimony, two provisions are worth particular note: the provisions relating to the agency's analysis of systemic compensation discrimination and the provisions targeted toward surveying the federal contractor community.[42]

Section 10 of the bill appears to be designed to reverse or modify several provisions of the OFCCP's guidelines on systemic compensation discrimination, which were adopted on June 16, 2006. In particular, section 10(b)(1)(A) appears to require the re-imposition of pay grade methodology and the abandonment of multiple regression analysis, among other things. The OFCCP, however, largely abandoned pay grade analysis as a method for proving that systemic compensation discrimination exists for one very simple reason: it doesn't work. Assuming individuals in the same pay "band" are similarly situated is simply too crude a statistical tool. Multiple regression analysis, on the other hand, is the widely accepted method by which plaintiffs and defendants make their case. Robust statistical tools like this are necessary to analyze the many factors that determine compensation and determine whether pay differentials are due to discrimination or some other factor. Statistical techniques will result in the OFCCP alleging discrimination more frequently, without adequate proof, forcing employers to unnecessarily incur legal costs and wasting OFCCP's resources. One perverse result of making such a change will be that employers that choose to settle with OFCCP based on such an inadequate statistical analysis would open themselves up to charges of reverse discrimination under Title VII or state law.[43]

Proposed section 10(b)(1)(C) appears to be designed to re-impose the long-discredited OFCCP equal opportunity survey. It should be noted that the OFCCP's survey, which was intended to help identify federal contractors that should be audited by OFCCP, was substantively flawed, failed to serve as a useful enforcement tool for the agency, and placed a significant, unnecessary burden on contractors. A neutral study of the survey was conducted by Abt Associates as part of the OFCCP's review of the survey. The study conclusively demonstrated that the survey provided no useful data. One example is particularly telling: the study found that of the establishments classified by the survey as suspected of having systemic discrimination, 93 percent would be false positives. Nevertheless, the OFCCP estimated the study cost contractors almost $6 million per year (a very conservative estimate, based on reports from Chamber

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[41] *See* section 10(b)(1)(C), referencing 41 C.F.R. section 60-2.18, which was repealed on September 8, 2006 (see 71 Fed. Reg. 53,032).

[42] A full discussion of these issues is beyond the scope of this testimony. For more information about the OFCCP's repeal of the EO Survey, see the agency's comments at 71 Fed. Reg. 53,032 (Sept. 8, 2007). For more information about the OFCCP's guidelines on systemic compensation discrimination, see the agency's comments at 71 Fed. Reg. 35,124 (June 16, 2006). Extensive comment by the Chamber on both issues is available on the Chamber's web site at: www.uschamber.com.

[43] *See Maitland v. Univ. of Minn.*, 155 F.3d 1013, 1016-18 (8th Cir. 1998) (reversing district court's grant of summary judgment to employer on reverse discrimination claim and ruling that "the fact that the affirmative action salary plan was implemented pursuant to a consent decree does not bolster the District Court's conclusion at the summary judgment stage of this case that there was a manifest imbalance in faculty salaries."); *see also Rudebusch v. Hughes*, 313 F.3d 506, 515-16 (9th Cir. 2002)(reverse discrimination case based on allegedly insufficient multiple regression analysis, ultimately resulted in a ruling requiring the employer to pay male faculty members $1.4 million); *Smith v. Virginia Commonwealth Univ.*, 84 F.3d 672, 676-77 (4th Cir. 1996) (reverse discrimination claim based on inadequate multiple regression analysis).

members).[44] Re-imposing this burden, which has been proven to do nothing to help identify or eradicate discrimination, on the federal contractor community cannot be justified.

Other Concerns

In addition to the concerns discussed above, the Paycheck Fairness Act raises other serious concerns. Some of those concerns are noted below:

Permitted Inquiries About Wages

The Paycheck Fairness Act appears to provide an unprecedented broad new right to employees under the EPA. Employees would have the right to "inquire about wages of the employee or another employee…" without fear of any adverse action by an employer. The new right does not appear to be narrowed in any way by relevancy to the employee's pay or by confidentiality concerns of an employer. This language goes far beyond any rights enjoyed by non-unionized and unionized employees under the National Labor Relations Act ("NLRA").

For example, under the NLRA, non-unionized employees have the right to discuss their own wages with other employees, but do not otherwise have the right to obtain written documentation about the wages of any other employees. Although unionized employees, as part of an employer's duty to bargain in good faith, have the right to inquire about wage information for bargaining purposes, this right is not without boundaries and not without safeguards. In *International Business Machines Corp. and Hudson*, 265 NLRB 638 (1982), the National Labor Relations Board ("NLRB") held that employees could discuss their own wages with each other, but could not access or distribute company-compiled information as the company had a valid business justification for its rule against distribution of wage data compiled and classified as confidential. Instead, the NLRB explained that the employer had a valid business justification for discharging an employee who disclosed wage information in violation of the company's rule. In contrast, here, the Paycheck Fairness Act provides an open door for an employee's inquiries in the wages of all employees, without any balancing of an employer's need for confidentiality and other legitimate concerns.

New Definition of "Establishment"

The Paycheck Fairness Act appears to redefine and expand the definition of equal work, by amending the EPA to allow an employee to raise a claim of denial of equal pay for equal work if the inequality between men and women pay exists between men and women who work at different physical places of business within the company. Currently, in keeping with the EPA's prohibition against denying employees equal pay for equal work because of their sex, the EPA requires an employee to compare their wages earned against other employees within the physical place of business in which they work. According to the Regulations issued by EEOC to construe the EPA, "establishment" "refers to a distinct physical place of business rather than to an entire business or 'enterprise' which may include several separate places of business. Accordingly,

[44] *See* 71 Fed. Reg. 3,378 (Jan. 20, 2006).

each physically separate place of business is ordinarily considered a separate establishment." 29 C.F.R. §1620.9(a). We urge the Committee to consider the difficulty and impropriety of comparing jobs across locations and geographical regions in determining whether equal pay is being paid for equal work, and reject the unworkable proposal contained within the Paycheck Fairness Act.

Conclusion

In conclusion, the Chamber has serious concerns with, and opposes, the Paycheck Fairness Act. Mr. Chairman and members of the Committee, we thank you for the opportunity to share some of those concerns with you today. Please do not hesitate to contact me or the Chamber's Labor, Immigration, and Employee Benefits Division, if we can be of further assistance in this matter.

Chairwoman WOOLSEY. Thank you, Ms. Olson.
Mr. Sellers?

STATEMENT OF JOSEPH SELLERS, PARTNER, COHEN, MILSTEIN, HAUSFELD AND TOLL PLLC

Mr. SELLERS. Good morning, Madam Chair, members of the subcommittee. Thank you for inviting me today.

When it was enacted in 1963, the Equal Pay Act, the first federal sex discrimination law that had been passed applying to the workplace, held great promise. But it has fallen far short of that promise because of a number of procedural flaws in the legislation, many of which the Paycheck Fairness Act would address.

I want to identify a few of the areas and begin with the area that has not been discussed. And that is the initial burden that women who wish to invoke the Equal Pay Act must satisfy in order to even shift the burden to the employer to have his business practices scrutinized.

The factors that must be satisfied are difficult to satisfy, typically requiring expert analysis that most individuals cannot afford to pay. And therefore, many women stumble at the beginning in pursuing these claims when they pursue them individually. So I would like the subcommittee not to begin its assessment of this bill by assuming, as might otherwise be led to believe, that these claims are anything but very difficult to bring under the best of circumstances.

We have already discussed briefly among the panel the catch-all defense, the factor other than sex that can be used by employers to defend these claims. That defense can permit such practices as strength and agility tests or prior pay levels at the time before employees are hired to be used to justify existing pay disparities between men and women in the workplace.

And simply because they do not on the surface reflect an intention to discriminate or reflect some basis to be inclined to discriminate, they may satisfy this factor other than sex standard. And so, I applaud the Paycheck Fairness Act's proposed changes here, which do nothing more than import into this statute the protections that were already accorded to workers in the Civil Rights Act of 1991 as it applied to disparate impact claims.

There is nothing revolutionary about requiring that the factors be bona fide, that they be related to the job in question, that they be shown to serve a legitimate business purpose. Those are hardly extraordinary requirements. And that is what this provision would require.

I turn quickly to the issue of multiple party claims, class actions. I think there is a good deal of misunderstanding perhaps about what this bill would accomplish here.

I have represented employees for nearly 30 years in a number of pay discrimination cases. And I have found repeatedly that they are, as I think Dr. Murphy mentioned at the beginning, there is a great deal of fear about suing your employer.

And the provision currently in place, which is simply an anomaly because this act was—the Equal Pay Act was an amendment to the Fair Labor Standards Act—requires that each woman who wishes to participate in these cases has to file a notice to her employer and take some affirmative action to actually participate in the case. In practice that leads to far often fewer than 50 percent of women aggrieved with respect to a particular pay practice actually participating. That is hardly the goal we should seek to achieve, unless your goal is simply to minimize liability for an employer.

And that is certainly, I would hope, not the sole goal of our nation's civil rights laws, but rather to do justice. And those women

who are aggrieved ought to be given the opportunity to participate in these cases.

The act would simply add to the law a provision which is applicable under Title 7, applicable to virtually every other modern civil rights law that individuals who wish to pursue a claim as a group can invoke the rules of civil procedure applicable to all cases in federal court. And therefore, people who are aggrieved can participate in those cases where they initiate their own action or not. So it really puts this law in parity with the other civil rights laws.

The remedies—I will say only one thing quickly about that. And that is by simply awarding to aggrieved individuals the earnings lost and occasionally double the earnings lost, it provides no deterrent to employers to ensure that their pay practices are fair. It simply, as has already been explained, potentially the cost of doing business to discriminate on the basis of pay.

And finally, the last point I will make to conclude quickly is I really want to stress the importance of the reporting requirements that this bill would add to require employers to present data about pay to the Office of Federal Contract Compliance Programs and the EEOC. As Justice Ginsburg in the Ledbetter decision recognized, most employees don't know how others are paid, lack the basis to make those comparisons. We need the federal agencies to collect that information in order to provide the proper enforcement.

Thank you very much.

