National Organization for Women, Inc.
1401 New York Avenue, N.W., Suite 800 • Washington, D.C. 20005-2102 • (202) 347-2279

Testimony of
Eleanor Cutri Smeal
President, of the National Organization for Women

On Behalf of the National Organization for Women
and the National Women's Political Caucus

Before the Senate Committee on the Judiciary
on the Nomination of Antonin Scalia for Associate Justice
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I am Eleanor Smeal, president of the National Organization for Women, and I come before the Committee today on behalf of the largest feminist organization in the United States to oppose the appointment of Antonin Scalia as Associate Justice of the U.S. Supreme Court.

While Judge Scalia has sat on the United States Circuit Court for the District of Columbia for only four years, and therefore we do not have an extensive judicial record to review in evaluating his positions on the rights of women and of minority members of our society, we would submit that even his short tenure as judge is sufficient to reveal a hostility toward the enforcement of remedial anti-discrimination laws passed by the Congress.

In addition, we have reviewed those law journal articles and writings prepared for the American Enterprise Institute for Public Policy Research of which we are aware, and which do address the issues of vital concern to us, and we believe these written statements underscore Judge Scalia's hostility to remedies against sex and racial discrimination. Furthermore, we are struck by his penchant to ridicule and to trivialize not just the remedies themselves but the very notion that those who have suffered from discrimination should in any way be given special consideration to end these patterns of discrimination.

I. Opposition to Affirmative Action

Judge Scalia, a foe of affirmative action, has been very careful to couch his opposition in what we are sure he believes to be appropriate language. He acknowledges, for instance, that society owes a debt to the underprivileged, but he makes clear that by this he means those who we would classify as poor economically.

He would not extend the notion of indebtedness to any person or group that has suffered discrimination and has been denied equal opportunities in education or employment simply on the basis of race or sex.

He has, in fact, made a point of ridiculing Justice Powell's decision in the Bakke case as reflecting a racist concept of restorative justice which he reduces to an Anglo-Saxon notion of guilt for the enslavement of the black people in our nation. Judge Scalia is very clear that as the son of Sicilian immigrants, he shares no burden to repay a debt to a group his ancestors never wronged.

At a personal level, as the daughter of Italian immigrants, I can tell this Committee that I wish my parents and grand parents had had the benefits of affirmative action. My experience with ethnic and gender discrimination has led me to a lifetime of strong support of measures to eliminate any kind of discrimination based on race, ethnicity, religion, sex, sexual preference, physical handicap or age -- not sophomoric verbal and mental exercises which are mere justifications for social Darwinism. Judge Scalia's views by no means represent a consensus in the ethnic community which we have common.

On a much broader level, the National Organization for Women finds it unconscionable that a federal appeals judge and a would-be Justice of the Supreme Court would summarily dismiss as unimportant over 200 years of discrimination against a racial minority in America simply because his ancestors didn't directly participate in the discrimination.

We would ask that you consider carefully the scathing ridicule that Judge Scalia's heaped upon the concept of

affirmative action in the Winter, 1979, issue of the Washington University Law Quarterly:

> To remedy this inequity, I have developed a modest proposal, which I call RJHS - the Restorative Justice Handicapping System. I only have applied it thus far to restorative justice for the Negro, since obviously he has been the victim of the most widespread and systematic exploitation in this country; but a similar system could be devised for other creditor-races, creditor-sexes or minority groups. Under my system each individual in society would be assigned at birth Restorative Justice Handicapping points, determined on the basis of his or her ancestry. Obviously, the highest number of points must go to what we may loosely call the Aryans - the Powells, the Whites, the Stewarts, the Burgers, and, in fact, (curiously enough), the entire composition of the present Supreme Court, with the exception of Justice Marshall. This grouping of North European races obviously played the greatest role in the suppression of the American black. But unfortunately, what was good enough for Nazi Germany is not good enough for our purposes. We must further divide the Aryans into subgroups. As I have suggested, the Irish (having arrived later) probably owe less of a racial debt than the Germans, who in turn surely owe less of a racial debt than the English. It will, to be sure, be difficult drawing precise lines and establishing the correct number of handicapping points, but having reviewed the Supreme Court's jurisprudence on abortion, I am convinced that our Justices would not shrink from the task.
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> Of course, the mere identification of the various degrees of debtor-races is only part of the job. One must in addition account for the dilution of bloodlines by establishing, for example, a half-Italian, half-Irish handicapping score. There are those who will scoff at this as a refinement impossible of achievement, but I am confident it can be done, and can even be extended to take account of dilution of blood in creditor-races as well. Indeed, I am informed (though I have not had the stomach to check) that a system to achieve the latter objective is already in place in federal agencies - specifying, for example, how much dilution of blood deprives one of his racial-creditor status as a "Hispanic" under affirmative action programs. Moreover, it should not be forgotten that we have a rich body of statutory and case law from the Old South to which we can turn for guidance in this exacting task.

