No. 94-1941

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

UNITED STATES OF AMERICA,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF *AMICI CURIAE* NATIONAL WOMEN' S LAW CENTER AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF PETITIONER (Additional *Amici* Listed Inside Cover)

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INTERESTS OF *AMICI*

Amici curiae are organizations strongly committed to achieving equity for women and have a demonstrated interest in assuring the sound interpretation of the protections guaranteed by the Fourteenth Amendment. Descriptions of the individual organizations are set forth in the attached appendix.[1]

INTRODUCTION

Virginia for 150 years has offered men a benefit it denies women -- the opportunity to pursue an education at VMI. Virginia began excluding women from VMI when it founded the college in 1839 -- a time when Virginia considered African-American slaves to be property and subjected married women to the total control of their husbands. Despite vast changes in the status of women, Virginia's exclusion of women from VMI has "unquestionably been driven unchanged since its origins by a stereotyped view of the proper role and capabilities of women in society." A. 44a-45a (Phillips, J., dissenting). Virginia's creation of a gender-stereotyped, separate and inferior program for women -- the Virginia Women's Institute for Leadership ("VWIL") at Mary Baldwin College -- cannot begin to remedy the constitutional

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[1] The parties' written consent to the filing of this brief has been filed with the Court.

deprivations of rights caused by the exclusion of women from VMI.

SUMMARY OF ARGUMENT

This Court has left open the question whether governmental classifications based on sex warrant strict scrutiny under the Equal Protection Clause. The time has come to decide that strict scrutiny applies.

The standard of intermediate scrutiny for gender classifications has proved an unworkable half-measure. To be sure, Virginia's separate but unequal educational program for women falls far short of satisfying the test of intermediate scrutiny. Nevertheless, the courts below found intermediate scrutiny sufficiently malleable to uphold Virginia's discrimination against women based on regressive gender stereotypes. Despite this Court's repeated efforts to strengthen the standard of intermediate scrutiny, the standard has yielded incorrect and inconsistent results in the lower courts, and generated frequent complaints about the lack of guidance it affords.

In addition, after Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995) and City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (plurality opinion), continued application of intermediate scrutiny creates a serious anomaly in equal protection jurisprudence. White men receive greater constitutional protection from race-conscious affirmative action plans, however benignly

intended, than women receive from sex discrimination. And, in the policy arena, distinctions between the standard of review for race and gender-based classifications often blur, causing women to be more easily discriminated against than to benefit from programs designed to overcome such discrimination. The need to clarify and harmonize the Court's prior decisions provides good cause to rule now that strict scrutiny is the proper standard of review for classifications based on gender.

The Court has identified several warning signs that indicate that a particular classification is suspect and therefore warrants strict scrutiny. One factor supporting the application of strict scrutiny to gender-based classifications is that gender is an immutable characteristic unrelated to ability, and therefore such classifications are likely to reflect harmful stereotypes that continue to disadvantage women. Second, strict scrutiny is appropriate because women have suffered from a long -- and continuing -- history of discrimination. Third, women remain severely underrepresented in the political process, and lack the power necessary to prevent sex-based discrimination like that at issue here.

The fact that women constitute a numerical majority in this country is no argument against strict scrutiny. As the historical record reflects, the percentage of women in the population has never prevented discrimination against them. Moreover, under Adarand and Croson, strict scrutiny applies to race-based classifications that purportedly discriminate

against whites, a majority group. Further, under Adarand, strict scrutiny is not fatal in fact for such classifications, nor should it be for sex-based classifications designed to remedy discrimination against women.

In short, the Court should direct now, once and for all, that courts strictly scrutinize governmental classifications based on gender.

ARGUMENT

I. ALTHOUGH THE EXCLUSION OF WOMEN FROM VMI FAILS TO WITHSTAND INTERMEDIATE SCRUTINY, THIS COURT SHOULD DECIDE NOW THAT GENDER-BASED CLASSIFICATIONS MUST BE SUBJECT TO STRICT SCRUTINY

The brief for the United States sets forth persuasively why the separate but unequal program at VWIL cannot withstand the intermediate scrutiny this Court has applied in cases such as J.E.B. v. Alabama, 114 S. Ct. 1419 (1994), and Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982).[2] Amici agree with the government's arguments and do not reiterate them here. Rather, amici urge that the Court take this opportunity in this case to hold that sex is a suspect class under the Equal Protection Clause -- a question

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[2] Because the exclusion of women from VMI cannot withstand intermediate scrutiny, it necessarily cannot survive strict scrutiny.

this Court has repeatedly left open. See J.E.B., 114 S. Ct. at 1426 n.6.; Hogan, 458 U.S. at 724 n.9; Harris v. Forklift Sys., 114 S. Ct. 367, 373 (1993) (Ginsburg, J., concurring); Stanton v. Stanton, 421 U.S. 7, 13 (1975). The Court should hold now that governmental classifications based on gender must withstand strict scrutiny.