[The statement of Mr. Sellers follows:]

Prepared Statement of Joseph M. Sellers, Partner, Cohen, Milstein, Hausfeld & Toll PLLC

Although in effect for more than 40 years, the Equal Pay Act ("EPA") has fallen into disuse. The liability requirements of the EPA are extraordinarily difficult for plaintiffs to satisfy, the remedies available fail to address the full range of harm suffered by aggrieved women and the enforcement scheme provided by the statute ignores the realities of the modern workplace. As a result, women who believe they have been subject to pay discrimination in compensation more often invoke Title VII of the Civil Rights Act of 1964, enacted one year after the EPA was passed. Properly recast, however, the EPA can offer a powerful tool in the ongoing efforts to reduce the gap in earnings between men and women. The Paycheck Fairness Act of 2007 ("PFA" or "Act") would eliminate most shortcomings of the EPA that have limited its utility.

In this statement, I will identify and discuss the most serious flaws of the EPA. In offering these views, I draw upon nearly 30 years of legal practice representing victims of civil rights violations, especially in equal employment opportunity matters.

First, the initial proof required of a plaintiff to establish a prima facie case is prohibitively high, as a result of which most women who pursue claims individually under the EPA do not prevail.

Second, the EPA permits employers to defend claims by asserting that the pay difference is attributable to one or more "factors other than sex." This defense shields from challenge grounds for pay disparities that, while not overtly attributable to sex, may nonetheless be closely associated with gender. As such, the scope of the defense must be confined to grounds that plainly could have no relationship to gender.

Third, where evidence exists of a pattern or practice of pay discrimination, the EPA requires each aggrieved worker to opt into the case in order to receive any relief. This opt in requirement has had the effect of excluding many women from participation in EPA cases. Instead of employing this outdated and burdensome procedure where multiple claims are advanced, the EPA should employ Rule 23 of the Federal Rules of Civil Procedure which includes within a certified class all women who may be aggrieved by the same or similar pay practice without the obligation to opt into the case.[1]

Fourth, the remedies available under the Equal Pay Act fail to address fully the harm that pay discrimination causes and provide little deterrence to employers from engaging in such discrimination, as the maximum relief available is often little more than payment of the wages the aggrieved women would have been paid in the absence of the pay discrimination to which they were subject.

Fifth, as most employees are unaware of the compensation paid to their co-workers, they lack the information needed to initiate actions under the EPA. Private enforcement of this statute, therefore, will often fail to reveal, much less challenge and end, systemic gender-based pay disparities. Without regular disclosure of worker compensation by gender to an appropriate enforcement agency, the protections afforded by the EPA will never be realized.

I. Difficulties in establishing plaintiff's prima facie case

A plaintiff seeking to recover under the Equal Pay Act bears a heavy burden of proof to demonstrate a sex-based pay disparity is discriminatory. A plaintiff must show she performed work that is "equal" or "substantially equal" to that of a male comparator in the same establishment and under similar working conditions.In determining whether work is equal or substantially equal, courts consider factors such as skill, effort, responsibility, and working conditions.While a plaintiff must show more than that the work of the comparator is comparable, she is not required to prove the work was identical.The meaning of equal work in the EPA, therefore, lies somewhere between comparable and identical work. This range of possible meanings that can be ascribed to "equal work," the central requirement that the plaintiff must satisfy, has created considerable uncertainty about how to satisfy this standard.

Rather than conducting a comparison of the essential features of jobs held by a plaintiff and her comparator, courts too often compare superficial features of the jobs and overlook fundamental similarities that are masked by trivial differences. Without the assistance of an expert to conduct analyses of each job at issue, which requires an expense few plaintiffs can afford individually, courts are left at sea in interpreting the requirements that plaintiffs must satisfy. Rather than assessing whether the jobs involve equal or similar skill, effort, and responsibility, courts have been tempted simply to compare a detailed job task list.Similarly, courts are not required to consider (1) experience, training, education, and ability required of jobs when assessing whether they involve equal skill; (2) the degree of mental or physical exertion required by the two jobs, as effort may be equal even if exerted in a different manner; and (3) the degree of accountability required for each job responsibility, despite the relevance of such factors in determining job comparability. Without the assistance of experts to guide the interpretation of broad statutory language and its application to job features that may not be easily compared, courts often find plaintiffs failed to satisfy their initial burden of proof and, as a result, the burden of proof never shifts to the employer to justify its challenged pay practices.

The Equal Pay Act also requires that a plaintiff and her male comparator work in the same establishment.As more employers have multiple facilities at which the same jobs are performed, this requirement imposes increasingly unjustified constraints on the job comparisons that must be made. Where women work in jobs whose only comparators are located in other facilities, this provision creates a requirement that is impossible to satisfy.

These difficulties in establishing appropriate comparators pose the greatest obstacles to success under the EPA for women holding higher level jobs where an employer's contention that each job is unique may seem most plausible. Current litigation trends show that blue-collar workers who hold jobs with simple, well-defined duties and whose work is almost identical have had greater success in satisfying their burden of proof under the EPA.In contrast, women in administrative, managerial and executive positions have experienced a high rate of dismissal of their EPA claims because their jobs are more easily viewed as unique and therefore lack an appropriate comparator. As women have come to occupy higher level positions in the workplace with increasing frequency, they have found less available to them the protection against pay discrimination that Congress intended to provide by enacting the EPA.

The Paycheck Fairness Act in part addresses these obstacles to satisfying the plaintiffs' burden of proof under the EPA. The Act would appropriately eliminate the requirement that equal work must be performed at jobs located at the same facility, thereby shifting the focus of any comparison to the characteristics of the work performed.Other artificial barriers to satisfaction of the plaintiffs' burden of proof cannot be so easily eliminated. Clearer and more precise definitions of the initial requirements that plaintiffs must satisfy might provide courts with greater guidance and reduce the all-too-common resort to mechanical comparisons that ignore important features of the jobs. Ultimately, the elaborate comparisons of multiple job di-

mensions that the EPA requires are most likely accomplished with assistance from experts. But, their cost is prohibitive for most employees who pursue their claims individually, making the ability to pursue such claims collectively especially important to effective enforcement of the EPA.

II. The defense available to employers, that a pay disparity was attributable to a "factor other than sex," must be more narrowly defined, as it presently protects conduct that causes gender pay disparities.

In order to avoid liability, employers must rebut evidence of a gender-based pay disparity by proving that the wage gap is a result of one of the following—a bona fide seniority system, a merit system, a system which measures earnings by quantity or quality of production, or a factor other than sex. The first three defenses available to employers are specifically defined by statute and are normally associated with sound business practices likely to minimize the influence of gender in compensation decisions. The last defense that the EPA affords employers, however, that the pay disparity was caused by a "factor other than sex," insulates from judicial scrutiny a wide array of business practices which, while neutral on their face, nonetheless may rely on factors that disadvantage women. Accordingly, the "factor other than sex" defense must be confined to business practices shown to serve compelling and legitimate interests of the employer and for which no alternative exists that would cause a smaller or no disparity in pay.

For example, a policy that paid war veterans more than non-war veterans in jobs involving the same work was found to be a gender-neutral "factor other than sex" notwithstanding that the lower paid non-war veteran employees were all women and the higher paid war veterans were all men.Reliance on pre-hire pay levels and strength and agility requirements offer other examples of factors that correlate highly with gender but which nonetheless can satisfy the "factor other than sex" defense.

While not expressly relying upon gender, these factors and others like them are so closely associated with gender that they serve as a proxy for gender. As such, they should not qualify as grounds on which an employer may successfully defend a gender-based pay disparity.

Nor is the EPA clear in prescribing the burden of proof that employers must satisfy in order to assert the "factor other than sex" defense successfully. The vague language of this defense, in contrast to the specificity of the other three defenses, has led courts to allow employers to satisfy the "factor other than sex" defense more easily than the other defenses. In Strecker v. Grand Forks County Social Service Board, for example, the court accepted the employer's simple assertion that use of the state personnel classification system was a gender-neutral "factor other than sex" that contributed to the observed gender-based pay disparity.In contrast, in Brewster v. Barnes, the court required the employer to satisfy a burden of persuasion; that is, to persuade it that the proffered reason actually contributed to the pay disparity and was gender neutral.As a result, the court concluded that the employer had failed to raise a "factor other than sex" because it failed to investigate or determine whether the employee in fact spent more than fifty percent of her time performing certain tasks. Defining the "factor other than sex" defense with greater particularity and specifying the burden of proof that the employer must satisfy would likely ensure that courts hold employers to the same evidentiary standard as they do with the other affirmative defenses available under the EPA.

The Paycheck Fairness Act would address the shortcomings in the "factor other than sex" defense available in the EPA. First, the Act requires that the "factor other than sex" be bona fide. The addition of the bona fide requirement ensures the factor proffered by the employer actually is neutral and unrelated to sex. Second, the Act requires that, in order to qualify as a defense, the proffered factor must be related to the position in which the pay disparity was observed, ensuring that it actually accounts for the challenged pay disparity.Third, the Act requires as an alternative ground that the proffered factor serve a "legitimate business purpose" and that no alternatives be available that would achieve the same business purpose but cause less pay disparity.This provision will be invaluable in ensuring that neutral practices, such as pre-hire pay levels or criteria relying upon stamina or strength, be scrutinized closely for the purpose they serve and compared with alternative criteria that may not cause gender-based pay disparities.

Oddly, the Act as it is presently drafted treats these two new requirements that a "factor other than sex" must satisfy as alternatives rather than as standards both of which must be met.There is no reason the requirement that a "factor other than sex" be related to the job in question serve as an alternative to the requirement that "a factor other than sex" serve a legitimate business purpose and have no alternative factors available that may cause no pay disparity. The first requirement, that

the factor at issue is job related, ensures that it is applicable to the job in which the disparity was observed, not simply apply to a broader or different category of jobs. The second requirement, that the factor serve a legitimate business purpose and have no alternatives that would have caused less pay disparity, ensures that the factor at issue be important to the employer's business and that the availability of options that might not cause the observed pay disparity be considered in assessing the lawfulness of the employer's compensation practice. Both requirements are necessary to ensure a "factor other than sex," while neutral on its face, not serve as a proxy for sex. The Act should be revised to treat these requirements in the conjunctive, not the disjunctive as they now appear, to ensure that both requirements be satisfied when an employer asserts the defense that a gender-based pay disparity was due to a "factor other than sex."

III. When multiple claims are asserted under the epa, each claimant should be able to participate in the case without the need to opt into the action.

When more than one woman working for the same employer claims she was the subject of a gender-based pay disparity, the EPA may permit them to pursue their claims together. Unlike virtually every other employment discrimination law, however, the EPA requires each woman who may have been adversely affected by the same discriminatory pay practice to file a notice with the court in which the case is pending expressing an intention to participate in the action. This burden erects an obstacle to women who may have been aggrieved by the same pay practice that may deny to some, or even many, the opportunity to participate in the case. Women aggrieved by the same pay practice should be afforded the opportunity to participate in the same lawsuit by order of the court, as occurs under virtually every other civil rights statute, rather than be required to notify their employer and the court of such an interest.