We would also ask that the committee note in this particular commentary by Judge Scalia the fact that he holds sex discrimination as even less important that racial discrimination, and that he is blatantly contemptuous of the present Supreme Court for its ruling on the legality of abortion.

II. <u>Opposition to Remedial Provisions for Discrimination in</u>

Employment

In reviewing the few employment cases in which Judge Scalia has participated in his four years on the federal bench, his hostility to remedies for both sex and racial discrimination become even more apparent.

His principal role has been to dissent, to generally oppose the remedial provisions of Title VII laws, and to interpret them so narrowly as to virtually render ineffective the Congressional intent behind the laws.

Mr. Chairperson, members of the Committee, we would again remind this Committee that in a public opinion poll released just two weeks ago 63 percent of Americans said judges should be committed to equal rights for women and minorities. We also would remind this Committee that the notion of equal rights for women and minorities received a higher support level than any President has received since the 1936 general election.

We also would submit that Judge Scalia's record doesn't even approach a commitment to equal rights for women and minorities in our nation.

In Vinson v. Taylor, 753 F. 2d 141 (D.C. Cir. 1985), rehearing denied, 760 F. 2d 1330 (D.C. Cir. 1985), affirmed sub nom Meritor Savings Bank v. Vinson, (S. Ct., July, 1986), Judge Scalia joined a dissent that argued for a rehearing on the grounds that the three-judge panel initially hearing the case had misinterpreted Title VII as it applies to cases of sexual harassment. The original panel had made the following holdings:

(1) sexual harassment in violation of Title VII need not involve an exchange of sexual favors for employment; rather, a discriminatory workplace is sufficient;

(2) a sexual harassment victim does not lose her right to legal redress because she capitulated to sexual advances;

(3) evidence that other employees were harassed is admissible;

(4) evidence as to the victim's dress and personal sexual fantasies is not admissible; and

(5) the employer is liable for its supervisor's harassment of an employee.

Judge Scalia, in dissenting, disagreed with most of these holdings. First, according to the dissenting opinion that he joined, sexual harassment is "individual" and hence not "discrimination in conditions of employment because of gender," and should not be viewed as a violation of Title VII. This extreme position was rejected by all present justices of the Supreme Court in the Vinson case, even by Justice Rehnquist. However, Judge Scalia evidently believes the nonsensical argument that when women are sexually harassed, their sex is not an issue. This notion is as illogical and cruel in its application as is the idea that discrimination on the basis of pregnancy is not sex discrimination.

Second, the dissent claimed that evidence of "voluntary" submission to harassment is a defense. According to the dissent, he evidently believes that a victim of discrimination can have no redress if she ever capitulates to the harassment for fear of retaliation. This view is inconsistent with the remedial purpose of Title VII law in general. A victim of wage discrimination is not, for example, denied a remedy because she accepted work at the discriminatory wage rate.

Third, the dissent claimed that evidence as to the victim's dress and personal fantasies was admissible as "relevant to the question of whether any sexual advances by her supervisor were solicited or voluntarily engaged in," and therefore relevant to "the presence of discriminatory intent."