That intermediate scrutiny yields the right result in this case is not a good reason to continue to apply it. To the contrary, there are compelling reasons why the Court should now announce that strict scrutiny applies. In particular, there is a need to eliminate confusion in the lower courts, and to resolve serious inconsistencies in the law resulting from this Court's decisions in Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995) and City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (plurality opinion).

When presented with such good cause to decide a constitutional issue, this Court has not stayed its hand. See, e.g., Teague v. Lane, 489 U.S. 288, 300 (1989) (reaching issue of retroactivity because of need "to clarify the question"). See also Illinois v. Gates, 462 U.S. 213, 230 (1983) (replacing the two-pronged, probable-cause test with the totality-of-the-circumstances test although the same result would obtain); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (holding that the Supreme Court could issue mandamus although such determination was unnecessary).

A. The Intermediate Scrutiny Standard Has Proven To Be Unworkable As Applied to Gender-Based Classifications

There is serious confusion among the lower courts regarding the application of intermediate scrutiny to governmental classifications based on sex. The standard requires a court to determine whether the government can offer an "exceedingly persuasive justification" for a gender classification and to evaluate whether the classification serves "'important governmental objectives and [whether] the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" Hogan, 458 U.S. at 724 (quoting Wengler v. Druggists Mut. Ins. Cos., 466 U.S. 142, 150 (1980)).

Despite decisions of this Court strengthening the intermediate scrutiny standard, lower courts have had great difficulty assessing the importance of governmental interests and in calibrating whether the fit between the classification and the government's purpose is "substantially related."[3] The lower courts have complained repeatedly that the standard provides little guidance for decisionmaking. See, e.g., Lamprecht v. FCC, 958 F.2d 382, 398 n.9 (D.C. Cir. 1992) (referring to intermediate scrutiny as indeterminate); Coral Constr. Co. v. King County, 941 F.2d 910, 931

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[3] Cf. J.E.B. v. Alabama, 114 S. Ct. at 1433 (Kennedy, J., concurring) ("the intermediate scrutiny test" does not "provide a very clear standard in all instances").

(9th Cir. 1991) ("[w]e are cognizant of the problems with intermediate scrutiny"), cert. denied, 502 U.S. 1033 (1992); Associated Gen. Contractors of Cal., Inc. v. City and County of San Francisco, 813 F.2d 922, 939 (9th Cir. 1987) ("[intermediate scrutiny] provides 'relatively little guidance in individual cases'") (citation omitted); Meloon v. Helgemoe, 564 F.2d 602, 604 (1st Cir. 1977) (calling intermediate scrutiny "hardly a precise standard"), cert. denied, 436 U.S. 950 (1978); Contractors Ass'n of E. Pa. v. City of Philadelphia, 735 F. Supp. 1274, 1303 (E.D. Pa. 1990) (asserting that intermediate scrutiny provides little guidance to courts in decision making); Joseph v. City of Birmingham, 510 F. Supp. 1319, 1335 n.22 (E.D. Mich. 1981) ("[intermediate scrutiny does] not provide definite guidance . . . decisions may appear inconsistent and unprincipled"). Commentators echo the courts' complaints.[4]

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[4] See, e.g., Maureen B. Cavanaugh, Towards a New Equal Protection: Two Kinds of Equality, 12 Law & Ineq. J. 381, 382 (1994) (criticizing "the Court's ad hoc, and hence variable, analysis as applied to equal protection challenges to gender-based discrimination"); 3 Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law § 18.23, at 277 (2d ed. 1992) ("The Court's decisions appear to be ad hoc judgments based upon Justices' perceptions of the gender classification at issue in each case."); E.A. Hull, Sex Discrimination and the Equal Protection Clause: An Analysis of Kahn v. Shevin and Orr v. Orr, 30 Syracuse L. Rev. 639, 671 (1979) ("the middle tier has no predictable application. Whether or not a given classification furthers an 'important governmental interest,' or is 'substantially related' to this interest, are subjective determinations, and a conservative majority is as likely to conclude one way as a liberal majority is to conclude the