At the time the EPA was enacted in 1963, most of the civil rights laws in effect today had not been passed. As there was no other federal law in effect at that time which protected against sex discrimination in the workplace, the EPA was enacted as an amendment to the Fair Labor Standards Act, 29 U.S.C. §§ 201-219. ("FLSA") Enacted in 1938, the FLSA provides that where multiple persons wish to challenge the same conduct under that statute, each must file a separate notice with the court in order to opt into the case. One year after the EPA was enacted, Congress passed the Civil Rights Act of 1964, of which Title VII provides comprehensive protections against employment discrimination in all phases of the employment relationship, including compensation practices. Because Title VII was enacted as freestanding legislation, claims brought under it are governed by the Federal Rules of Civil Procedure which generally apply to all cases brought in the federal courts. Rule 23 of the Federal Rules of Civil Procedure provides that, where multiple claimants seek to challenge the same conduct, an order of the court certifying their group as a class ensures their participation in the action and their eligibility to share in any remedies awarded to members of the class. As a consequence of its early enactment and the absence of other laws that addressed sex discrimination in the workplace at that time, the EPA borrowed a procedure to govern multi-party claims from the FLSA, a statute that was enacted about 30 years earlier, before the Federal Rules of Civil Procedure and Rule 23 existed.

The ability of all women aggrieved by a discriminatory pay practice to participate in the same case is critical to vindicating their rights under the EPA and ensuring that the rights of all women with the same claim are adjudicated in the same case at the same time and before the same court. The current process governing the pursuit of multiple pay discrimination claims against the same employer inevitably leads to the exclusion of many women with similar claims from the case in which the alleged pay practices are challenged. Although the EPA permits the court to issue notice to all women who may have been aggrieved by the challenged pay practice, some women have refrained from opting into EPA cases as they may lack knowledge personally that they were paid less than similarly situated men. Other women have declined to opt into the EPA cases from fear that the notice they must provide to their employer of an interest in participating in the case will subject them to retaliation. The cumulative effect of these additional hurdles that must be surmounted for women to participate in EPA multi-party cases, in my experience, leads to the exclusion of as many as half of the women eligible to participate.

The better approach to the adjudication of multi-party claims arising under the EPA is to permit pursuit of such claims in a class action certified by a court pursuant to Rule 23 of the Federal Rules of Civil Procedure, where the circumstances warrant it. By employing the class certification process, the claims of women aggrieved by the same or similar pay practice are encompassed within the same case by court order and without the need for each woman to file notice opting into the

action. This process comports with the procedure used for adjudicating multi-party sex discrimination claims arising under Title VII and ensures that all women who may have been aggrieved by the same or similar pay practice will pursue their claims together.

The Paycheck Fairness Act would amply address this shortcoming in the EPA by expressly providing that women seeking to challenge the same or similar pay practices may proceed by class action governed by Rule 23 of the Federal Rules of Civil Procedure.This provision will rectify a significant procedural flaw in the EPA and bring it into conformity with other civil rights laws enacted during the same period.

IV. Remedies available under the equal pay act should include the award of compensatory and punitive damages

The remedies available under the Equal Pay Act are too limited to address the harm that is suffered by pay discrimination and to provide an adequate deterrence to discrimination by employers.

Successful litigants under the Equal Pay Act ordinarily recover the difference between the wages they were paid and the average wages paid to employees of the opposite sex who performed equal work for the two years before their complaint was filed. If the plaintiffs show the violation was willful, then they receive three years of back pay. Should the employer fail to show that the challenged pay disparities were the product of good faith, then the plaintiffs may also recover liquidated damages in the amount of the pay disparity.

Unlike Title VII of the Civil Rights Act of 1964, which was amended in 1991 to permit the award of compensatory and punitive damages to victims of intentional discrimination, the Equal Pay Act does not authorize the award of such remedies. The award of compensatory damages may be warranted where a victim's knowledge of the pay disparity causes emotional harm or the payment of wages to women below those paid to similarly-situated men leads to consequential damage to a victim. Punitive damages might be warranted where an employer knew of the gender-based pay disparity and failed to take prompt and appropriate corrective action or the employer recklessly disregarded the rights of women to be free from pay discrimination. Absent the availability of these remedies, the EPA fails to provide the full panoply of remedies that are now routinely available under federal law to victims of intentional employment discrimination.

Moreover, the monetary remedies currently available under the EPA for the most part simply require payment of wages that were unlawfully withheld in pursuit of gender-based pay discrimination. That remedy fails to provide an adequate incentive for employers to engage regularly in the examination of their own compensation practices and to investigate and address any pay disparities that may be detected. Even the payment of lost wages doubled where an employer has failed to demonstrate it acted in good faith permits employers to tolerate the risk that employment practices resulting in gender-based pay disparities will be detected and challenged, as they can compute precisely the economic exposure and determine whether it is a tolerable cost of doing business. The potential for the award of damages, on the other hand, may create risk that is not easily quantified and financial exposure that will cause employers to be more diligent in examining their pay practices and promptly address gender-based disparities where warranted.

The Paycheck Fairness Act redresses the deficiency in the remedies available under the EPA by permitting the award of compensatory and punitive damages.In doing so, the Act eliminates a shortcoming of the EPA that has long diminished its value as a vehicle for addressing unlawful pay disparities.

V. As most employees are unaware of the amount of pay their co-workers receive, compensation data must be reported to federal enforcement agencies to ensure unlawful pay disparities can be systematically detected and redressed.

In most workplaces, the amount of compensation paid to each employee is not known by his or her co-workers. As a result, employees ordinarily lack the factual basis with which to compare the compensation they receive with pay levels of co-workers performing the same work. The lack of such information from which informed pay comparisons can be made greatly limits the ability of most workers to formulate and advance a claim of pay discrimination under the EPA. The enforcement of the EPA, therefore, cannot depend for the most part on private legal action. Instead, the

protections of the EPA can only be secured by investigation and enforcement of pay disparities by the EEOC and the Office of Federal Contract Compliance Programs, the federal agencies charged with enforcing the EPA in the private sector. In order to ensure that these agencies possess reliable information about employer

compensation levels, employers must be required to report such information regularly to them.

Unlike most personnel actions, the results of which are readily evident to many employees, the levels of compensation paid to an employee are rarely known to co-workers. In contrast, the identity of persons selected for promotion is often observed by employees who work near or with the selectee. Perhaps more than any other personnel action, the results of compensation decisions are typically confidential and the ensuing amounts of compensation paid are known only to the pay recipient and a handful of managers and personnel staff. Indeed, the limits on knowledge about pay levels and the corresponding difficulty most employees have in comparing their compensation with amounts paid to co-workers prompted Justice Ginsburg to observe recently that: "Comparative pay information * * * is often hidden from the employee's view."

The lack of knowledge about the amounts paid to co-workers is undoubtedly attributable to several causes. First, concealing compensation levels from workers protects the privacy of employees, for most of whom the amount of their pay is regarded as a matter of considerable sensitivity. Second, many employers discourage, and some actually ban, discussion between employees about the amounts of their compensation. Third, even employees informed about the pay levels of their co-workers likely lack knowledge about the factors that influenced those pay levels, such as evaluation of their co-workers performance and perhaps even the level of education and training each has received.

Absent ready access to the pay levels of their co-workers and the factors that led to those pay levels, most employees lack the knowledge needed to make a viable claim of pay discrimination under the EPA. While discovery is ordinarily available to workers who initiate litigation under the EPA, workers must have sufficient information with which to determine they wish to file such a claim before bringing an action to enforce the EPA. It is not surprising, therefore, that of the claims filed alleging discrimination in the workplace, only a small percentage make specific allegations of pay discrimination.

Lacking regular access to information about the amounts of compensation paid to their co-workers, the few employee-initiated complaints of pay discrimination cannot serve as an adequate source of information to federal enforcement agencies about the incidence of gender-based pay disparities in the workplace. Instead, those agencies must be granted access on a regular and organized fashion to information about the amounts of compensation paid to workers, identified by their demographic features and by the characteristics of the jobs they hold. Only with access to such information can federal enforcement of the EPA and its sister protections under Title VII of the Civil Rights Act of 1964 be pursued systematically and thoroughly.

The Paycheck Fairness Act directs the EEOC to survey the data on employee compensation currently available to the federal government and, soon thereafter, to issue regulations that will provide for the collection of pay information from employers.This provision offers the best hope for the systematic investigation of employer compensation practices and, to the extent warranted, the pursuit of an organized and strategically developed enforcement program. A similar provision should be added to the Act directing the Office of Federal Contract Compliance Programs of the Department of Labor to undertake similar measures.

Conclusion

More than 40 years ago, the Equal Pay Act was enacted with great hope that its protections would eliminate gender-based pay disparities from workplaces throughout the nation. But, the difficult scheme employed for enforcement of the EPA and the inaccessibility of information about pay to most employees has caused enforcement of this statute to fall far short of its promise. The Paycheck Fairness Act would considerably enhance the ability of employees to secure the protections against pay discrimination afforded by the EPA and create the first comprehensive program to investigate and eradicate gender-based pay disparities in this country. I urge its speedy enactment.

NOTES

[1] Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974).

[2] Working conditions need not be equal, but must be similar as evidenced by the physical surroundings and job hazards. Id. at 200.

[3] 29 C.F.R. 1620.14(a) (2003); Lambert v.Genesee Hosp., 10 F.3d 46, 56 (2d Cir. 1993)

[4] Cavuoto v. Oxford Health Plans, Inc., 2001 WL 789316, *7 (D.Conn. June 13, 2001) (conducting a superficial task-by-task comparison of job duties as opposed to inquiring into the effort, skill, and responsibility involved in the jobs being compared); 29 C.F.R. § 1620.15(a) (2003).

[5] 29 U.S.C. § 216(d) (2007).

[6] See, e.g., Georgen-Saad v. Texas Mutual Insurance Co., 195 F.Supp.2d 853, 857 (W.D. Tex. 2002) (noting that the Equal Pay Act is more easily applied to lower-level workers performing commodity-like work and is not suitable for assessing high-level workers)

[7] See Juliene James, The Equal Pay Act in the Courts: A De Facto White-Collar Exemption, 79 N.Y.U. L. REV. 1873 (2004) (explaining the historical and normative factors that result in a de facto white collar exemption to the Equal Pay Act).

