No. 06-1221

IN THE
SUPREME COURT OF THE UNITED STATES

SPRINT/UNITED MANAGEMENT CO.,
Petitioner,

V.

ELLEN MENDELSOHN,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Brief of *Amici Curiae* Lawyers' Committee for Civil Rights Under Law, Asian American Justice Center, Mexican American Legal Defense and Educational Fund, National Association for the Advancement of Colored People, NAACP Legal Defense and Educational Fund, Inc., National Association of Social Workers, National Employment Lawyers Association, National Partnership for Women & Families, National Women's Law Center, People for the American Way Foundation, Puerto Rican Legal Defense and Education Fund, and Women Employed In Support of Respondent

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INTEREST OF *AMICI CURIAE*

The Lawyers' Committee for Civil Rights Under Law, Asian American Justice Center, Mexican American Legal Defense and Educational Fund, National Association for the Advancement of Colored People, NAACP Legal Defense and Educational Fund, Inc., National Association of Social Workers, National Employment Lawyers Association, National Partnership for Women & Families, National Women's Law Center, People for the American Way Foundation, Puerto Rican Legal Defense and Education Fund, and Women Employed submit this Brief as *amici curiae* with the consent of the parties,[1] in support of Respondents' argument that "other supervisor" evidence should not be *per se* inadmissible under the Federal Rules of Evidence.

Amici represent large segments of our society who rely on our nation's civil rights laws to ensure that they are not victims of workplace discrimination. *Amici* submit this brief because of the direct impact this ruling will have on victims of unlawful discrimination. If the victim's evidence is limited by a *per se* rule of exclusion, then unlawful discrimination may go without remedy. The interests of the employees served by *amici* will be directly affected by this Court's ruling in this matter.

Summary descriptions of each of the *amici* are included in the appendix to this brief.

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[1] Counsel for *amici curiae* authored this brief in its entirety. No person or entity other than *amici curiae*, their staffs, or their counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

SUMMARY OF ARGUMENT

Circumstantial evidence, such as "other supervisor" evidence, that an employer either tolerates or encourages unlawful discrimination may be a key component of a victim's proof of intentional discrimination. The issue presented in this case is as important as it is simple—whether this Court should decline Petitioner Sprint/United Management Company's ("Sprint") suggestion of a rigid *per se* rule excluding *all* "other supervisor" evidence in *all* employment discrimination cases. The *per se* rule of exclusion urged by Sprint would replace the commonly understood and universally followed analysis for determining admissibility under the Federal Rules of Evidence, which gives trial courts the flexibility to control the presentation of evidence based on the specific facts at issue in each of the individual cases before them.

Because Respondent and the Solicitor General provide a detailed analysis of why "other supervisor" evidence may be both relevant and not unduly prejudicial, this brief will focus instead on the devastating effect that the *per se* exclusion of such evidence would have on employees' ability to prove individual claims of discrimination. This brief will also refute several misconceptions presented by Sprint and its business *amici* regarding the effect of admitting "other supervisor" evidence.

As discriminatory employment practices become less overt, and thus increasingly difficult to prove, plaintiffs who bring discrimination actions must rely more and more on circumstantial evidence to establish that they have been discriminated against. Endorsing the *per se* rule requested by Sprint, which

would exclude *all* "other supervisor" evidence, would further reduce these plaintiffs' already limited store of available evidence to prove and combat illegal discrimination. In so doing, it would undermine our nation's express commitment to eradicating discrimination.

Sprint's and its *amici*'s professed mistrust of juries is no basis for excluding *all* "other supervisor" evidence. The Court and recent scientific scholarship have recognized that juries can and do function as fair and unbiased arbiters of the evidence presented to them, and that individual jurors can and should be trusted to make sound decisions free from emotional or personal bias. Juries are routinely asked to parse through even the most complex and difficult facts, and to decide emotionally charged matters including, literally, matters of life and death. There is simply no justification for treating juries differently in cases involving employment discrimination.

Rejecting Sprint's proposed *per se* rule of exclusion will not create a significant burden on courts or defendants. The Federal Rules of Evidence already provide sufficient safeguards against the admission of irrelevant, unduly prejudicial, or cumulative evidence; pursuant to the rules, trial courts routinely decide questions of admissibility that are no more or less complicated than the question of whether "other supervisor" evidence should be admissible in certain employment discrimination cases. Moreover, admitting "other supervisor" evidence does not change the legal standard for determining liability in discrimination cases. Rejection of Sprint's proposed *per se* rule of exclusion will not encourage plaintiffs to pursue frivolous lawsuits, despite Sprint's and its

amici's unsubstantiated arguments to the contrary. A rule that permits the admission of "other supervisor" evidence in appropriate cases will actually encourage compliance with anti-discrimination laws, thus reducing discrimination claims.

ARGUMENT

The Federal Rules of Evidence provide an appropriate vehicle for analysis of the admissibility of "other supervisor" evidence.[2] As recognized by the Solicitor General, this evidence is both relevant and not unduly prejudicial in many circumstances. (Solicitor General's Br. at 16, 23-24.)[3]

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[2] Sprint and its *amici* argue that in order to lay a proper foundation for "other supervisor" evidence, the plaintiff must present independent evidence demonstrating that Sprint has company-wide discriminatory practices. (Chamber of Commerce's Br. at 7; Pet's Br. at 31-32.) As the Solicitor General correctly points out (Solicitor General's Br. at 21), this argument is not supported by the Federal Rules of Evidence, which indicate that a foundation is laid when the evidence as a whole could lead a reasonable fact-finder to conclude that the employer has a policy of discrimination. *See* Fed. R. Evid. 104(b); *cf. Huddleston v. United States*, 485 U.S. 681, 689-90 (allowing evidence of "other wrongs" if a jury could conclude by a preponderance of the evidence as a whole that the "other wrongs" occurred). This burden can be, and often is, met with circumstantial evidence. *See*, *e.g.*, *United States v. Harvey*, 117 F.3d 1044, 1049 (7th Cir. 1997).