In practice, the intermediate scrutiny standard has produced erroneous, confused, and inconsistent results in the lower courts. The decision below -- which relies on a wholly new construction of intermediate scrutiny to embrace gender-based stereotypes and uphold the denial of equal opportunity to women -- exemplifies such confusion. The court of appeals misapplied intermediate scrutiny to sustain all but "pernicious" governmental classifications based on gender, essentially transforming the standard into the minimal rational basis test. A. 22a. Strict scrutiny is not so easily susceptible to misunderstanding. See Rotunda and Nowak, supra note 4, § 18.23, at 286-87 (strict scrutiny "would limit the ability of individual judges to argue for the legitimacy of gender classifications based upon their personal perceptions of the reasonableness of allocating rights by gender").

Other lower court opinions also demonstrate how the intermediate standard of review has been manipulated.[*] For example, Faulkner v. Jones, 51 F.3d 440 (4th Cir. 1995), cert. denied, __ S. Ct. __, 1995 WL 500529 (Oct. 10, 1995), left open the possibility that South Carolina may be permitted to deny women a Citadel education by operating an alternative, inferior leadership training program for women. See id. at 450 (Hall, J., concurring) ("I am convinced that we have embarked on a path that will

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other"); Note, Equal Protection and the "Middle-Tier": The Impact on Women and Illegitimates, 54 Notre Dame L. Rev. 303, 321 (1978) (noting the highly subjective nature of the inquiry and the "confusion and inconsistency generated" by the intermediate scrutiny standard).

inevitably fall short of providing women their deserved equal access to important avenues of power and responsibility.").

In other cases, lower courts have reached clearly incorrect results applying intermediate scrutiny. For example, before this Court decided J.E.B., numerous courts upheld gender-based peremptory strikes based on traditional and overbroad stereotypes. See United States v. Nichols, 937 F.2d 1257, 1262-64 (7th Cir. 1991); United States v. Broussard, 987 F.2d 215, 218-20 (5th Cir. 1993); State v. Culver, 444 N.W.2d 662 (Neb. 1989). See also Vorchheimer v. School Dist. of Philadelphia, 532 F.2d 880 (3d Cir. 1976) (holding that the exclusion of girls from an all-male high school would survive both rational basis and substantial relationship reviews despite the fact that the all-male school had a superior science program), aff'd without op., 430 U.S. 703 (1977) (equally divided Court).[5]

The intermediate scrutiny standard has also produced conflicting results in similar cases. Lower courts have applied intermediate scrutiny to reach different results regarding:

- the constitutionality of rape statutes punishing only male rapists who attack female victims, compare

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[5] Notably, a Pennsylvania court reached an opposite conclusion in a later challenge to the same school system under both the Equal Protection Clause and the state equal rights amendment. Newberg v. School Dist. of Pa., slip op. at 46 (Pa. Ct. of C.P., Philadelphia County, Aug. 30, 1983), aff'd, 478 A.2d 1352 (Pa. Super. Ct. 1984).

Country v. Parratt, 684 F.2d 588 (8th Cir.) (upholding statute), cert. denied, 459 U.S. 1043 (1982), Moore v. Cowan, 560 F.2d 1298 (6th Cir. 1977) (same), cert. denied, 435 U.S. 929 (1978), Rodriguez v. Harris, 496 F. Supp. 116 (S.D.N.Y. 1980) (same), and Eberhart v. State, 727 P.2d 1374 (Okla. Crim. App. 1986) (same), with People v. Liberta, 474 N.E.2d 567 (N.Y. 1984) (striking down statute), cert. denied, 471 U.S. 1020 (1985);

- the constitutionality of criminal statutes distinguishing between male and female defendants who commit the same crime, compare State v. Gurganus, 250 S.E.2d 668 (N.C. Ct. App. 1979) (upholding assault statute penalizing males more heavily than females when the victim is a female) and State v. Ware, 418 A.2d 1 (R.I. 1980) (same) with Tatro v. State, 372 So. 2d 283 (Miss. 1979) (striking down statute prohibiting males but not females from sexually assaulting a child less than fourteen years old);

- the constitutionality of statutes permitting a widow, but not a widower, to elect against a spouse's will, compare Estate of Baer, 562 P.2d 614 (Utah) (upholding statute), appeal dismissed, 434 U.S. 805 (1977) with Hess v. Wims, 613 S.W.2d 85 (Ark. 1981) (striking down statute) and In re Estate of Reed, 354 So. 2d 864 (Fla. 1978) (same); and

- the constitutionality of criminal statutes imposing different penalties on men and women for nonsupport of spouses and children, compare Perini v. State, 264 S.E.2d 172 (Ga. 1980) (upholding statute) and Huskins v. State, 266 S.E.2d 163 (Ga. 1980) (same) with State v. Fuller, 377 So. 2d 335 (La. 1979) (striking down statute), Lloyd v. State Div. of Parole and Probation, 557 F. Supp. 1297 (D. Md. 1983) (same), and People v. Lewis, 309 N.W.2d 234 (Mich. Ct. App. 1981) (same).