[8] PFA, § 3(c).

[9] Fallon v. State of Illinois, 882 F.2d 1206, 1212 (7th Cir. 1989).

[10] 640 F.2d 96 (8th Cir. 1980), rev'd on other grounds by Pullman-Standard v. Swint, 456 U.S. 273 (1982); see also Patkus v. Sangamon-Cass Consortium, 769 F.2d 1251 (7th Cir. 1985) (holding that the defendant satisfied the factor-other-than-sex defense based on the existence of a reorganization plan).

[11] 788 F.2d 985 (4th Cir. 1986). A burden of persuasion requires the party to which it is assigned to prove or persuade a fact finder that the fact proffered is more likely true than not. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506 (1993); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981). In contrast, a burden of production only requires the party to which it is assigned to articulate or produce evidence in support of the fact proffered, not persuade the fact finder that such evidence should be credited. Id. See also Stanziale v. Jargowsky, 200 F.3d 101, 107 (3d Cir. 2000) (concluding that, unlike Title VII claims, Equal Pay Act claims follows a two-step burden-shifting paradigm).

[12] PFA § 3(a).

[13] PFA § 3(a)(I)(aa)(AA).

[14] PFA § 3(a)(I)(aa)(BB).

[15] PFA § 3(a)(I)(aa)(AA).

[16] PFA § 3(e)(4).

[17] PFA § 3(e)(1).

[18] Ledbetter v. Goodyear Tire & Rubber Co., Inc., 550 U.S.———, No. 05-1074, slip op. at 3 (2007)(Ginsberg, J. dissenting).

[19] See Equal Employment Opportunity Commission, EEOC Litigation Statistics FY 1997 to FY 2006, available at *http://www.eeoc.gov/stats/litigation.html* (showing that only 10 of the 403 suits filed in 2006 included Equal Pay Act claims).

[20] PFA§ 9.

Chairwoman WOOLSEY. Thank you.

Thank you all for your testimony.

Now I am going to recognize myself for 5 minutes. And my first question is to you, Dr. Murphy. In Ms. Olson's written testimony, she claims that unexplained differences in the wage gap are attributable to women's choices. How would you respond to that?

Ms. MURPHY. Well, for years now statisticians have been analyzing, doing regression analysis to try and explain through women's characteristics or through workers' characteristics what this 23-cent difference is all about. And finally, I mean, the consensus right now is that 40 percent of that cannot be explained by all these regression analyses. I am a data nerd. You have to excuse me.

But being a data nerd, if you look carefully at this 40 percent, as much as everybody has tried to explain that it is not discrimination, you have to conclude after a while that this is discrimination. If you start with that 40 percent and then you look back into other statements about what is explained and look carefully at the footnotes and the hedging clauses, you will find that there may be some discrimination in the explained portions.

So I take the 40 percent to be discrimination. And it may be substantially more than that. That is why, as Attorney Sellers was saying, that is why it is important to gather this other data until we have data from the workplace that can be factored in and used as well to explain and understand the extent of this discrimination.

We have pushed as far as we possibly can with the Bureau of Labor Statistics and the Census Bureau's data. You can't go any further without analysis to get a clear statement and understand what discrimination is. But you can with the EEOC data and some modification which finally gets the pay data in workplaces.

Chairwoman WOOLSEY. Okay, thank you.

Ms. Greenberger, you would probably like to respond to that, too. But I would like you to talk to us a little bit about the current Equal Pay Act and what has happened with the Ledbetter decision and with the very idea of that we are weakening, not strengthening support for women in the workforce. So where does this legislation we are talking about now—how would that help or hinder what came out of Ledbetter?

Ms. GREENBERGER. Well, let me just make one quick comment with respect to the pay gap and the nature of discrimination as a major cause of the pay gap in the country today, as Dr. Murphy said. Not only is the "unexplained" portion, which has to be due to discrimination substantial in and of itself, but also the so-called other factors like women making choices sometimes to stay at home to take care of children.

Well, clearly, for some women that is their choice. And it is a choice to be supported. And I wish we had policies in our country that better did support those choices.

But in many families, it is the worker, the wage earner who earns the least, who economically is the one who then cuts back on their paid labor force participation in order to deal with family responsibilities, whether it is children, elderly parents or the like.

And so, what is deemed by many of these judgments as women's choices actually in a number of instances also reflects the pay discrimination that women face, which means they are the ones who have to give up paid employment, health insurance, pension plans and the like to meet the family responsibilities that need to be addressed in this country.

So we are facing very substantial costs for families and for women with this pay discrimination. That is number one.

Now, where are we with the law? First of all, what we have seen over the past number of years is an actual cutback in government enforcement of our anti-discrimination laws in general in the workplace, including the Equal Pay Act. So we have seen a cutback in data being collected on the basis of race, national origin, sex, religion, et cetera. We have seen the Bureau of Labor Statistics collecting less information with respect to women, not more.

We know there is a particular problem with respect to women of color who suffer especially with respect to discrimination in the workplace and with pay. We do not collect adequate data by race, by gender or by gender and by ethnicity.

That data is essential in order to identify the problems to have enforcement. Without that data, which this bill would go a long way to assuring is collected, we cannot target enforcement for the government properly. We cannot as a country understand the full scope and effect and the damage being done by pay discrimination.

So this legislation is essential for that. On top of that, you mentioned the Ledbetter Supreme Court decision, a five-four decision where the Supreme Court by one vote narrowly interpreted Title 7's ability to address the issue of pay discrimination by limiting individual's right to bring a complaint to 180 days within the first discrimination.

Chairwoman WOOLSEY. Okay, I am going to stop you there. And we are going to have a second round. And I am going to ask you to go further into Ledbetter.

Ms. GREENBERGER. Okay, thank you.

Chairwoman WOOLSEY. Mr. Wilson?

Mr. WILSON. Thank you, Madam Chair.

And, again, witnesses, thank you for being here.

Dr. Murphy, I have a high regard for economists. But I have to tell you I am quite partial to three attorneys. And this is unheard of, I know. But I am an inactive attorney myself, sir, practiced for 25 years. And I am very grateful my oldest son is a trial attorney. And so, I appreciate your profession very much.

Ms. Olson, my first question would be what is the difference between "a factor other than sex" and "a bona fide other than sex," if you can explain the distinction. Then as follow-up, if you could, can you explain what the practical impacts of the further limitations on the defense such as the alternative employment practice requirement would be?

Ms. OLSON. Thank you, yes. It is difficult to tell because the words bona fide are not defined by the act. Instead when you look up the definition of the word bona fide, it says genuine. And the question is is that going to be something that one is going to look at with subjective intent, or is that something that is going to be looked at in terms of whether there is an underlying determination that there was intentional discrimination, or was it an appropriate factor to consider.

Mr. WILSON. So whether or not it was a result of discrimination, if a reviewing court or jury determines it just wasn't an appropriate factor or the right factor that the employer should be considering, would that be sufficient to be bona fide within the meaning of the act? And I think that would be the subject of significant litigation for many years to come.

Question: Does it impart a state of mind obligation or doesn't it? Is it something that can be supplanted in terms of the judgment of a particular employer by a jury? And that is clearly one of the issues.

Ms. OLSON. In addition to amending any other factor other than sex by adding bona fide, there are a number of other differences and a much higher standard of proof that an employer—and, again, an employer who at this point, unlike Title 7, would bear the ultimate burden of persuasion in front of a jury, would be required to show, they would also be required to show that there was a legitimate business purpose.

And even once they show that, the plaintiff could still prevail if the plaintiff were able to show, notwithstanding a business necessity in connection with the defense that is built in here, that there was another way in which second guessing in hindsight, somebody looking at the decisions of the employer, a jury, could determine that perhaps the same objective could have been achieved by the employer using another factor that might not have in retrospect as significant an impact on women.

An example might be, for example, an employer might have a pre-employment or a requirement, an employee in terms of a certain position have a certain amount of training. And the plaintiff

may be able to defeat the employer's legitimate factor, which was training, by saying the employer could have spent 6 months to a year on the job training individuals who were not trained outside of the workplace and that that would eliminate the disparate factor, disparate treatment of women in connection with that particular issue.

Mr. WILSON. But shouldn't an employer have the right at the start of a relationship to hire employees who are the most qualified to do the job?

Additionally, can you explain to me in greater detail the theory of comparable worth and how this bill might result in more of these sorts of claims being brought? How exactly does a comparable pay system work? And what are the results, generally?

Ms. OLSON. That is a very good question. And it is an amazing thing that we are looking at a strict liability statute, the Equal Pay Act, that does not even require intentional discrimination. And we are looking at changing it by including the entire concept of comparable worth, which has been resoundly rejected, not just by this legislature, not just by the initial legislature that passed the Equal Pay Act, as you can see from my written comments, but also by judges and circuits courts of appeal and the U.S. Supreme Court.

Comparable worth theory, at its essence, allows someone to compare the pay of one job to another job, even though the jobs are different. Basically what this statute would do, the Paycheck Fairness Act would do, would be to direct the Department of Labor and the OFCCP to compare—and the language of the statue is clear—jobs that are different for the purpose of determining whether employers have determined "fair pay" for those jobs. That is not what is required under Title 7, under the Equal Pay Act or under any federal legislation that I am aware.

Mr. WILSON. Thank you very much.

Chairwoman WOOLSEY. Thank you.

Mr. Hare?

Mr. HARE. Thank you very much, Madam Chair. I do share one thing with the ranking member. I am troubled by this legislation. But I am troubled that we even have to have hearings in past legislation to end discrimination against women in the workplace.

I came out of a clothing factory where 95 percent of the people that were employed there were women. And I could tell you we live in a fantasy world if we really believe that this isn't happening to women every single day as we sit here. And so, from my perspective, I think it is not just the right thing to do. I think we have a moral obligation to pass this bill and to pass it quickly and hopefully get the President to sign this.

I would like to ask you, Ms. Olson. You were talking about in your defense of the EPA cases—I was wondering how many cases under the EPA with multiple claims, including a positive action, have you personally defended. And the second part of that question would be with regard to those cases, how successful have the plaintiffs been in the cases that you were defending?

Ms. OLSON. I defended a number of cases on behalf of employers. And in those cases, a number of cases, as you know, approximately, I think, over 90 percent of all cases settle prior to going to trial. And many of those cases do settle at some point. In addition, the

motion for summary judgment structure is set up to allow both plaintiffs and defendants to file motions.