[3] Despite its characterization of "other supervisor" evidence as "sometimes" admissible, the Solicitor General's brief demonstrates that this type of evidence is often relevant, rarely unduly prejudicial, and admissible in most circumstances. (*See* Solicitor General's Br. at 14 (recognizing that "Rule 401 sets a purposely low gateway threshold for the introduction of evidence," which "may be satisfied even if the evidence 'only slightly affects the trier's assessment of the probability of the matter to be proved'") (internal citations omitted); *id.* at 23 (acknowledging that "when other-supervisor evidence has substantial probative force,

Rule 401 of the Federal Rules of Evidence states that evidence is relevant if it has "any tendency" to make a party's claim more probable. In many circumstances, "other supervisor" evidence will make it more probable that the employer has a company-wide practice of discrimination. It may help to prove an employer's motive and intent to discriminate,[4] and may be especially germane to proving that an employer's actions are a pretext for discrimination. Indeed, the Court held that "evidence that may be relevant to any showing of pretext includes facts as to . . . *[an employer]'s general policy and practice with respect to minority employment*." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-05 (1973) (emphasis added).[5]

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generalized concerns of jury confusion and unfair prejudice ordinarily do not outweigh, much less *substantially* outweigh, the probative value of the other-supervisor evidence and therefore do not justify the exclusion of the evidence under Rule 403") (emphasis in original).)

[4] *See* Fed. R. Evid. 404(b); *see also Cummings v. Standard Register Co.*, 265 F.3d 56, 63 (1st Cir. 2001) (stating that "other supervisor" evidence of a discriminatory atmosphere may be relevant to showing "the corporate state-of-mind" at the time of the plaintiff's termination); *Philip v. ANR Freight Sys., Inc.*, 945 F.2d 1054, 1056 (8th Cir. 1991) (concluding that evidence of discrimination claims by other employees "may be critical for the jury's assessment of whether a given employer was more likely than not to have acted from an unlawful motive"); *Morris v. WMATA*, 702 F.2d 1037, 1046 (D.C. Cir. 1983) (finding that testimony from other employees showing a broad practice of retaliation "has some probative value on the issue of the employer's likely motivation here").

[5] Contrary to the Chamber of Commerce's assertion that *McDonnell Douglass* held that a plaintiff is limited to using statistics to prove an employer's general policy of discrimination (Chamber of Commerce's Br. at 8), there is nothing in that opinion or other opinions that indicate the Court meant to restrict plaintiffs from also using other forms of evidence. *See McDonnell Douglas*, 411 U.S. at 805. Indeed the opposite is true; as discussed

Thus, when determining whether to permit such evidence at trial, the trial court should – and must – determine whether, based on the facts of that individual case, the proposed "other supervisor" evidence has "any tendency" to demonstrate the employer's general policies and practices with regard to protected employees.

Relevant evidence may, of course, be excluded if its probative value is *substantially* outweighed by its prejudicial effect. Fed. R. Evid. 403. This, too, involves a fact-intensive inquiry that would be subverted by a *per se* rule excluding all "other supervisor" evidence.

I. THE ABILITY TO INTRODUCE "OTHER SUPERVISOR" EVIDENCE IS VITAL TO EFFECTIVE ENFORCEMENT OF OUR NATION'S ANTI-DISCRIMINATION LAWS.

A. Eliminating Discrimination is a Nationally Recognized Priority That is Furthered by the Admission of "Other Supervisor" Evidence.

Our employment laws reflect our national commitment to eliminating discrimination in the workplace. The Civil Rights Act of 1964 affirmed our nation's commitment to eradicate discrimination in the United States. In signing the bill, President Lyndon B. Johnson stated that "[the denial of equal rights] cannot continue. Our Constitution, the foundation of our Republic, forbids it. The principles of freedom forbid it. Morality forbids it. And the [Civil Rights Act]

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infra, the Court has recognized the need to protect the ability to introduce all relevant evidence.

forbids it."[6] More than 25 years later, President George H. W. Bush reiterated the country's continued commitment to equality when he signed the Americans with Disabilities Act to "remove the physical barriers we have created and the social barriers we have accepted. For ours will never be a truly prosperous nation until all within it prosper."[7] In keeping with these fundamental principles, the Supreme Court has time and again recognized that anti-discrimination laws reflect an "important national policy." *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983).[8]

The Court's ruling in this case will have broad implications for the realization of the national goal of eliminating discrimination in the workplace. First, although Respondent's claim is limited to age discrimination, a *per se* rule excluding *all* "other supervisor" evidence would severely hamper future plaintiffs' ability to prove all types of employment

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[6] Lyndon B. Johnson, President of the U.S., Remarks Upon Signing the Civil Rights Bill (July 2, 1964).

[7] George H. W. Bush, President of the U.S., Remarks on the Signing of the Americans with Disabilities Act (July 26, 1990).

[8] *See also Franks v. Bowman Transp. Co.*, 424 U.S. 747, 779 (1976) (stating that "ameliorating the effects of past racial discrimination [is] a national policy objective of the 'highest priority'"); *Johnson v. California*, 545 U.S. 162, 172 (2005) (recognizing "the overriding interest in eradicating discrimination from our civic institutions"); *Patterson v. McLean Credit Union*, 491 U.S. 164, 174 (1989) (pointing out "society's deep commitment to the eradication of discrimination based on a person's race or the color of his or her skin"); *Rose v. Mitchell*, 443 U.S. 545, 578 (1979) (noting the "compelling constitutional interest of our nation in eliminating all forms of racial discrimination"); *NAACP v. FPC*, 425 U.S. 662, 665 (1976) (concluding, "the elimination of discrimination from our society is an important national goal").

discrimination.[9] Second, if this Court were to adopt the *per se* rule of exclusion urged by Sprint and its business *amici*, then individual victims alleging discriminatory employment policies would be forced to choose between two alternatives: either rely on statistics alone or plead and present evidence of a pattern and practice of discrimination in every case. Being forced to depend on statistics alone would severely inhibit the plaintiff's ability to make his or her case because, as the Court has recognized, testimony regarding "personal experiences with the company [brings] the cold numbers to life." *See Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977).[10] Furthermore, given the significant expense of procuring expert testimony, it is often not feasible for individual plaintiffs to obtain the refined statistics necessary to prove a pattern and practice of discrimination.