Even on a question that this Court has clearly answered -- who carries the burden of proof to demonstrate the "importance" of the government's interest and whether that interest is "substantially related" to the classification at issue, see Hogan, 458 U.S. at 724 -- the lower courts have failed to agree. Compare Hines v. Caston School Corp., 651 N.E.2d 330, 335 (Ind. Ct. App. 1995) (burden is on the challenger) (citations omitted) and Olesen v. Board of Educ. of Sch. Dist. No. 228, 676 F. Supp. 820, 823 (N.D. Ill. 1987) (same) with Kleczek v. Rhode Island Interscholastic League, Inc., 612 A.2d 734, 737 (R.I. 1992) (burden is on the state) and Contractors Ass'n of Eastern Pa., 735 F. Supp. at 1300 (same).

B. This Court's Recent Decision in Adarand Reinforces the Need To Clarify the Proper Standard of Review for Gender-Based Classifications

Clarification of the proper standard of review for gender-based classifications is also necessary to ensure consistency in this Court's jurisprudence. The Court's recent decision in Adarand, coupled with its earlier decision in Croson, has created an anomaly in equal protection law. For this reason as well, classifications based on gender should be subject to strict scrutiny.[6]

Under Adarand and Croson, race-based classifications, including certain programs intended to remedy race discrimination against minorities, are subject to strict scrutiny. If gender-based classifications continue to be evaluated under intermediate scrutiny, white males will have greater constitutional protection from race-conscious affirmative action, however benignly intended, than women will have from invidious sex discrimination.[7] As a matter

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[6] Amici believe that racial and sex-based classifications intended to remedy discrimination should be subject to review under a standard less stringent than strict scrutiny. However, particularly since the Court has held that strict scrutiny applies to all race-based classifications regardless of intention, amici urge that sex-based classifications that discriminate against women be accorded the same treatment.

[7] Cf. Adarand, 115 S. Ct. at 2122 (Stevens, J., dissenting) (noting the "anomalous result" created by the application of strict scrutiny to affirmative action programs designed to remedy invidious race

of logic and history, this result cannot be squared with a principled equal protection analysis.

Moreover, as a matter not of law, but of practical reality, unless the Court applies a standard of strict scrutiny to classifications based on gender, it will be easier for the government to discriminate against women than to remedy discrimination against them. Many affirmative action programs, as in Adarand, are designed to remedy discrimination against both minorities and women.[8] Although not required by this Court's precedents, public policy makers are likely to continue to treat women and minorities similarly under these programs, thereby applying the standard of strict scrutiny to affirmative action programs benefiting women that they now must apply to affirmative action programs benefiting minorities.[9]

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discrimination yet intermediate scrutiny to affirmative programs designed to remedy sex discrimination).

[8] One of the federal programs discussed in Adarand presumed that women as well as members of minority groups were "socially and economically disadvantaged individuals," and created incentives to encourage the awarding of federal contracts to such individuals. Adarand, 115 S. Ct. at 2102.

[9] Indeed, although nothing in Adarand or in Croson supports such application, some courts have already improperly applied strict scrutiny to gender-based affirmative action programs. See Brunet v. City of Columbus, 1 F.3d 390 (6th Cir. 1993), cert. denied, 114 S. Ct. 1190 (1994); Conlin v. Blanchard, 890 F.2d 811 (6th Cir. 1989); Cone Corp. v. Hillsborough County, 723 F. Supp. 669 (M.D. Fla. 1989). But

Consequently, unless gender-based discrimination is subjected to strict scrutiny, the government will in practice exercise greater leeway to create and implement programs or policies that discriminate against women than programs or policies designed to overcome such discrimination. Such an anomaly represents a serious miscarriage of justice and has no place in equal protection jurisprudence. This Court in Adarand insisted that consistency was an important principle in equal protection law. See Adarand, 115 S. Ct. at 2112-13. The Court should act to salvage that principle now.