This outrageous position requires some emphasis because it is based on a belief that how a woman dresses, and the content of her intimate thoughts, are relevant to whether or not someone harassed her. In other words, what the harasser did is based on how the victim looked.

The dissent sought to revive the old defense of "she asked for it," and sought to place the victim on trial in a manner similar to the way that rape victims were once viewed in virtually all state court criminal proceedings. This position is particularly preposterous in view of the fact that, in no other

area of Title VII law, is the victim's dress or personal thought process a defense to discrimination. The dissent, evidently, sought to return to the days when a woman's sexuality was viewed as provocation for assault.

Finally, the dissent opposed any employer liability for sexual harassment. The dissent relied on the limited tort theory of liability that "sexual escapades" should not result in employer liability "because they are personally motivated." The dissent further ignored the fact that, in passing Title VII, Congress chose to reject the limited tort theories of liability. Congress decided that employment discrimination is such a serious, pervasive problem that nothing short of a strong remedy will suffice. The dissent ignored the fact that other forms of employment discrimination, while also potentially "personally motivated," result in employer liability. The dissent made the paradoxical claim that if women are sexually harassed, as women, the harassment is personal.

Judge Scalia's other dissents show similar insensitivity to other types of employment discrimination. In Carter v. Duncan-Huggins, Inc., 727 F. 2d 1225 (D.C. Cir. 1984) the Court considered an appeal of a jury verdict awarding plaintiff $10,000 in damages for discriminatory activities under the Civil Rights Act of 1870, 42 U.S.C. S1981. Plaintiff had alleged racial discrimination in employment. (She was not able to file a suit under Title VII because the employer had less than 15 employees.)

After the jury's verdict, the company sought a judgment n.o.v. (notwithstanding the verdict, also sometimes called a "directed verdict") on the ground that there was insufficient evidence.

The burden in such a request is on the moving party. That is, the employer had to prove that no reasonable jury could have reached the verdict under any circumstances.

The District Court and the Court of Appeals both denied the employer's request. In its holding, the Court of Appeals reviewed the evidence which was the basis for the verdict. Plaintiff was the company's first, and only, black employee. She was physically segregated from other employees. While she was

expected to make sales, she was also isolated from the showroom floor and from any contact with customers. She was not permitted to answer the telephone. She was the lowest paid full-time employee; she was paid less than other employees with less seniority and similar qualifications. She was awarded smaller bonuses. She also suffered other unequal treatment in her day-to-day work.

Testimony at trial focused on four issues: (1) prohibition against plaintiff's attendance at staff meetings, to which all other employees were invited; (2) denial of parking privileges available to others; (3) denial of a key to the work facility, also available to others; and (4) a racially derogatory anecdote. The Court recited these facts, and found that a jury could reasonably conclude that there was racial discrimination and that it was intentional (motive is a requirement for 42 U.S.C S1981 cases).

Judge Scalia dissented. He believed that there was no evidence of discriminatory treatment and no showing of racial motivation. He found that the company's small size precluded salary comparisons even among similarly qualified employees. He also found that there were reasonable grounds for all of the other distinctions made by the employer in his treatment of the black employee. Finally, he concluded that even if the treatment was discriminatory, there was no showing of racial motive. Thus, he felt that no reasonable person could conclude that the "allegedly differential treatment was race-related."

Judge Scalia had the following to say: "If this case did not call for a directed verdict, it is difficult to imagine any small business hiring a minority employee which does not, in doing so, commit its economic welfare and its good name to the unpredictable speculations of some yet unnamed jury."

Clearly, he not only failed to see plain, naked discrimination when it stared him in the face, he also had total contempt for the jury system by assuming that juries will speculate and ignore the evidence.

Finally, even though Judge Scalia supposedly prides himself on strict application of the law, in this case he ignored the legal standard for directed verdicts, which requires that jury verdicts be reversed only if they are totally implausible.