This Court should not compel plaintiffs to bring a pattern and practice claim simply so they will be allowed to introduce "other supervisor" evidence. Sprint's proposal of a *per se* exclusion would have the perverse effect of actually encouraging broader claims by plaintiffs.

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[9] *See, e.g., LaClair v. City of St. Paul*, 187 F.3d 824 (8th Cir. 1999) (analyzing the admissibility of "other supervisor" evidence in a retaliation claim); *Conway v. Electro Switch Corp.*, 825 F.2d 593, 596-597 (1st Cir. 1987) (upholding the admission of "other supervisor" evidence in a gender discrimination case); *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417, 1423-24 (7th Cir. 1986), *abrogated on other grounds by Patterson v. McLean Credit Union,* 491 U.S. 164 (1989) (admitting "other supervisor" evidence in a race discrimination claim).

[10] Ironically, employers have previously urged the Court to rely *not* on statistics, but rather on anecdotal evidence. *See, e.g., Int'l Bhd. of Teamsters*, 431 U.S. at 339-43.

Given the vital interests at stake, the Court should not prevent plaintiffs from presenting *all* evidence that is relevant and not unduly prejudicial or burdensome. A *per se* exclusion of all "other supervisor" evidence would unfairly impede the ability of plaintiffs to prove all future claims of discrimination.

B. Because Direct Evidence of Discrimination is Rarely Available, Circumstantial Evidence, Including "Other Supervisor" Evidence, May Be Critical to Proving Employment Discrimination.

The Court has repeatedly observed that direct, "smoking gun" evidence of discrimination can be very difficult to uncover. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 271 (1989) (O'Connor, J., concurring) ("As should be apparent, the entire purpose of the *McDonnell Douglas* prima facie case is to compensate for the fact that direct evidence of intentional discrimination is hard to come by.").[11] Similarly, every Court of Appeals has recognized the "elusive" nature of direct proof of discrimination and plaintiffs' subsequent need, in many cases, to rely on

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[11] *See also Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985) ("The shifting burdens of proof set forth in *McDonnell Douglas* are designed to assure that the plaintiff has his day in court despite the unavailability of direct evidence.") (internal quotations omitted); *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 75 (1986) (Marshall, J., concurring) (recognizing that "discrimination is rarely carried out pursuant to a formal vote of a corporation's board of directors"); *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983) ("All courts have recognized that the question facing triers of fact in discrimination cases is both sensitive and difficult . . . There will seldom be 'eyewitness' testimony as to the employer's mental processes.").

circumstantial evidence.[12] Indeed, the Court "has often acknowledged the utility of circumstantial evidence in

[12] *See also Jordan v. City of Cleveland*, 464 F.3d 584, 596 (6th Cir. 2006) ("Proof of discriminatory animus presents 'an elusive factual question' that is often difficult to determine by way of direct proof."); *Coghlan v. Am. Seafoods Co. LLC*, 413 F.3d 1090, 1100 (9th Cir. 2005) ("Employment discrimination cases inevitably present difficult problems of proof, precisely because we cannot peer into the minds of decisionmakers to determine their true motivations."); *EEOC v. Liberal R-II Sch. Dist.*, 314 F.3d 920, 923 (8th Cir. 2002) ("A 'smoking-gun' case in the discrimination arena is rare."); *Oest v. Illinois Dept. of Corrections*, 240 F.3d 605, 612 (7th Cir. 2001) (acknowledging that "employers usually are 'careful not to offer smoking gun remarks indicating intentional discrimination'") (internal citations omitted); *Crawford v. Formosa Plastics Corp., Louisiana*, 234 F.3d 899, 902 (5th Cir. 2000) ("We have often recognized the difficulty of proving discrimination by direct evidence."); *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 58 n.12 (1st Cir. 1999) (recognizing that "'smoking gun' evidence is rarely found in today's sophisticated employment world") (internal citations omitted); *Iadimarco v. Runyon*, 190 F.3d 151, 157 (3d Cir. 1999) ("The Supreme Court has recognized that an employer who discriminates will almost never announce a discriminatory animus or provide employees or courts with direct evidence of discriminatory intent."); *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 685 (10th Cir. 1998) (noting that "direct evidence is rarely available in a discrimination case and circumstantial evidence is sufficient"); *Combs v. Plantation Patterns*, 106 F.3d 1519, 1537 (11th Cir. 1997) ("Frequently, acts of discrimination may be hidden or subtle; an employer who intentionally discriminates is unlikely to leave a written record of his illegal motive, and may not tell anyone about it"); *Rosen v. Thronburgh*, 928 F.2d 528, 533 (2d Cir. 1991) ("An employer who discriminates is unlikely to leave a 'smoking gun,' such as a notation in an employee's personnel file, attesting to a discriminatory intent."); *Pinchback v. Armistead Homes Corp.*, 907 F.2d 1447, 1452 (4th Cir. 1990) ("The *McDonnell Douglas* scheme is a recognition that direct proof of unlawful discrimination is often difficult to obtain."); *Cuddy v. Carmen*, 694 F.2d 853, 860 (D.C. Cir. 1982) ("Employees and applicants for employment have great informational disadvantages: they cannot reach into the minds of decision makers, and therefore they

discrimination cases," and that such evidence is no less compelling, persuasive, or valuable than more direct methods of proof. *Desert Palace, Inc. v. Costa,* 539 U.S. 90, 99-100 (2003) (acknowledging that "juries are routinely instructed that 'the law makes no distinction between the weight or value to be given to either direct or circumstantial evidence'") (citations omitted).