In sum, the Court should not require litigants who have been subjected to discrimination to proceed under intermediate scrutiny. It should not require the lower courts to struggle with an unworkable standard. And it should not let the anomaly created by Adarand become any more entrenched. Instead, the Court should declare without further delay that gender classifications must be subject to strict scrutiny.

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see Associated Gen. Contractors, 813 F.2d at 941 (applying intermediate scrutiny to gender-based affirmative action plan).

II. GOVERNMENTAL CLASSIFICATIONS BASED ON GENDER REQUIRE THE APPLICATION OF STRICT SCRUTINY

A. All the Reasons Articulated by This Court for Applying Strict Scrutiny Exist with Respect to Gender-Based Classifications

This Court has identified a number of warning signals that indicate that a classification is suspect and therefore warrants strict scrutiny. Although these signals are not prerequisites to declaring a class to be suspect, they raise concern whether governmental processes have been infected by prejudice or stereotypes. Thus, the Court has considered whether a classification rests on immutable characteristics unrelated to ability, Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (plurality opinion); Lyng v. Castillo, 477 U.S. 635, 638 (1986); City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440-41 (1985), whether there is a history of "purposeful unequal treatment" against the affected class, Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976), and whether the targeted class has been underrepresented in the political process, Frontiero, 411 U.S. at 686. See also Plyler v. Doe, 457 U.S. 202, 216-17 n.14 (1982).

In Frontiero, a plurality of this Court, focusing on these warning signals, concluded that "classifications based upon sex, like classifications based upon race, alienage, and national origin, are inherently suspect, and must therefore be

subjected to close judicial scrutiny." Frontiero, 411 U.S. at 688. As shown below, the factors that persuaded the plurality in Frontiero to recognize sex as a suspect class have equal force today.

1. Sex, Like Race and National Origin, Is an Immutable Characteristic Unrelated to Ability

In Frontiero, the plurality emphasized the immutability of gender and its lack of connection with individual ability. See Frontiero, 411 U.S. at 686. When a characteristic, such as gender, does not determine the ability of an individual "to perform or contribute to society," id., classifications based on that characteristic are unlikely to further a legitimate state interest. Rather, as this case demonstrates, the classification may well reflect stereotypes, with the effect of excluding women from power in a particular domain. This Court has repeatedly recognized that danger with regard to gender. See, e.g., J.E.B., 114 S. Ct. at 1422 (sex-based classifications may not "serv[e] to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women").

Governmental classifications based on gender stereotypes stigmatize and harm women, inflicting injuries that extend beyond those persons immediately affected by the government's action. Stanton v. Stanton, 421 U.S. 7, 14-15 (1975) (striking down state statute that relied on "old notions" to require child support for males up to age 21 and

females up to age 18, which effectively denied females a college education); Orr v. Orr, 440 U.S. 268, 283 (1979) (striking down legislative classification that risked "reinforcing the stereotypes about the 'proper place' of women" and denied aid to needy men); see also Hogan, 458 U.S. at 725, 730 n.15 (stating that "[c]are must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions," and noting that, although purportedly based on a protective rationale, "excluding men from the field [of nursing] has depressed nurses' wages").

The facts and history of this case underscore that governments continue to use stereotyped gender classifications that block women's participation in powerful societal institutions. The decisions below, and the actions of Virginia that they validate, rely on numerous stereotypes to exclude women from a prestigious educational institution. In the telling phrase of the district court, Virginia -- legitimately in the court's view -- sought to teach men to march "to the beat of a drum" and women "to the melody of a fife." A. 84a. This should indeed raise a red flag that there is a need for a more clear-cut and exacting standard of review of governmental classifications based on gender.

2. There Is a Long History of Sex Discrimination in the United States, and Such Discrimination Continues Today

A second warning signal this Court looks to in determining whether to apply strict scrutiny is a history of

discrimination against the group at issue. See Frontiero, 411 U.S. at 684-85; Murgia, 427 U.S. at 313. Such a history signals that governmental decision making may be tainted by stereotypes and prejudice, resulting in invidious discrimination and exclusion. Plyler, 457 U.S. at 216-17 n.14.

As the plurality recognized in Frontiero, "[t]here can be no doubt that our Nation has a long and unfortunate history of sex discrimination." 411 U.S. at 684. From its beginning, the United States maintained a dual system of law for men and women -- separate and unequal. The Constitution effectively excluded women from the vote and from service in the national legislature by permitting state law -- which explicitly reserved the vote and service in the state legislature to men -- to control federal elections and service in Congress.[10]

The federal and state legislatures provided women no remedy for their exclusion from colleges, from the professions, from the best jobs, and from equal pay.[11] State law made the husband the legal "head" of each family -

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[10] Barbara Allen Babcock et al., Sex Discrimination and the Law: Causes and Remedies 69-70 (1975).