In Poindexter v. F.B.I., 737 F. 2d 1173 (D.C.Cir, 1173), the Court of Appeals confronted that provision of Title VII which requires trial courts, in their discretion, to find counsel for Title VII plaintiffs who are too poor to afford counsel or who are otherwise unable to obtain counsel. 42 U.S.C. S2000e-5(f)(1).

The majority of the panel found that, in determining whether to appoint counsel, the trial court should consider the ability of the plaintiff to pay for her/his own attorney, the merits of the case, the efforts of the plaintiff to obtain counsel, and the ability of plaintiff to represent her/himself in the absence of counsel. The Court of Appeals then found that the trial court had not considered all of these factors and remanded the case.

Judge Scalia dissented. He agreed with the majority's analysis of the requirements for appointment of counsel. He found that the plaintiff, a black male coding clerk at a GS-6 level, was sufficiently wealthy to hire counsel even after his termination from employment. As one of his reasons for this conclusion, Judge Scalia cited $196 per week of unemployment compensation received by plaintiff.

Obviously Judge Scalia is either unaware of the contemporary cost of living and of obtaining legal counsel, or he deliberately wants to weaken the remedial provisions of Title VII.

A similar situation arose in Trakas v. Quality Brands, 759 F. 2d 185 D.C. Cir. 1985). In this instance, the female plaintiff filed a sex discrimination lawsuit. She subsequently moved from Washington to St. Louis. The trial date was scheduled. Two days before trial, plaintiff advised her counsel that she would be unable to travel to Washington, D.C. because her husband had recently lost his job and she had no funds for the trip. Her counsel sought a continuance.

The trial court denied a continuance and dismissed the case for failure to prosecute. The Court of Appeals found that, in

the special circumstances of the case, this was abuse of discretion and remanded the case.

Judge Scalia dissented, again because of this skepticism about the plaintiff's inability to pay. In his dissent, he referred to plaintiff's husband as an attorney, ignoring the fact that he had recently lost his employment. Again, he ignored the remedial and equitable nature of Title VII law.

III. Philosophical Opposition to Constitutional Rights of Individuals

While Judge Scalia's record in these cases is of grave concern to NOW, we are equally appalled by his philosophical opposition to constitutionally guaranteed rights for individuals.

His notion that the rights of individuals are only those which the majority confers, and not guaranteed by the Constitution regardless of majority views, would, if it became the dominant view, serve to undermine the Constitution and in particular the Bill of Rights which he is sworn to protect and defend.

During a public discussion sponsored by the American Enterprise Institute, Judge Scalia, at that time a visiting scholar for the Institute, made crystal clear his view not only on abortion rights but individual Constitutional rights in general:

> In the abortion situation, for example, what right exists - the right of the woman who wants an abortion to have one, or the right of the unborn child not to be aborted? In the past that was considered to be a societal decision that would be made through the democratic process. But now the courts have shown themselves willing to make that decision for us ...
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> The courts' expansion stems, in part, from their function of deciding what are constitutional rights. Much of their activity is in that area, and I think they have gone too far. They have found rights where society never believed they existed.
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> The courts have enforced other rights, so-called, on which there is no societal agreement, from the abortion cases, at one extreme, to school dress codes and things of that sort. There is no national consensus about those things and there never has been. The courts have no business being there. That is one of the problems; they are calling rights things which we do not all agree on.

Mr. Chairperson, members of the Committee, I cannot convey adequately the alarm with which the National Organization for Women greeted these words by Judge Scalia.

The very notion that rights are determined by consensus has to rank among the most appalling concepts we have ever encountered.

To begin with, consensus means agreement by almost everyone, if not everyone. Given the definition, I am sure we can all agree that there are few things in our national life in which we have consensus, in light of the broad diversity and make-up of American society.

Just how large a majority must Judge Scalia have to confront in order to deem that there is a consensus on a given question? Will a simple majority suffice? Is a 74 percent majority, enormous by most standards, large enough to convince him?

As we have submitted earlier to this Committee, the latest public opinion poll on the question of abortion shows that 74 percent of Americans support the Supreme Court's 1973 ruling on legalized abortion.