The need to rely on circumstantial evidence often makes it very difficult for plaintiffs to prevail in employment discrimination cases, even under *existing* evidentiary standards.[13] A *per se* rule excluding all "other supervisor" evidence, regardless of circumstances, would further constrain victims of discrimination and render it even more difficult to hold employers responsible for discriminatory conduct. As the Eighth Circuit explained, "[t]he effects of blanket evidentiary exclusions can be especially damaging in employment discrimination cases, in which plaintiffs must face the difficult task of persuading the fact-finder to disbelieve an employer's account of his own motives." *Estes v. Dick Smith Ford, Inc.,* 856 F.2d 1097,

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usually can gather only circumstantial evidence of discriminatory motives.").

[13] Employment discrimination plaintiffs fare worse at the trial court level than plaintiffs in nearly all other classes of cases. *See* Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. of Empirical Legal Studies 429, 444, 452 (2004). Should an employment discrimination plaintiff actually prevail at trial, they face reversal in nearly 42 percent of cases appealed by defendants. *See id*. at 449-451; *see also* Kevin M. Clermont & Theodore Eisenberg, *Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ From Negotiable Instruments*, 2002 U. Ill. L. Rev. 947, 957-58 (2002). By contrast, when a plaintiff appeals a judgment for an employer, the judgment is reversed less than 8 percent of the time. *See* Clermont & Schwab, at 442, 452.

1103 (8th Cir. 1988). Without effective means of proving employment discrimination, existing anti-discrimination statutes would essentially become broken promises of equality. Laws would remain on the books, but due to court-imposed evidentiary constraints could practically be rendered meaningless.

As discriminatory employment practices become less overt, the evidentiary problems for employees adversely affected by discrimination have become more pronounced. Racial epithets and blatantly discriminatory policies and personnel decisions have largely been replaced by subtle comments, seemingly neutral policies that are unfairly applied, and private personnel discussions held behind closed doors. *See, e.g., Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1082 (3d Cir. 1996) ("Discrimination continues to pollute the social and economic mainstream of American life, and it is often simply masked in more subtle forms . . . [W]hile discriminatory conduct persists, violators have learned not to leave the proverbial 'smoking gun' behind.").

Given the evidentiary problems posed by clandestine discrimination, circumstantial evidence, such as "other supervisor" testimony, is essential to the continued efficacy of our anti-discrimination laws. Creating an additional and arbitrary rule categorically excluding specific forms of circumstantial evidence in employment discrimination cases would be contrary to the Federal Rules of Evidence and would do great damage to our anti-discrimination laws.[14]

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[14] This Court pointed out in *Desert Palace* that circumstantial evidence is sufficient to support a criminal conviction, even though guilt must be proved beyond a reasonable doubt. *See* 539 U.S. at 100. It stands to reason, therefore, in a civil context where

Excluding "other supervisor" evidence in all discrimination cases would not only contradict the Court's endorsement of the use of circumstantial evidence in appropriate circumstances, but would also ignore the realities of contemporary discrimination. It is precisely because the forms of discrimination have changed over time that broad evidentiary exclusions, such as those advanced by Sprint and its *amici*, are inappropriate. *See Riordan v. Kempiners*, 831 F.2d 690, 698 (7th Cir. 1987). The burdens already placed on plaintiffs in discrimination cases have prompted an appropriate "judicial inhospitability to blanket evidentiary exclusions in discrimination cases." *Quinn v. Consol. Freightways Corp. of Del.*, 283 F.3d 572, 578 (3d Cir. 2002).

If our anti-discrimination laws are to have any sustained force, and if our nation's stated commitment to eradicating discrimination is to have continued meaning, this Court should not abandon the Federal Rules of Evidence and establish a *per se* rule excluding all "other supervisor" evidence no matter what the circumstances of each individual case. The decision whether to admit such evidence should be left to the sound discretion of the trial court.

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liability is established by a preponderance of the evidence, that the Federal Rules of Evidence also afford sufficient safeguards for the admission of circumstantial evidence in discrimination cases, namely "other supervisor" evidence.

II. JURIES CAN ANALYZE "OTHER SUPERVISOR" EVIDENCE PROPERLY AND WITHOUT UNDUE PREJUDICE TO THE EMPLOYER

Sprint and its *amici* claim, without support, that even the strongest jury instruction could not protect against the potential for undue prejudice caused by "other supervisor" testimony, and thus juries will cavalierly impose liability if they find that the defendant discriminated against any single witness. (Pet. Br. at 44; Chamber of Commerce's Br. at 9-10.) In so doing, Sprint and its *amici* assert that juries simply cannot be trusted—a view that has been widely discredited as both elitist and scientifically unsound. There is no justification for allowing Sprint's and its *amici*'s claimed fears, however unfounded they may be, to prevent victims of discrimination from holding employers responsible. *See Riordan,* 831 F.2d at 698 ("A plaintiff's ability to prove discrimination indirectly, circumstantially, must not be crippled by evidentiary rulings that keep out probative evidence because of crabbed notions of relevance or excessive mistrust of juries.").

A. Juries Have Long Been Trusted to Evaluate Evidence and to Make Unbiased Decisions in Even the Most Emotionally Charged Cases.

Our legal system has consistently operated under the assumption that juries not only can but *should*, and in many cases *must*, be trusted. In the seminal ruling of *Duncan v. Louisiana*, 391 U.S. 145, 156-57 (1968), for example, the Court affirmed our centuries-old tradition of entrusting juries with the power to decide the weightiest of issues, explaining:

> We are aware of the long debate, especially in this century, among those who write about the administration of justice, as to the wisdom of permitting untrained laymen to determine the facts in civil and criminal proceedings . . . [A]t the heart of the dispute have been express or implicit assertions that juries are incapable of adequately understanding evidence or determining issues of fact, and that they are unpredictable, quixotic, and little better than a roll of dice. Yet, the most recent and exhaustive study of the jury in criminal cases concluded that juries do understand the evidence and come to sound conclusions in most of the cases presented to them.

Justice Scalia, writing for the majority in *Blakely v. Washington*, 542 U.S. 296, 305-06 (2004), counseled that the right to a jury "is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, a jury trial is meant to ensure their control in the judiciary." As Justice Scalia emphasized, the importance of the jury has been recognized since the time of the Founding Fathers.[15]

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[15] John Adams wrote in 1771 that "'[T]he common people, should have as complete a control . . . in every judgment of a court of judicature' as in the legislature." *Blakely*, 542 U.S. at 296, 306. Thomas Jefferson, writing in 1789, similarly declared, "[w]ere I called upon to decide whether the people had best be omitted in the Legislative or Judiciary department, I would say it is better to leave them out of the Legislative." *Id.* (internal citations omitted).