[11] Not until the 1960s did the nation begin to take action on the job front, through the Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1988), and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1988), and not until the 1970s did it take action on the education front, through Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (1994).

- a choice left to the states' sole discretion by the Constitution.[12] Even after the convulsive changes wrought by the Civil War and the Fourteenth Amendment, the judiciary held that women had neither the right to vote, Minor v. Happersett, 88 U.S. (21 Wall.) 162, 177-78 (1875), nor the right to practice law, see Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 139 (1873). Indeed, as this Court recently observed in the jury context, the position of women throughout much of the 19th century "was, in many respects, comparable to that of blacks under the pre-Civil War slave codes." J.E.B., 114 S. Ct. at 1425 (quoting Frontiero, 411 U.S. at 685). See also Gunnar Myrdal, An American Dilemma: The Negro Problem and American Democracy 1073 (Appendix 5) (1944) (recognizing that the legal status of women and children served as a model for the legal status of slaves). It was not until 1920 that women finally gained the right to vote.

As women moved into the new industrial workforce in the late 19th and early 20th centuries, states enacted laws explicitly requiring both private and public employers to discriminate against women at work. Such laws required,

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[12] As head of the family the husband voted for the wife, owned her personal property, managed and controlled all of her real property, owned her labor, and was entitled to custody and control of her children. The husband also chose his wife's domicile and was responsible for her debts. The husband was specifically immunized from any legal consequences for raping his wife and was effectively immunized for beating her by the law's reluctance to intervene unless she suffered serious and permanent injury. Babcock et al., supra note 10, at 561-63. See also id. at 1-2 (describing the dual law system for men and women).

for example, employers to exclude women from certain occupations, from more lucrative overtime work, heavy work, night work, and from working before or after childbirth. Babcock et al., supra note 10, at 261. Even as late as 1948, this Court upheld a statute prohibiting women from being bartenders because of the "moral and social problems" that arise when women -- but apparently not men -- tend bar. Goesaert v. Cleary, 335 U.S. 464, 466 (1948).[13]

Such stereotyping has continued to exclude women from spheres of power throughout the 20th century. As late as 1961, the Court justified an exemption from jury service for women on the ground that "woman is still regarded as the center of home and family life" unless "she herself determines that such service is consistent with her own special responsibilities." Hoyt v. Florida, 368 U.S. 57, 62 (1961). It was not until 1975 that the Court finally struck down an exemption from jury service for women. See Taylor v. Louisiana, 419 U.S. 522, 537 (1975). And, of particular relevance here, not until 1970 was the University of Virginia ordered to admit women. See Kirstein v. Rector & Visitors of the Univ. of Va., 309 F. Supp. 184, 187 (E.D. Va. 1970).

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[13] Compare Goesaert, 335 U.S. at 467 (rejecting argument that legislature's exclusion of women, except wives or daughters of male owners, from bartending "was an unchivalrous desire of male bartenders to try to monopolize the calling") with Babcock, supra note 10, at 280-81 (recounting vigorous campaign waged by bartender's union after World War II to restore bartending to an exclusively male job).

Despite the advances of women in society, and despite the application of intermediate scrutiny to sex-based classifications nearly 20 years ago, the stereotypes reflected in the historical record persist. This Court's recognition in Frontiero, over two decades ago, that "women still face pervasive, though at times more subtle, discrimination," 411 U.S. at 686, remains true today.

Although women now compose nearly half the U.S. workforce,[14] they are still relegated to jobs that generally pay less and provide fewer benefits than traditionally "male" jobs. For example, women occupy predominantly administrative support jobs: in 1991, one out of every four working women held such a job, and women constituted 82 percent of the total administrative support workforce in all industries.[15] Women are also underrepresented in many professional and technical jobs, comprising only 8.6 percent of all engineers, 3.9 percent of airplane pilots and navigators, 18.6 percent of architects, and little more than 20 percent of doctors and lawyers.[16] While

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[14] Bureau of the Census, U.S. Dep't of Commerce, Statistical Abstract of the United States 396 (1994).

[15] 9 to 5, Profile of Working Women 1 (1992-93) (based on U.S. Bureau of Labor Statistics and Bureau of Census data) (on file with National Women's Law Center); Equal Employment Opportunity Commission, Job Patterns for Minorities and Women in Private Industry 1993 1 (1994) (table 1).