And if you look at cases, some of them are won in summary judgment. Some of them are tried to juries. Most of those cases do not just include Equal Pay Act cases. One might argue that it would be actually malpractice for a plaintiff's lawyer to simply bring an Equal Pay Act case without a Title 7 case because of the overlapping and the lucrative available remedies when you pair those two statutes together.

Let me just mention that if you look at——

Mr. HARE. Well, I guess my question was how successful—because it seems that the plaintiff has to go through numerous, numerous hoops to even get to that step. And I am wondering in the cases where you defended the employer, how successful was the plaintiff in—I mean, what percent of cases were you not successful in representing the defendant on?

Ms. OLSON. I can't give you a percentage of success. But I can tell you that in connection with those cases, cases where there was an issue with respect to whether or not there was equality in pay, obviously are considered and are resolved prior to a resolution by defense counsel, including myself.

With respect to those cases in which the employer has a strong position that, in fact, there was a disparity that was based on a factor other than sex, those cases actually were tried through pleadings. And actually employers were successful in my situation, every case that I can recall involving the Equal Pay Act.

Mr. HARE. So you had 100 percent success rate, then, defending your clients?

Ms. OLSON. That is not the way I would look at it. I would look at it—because you have to include the much more significant number of cases that are resolved short of a determination positively in terms of one person's favor or another.

In addition, if you look at just the last 2 years and Equal Pay Act and Title 7 wage claims, and if you look at just the reported cases, you will see verdicts of anywhere between $1 million and over $50 million in connection with verdicts across the country in connection with those cases. So to say that, in fact, there isn't an effective mechanism out there today in which classes are being certified or collective actions are proceeding wouldn't be an accurate reflection of the case law.

Mr. HARE. Okay.

So I just wanted to ask Mr. Sellers this. But I guess, so you have never lost one then, in other words? You are batting 1,000?

Ms. OLSON. I have settled. That is correct. I have settled.

Mr. HARE. Okay.

Mr. Sellers, of people who go to court, go all the way through this process where there is not a settlement who have a case and have taken all this time and all the effort to bring this to an end, what percent of those cases does the plaintiff, from your personal experience—how successful is the plaintiff in even getting a judgment in their behalf?

Mr. SELLERS. I would estimate it somewhere less than 10 percent. And that is, of course, recognizing that there are many women who don't pursue their claims to begin with. They often

contact me, and I conclude the proof required to even make the initial showing is too demanding, and, therefore, they wouldn't even get to the point of shifting the burden to the employer.

Mr. HARE. Go ahead.

Mr. SELLERS. I just wanted to make one other point because we have heard a couple of times the use of the reference to the statute as a strict liability statute. And I really want to respectfully disagree with that characterization.

A strict liability statute would be one in which the plaintiff prevailed if she simply satisfied the legal requirements set forth for her. This statute provides a whole array of defenses for employers. There is no employer that has a case brought against it, as I think Ms. Olson's experience demonstrates, that doesn't have very substantial defenses available.

So I really think it is a mistake to characterize this as some kind of "you bring your case and you automatically win." The practice is otherwise; I think strict liability is nowhere to be applied to this statute.

Mr. HARE. Thank you. I yield back.

Chairwoman WOOLSEY. Thank you very much.

Mr. Price?

Mr. PRICE. Thank you, Madam Chair.

I appreciate the panelists coming today. I appreciate the information that has been presented.

I thank the Chair for providing this opportunity because I think it points out clearly distinct differences between the approach that many of us take here in Congress. This would be, I think, another classic example of what I have coined to be Orwellian democracy that we are engaged in here in this 110th Congress.

We have a bill before us that is entitled the Paycheck Fairness Act might better be described or titled the Increase in Class Action Suit Litigation Act in order to be more accurate in its description.

I come to this setting, again, appreciating the information. I come from a family of professional women. I come from a profession where the number of women are increasing, medicine. I will assure you that the federal government discriminates equally against both men and women in the area of health care and of medicine and would hope that we would be addressing some of those issues as well.

I am struck by many of the comments. And it is always a challenge to try to figure out exactly how to use your time up here because we get 5 minutes.

Mr. Sellers, I was interested in your comment about apparently if a job had to do with strength and agility, the employer ought not be able to take strength and agility into account. I was amused, I guess, by the fact that you lamented that there weren't more lawsuits that were able to be brought.

It is understandable, given your profession. But I think that it is somewhat curious that that ought to be our goal. And my good friend who just spoke seemed to think that because plaintiffs weren't winning more then we ought to change the rules so that plaintiffs could win more, not talking about the merits of the issue or the merits of the cases.

Dr. Murphy talked about being a data nerd. I am a fact nerd. And facts are stubborn, stubborn things. And so, I would like to draw the attention of all a couple facts. CBO found that among people ages 27 to 33 who have never had a child, women's earnings approached 98 percent of men's. And women who hold positions and have skills of similar experience to those of men face wage disparities of less than 10 percent. And many are within a couple points.

Now, is there discrimination out there? Absolutely, absolutely. But I have got real reservations about how rampant that is indeed and whether or not the vast majority of these factors aren't simply the market.

I have asked a number of times to get information about companies held, owned, and operated by women and whether the pay discrepancies that—or pay differentials—in those companies are similar to others. And I suspect that—and I haven't been able to get that, but I suspect that that is indeed the case.

Again, talking about Orwellian democracy, this Congress might be—and this committee might be described as being an anti-jobs committee and an anti-jobs Congress. There are three major things that drive the cost of business: taxation, litigation, and regulation. And we are coming down hard on business on every one.

This, I believe, would significantly increase the litigation that is present and, therefore, decrease jobs in America, decrease jobs for men and women. And I would suggest that that is a direction in which we ought not head as a nation.

But if I may, Ms. Olson, my reading of 1338 shows that we would provide—if it were enacted—we would provide for an uncapped compensatory and punitive damages. And I wondered if you might talk about the consequences of that in employment litigation and in the marketplace.

Ms. OLSON. Yes. And if I might add, in terms of the issue of uncapped punitive and compensatory damages, those are not available today under Title 7 so that you would be taking sex discrimination in pay and saying that sex discrimination in pay as opposed to under the Americans with Disabilities Act, the Age Discrimination Employment Act or Title 7 should have a higher, an uncapped, unlimited amount of damages available. It would be much more difficult in those situations.

Let me just mention in its essence, again, there is no intentional finding that is required under the Equal Pay Act. Mr. Sellers disagrees with those courts that have described the Equal Pay Act as a strict liability statute, as he may. But he hasn't disagreed with the concept that it is fundamentally different than Title 7.

Punitive damages are damages that are assessed by courts and juries to deter, to punish bad conduct. That kind of assessment is one that is completely contrary to the notions of the Equal Pay Act that don't require even intent, yet alone a willfulness in terms of an even higher standard, yet alone an intentional punitive damage-type determination.

There are cases involving the Equal Pay Act and Title 7 in which juries have found that an employer violated the Equal Pay Act and was willful in doing so. But that standard is lower than even the general intentional discrimination standard under Title 7. And,

therefore, they didn't make it a violation of Title 7. And there is a 10th Circuit case to that effect. There are a number of cases to that effect that are cited in my written testimony.

It would be very difficult to determine what is the practical effect. There would be many more cases. There would be much more litigation. It is an open-ended checkbook. How do you determine what the economic value of those cases are if there are meritorious ones to try to settle? It provides a lottery-type recovery over and above what would be required in connection with liquidated damages.

Mr. PRICE. My time is expired.

And I appreciate that, Madam Chair.

Chairwoman WOOLSEY. Thank you.

Mr. PRICE. I would just echo those sentiments. I have grave concerns about the unintended consequences.

Chairwoman WOOLSEY. Thank you, Mr. Kline. We actually didn't turn the light on way into your opening statement.

Mr. PRICE. Right.

Chairwoman WOOLSEY. So you——

Mr. PRICE. I am Mr. Price.

Chairwoman WOOLSEY. Right, I am sorry, Mr. Price.

Mr. PRICE. I don't want you to——

Chairwoman WOOLSEY. Thank you.

Mr. Payne?

Mr. PAYNE. Thank you very much. And we could really look at discrimination, I guess. There are some medical people there. But if we ever take a look at discrimination in the medical profession, it would be unbelievable.

They did a study of aspirin years ago. Twenty-two thousand people were included in it and not a single woman. And the whole question was to see about life expectancy and the impact. And we find even in the tamoxifen clinical tests they really didn't tell women that they could get a different type of cancer by using this, the drug over the placebo. But I am not a doctor.

Also this question about comparable worth. We talk about it more simply as equal pay for work of equal value and the disparate impact, for example. Fire departments just did not want women to be fire persons, I guess, or firemen.

And so, they would have a part of the test—and I was a member of the municipal council—that everyone who qualified had to drag a dummy weighing 150 pounds or 200 pounds across a gym floor of about 100 years in a certain amount of time. Well, many women could not make it.

Now, the question of disparate impact, whether it is necessary. How many people are you going to drag across a floor weighing over 150 pounds every time you get a fire? So one of the things we did was to say, well, is this a disparate impact, does it make sense. And it didn't. And, therefore, we were able to get women on the fire department.

But there is no question that there are so many built in discriminations against women, whether it is in, like I said, the medical field where they are not brought into clinical tests. And they have said, well, it is bad business, those three business points that I

mentioned, taxation, regulation, and litigation and how this is so terrible for America.

But I just wonder if maybe Dr. Murphy or Ms. Greenberger—is the disparate pay between men and women bad for the economy? You know, we just heard that this job creation, its impact. And I just wonder what your opinion is on this topic that my colleague just talked about being so bad for American business.

Ms. GREENBERGER. We have heard some arguments to that effect about every single anti-discrimination statute that if it means that employers somehow are going to have all these enormous burdens, that we need to just let the market work its will, that we can't afford to have people vindicating their rights in court, that if women get equal rights, that it means that they will end up hurting the economy. All of those predictions have turned out not to be true.

And, in fact, women's wages are essential for the economy today. Most families rely upon the wages of women as well as men in order to make ends meet. If you ask—and there have been many public opinion surveys—about the nature of pay discrimination and do men and women see pay discrimination against women, the numbers are off the charts about the importance of addressing pay discrimination.

Because around the kitchen table, men and women know that women's wages are not fair, they are not equal, and that the children, the families, men, women, sons, daughters pay the price for the discrimination against women in the workplace. And our economy is the poorer for it as well because women's skills aren't being able to be developed.