In espousing its flawed position, Sprint seeks to undermine the very nature and unique power of the American judicial system. Sprint would have this Court exclude *all* "other supervisor" evidence in employment discrimination cases based on the unsupported—and insupportable—assertion that juries are fickle and untrustworthy entities that would "inevitabl[y]" be swayed by "personable, sympathetic and attractive persons." (Pet. Br. at 44.) To the contrary, the likelihood that juries will be unduly swayed by sympathy or emotion as a result of "other supervisor" evidence pales in comparison to the highly charged matters, such as those involving life and death,[16] that courts routinely ask juries to adjudicate. Juries, far from being erratic and naïve, "take seriously their duties as officers of the law." Paul D. Carrington, *The Civil Jury and American Democracy*, 13 Duke J. Comp. & Int'l L. 79, 88.

B. Juries are Fully Capable of Properly Evaluating "Other Supervisor" Evidence in Cases Alleging Discrimination.

Ignoring our centuries-old trust in juries of our most complex disputes of all shapes and sizes,[17] Sprint

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[16] *See*, *e.g., Durr v. Mitchell,* 487 F.3d 423, 447 (6th Cir. 2007) (upholding jury's imposition of the death penalty); *Coleman v. Giles,* 140 Fed. Appx. 895, 900 (11th Cir. 2005) (upholding jury verdict in rape case); *United States v. De La Rosa,* 911 F.2d 985, 992 (5th Cir. 1990) (upholding jury verdict in kidnapping case).

[17] *See* U.S. Const. art. III § 2 ("The trial of all crimes, except in cases of impeachment, shall be by jury"); U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed"); U.S. Const. amend. VII ("In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved").

argues that juries should not be trusted when it comes to analyzing "other supervisor" evidence. Sprint asserts that, "in any RIF axiomatically there will be personable, sympathetic and attractive persons," that "[j]uror sympathy to these individuals is inevitable," and that therefore this Court should not trust juries to make rational decisions in such cases. (Pet. Br. at 44.) Sprint's argument, in this regard, is fundamentally flawed.

Much of the most recent and authoritative scholarship on the value of the jury system reinforces the most basic tenet of our system of justice: in almost all cases, juries can be counted on to make the most difficult of decisions fairly. Researchers have found that judges and juries reach the same conclusion in most cases and, where they disagree, judges and juries are evenly split on which party should win.[18] Indeed, in a classic study comparing the decision-making of judges and juries, the evidence indicated that there was "no relationship between the complexity of a case and the differences in their decisions."[19]

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[18] *See* Richard C. Waites & David A. Giles, *Are Jurors Equipped to Decide the Outcome of Complex Cases?* 29 Am. J. Trial Advoc. 19, 24 (2005) ("[A] team of prominent legal and social science researchers, led by Harry Kalven and Hans Zeisel, compared the decisions of trial judges and juries in 3576 criminal and civil trials and found that trial judges and juries made identical decisions in the same case seventy-eight percent of the time . . . [The study] further determined that, in the remaining twenty-two percent of cases, judges and juries were about evenly split on which party should win . . . More recently, in a study of the effects of jury trial innovations on jury decision-making, researchers found similar agreement between the decisions of trial judges and juries. Their findings were consistent with those of the prior Kalven and Zeisel study.").

[19] *Id.*

The scholarship highlights that the complexity of an issue does not affect the rationality of a jury's decision. Indeed, studies indicate that, although "there is neither objective nor scientific proof that trial judges are generally more capable than juries in comprehending complicated subject matter," both "research and anecdotal evidence indicate that trial judges are usually no more capable than lay jurors in comprehending and interpreting complicated subject matter or in determining the reliability and value of . . . testimony." *Id.* at 23-24. Further, the relevant evidence points to a finding that juries are likely better at combing through difficult evidence and concepts than trial judges.[20]

Jurors are routinely called on to parse through difficult evidence and to understand complex and frustrating concepts. *See*, *e.g.*, *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 993 (Fed. Cir. 1995) ("There is simply no reason to believe that judges are any more qualified than juries to resolve the complex technical issues often present in patent cases."). There is no reason to assume, as Sprint contends, that juries are incapable of such analysis in cases involving the comparatively simple issue of whether a plaintiff was treated unfairly for discriminatory reasons.

Understanding the distinction between "same supervisor" evidence and "other supervisor" evidence is far from the most challenging intellectual feat juries are expected to perform. Unless this Court is willing to erode the axiom that jurors are capable of fulfilling their fundamental duties—a decision that would have

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[20] *See* Jennifer K. Robbennolt, *Evaluating Juries by Comparison to Judges: A Benchmark For Judging?*, 32 Fla. St. U. L. Rev. 469, 509 (2005).

significant consequences in all areas of the law—it is untenable to suggest that trial judges and juries should be prohibited from engaging in this simple task.

C. The Trial Court's Limiting Instructions Can Assist a Jury to Determine the Weight to be Afforded to "Other Supervisor" Evidence.

Juries are often asked to digest evidence and arguments presented by both parties in the context of the judge's limiting instructions. There is no basis to assume—as Sprint apparently does (Pet. Br. at 43-44)—that juries are incapable of performing that function in a case involving "other supervisor" evidence, and so will unthinkingly accept a plaintiff's evidence over that offered by the defendant. Sprint argues that allowing "other supervisor" evidence will create "an intolerably high risk of jury confusion." (Pet. Br. at 42.) Yet it is a fundamental tenet of our system of justice that juries are able to comprehend and follow a judge's limiting instructions.