[16] Bureau of the Census, supra note 14, at 407-09 (citing 1994 census data).

89.5 percent of all dentists are male, 99.3 percent of all dental hygienists are female.[17]

Even where women have begun to overcome traditional barriers to entry, they remain disproportionately in the lower ranks of workplace hierarchies. For example, women are now 23 percent of attorneys, but only 10 percent of law firm partners.[18] The Federal Glass Ceiling Commission recently found that, in 1994, only two of the Fortune 1000 companies had female Chief Executive Officers, and, of the Fortune 1500 companies' senior managerial positions, only three to five percent were held by women.[19]

Women also continue to earn less than their male counterparts in comparable jobs. In 1994, women earned an average of 72 cents for every dollar earned by men.[20] A wage disparity between men and women exists even where their educational levels are the same, and in fact increases as men's and women's levels of education increase. In a 1989 study, women who had completed four years of college

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17 Id.

18 Id. at 407; Curran and Carson, American Bar Foundation, The Lawyer Statistical Report 10 (1994).

19 Federal Glass Ceiling Commission, Good for Business: Making Full Use of the Nation's Human Capital 12 (1995).

20 National Committee on Pay Equity, The Wage Gap: 1993 (citing U.S. Dep't of Commerce, Bureau of the Census, Current Population Reports, Series P-60).

earned $26,709, while their male counterparts earned $38,565.[21] Even when women have more education than men, they generally earn less. In 1979 and 1989, women with a high school diploma earned less than or as much as men with only an elementary school education. Similarly, women with some college education earned less than men with a high school degree.[22]

The stubborn persistence of these disparities demonstrates that women remain a disadvantaged group and that gender-based stereotypes continue to infect society at large. Indeed, the Federal Glass Ceiling Commission cited stereotyping as one of the major barriers to advancement of women in the workplace.[23]

In sum, there is a longstanding and continuing history of discrimination against women -- discrimination that, as this Court has recognized, can too easily infect the processes of governmental decision making. Just as the remnants of the law of slavery and the post- Civil War Black Codes -- that

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[21] Women's Bureau, U.S. Dep't of Labor, Women Workers: Trends and Issues 35, 97 (1993). These disparities exist even after controlling for work experience, hours of work, family responsibilities, and other variables. See Robert G. Wood et al., Pay Differences Among the Highly Paid: The Male-Female Earnings Gap in Lawyers' Salaries, 11 J. Lab. Econ. 417, 430-31 (July 1993).

[22] Women's Bureau, supra note 21, at 97.

[23] Federal Glass Ceiling Commission, supra note 19, at 28.

dual structure of laws governing whites and blacks -- are suspect, so should the vestiges of that preexisting legal system that confined and disadvantaged women be equally suspect.[24]

3. Women Are Underrepresented in the Political Process

Because the Court has applied strict scrutiny to ensure that prejudice and stereotypes have not tainted the political process to the disadvantage of particular groups, it has viewed underrepresentation in the political process as another warning sign in determining whether a classification is suspect. See, e.g., Frontiero, 411 U.S. at 686; Foley v. Connelie, 435 U.S. 291, 294 (1978). The plurality in Frontiero, in noting that women face "pervasive discrimination," found that the effects of this discrimination persisted "most conspicuously in the political arena." Frontiero, 411 U.S. at 686.[25]

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[24] It is precisely those vestiges of the dual system of law for men and women that must be subjected to the strictest scrutiny -- a scrutiny informed by our all too recent recognition of the historical depth and persistence of sex discrimination in this country and the difficulty the judiciary has had in recognizing discrimination in culturally accepted stereotypes. See, e.g., Wendy Williams, The Equality Crisis: Some Reflections on Culture, Courts and Feminism, 7 Women's Rts. L. Rep. 175 (1982).

[25] Indeed, this underrepresentation is hardly surprising given this country's history regarding exclusion of women from the right to vote.

Although women are not entirely powerless in the political arena, very little has changed since this Court decided Frontiero over 20 years ago. In 1995, women constitute only eight percent of all U.S. Senators and 10.8 percent of all U.S. Representatives.[26] No woman has ever served as President or Vice President of the United States, a Secretary of State, Secretary of the Treasury, Secretary of Defense, or Speaker of the House.

The representation of women in state governments is only minimally more encouraging. In 1995, only 20.7 percent of state legislators are women.[27] Women hold only 25.9 percent of all state elective executive offices,

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See Ruth Bader Ginsburg, Women as Full Members of the Club: An Evolving American Ideal, 6 Hum. Rts. 1, 4 (1976-77).