They don't have the resources to pay for health care. And there are a number of studies about the problems that women face in the health care system, the fact that they do not have the kind of health insurance that they need, that they don't get that as part of the pay in the workplace.

Our country pays an enormous price because of this pay discrimination. And I agree completely that our economy would be stronger, the workplace would be not only fairer, but also that we as a country would be far richer if women were paid what they are worth.

And I do want to make one point with respect to Ms. Olson. I think she misreads the statute in very serious respects and has paraded a whole range of horrible effects of this legislation, which it doesn't require. But in particular with respect to comparable worth or comparable pay, which was a question that was asked, all that this legislation does is talk about studying the issue. It isn't talking about requiring this.

But when we have parking attendants making more than child workers, employers ought to be looking and seeing whether that is a pay scale that makes sense.

Chairwoman WOOLSEY. Thank you, Ms. Greenberger.

Ms. GREENBERGER. Thank you.

Chairwoman WOOLSEY. I want to remind Mr. Price that the reason it seemed like I cut him off was that he had a minute-and-a-half before we even turned his clock on.

Mr. Kline?

Mr. KLINE. Thank you, Madam Chair. And anytime that you get Dr. Price and I confused, it is okay with me. I fare better when that happens.

I want to thank the witnesses for being here today. I was a little bit concerned when my good friend and colleague, the gentleman from Illinois, said it was a moral imperative that we pass this legislation. And I disagree, of course.

But what really concerns me is that we have put this on a moral basis, that those that might not support this somehow are lacking in morals. So I hate it when the dialogue kind of gets down to that level.

This is a lot about details, and lawyers are involved here. That is what we do here, I suppose, is get lawyers involved because we are writing law.

I would like to, Ms. Olson, give you the opportunity to address a couple of issues. One, we had a discussion. There was some confusion about the theory of comparable worth. And then disparate impact was brought in. Can you sort of sort through that for us a little bit? And then if time allows, I would like you to address the regression analysis discussion that Dr. Murphy had. And we have got a vote on, so we will be scrambling out of here pretty shortly.

Ms. OLSON. Okay. And if I just might start my comments by saying there is something to the issue of whether it would be bad for the economy. There is no question it would be bad for the free market system that we have in our country in terms of the way wages are set as opposed to government agencies determining which jobs should be treated as comparable and which pay should be attached to those as opposed to allowing the free market system to do that.

In terms of comparable worth, the comment that has come here from the table is that, in fact, I misunderstand the statute and that it doesn't intend to inject comparable worth into the description of what would be required by the Equal Pay Act. In fact, it does so by directing the Department of Labor and the OFCCP to actually study jobs that are different and to publish guidelines to be addressed and reviewed by employers.

My experience—and I have spent a lot of time doing trial work in front of juries—is that judges automatically take those guidelines promulgated by the various agencies, whether it is the EEOC or the Department of Labor, and present them to the juries as the governing law in connection with what is appropriate, whether it be a pre-employment testing issue or in this situation, which would be an issue of what jobs should be treated as comparable and what they pay ought to be. That is not something which has previously been the province of any agency or the province of judges or juries in connection with employment discrimination litigation.

In terms of disparate impact analysis, today plaintiffs and women have the right under Title 7 using the rule 23 device that Mr. Sellers described to bring disparate impact pay claims that exist today. And those cases are brought. And I describe—they are significant settlements in many of those cases over the last number of years.

With respect to regression analysis, it is an analysis that was adopted by the OFCCP back in June of last year in terms of once it gave significant consideration to how can we best determine

what is appropriate in terms of the comparison of different jobs and different issues in terms of pay. It felt that accrued analysis just looking at jobs by pay band really didn't explain the differences.

You really need to consider a number of different factors. And the statistical methodology to do that is regression analysis. And it adopted it in just June of last year as the appropriate way it would go about taking a look at jobs and pay.

Mr. KLINE. Thank you, Madam Chair. I yield back.

Chairwoman WOOLSEY. I think you heard the bells ringing. We have a series of four votes. So we will conclude.

And in concluding, I would like to say there is a difference between both sides of the aisle on this issue. Many of us and many of you believe that you can have jobs, you can have successful businesses, and you can have equality. One does not cancel out the other.

So in looking at that, if the Equal Pay Act worked as well as Ms. Olson believes it does, then my question is why do women earn 23 cents less an hour than men. Are women not worth the same as men? Of course not.

That is what we are dealing with. That is what we will have to do something about. That is what you have spoken to us about today.

I wish we had a lot more time. But you don't want to hang around here while we go vote. It is going to be at least 45 minutes. And I want to thank you so much for being here, all four of you. You have brought a lot to the discussion.

As previously ordered, members will have 14 days to submit additional materials for the hearing record. And any member who wishes to submit follow-up questions in writing to the witnesses should coordinate with the majority staff within 14 days.

Without objection, this hearing is adjourned.

[The prepared statement of Ms. DeLauro follows:]

Prepared Statement of Hon. Rosa L. DeLauro, a Representative in Congress From the State of Connecticut

Madame Chairwoman, I want to thank the Committee for hosting its second hearing on the 'Paycheck Fairness Act'. This is an important sign of progress, showing just how serious the Committee is about this issue and just how well you appreciate the need to help women in the workplace.

In the more than ten years, I have spent working on these issues, we were not able to get a hearing on the bill. Now we have had two hearings in just three months. I am very proud of the momentum we are building.

It is time to value the work that women do in our society. It is time to continue fighting, as we are doing here today, for working women and families—and for women like Lilly Ledbetter.

When the Supreme Court ruled 5 to 4 against Ms. Ledbetter this Spring, it decided that a victim of pay disparity should be able to document a discriminatory difference in pay within a mere six months, despite the typical office secrecy over income. When women still earn only about 77 percent of what men earn, this ruling leaves them with no remedy, essentially rolling back efforts to ensure equal pay.

We need to fix the Supreme Court ruling, and we need to ensure no woman is ever subject to the injustice Lilly Ledbetter experienced. That is why I have called on Congress to pass the 'Paycheck Fairness Act' and give women the tools to confront discrimination in the workplace and give teeth to the Equal Pay Act. Shortchanging women of their due, shortchanges their entire families, limits their opportunity, and undermines their work.

It is no wonder, that today the 'Paycheck Fairness Act' enjoys the bipartisan support of 224 cosponsors. This is an issue of fairness. We owe it to Lilly Ledbetter. We owe it to the more than 1.5 million female employees at Wal-Mart who have

sued the retailer for paying them less than their male counterparts. We need to ensure women have the tools to remedy and if necessary, fight pay discrimination.

And that is exactly what Paycheck Fairness would do, requiring the Department of Labor to enhance outreach and training efforts to work with employers to eliminate pay disparities. It would prohibit employers from retaliating against employees who share salary information with their co-workers and stiffen penalties for employers in violation of the Equal Pay Act. And it would require the Department of Labor to resume collecting and disseminating information about women workers and create a new grant program that would help strengthen women's salary negotiation skills.

Ensuring pay equity can help families gain the resources they need to give their children a better future—the great promise of our American dream.

And in today's hearing we will hear from some excellent witnesses who will help illuminate these issues from a number of valuable perspectives. Evelyn Murphy, an economist, is founder of the Wage Clubs and the author of "Getting Even: Why Women Still Don't Get Paid Like Men." Joe Sellers, an attorney, working on civil rights and employment cases has worked with Wal-Mart employees claiming discrimination, and Marcia Greenberger, Co-President, National Women's Law Center.

Again, Madame Chairwoman, I want to thank you for your careful deliberation of this critical issue and I look forward to the day when we bring The Paycheck Fairness Act to the House floor.

[The prepared statement of the American Association of University Women, submitted by Ms. Woolsey, follows:]

Testimony submitted from
Lisa M. Maatz, Director of Public Policy and Government Relations
American Association of University Women
to the
Workforce Protections Subcommittee
in support of the
Paycheck Fairness Act (H.R. 1338)
July 11, 2007

The American Association of University Women has long fought to end wage discrimination. As early as 1922, AAUW's legislative program called for a reclassification of the U.S. Civil Service and for a repeal of salary restrictions in the Women's Bureau. In 1955, AAUW supported a bill introduced by Reps. Edith Green (D-OR) and Edith Rogers (R-MA) requiring "equal pay for work of comparable value requiring comparable skills." Congress enacted the Equal Pay Act,[1] a version of the 1955 bill, in 1963. AAUW's 2007-2009 Public Policy Program states that AAUW is committed to supporting "pay equity and fairness in compensation, equitable access and advancement in employment, and vigorous enforcement of employment antidiscrimination statutes."[2]

AAUW's interest in this issue is reflective of women's interest as a whole. Among issues identified as important to women, 90 percent say equal pay for equal work is a priority.[3] This is not surprising, since the wage gap is a pervasive issue affecting women in all walks of life, regardless of marital or familial status. Inequity in pay is not limited to one career or demographic. Pay disparities affect women of all ages, races, and education levels—regardless of their family decisions. Public and editorial page outrage to the U.S. Supreme Court's decision in *Ledbetter v. Goodyear Tire and Rubber Company* recently further underscored the public's support for equal pay laws.

The wage gap has real consequences. With a record 69 million women in the workforce,[4] wage discrimination hurts the majority of American families. In addition, wage discrimination lowers total lifetime earnings, thereby reducing women's benefits from Social Security and pension plans and inhibiting their ability to save not only for retirement but for other lifetime goals such as buying a home and paying for a college education.