The Court has repeatedly held that, when a trial judge gives a jury limiting instructions, those instructions can be assumed to have been followed. In *Michelson v. United States*, 335 U.S. 469, 484-485 (1948), the Court explained:

> [L]imiting instructions on this subject are no more difficult to comprehend or apply than those upon various other subjects; for example, instructions that admissions of a co-defendant are to be limited to the question of his guilt and are not to be

considered as evidence against other defendants.[21]

Sprint's contention that juries cannot be trusted to act in conformity with a trial court's instructions shows an extreme and unjustified lack of faith in juries contrary to the unwavering commitment to the jury system expressed by the Founding Fathers and the members of the Court.

Although Sprint argues that juries are easily swayed, and will automatically accept a plaintiff's evidence with little or no critical analysis, both the Court and recent scholarship on the matter have confirmed that juries can be trusted to digest even the most difficult evidence rationally and logically.[22]

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[21] The Court has rejected the argument that jurors will assign guilt to all co-defendants if they believe that at least one defendant is guilty, instead holding that a district court's instruction that each defendant is entitled to separate consideration is sufficient to cure any possible prejudice. *See Zafiro v. United States*, 506 U.S. 534, 540-41 (1993). The same principle applies here; the Court should reject Sprint's *amici*'s argument that allowing "other supervisor" evidence will invite juries to find liability if it finds that any one of the witnesses suffered unlawful discrimination, regardless of whether Mendelsohn proves *her* claim. (Chamber of Commerce's Br. at 14.) As in *Zafiro*, evidence should not be taken away from the jury where a proper limiting instruction will adequately serve to eliminate any possible prejudice.

[22] A recent study indicates that trial judges have consistently given "their civil juries high marks for their process of decision making." Paula L. Hannaford, B. Michael Dann, & G. Thomas Munsterman, *How Judges View Civil Juries*, 48 DePaul L. Rev. 247, 249-250. Indeed, "over 98% of state and federal judges believe that jurors usually make a serious effort to apply the law as they are instructed . . . Seventy-nine percent of the survey respondents rejected the suggestion that bias in favor of a party was the reason for judge-jury disagreement and 92% rejected jury miscomprehension as the reason for the disagreement." *Id.*

"Most commentators conclude that a carefully selected jury given accurate instructions and presented with coherent evidence will be superior to a judge because of jurors' collective comprehension and independent, earnest approach to the proceedings." Lisa Kern Griffin, *'The Image We See Is Our Own': Defending the Jury's Territory at the Heart of the Democratic Process* 75 Neb. L. Rev. 332, 365-66 (1996).

III. ADMITTING RELEVANT "OTHER SUPERVISOR" EVIDENCE WILL NOT UNNECESSARILY BURDEN COURTS OR DEFENDANTS

A. The Federal Rules of Evidence Provide Judges with Safeguards to Protect Against Uninformative or Duplicative Evidence.

Sprint and its *amici* argue that, without a *per se* exclusion of "other supervisor" evidence, courts and defendants will be overcome by excessive testimony about discrimination suffered by non-party witnesses at the hands of non-party supervisors. (Pet. Br. at 40; EEAC *et al.'s* Br. at 12-13.) But there is no reason to believe that trial courts are not fully capable of managing their trials and the evidence admitted therein. As with nearly all evidentiary issues, trial courts must be permitted to consider evidentiary questions on a case-by-case basis and should be afforded broad discretion to preclude the introduction of evidence that is duplicative or that does not have sufficient probative value.

The Rules already provide that only relevant "other supervisor" evidence may be admitted at trial. *See* Fed. R. Evid. 401. Sprint's claimed fear that evidence that is too far removed in time or circumstance will be admitted ignores the vital role

that the trial judge plays in managing a trial and making evidentiary determinations. Where evidence demonstrating the bias or discriminatory acts of other supervisors is too remote to warrant its admission, the trial court has the discretion to exclude it. *See, e.g.*, *Cummings v. Standard Register Co.*, 265 F.3d 56, 63 (1st Cir. 2001) (recognizing that "other supervisor" evidence can be too attenuated and that testimony to this effect should be let in sparingly). In other cases, circumstantial evidence of discrimination by other supervisors will not only be relevant, but also crucial to the plaintiff's claim. *See, e.g.*, *Ryder v. Westinghouse Elec. Corp.*, 128 F.3d 128 (3d Cir. 1997) (upholding the admissibility of comments made by individuals that were not involved in the decision to terminate the plaintiff). Indeed, in this case, the Tenth Circuit performed this analysis and found that the "other supervisor" evidence in question was not too removed by either time or circumstance because the other employees were terminated within a year of Mendelsohn and their selection was based on similar criteria. *Mendelsohn v. Sprint/United Mgmt. Co.*, 466 F.3d 1223, 1228 (10th Cir. 2006).

Of course, trial courts may disallow even relevant evidence if its probative value is substantially outweighed by its prejudicial effect, or if the evidence is unnecessarily cumulative or would confuse the jury. *See* Fed. R. Evid. 403. In light of these safeguards, a *per se* rule of exclusion is unnecessary, and would undercut the discretion of trial court judges who know the particular facts of each case and who are in the best position to determine evidentiary questions. *See Estes v. Dick Smith Ford,* 85 F.2d 1097, 1103 (8th Cir. 1988) (recognizing the evidentiary limitations a *per se* rule of

exclusion in employment discrimination cases would place on plaintiffs).

B. Sprint's and Its *Amici's* Fears of Groundless Employment Discrimination Claims are Unfounded.

Sprint and its *amici* express doomsday fears about the potential implications of the introduction of "other supervisor" evidence into employment discrimination cases. They contend that preserving judicial discretion on the admissibility of "other supervisor" evidence will result in uncontrollable, never-ending trials and will lead plaintiffs to file frivolous lawsuits. Neither Sprint nor its *amici*, present any evidence in support of this argument, and they omit reference to the many Circuit Courts of Appeal that have long held that this category of evidence should be subject to the standard discretionary rules of evidence.[23] If allowing "other supervisor" evidence would force such drastic consequences, then the effects would presumably already be apparent in those circuits that allow plaintiffs to present such evidence. Surely, if Sprint had any evidence to support its position, it would be cited in its brief. Given that neither Sprint nor any of its *amici* have come forth with any such evidence, it seems likely that these fears are highly exaggerated or entirely unwarranted.