We doubt, however, that this is the real issue for Judge Scalia, anymore than it is the real issue for the National Organization for Women.

NOW believes that women have the right to abortion, as a matter of privacy and of individual rights, regardless of what public opinion polls show.

And we believe Judge Scalia holds the view that no such right exists, regardless of what public opinion polls show. In fact the Reagan Administration has made it abundantly clear that hostility to the Roe v. Wade decision is part of the screening process for nomination to the federal judiciary at all levels.

We would submit that unless the Reagan Administration was totally confident of Judge Scalia's views on abortion rights, his name would not be before this Committee. Period.

But in addition to the abortion issue, which is of crucial importance to our organization, we would ask this Committee to examine closely Judge Scalia's concern that the courts "are calling rights things which we do not all agree on."

Is this simply another way of stating Justice Rehnquist's appalling claim that "in the long run it is the majority who will determine what the constitutional rights of the minority are."

Again, I would refer the Committee to Judge Scalia's standards of general societal agreement and national consensus. As we mentioned earlier the latest public opinion poll on the question of judicial response to racial and sex discrimination shows that 63 percent of Americans believe our judges should be committed to equal rights for women and minorities. Again, is this, a larger majority than elected Ronald Reagan President, large enough to satisfy Judge Scalia's standards?

I believe we know the answer to that, and I believe this Committee does also.

Judge Scalia does not believe the rights of women and minorities are determined by majority opinion any more than we do. Either the Constitution and the laws of our nation confer these rights or they do not, regardless of shifting political majorities.

The fact that the majority now supports these rights is simply a credit to the people of this nation that at long last we have come to recognize, as a people, that in order to remain true to our ideals, we must in fact constantly pursue "liberty and justice for all."

The people of this nation have come to the realization that these rights exist.

We believe it is evidence of Judge Scalia's extremist viewpoint on Constitutional rights that he refuses to concede their existence.

This is not testimony to his independence and intelligence as a jurist. It is testimony to his unfitness to preside as one of a nine-member panel whose job it is to defend Constitutional rights.

In line with Judge Scalia's pronouncements on "national consensus," "societal agreement," and abortion in the AEI panel discussion, he also said that in drawing the line in the area of constitutional rights, "it would fall short of making fundamental, social determinations that ought to be made through

the democratic process, but that the society has not yet made. I think the Court has done that in a number of recent cases. In the busing cases ... there was no need for the courts to say that the inevitable remedy for unlawful segregation is busing. Many other remedies might have been applied. It was not necessary for the courts to step in and say what must be done, especially in the teeth of an apparent societal determination that the costs are too high in terms of other values of the society."

Now, Judge Scalia didn't offer in that discussion any suggestions as to what those "many other remedies" might be, only that he was sure they existed.

What he was really saying, we know from both experience and from other of his writings, is that the Court is only there to rule, not to provide remedies for injustice, and that if the executive and legislative branches choose not to enforce a ruling, then so be it -- regardless of how abominable the injustice.

Does anyone, including Judge Scalia, seriously believe that Southern school systems, not to mention school systems elsewhere, as well as public accommodations in the South, would really have integrated on their own if the Court had not forced enforcement of its ruling?

Does anyone, including Judge Scalia, seriously believe that the majority in this instance would not have continued to deny the black minority in this nation its rights if that majority thought it could get away with it?

Now, in that same discussion which, incidentally, was titled, "An Imperial Judiciary: Fact or Myth?", Judge Scalia went on to say that the Court doesn't always have to "go along with the consensus of the day. The Court may find that the traditional consensus of the society is against the current consensus. If that is the case, then the Court overrides the present beliefs of society on the basis of its historical beliefs. I can understand that."

"But when neither history nor current social perception demands that something be called unlawful, I cannot understand how the Court can find it to be so."

You should know that when confronted with the suggestion that both the traditional consensus and the contemporary consensus were against school desegregation in 1954, Judge Scalia replied that he didn't "believe that is true. Most of the country did not consider separate black schools proper in 1954."