The Wage Gap Persists

According to the U.S. Census Bureau and Bureau of Labor statistics, women who work full time earn about 77 cents for every dollar men earn.[5] The AAUW Educational Foundation's 2007 research in *Behind the Pay Gap* shows that one year out of college, women working full-time earn only 80 percent as much as their male colleagues earn. Ten years after graduation, women fall farther behind, earning only 69 percent as much as men earn. Controlling for hours, occupation, parenthood, and other factors normally associated with pay, college-educated women still earn less 5 percent less than their male peers just one year out of college, and this unexplained portion of the pay gap grows to 12 percent at ten years out of college.[6]

Because of the wage gap, since 1960, the real median earnings of women have fallen short by more than half a million dollars compared to white men.[7] Minority women face a larger wage gap. Compared to white men, African American women make 67 cents on the dollar (African

American men make 75 cents); Hispanic women make almost 58 cents (Hispanic men make almost 66 cents).[8]

Origins of the Wage Gap

One partial explanation for the wage gap is occupational segregation. According to AAUW research, women are still pigeonholed in "pink-collar" jobs, which tends to depress their wages. The AAUW Educational Foundation's 2003 report, *Women at Work,* found that women are still concentrated in traditionally female-dominated professions, especially the health and education industries. Male students dominate the higher-paying fields: engineering, mathematics, and physical sciences.[9] The highest proportion of women with a college education work in traditionally female occupations: primary and secondary school teachers (8.7 percent) and registered nurses (6.9 percent).[10] Women and men who majored in "male-dominated" subjects earn more than do those who majored in "female-dominated" or "mixed-gender" fields. For example, one year after graduation, the average female education major working full time earns only 60 percent as much as the average female engineering major working full time earns.[11]

A 12 state analysis based on data from the U.S. Department of Education found that women tend to be overwhelmingly clustered in low-wage, low-skill fields. For example, women constitute 98 percent of students in the cosmetology industry, 87 percent in the child care industry, and 86 percent in the health aide industry. In high-wage, high-skill fields, women fall well below the 25 percent threshold to qualify as a "nontraditional field." For example, women account for 10 percent in the construction and repair industry, 9 percent of students in the automotive industry, 6 percent in the electrician industry, and 6 percent in the plumbing industry.[12]

Women's achievements in higher education during the past three decades are considered to be partly responsible for narrowing the wage gap.[13] At every education level, however, women continue to earn less than similarly educated men. As AAUW's *Behind the Pay Gap* report illustrates, educational gains have not translated into full equity for women in the workplace.

The Impact of Education on the Wage Gap

The impact of education levels on the wage gap is of particular importance to AAUW. Women with a college degree earn more than women without this credential. For example, on an hourly basis, women with a four-year college degree earned about 80 percent more than women with only a high school degree in 2001. Moreover, during the past two decades, this difference has grown. Men and women with college degrees enjoyed a real increase in the purchasing power of their earnings between 1973 and 2001. Women without these credentials saw little or no improvement, and men with a high school education or less saw a decline in the purchasing power of their earnings. Nevertheless, while women with a college education earn considerably more than women without this credential, women continue to earn less than men with similar educational backgrounds.[14]

While several measures of educational achievement show that on average women are faring as well as their male counterparts today, often these gains do not translate into comparable economic success beyond college. In 2004, college-educated women 25 and older earned 75 percent of what their male peers earned.[15] This gap emerges within the first year after graduation and widens during the first ten years in the workforce.

The Wage Gap Reflects Sex Discrimination
Wage inequalities are not simply a result of women's qualifications or choices. Wage discrimination persists despite women's increased educational attainment, greater level of experience in workforce, and decreased amount of time spent out of the workforce raising children.[16] Controlling for hours, occupation, parenthood, and other factors normally associated with pay, college-educated women still earn less than their male peers earn, even in the same field.[17]

Education. Although the number of women attaining baccalaureate and advanced degrees now surpasses the number of men,[18] it has not translated into equal income. In 2004, a typical college-educated woman working full-time earned $31,223 a year, compared to $40,798 for a college-educated man—a stark difference of $9,575.[19]

Experience. The pay gap between college educated men and women appears within the first year after college—even when women are working full-time in the same fields as men—and continues to widen during the first ten years in the workforce.[20]

Child care. Women spend more time in the workforce than ever before. In fact, 57 percent of women with children under the age of three and 78 percent of mothers with school-age children remain in the workforce. Time spent out of the workforce is not enough to account for the persistent wage gap that women experience.[21]

The Paycheck Fairness Act: A Step towards Closing the Wage Gap
AAUW believes that equal pay for equal work is a simple matter of justice for women. Wage discrimination impacts the economic security of families today and directly affects retirement security as women look down the road. But despite the Equal Pay Act (EPA) and many improvements in women's economic status more than 40 years since its passage, wage discrimination still persists and it is past time to update this critical law

Although enforcement of the Equal Pay Act as well as other civil rights laws have helped to narrow the wage gap, significant disparities remain which need to be addressed. AAUW strongly supports initiatives that seek to close the persistent and sizable wage gaps between men and women, and minorities as well.

The Paycheck Fairness Act (H.R. 1338) would expand upon the original scope of the Equal Pay Act. It would also:

- Clarify acceptable reasons for differences in pay and close loopholes in the current law by affirmatively forcing employers to prove that wage gaps between men and women are caused by something other than sex. This includes strengthening the current EPA provisions that broadly state that wage comparisons must be made between employees working at the same establishment, which allows for courts to interpret the clause to mean the same physical place of business.

- Allow individuals to sue for fair wages and to receive punitive and compensatory damages—beyond back pay alone. This strengthens the penalties that courts may impose for equal pay violations, and provides a much stronger deterrent effect.
- Prohibit retaliation against workers who inquire about or disclose information about employers' wage practices.[22]
- Authorize additional training for Equal Employment Opportunity Commission staff to better identify and handle wage disputes.
- Make it easier for an EPA lawsuit to proceed as a class action suit.
- Require the EEOC to survey the current pay data and issue regulations within 18 months, requiring employers to submit any needed pay data identified by the race, sex, and national origin of employees.
- Require the U.S. Department of Labor to reinstate equal pay activities and investigatory enforcement tools for cases of gender discrimination, which have been eliminated under the current administration.
- Establish a competitive grant program to develop training for women and girls on compensation negotiations.[23]

Conclusion

Pay discrimination is responsible for a significant portion of the wage gap experienced by women and people of color. Although the wage gap has narrowed over the years, success in closing the gap remains elusive. Current gaps in the Equal Pay Act and the Supreme Court's decision in the *Ledbetter* case make it even more difficult for women workers and employees of color to close the wage gap.

Regarding *Ledbetter*, AAUW believes the Court's decision was inconsistent with Congress's intent and the Court's own precedents, and that Congress must address this with a legislative fix. **The Ledbetter Fair Pay Act (H.R. 2831)** would allow pay discrimination claims to be filed within 180 days of when an employee is subject to or injured by a discriminatory decision – for example, any time they receive a discriminatory paycheck. The bill would also be retroactive to the day before the *Ledbetter* decision and would apply to all claims of discrimination in compensation. The Ledbetter Fair Pay Act is an additional remedy that will work in conjunction with the Paycheck Fairness Act to more effectively address pay discrimination.

Many years of family-friendly legislation in action, including the Equal Pay Act, Family and Medical Leave Act, Pregnancy Discrimination Act, and policies such as flex time and telecommuting, have increased options to create a win-win situation for women and their employers—yet wage discrimination still persists. AAUW is engaged in grassroots action to educate the public about what they can do to address the wage gap. AAUW will continue to advocate within Congress and the administration to ensure that current equal pay laws are enforced, and to urge that appropriate measures to more thoroughly address the wage gap be passed. **AAUW believes passage of the Paycheck Fairness Act is an important and critical step in the right direction.**

[1] Public Law No. 88-38.
[2] 2007 – 09 AAUW Public Policy Program (approved June 2007).
[3] Center for the Advancement of Women, "Progress and Perils: New Agenda for Women", 2003. Statistic available at http://www.advancewomen.org/report/top-priority/ Accessed December 21, 2006.
[4] U.S. Department of Labor, Women's Bureau. *Employment Status of Women and Men in 2005.* http://www.dol.gov/wb/factsheets/QF-ESWM05.htm Accessed December 21, 2006.
[5] U.S. Census Bureau and the Bureau of Labor and Statistics. August 2006. Annual Demographic Survey. http://pubdb3.census.gov/macro/032006/perinc/new05_000.htm Accessed January 16, 2007.
[6] AAUW Educational Foundation. *Behind the Pay Gap*, p.2. 2007.
[7] National Committee on Pay Equity. http://www.pay-equity.org/info-time.html. Accessed December 21, 2006.
[8] U.S. Department of Labor, U.S. Bureau of Labor Statistics. Highlights of Women's Earnings in 2005, Report 995. http://www.bls.gov/cps/cpswom2005.pdf Accessed January 16, 2007.
[9] AAUW Educational Foundation. *Behind the Pay Gap*, p. 2. 2007.
[10] AAUW Educational Foundation. *Women at Work*, p. 27. 2003.
[11] AAUW Educational Foundation. *Behind the Pay Gap*, p. 2. 2007.
[12] National Women's Law Center. *Tools of the Trade: Using the Law to Address Sex Segregation in High School Career and Technical Education*, p. 6. 2005. http://www.nwlc.org/pdf/NWLC_ToolsoftheTrade05.pdf Accessed January 18, 2007.
[13] See, for example, Francine Blau and Lawrence Khan, "The Gender Pay Gap: Going, Going … But not Gone," Paper presented at the Cornell University Inequality Symposium, "The Declining Significance of Gender," September 2001, 23–24.
[14] Economic Policy Institute. *The State of Working America 2004-2005*, Table 2.18 and Table 2.19.
[15] U.S. Department of Education, National Center for Education Statistics. 1993/2003 Baccalaureate and Beyond Longitudinal Study.
[16] U.S. General Accounting Office. *Women's Earnings: Work Patterns Partially Explain Difference between Men's and Women's Earnings.* Report GAO-04-35. 2003. http://www.gao.gov/new.items/d0435.pdf Accessed January 18, 2007.
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[The prepared statement of Business and Professional Women/USA, submitted by Ms. Woolsey, follows:]

Prepared Statement of Business and Professional Women/USA

Chairman Woolsey and members of the Committee, thank you for this opportunity to provide written testimony on wage inequity and its impact on working women, their families, and employers.

Business and Professional Women/USA (BPW/USA) and Business and Professional Women's Foundation have a unique perspective on this issue in that we understand that working women are both employees and employers. Legislative solutions to workplace inequity must provide tools that support both the employee and employer, to level the playing field and provide opportunities that dismantle the systemic barriers that remain. We bring this perspective to our testimony today.

Background of Organizations

Founded in 1919, BPW/USA is a multi-generational, nonpartisan membership organization with a mission to achieve equity for all women in the workplace through advocacy, education, and information. Established as the first organization to focus on issues of working women, BPW/USA is historically a leader in grassroots activism, policy influence and advocacy for millions of working women. BPW/USA's legislative platform focuses on the issues of workplace equity and work-life effectiveness. Pay equity undeniably falls within this focus making fair pay one of our top policy priorities. BPW/USA has long fought for equal pay as our members were witness to President Kennedy signing the Equal Pay Act into law. Today, the wage gap continues to be one of the greatest economic factors that affect working women and families. Therefore BPW/USA remains committed to the pay equity issue by being the leading advocate to move legislation forward and educator for working women, and policy makers.