There is similarly no basis to believe Sprint's *amici*'s suggestion that, unless this Court adopts the *per se* exclusionary rule urged by Sprint, employers will be

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[23] *See Mendelsohn v. Sprint/United Management Co.,* 466 F.3d 1223 (10th Cir. 2006); *Cummings v. Standard Register Co.*, 265 F.3d 56 (1st Cir. 2001); *Philip v. ANR Freight Systems, Inc.*, 945 F.2d 1054 (8th Cir. 1991); *Hunter v. Allis-Chalmers Corp*., 797 F.2d 1417 (7th Cir. 1986).

forced to settle all lawsuits filed by employees accusing the company of discrimination. (Employer's Grp. Br. at 7.) Admitting "other supervisor" evidence will not change the legal test for determining liability—a plaintiff must still prove that he or she suffered an adverse employment action because of a protected characteristic. Moreover, as in any civil case, the threat of frivolous lawsuits is curbed by the availability of Rule 11 sanctions to deter and punish attorneys who file meritless claims.

C. Admitting Other Supervisor Evidence Should Reduce Discrimination Claims by Encouraging Employers to Adopt Reasonable Measures to Ensure Compliance with Anti-Discrimination Laws.

Sprint and its *amici* allege that, if this Court allows plaintiffs to present "other supervisor" evidence, large employers will be forced to ensure that all decisions are made in accordance with a common policy by adopting a more centralized management structure. (EEAC *et al.*'s Br. at 11; Chamber of Commerce's Br. at 17.) They further claim that a centralized structure is inefficient and would put corporations at a competitive disadvantage in the marketplace. (EEAC *et al.*'s Br. at 11.) Again, Sprint and the business community fail to support their claim with even a single instance in which a corporation conducting business in the circuits allowing "other supervisor" evidence has had to change to its corporate structure.

In another case that was recently before this Court,[24] the business community stated that the Human Resources or General Counsel's office of many large employers already conduct formal reviews of all termination decisions. For instance, the Equal Employment Advisory Council discussed the prevalence of this type of review in the *amicus* brief it filed in *BCI Coca-Cola v. EEOC*. That brief described the management structure as follows:

> Large employers often delegate initial investigations of workplace misconduct to local human resources personnel, who in turn report their findings to a more senior manager who may work in a different city or state. Often, the individual making the employment decision is not the same person who conducted the initial investigation.[25]

Similarly, the Chamber of Commerce asserted that the actual decision-maker in a large corporation may often be a senior manager rather than an employee's direct supervisor, allowing the senior manager to ensure consistency with company policies.[26] Surely, the business community cannot tout this review process

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[24] *BCI Coca-Cola v. EEOC*, No. 06-341 (U.S. Feb. 20, 2007) (Petition withdrawn prior to oral argument.

[25] Brief *Amici Curiae* of the Equal Employment Advisory Counsel in Support of Petitioner at 14, *BCI Coca-Cola v. EEOC*, No. 06-341 (U.S. Feb. 20, 2007).

[26] Brief of the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Petitioner at 16, *BCI Coca-Cola v. EEOC*, No. 06-341 (U.S. Feb. 20, 2007).

when they seek to avoid liability in one case, and then claim it is overly burdensome in another.[27]

Contrary to the fears expressed by Sprint and its *amici*, the likely result of allowing plaintiffs to present relevant "other supervisor" evidence will be to encourage employers to reasonably oversee employment decisions, thereby preventing upper-management from overlooking discriminatory employment practices. Such a review may illuminate latent discriminatory practices, thereby preventing future discrimination and reducing the employer's exposure to lawsuits.

[27] If an employer performs the type of review herein described, even under Sprint's rationale which requires a "demonstrated link" between "other supervisor" evidence and the challenged employment decision (Pet. Br. at 38), plaintiffs should be able to present "other supervisor" evidence to the trier of fact. If a senior manager or human resources employer reviews the personnel decisions of several different supervisors, this provides a sufficient link between the decisions of all supervisors subject to such review.

CONCLUSION

For the foregoing reasons, this Court should decline to adopt the *per se* rule of exclusion urged by Sprint and its *amici*. This Court should instead continue to permit trial courts to determine the admissibility, and juries to weigh, the "other supervisor" evidence on the case-by-case basis provided for in the Federal Rules of Evidence.

Respectfully submitted this 19th day of October, 2007.

Respectfully Submitted,

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APPENDIX

APPENDIX

List of *Amici:*

Organizations

The Lawyers' Committee for Civil Rights Under Law (the "Lawyers' Committee") is a nonprofit civil rights organization that was formed in 1963 at the request of President Kennedy in order to involve private attorneys throughout the country in the national effort to insure the civil rights of all Americans. Its Board of Trustees includes several past Presidents of the American Bar Association, past Attorneys General of the United States, law school deans and professors and many of the nation's leading lawyers. Through the Lawyers' Committee and its independent local affiliates, hundreds of attorneys have represented thousands of clients in civil rights cases across the country. The Lawyers' Committee is interested in ensuring that the goal of civil rights legislation, to eradicate discrimination, is fully realized. The resolution of this case will have a significant effect on the extent to which the Lawyers' Committee can protect the rights of its clients. The Lawyers' Committee has prepared or participated in numerous *amicus* briefs in Title VII cases before this Court, including *BCI Coca-Cola v. EEOC, Burlington Northern v. White,* and *Desert Palace v. Costa*.

The Asian American Justice Center ("AAJC") is a national non-profit, non-partisan organization whose mission is to advance the human and civil rights of Asian Americans through advocacy, public policy, public education, and litigation. Collectively, AAJC and its Affiliates, the Asian American Institute, Asian Law Caucus, and the Asian Pacific American Legal Center of Southern California, have over 50 years of

experience in providing legal public policy, advocacy, and community education on discrimination issues. AAJC and its Affiliates have a long-standing interest in workplace discrimination cases that have an impact on the Asian American community, and this interest has resulted in AAJC's participation in a number of amicus briefs before the courts.