Considering the history of the decade that followed the Brown v. Board of Education, I think we can say with confidence that Martin Luther King, Jr. would have been surprised to learn this from Judge Scalia.

While it is somewhat comforting to know that Judge Scalia ended the discussion of Brown v. Board of Education with the comment that, "In any event, the results of that decision have been very good," we are still left more than a little confused. The results of that decision, after all, also included the remedy of busing, and Judge Scalia doesn't believe the Court should order remedies.

We also find a great deal of danger in Judge Scalia's belief that it is proper for the Court to override the present beliefs of society on the basis of its historical beliefs.

It is staggering to contemplate the list of contemporary beliefs that would be at risk in the hands of a Justice Scalia, certainly sex and racial discrimination being just two areas of belief.

Just as frightening is the fact that Judge Scalia made no provision for the reverse: that it is proper for the Court to override historical beliefs on the basis of the present beliefs of society.

These are just a few instances in which Judge Scalia's logic falls apart upon analysis.

We would ask the Committee also to consider the following commentary from an article written by Judge Scalia in 1980, titled "The Judges are Coming", and reprinted in the Congressional Record of July 21, 1980, at the request of former Congressman Daniel Crane of Illinois:

> Thus, the Congress passes a law requiring the Department of Health, Education and Welfare to assure the elimination of "sex discrimination" in federally assisted educational programs. Everyone applauds. Who, after all, can be in favor of sex discrimination? It soon develops, however (as Congress knew when it passed the law), that "elimination of sex discrimination" is only a slogan. To some, it means little more than equal job opportunity and equal pay for equal work. To others, it includes also the expenditure of equal funds on men's and women's sports; or even the prohibition of all-male or all-female team sports; and to still others (quite seriously) the elimination of father-son dinners, unisex dorms or even unisex toilets. Who is to tell us, then, what the Congress meant - when in point of fact it did not know what it meant, and quite obviously did not want to know for fear of antagonizing one or the other side of the sexual revolution? The answer, of course, is the courts. In lawsuits challenging HEW's actions, they will ultimately develop for us a whole body of law concerning sex discrimination on the basis of virtually no guidance from our elected representatives in Congress.

In this case, Judge Scalia conveniently overlooks the fact that federal regulations were written and enforced by the Department of Health, Education and Welfare to enforce the provisions of Title IX of the Civil Rights Act. These regulations were based upon the public hearings and input and the legislative history of the Act.

He chooses to ignore that these regulations were enacted with a significant measure of success creating a substantial body of experience for Title IX. And, although many institutions of higher learning in our nation did not like being told they could not discriminate on the basis of sex, and still others spent a great deal of time trying to skirt the law, they knew what the regulations said and what they were legally required to do.

The gutting of Title IX was not done by a faint-hearted Congress. It was done by an executive branch that thought the government should be allowed to fund discrimination and that went to the Court to get a ruling allowing it to do so.

Ultimately, it was the Supreme Court that reversed the remedial effects of Title IX: in the face of clear Congressional intent to eliminate sex discrimination in education; in the face of a legislative and regulatory history that showed over a decade of progress in this area; and in the face of majority support in this nation for the elimination of sex discrimination in education.

Mr. Chairperson, members of the Committee, Judge Scalia has demonstrated that he is more than happy to go on the record with his beliefs about sex discrimination and about racial discrimination, even though he actually has had few opportunities to rule in these areas as a Judge.

He could not be more clear in his belief that these areas of law are, at best, a nuisance, and at worst, unworthy of his consideration.

We ask this committee, on behalf of the women of this nation and on behalf of the minority members of our society to reject a nominee to the U.S. Supreme Court who has no intention of using the Constitution and laws of this nation to help move this country toward equal rights and equal opportunities for all its citizens. In fact, reviewing his record and writings on affirmative action, discrimination law and individual rights, he is willing to use the Constitution to obstruct the advancement of equal rights.

We ask this Committee to reject the nomination of Antonin Scalia as Associate Justice of our U.S. Supreme Court.

Thank you.