In 1956, Business and Professional Women's (BPW) Foundation became the first research and education institution of national scope solely dedicated to issues that affect working women. BPW Foundation utilizes the avenues of research, education, policy and knowledge development to achieve its mission: to empower working women to achieve their full potential and to partner with employers to build successful workplaces. BPW Foundation encourages cross-sector collaboration between employers, research organizations, working women and policymakers. This collaboration is based on the understanding that each sector plays an important role in creating successful workplaces for working women and their employers by virtue of their ability to identify and act collectively upon common ground areas ready for change.

Women in the Workforce

Workingwomen have made great strides in establishing themselves as an integral force in the American economy in the last five decades. The growing participation of women in the paid labor force was a critical factor in the economic growth of the United States during this time. By 2006, women comprised 46 percent of the labor force increasing from 29 percent in 1956 and 36 percent in 1976.[i] By 2002, women-owned employer firms employed 7.1 million workers and paid $173.7 billion in annual payrolls and accounted for 6.5 percent of total employment in U.S.[ii] Women comprised 46.3 percent of wealthiest Americans, by 2001, with a combined net worth of $5.8 trillion.[iii]

The importance of working women to the U.S. economy and to their families' incomes can not be underestimated. According to the U.S. Census Bureau the wages of men (under age 44) have undergone a steady decline. At the same time the real median income of families has risen; economists attribute this rise to the growth in women's labor force participation.[iv] Typically, women in dual-income households provide approximately one-third of the family income. Two-thirds of all families with children have all available parents at work; among prime-age women (ages 25 to 45), 75 percent of women and 71 percent of mothers are in the labor force.[v]

Additionally, working women's continuing readiness to take on primary responsibility for addressing critical societal needs such as care giving for children, elders or ill family members or acting as volunteer leaders has fueled a shadow economy of unpaid work that contributes significantly to the economic and social well-being of communities and families. One estimate shows unpaid care giving (by women and men) for older or ill family members, alone, provides $257 billion in services to the nation.[vi]

Over the past 50 years, women in large numbers realized the individual accomplishments demanded of them at the start of the movement to achieve equity in the workplace: they received college degrees in ever increasing numbers, started their own businesses, made concerted efforts to move into nontraditional fields, mentored and were mentored.[vii]

Women are outperforming men at almost every educational level with 88 percent of women in the 25-29 age group completing high school compared to 85 percent of men; women also now make up 58 percent of U.S. college students compared to 43 percent in 1970. Women have earned more bachelor's degrees than men since 1982 and more master's degrees since 1986. Within four years, it is estimated that women undergraduate and graduate students will outnumber men by 10.2 million to 7.4 million. Women are also more likely to have higher grades than men.[viii] But still, women with graduate degrees earn only slightly more than men with only a high school diploma ($41,995 compared to $40,822).[ix]

Yet with all of this progress the wage gap persists in the 21st Century.

The Persisting Wage Gap

In a time when women make up nearly half the workforce, many think that the issue of wage inequity no longer exists. However, a recent deluge of corporate law suits disproves this view. A number of corporations such as Goodyear Tire, Smith Barney, Merrill Lynch, Wal-Mart and Boeing have all faced sex discrimination lawsuits in recent years brought on by female employees asserting that their employers paid them less than men or did not promote them as quickly. These pay discrimination law suits brought media attention to an issue that continues to impact the paychecks of many working women.

The 2006 Census Bureau estimates that full time, year-round female workers make 77 cents for every dollar a male earns. For minority women this statistic worsens as African-American women make 66 cents, Latinas make 55 cents and Asian-American women make 80 cents. After stalling in the 1980's, at the current rate of change, it will be another 50 years before women achieve equal pay.

Many women are aware of the wage gap and the enormous impact it will have on their financial lives; unfortunately some are not. According to economist Evelyn Murphy, over a working lifetime, the gender wage disparity will cost a woman between $700,000 and $2 million in lost wages, dependent upon her education level. Women know that the wage gap exists due to lost promotions and chronic discrimination. Economists believe that between 10 percent and 30 percent of the wage gap is attributable to discrimination.[x]

Pay inequity is not a women's issue, but a family issue. Men have an equal investment in ending the wage gap for the sake of total household income and retirement savings. Today the majority of American families depend on the earnings of both parents to financially survive so rewarding equal pay for equal work would result in increased family incomes. As a result of the wage gap, women stand to lose significant amounts of money that could be used for their families and retirement.[xi] Lower pension and social security benefits that result from unequal pay cause this gap to follow women and their families throughout their lives.

The Power of Grassroots

The goal of BPW/USA is to empower working women to be strong advocates for themselves, in their workplaces, and on behalf of legislation like the Paycheck Fairness Act. Annually, BPW/USA members recognize Equal Pay Day in April by hosting events and activities across the nation to raise awareness of the wage gap. BPW/USA believes in the three pronged approach to addressing the issue of pay equity. This entails passing legislation to enact tougher laws, holding businesses accountable for unfair pay practices, and providing women with the knowledge and tools to empower themselves. BPW/USA educates women about the wage gap, what to do if they are being paid unfairly, and how to negotiate a better salary. While BPW/USA is reaching thousands of women through its signature conferences, grassroots programs and activities, there needs to be government supported programs and trainings educating a broad audience of women about the wage gap, and providing them with needed skills training.

Change in the Workplace

As a neutral convener and independent research and education institution, BPW Foundation plays a unique and critical role in identifying opportunities for change and in building collaborative solutions.

In the 21st century, workplaces are undergoing constant transformation. The forces reshaping America's workplaces contain a compelling opportunity for innovation, adaptation and change. Such change can enable the dismantling of the remaining barriers that block women's full and equitable participation in the workforce.[xii]

An emerging workplace trend is the increasing realization that forces shaping options for working women are, in fact, forces affecting everyone in the workplace including women, men, caregivers, entry-level workers, impending retirees, second careerists, people with disabilities and employers. Public policy, aimed at ending the wage gap, has the power to offer solutions and tools that can positively reshape the workplace for all employees and expand the labor pool for all employers.[xiii]

Research conducted by BPW Foundation at its annual National Employer Summits has revealed that the causes of workplace dissatisfaction are often the same issues that create potential inequity in the workplace. Workplaces and workforces are wrestling with the changing realities of employees' lives and expectations, the demographic transformation of the labor force, the impacts of technology on work design, and the growth of global workplaces.[xiv] In the midst of this, employers striving to create diverse, equitable workplaces are faced with dismantling the systemic and cultural barriers that continue to block women's full and equitable participation in the workplace. Solutions to remove the structural and cultural barriers that sty-

mie women's participation in the workplace necessitate the collaboration of policy makers, employers and working women and requires a combination of public policy and voluntary practice-based solutions.[xv]

The Need for Public Policy to Address Pay Inequity

Ideally closing the wage gap should not occur as a result of legislative action, but because employers proactively pay their employees fairly. Unfortunately, many employers fall behind in monitoring their pay scales adequately, which is why Congress stepped in forty years ago to pass the Equal Pay Act.

The Equal Pay Act was passed to help remedy the chronic employment discrimination taking place in the private industry. Lawmakers in the 1960's knew that a law must be in place to bring fairness to a marketplace that was failing its working women. While women have been able to take charge of workplace biases and discrimination by holding businesses accountable for their pay practices by filing under the Equal Pay Act, there are limitations to this law which have hampered progress.

The marketplace alone cannot prevent pay discrimination, giving the government a significant role in ensuring fair workplace practices. Previous anti-discrimination laws like the Equal Pay Act, Civil Rights Act, Americans with Disabilities Act and Pregnancy Discrimination Act have each played a role in ensuring that people are treated fairly in the workplace. Congress is now in a position to take a proactive role in continuing the advancement women have made in the workplace and in ensuring that women are getting the paychecks and promotions they have earned through the Paycheck Fairness Act.

This legislation addresses some of the remaining systemic barriers to women being paid fairly and provides employees and employers with the tools and skills to deal with them. Provisions within the Paycheck Fairness Act address two important ingredients to closing the wage gap. These include providing women with negotiation skills and avenues of redress when discrimination occurs, which support working women as they deal with the structural inequities and biases within many workplaces. The bill also offers some support to employers. Rather than putting the onus on early adopters of equitable work practices, the bill would spread the work among all firms by allowing employers equal access to guidelines developed by the Department of Labor, and by utilizing government researchers to gather and pool employer data on wages to establish benchmarks and track progress. It also provides the opportunity for employers to share their knowledge through a national summit, about the transformation of their workplace practices.

The Paycheck Fairness Act would also educate a broad audience of women by establishing a competitive grants program to develop training for women and girls on compensation negotiations, and requiring the Department of Labor to reinstate equal pay activities and investigatory enforcement tools for cases of gender discrimination. Women who have better negotiation skills increase their chances of being paid and promoted fairly. However, they cannot receive this needed training without the passage of the Paycheck Fairness Act. The support of the Department of Labor will allow many working women to be exposed to strengthening their skills when negotiating salary for a new position or lobbying for a promotion.

The Paycheck Fairness Act addresses many of these limitations, clarifies key definitions that have limited the court's willingness to intercede in unfair practices and provides working women, researchers, and engaged employers with the tools and research they need to make and measure progress.

Suggestions for Paycheck Fairness Act

To further strengthen the legislation and the ability of employees and employers to create win-win solutions in the workplace, we suggest the following:

- The awards program focus on progress rather than effort. Existing awards programs that highlight employers of choice are coming under greater scrutiny with critics pointing out that these programs often give applicants a skewed vision of what is actually available in the workplace. Often programs or policies may exist that go unused by employees because of perceived cultural or systemic biases within firms. It is important that any recognition program focus on quantitative results in changing wage inequities and not simply on effort expended.
- Incentives should be offered to employers to help offset costs for reviewing and transforming their human resource practices.
- As partners in this change process, employers should be actively engaged in discussions about wage equity and workplace practices and the supports they need to create successful workplaces. The summit provision within the legislation is a good start. We encourage those developing legislation to engage more employers within the current development process to proactively address concerns and cost issues.

Conclusion

Solving the wage gap will require women to be proactive about their negotiation skills, the passage of effective legislation and the realization by businesses that paying women fairly has benefits to the bottom line. For the sake of our daughters, it is time for American women to stand together and create positive change not only for ourselves, but for the financial future of our families.

ENDNOTES

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[xi] The State of Work-Life Effectiveness, BPW Foundation, June 2005.
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[xiii] 2006 National Employer Summit Report, BPW Foundation, 2007.
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[Whereupon, at 11:45 a.m., the subcommittee was adjourned.]