The Mexican American Legal Defense and Educational Fund (MALDEF) is a national civil rights organization established in 1968. Its principal objective is to secure, through litigation, advocacy, and education, the civil rights of Latinos living in the United States. MALDEF's mission includes a commitment to employment equity and opportunity through advocacy, community education, and the courts, and therefore it has a strong interest in the outcome of these proceedings.

The National Association for the Advancement of Colored People ("NAACP"), established in 1909, is the nation's oldest civil rights organization. The principle objectives of the NAACP are to ensure the political, educational, social and economic equality of rights and eliminate race prejudice among citizens of the United States; to remove barriers of racial discrimination through democratic processes; to seek enactment and enforcement of federal, state and local laws securing civil rights; to inform the public of the adverse effects of racial discrimination and to seek its elimination; to educate persons as to their constitutional rights and to take all lawful action to secure the exercise thereof, and to take other lawful action in furtherance of these objectives. The NAACP believes that every individual has a right to secure a job

for which she is qualified without discrimination because of race, color, religion, sex or national origin. Consequently, the proper construction of the law, including the law of evidence, in employment discrimination cases is critical with respect to the Court's role of interpreting the law to ensure that Congress' intent in passing anti-discrimination statutes is duly effectuated and that justice be done.

The NAACP Legal Defense and Educational Fund, Inc. ("LDF") was incorporated in 1939 under the laws of New York State to provide legal assistance to black persons in securing their constitutional rights. For over six decades, LDF has appeared as counsel of record or *amicus curiae* in numerous cases involving race discrimination before the Supreme Court, the Courts of Appeals, and the federal District Courts. Since its passage 40 years ago, LDF has worked ceaselessly to enforce Title VII, litigating on behalf of individual plaintiffs and plaintiff classes against private and public employers to challenge discriminatory employment practices. Among the hundreds of Title VII cases LDF has litigated are *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993), both considering the issue of circumstantial proof of discrimination. Given its expertise, LDF believes its perspective would be helpful to this Court in resolving the issues presented in this case.

The National Association of Social Workers (NASW), established in 1955, is the largest association of professional social workers in the world with 145,000 members and chapters throughout the United States, in Puerto Rico, Guam, the Virgin Islands, and an

International Chapter in Europe. The National Association of Social Workers, Kansas Chapter has 1,410 members. With the purpose of developing and disseminating standards of social work practice while strengthening and unifying the social work profession as a whole, NASW provides continuing education, enforces the *NASW Code of Ethics*, conducts research, publishes books and studies, promulgates professional criteria, and develops policy statements on issues of importance to the social work profession. NASW recognizes that discrimination and prejudice directed against any group are not only damaging to the social, emotional, and economic well-being of the affected group's members, but also to society in general. The *NASW Code of Ethics* directs social workers to "engage in social and political action that seeks to ensure that all people have equal access to the resources, employment, services, and opportunities they require to meet their basic human needs and to develop fully" . . . and to "act to prevent and eliminate domination of, exploitation of, and discrimination against any person, group, or class on the basis of race, ethnicity, national origin, color, sex, sexual orientation, age, marital status, political belief, religion, or mental or physical disability." NASW policies state, "Given the persistence and pervasiveness of workplace discrimination, pay and employment equity must remain a major policy issue for the social work profession and for the nation." NATIONAL ASSOCIATION OF SOCIAL WORKERS, *Gender, Ethnic, and Race-Based Workplace Discrimination*, SOCIAL WORK SPEAKS, 172, 175 (7th ed., 2006). Accordingly, given NASW's policies and the work of its members, NASW has expertise that

will assist the Court in reaching a proper resolution of the questions presented in this case.

The National Employment Lawyers Association (NELA) is the largest professional membership organization in the country comprised of lawyers who represent workers in labor, employment and civil rights disputes. NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 67 state and local affiliates have a membership of over 3,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace.

The National Partnership for Women & Families is a non-profit, national advocacy organization founded in 1971 that promotes equal opportunity for women, quality health care, and policies that help women and men meet both work and family responsibilities. The National Partnership has devoted significant resources to combating sex, race, and other forms of invidious workplace discrimination and has filed numerous briefs *amicus curiae* in the United States Supreme Court and in the federal circuit courts of appeal to advance the opportunities of women and people of color in employment.

The National Women's Law Center ("NWLC") is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since

1972, NWLC has worked to secure equal opportunity in the workplace by supporting the full enforcement of anti-discrimination laws, including Title VII of the Civil Rights Act of 1964. NWLC has prepared or participated in numerous *amicus* briefs in Title VII cases before this Court.

People For the American Way Foundation ("PFAWF") is a nonpartisan citizens' organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of religious, civic, and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, PFAWF now has more than 1,000,000 members and activists nationwide. PFAWF has been actively involved in litigation and other efforts to combat discrimination, and is particularly concerned that Americans have meaningful access to the courts to enforce their right to a workplace free of unlawful discrimination. PFAWF joins this brief to help vindicate that important right.

The Puerto Rican Legal Defense and Education Fund ("PRLDEF") is a national nonprofit civil rights organization founded in 1972. PRLDEF is dedicated to protecting and furthering the civil rights of Puerto Ricans and other Latinos through litigation and policy advocacy. Since its inception, PRLDEF has participated both as direct counsel and as *amicus curiae* in numerous cases throughout the country concerning the proper interpretation of the civil rights laws. The resolution of this case will have significant impact upon the extent to which PRLDEF and other civil rights organizations can protect the rights of their constituencies.

APPENDIX – continued

Women Employed's mission is to improve the economic status of women and remove barriers to economic equity. Women Employed promotes fair employment practices, helps increase access to training and education, and provides women with information and tools to plan their careers. Since 1973, the organization has assisted thousands of working women with problems of discrimination, monitored the performance of equal opportunity enforcement agencies, and developed specific, detailed proposals for improving enforcement efforts, particularly on the systemic level. Women Employed strongly believes that "other supervisor" evidence can be relevant to proving the existence of discrimination.