[26] Center for the American Woman and Politics, Women in Elective Office 1995 (1995) (fact sheet); Center for the American Woman and Politics, Women Candidates and Winners in 1992 (1992) (fact sheet). Notably, women are significantly less well represented in the U.S. Congress than in the parliaments of other countries. See United Nations, The World's Women: 1995 Trends and Statistics 152 (1995) (chart 6.1).

[27] Center for the American Woman and Politics, Women in Elective Office 1995 (1995) (fact sheet).

and there is only one woman governor in all 50 states.[28] Women constitute only 18 percent of all mayors of cities with a population over 30,000.[29]

As the plurality in Frontiero recognized, Congress itself has acknowledged that "classifications based upon sex are inherently invidious," by enacting measures to ameliorate certain types of gender-based discrimination. Frontiero, 411 U.S. at 687-88. See, e.g., Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) (1994) (generally prohibiting sex discrimination in federally funded education programs); Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2 (1988) (prohibiting sex discrimination by employers with 15 or more employees). However, these and other measures are incomplete, and they do not suggest that women have achieved full political power.

For example, while Title VI of the Civil Rights Act, 42 U.S.C. § 2000d (1988), prohibits discrimination in federally funded programs on the basis of race, color, or national origin, and the Rehabilitation Act of 1973 (§ 504), 29 U.S.C. § 794 (1988), provides similar protection from discrimination based on disability, to this day there is no parallel federal statutory protection from

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[28] Id.

[29] Id.

government-sponsored discrimination based on sex.[30] Likewise, women are not statutorily protected against discrimination in places of public accommodation, although federal law prohibits such discrimination on the basis of race, color, religion, national origin, or disability. See 42 U.S.C. § 2000a (1988) and § 12182 (Supp. V 1993). There also is no statutory prohibition of discrimination based on sex in the making and enforcement of contracts, although race discrimination in this context is prohibited. See 42 U.S.C. § 1981 (1988). Other federal laws address violence and "hate crimes" based on race, religion, or national origin, but not based on sex. See 18 U.S.C. § 245(b)(2) (1994) and 28 U.S.C. § 534 Note (Supp. II 1990).

In sum, the warning signal of political underrepresentation continues to militate in favor of strict scrutiny of classifications based on gender.

B. Arguments Against the Application of Strict Scrutiny to Gender-Based Discrimination Are Unconvincing

In Frontiero, the only articulated argument against applying strict scrutiny to gender-based classifications was that the Equal Rights Amendment, if adopted, "will resolve the substance of this precise question." Frontiero, 411 U.S.

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[30] Although Title IX was modeled after Title VI in form, it is limited to education programs or activities.

at 692 (Powell, J., concurring). The Equal Rights Amendment, although approved by Congress and 35 states, narrowly failed to achieve the requisite state ratification over 13 years ago. It no longer provides a reason for the Court to stay its hand.

In his dissent in J.E.B., Chief Justice Rehnquist suggested that discrimination based on gender did not merit equivalent treatment to racial discrimination because "[r]acial groups comprise numerical minorities in our society, warranting in some situations a greater need for protection, whereas the population is divided almost equally between men and women." 114 S. Ct. at 1435. But, as noted, the number of women in the population has not prevented predominantly male legislatures from enacting state-sponsored discrimination, nor deterred a predominantly male judiciary from upholding gender-based distinctions that disadvantage women, nor extinguished the stereotypes that block advancement in a society still dominated by men. In any event, the Court in Adarand and Croson made clear that strict scrutiny applies equally to racial classifications affecting whites, a substantial majority in this country. See Adarand, 115 S. Ct. at 2110. Thus, minority status is not a talisman for invocation of strict scrutiny.

The Chief Justice also observed in J.E.B. that, "while substantial discrimination against both groups still lingers in our society, racial equality has proved a more challenging goal to achieve on many fronts than gender equality."

114 S. Ct. at 1435.[31] But absolute parity between racial and sexual discrimination is not a prerequisite for this Court to find that classifications based on gender warrant strict scrutiny.[32] Rather, what this Court should focus on is that, as the Chief Justice observed, "substantial discrimination . . . still lingers," id., and that women continue to be excluded from public educational institutions based on their gender rather than their individual ability, as exemplified by the decisions below. These factors counsel strict scrutiny of classifications based on gender.[33]

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[31] Although certainly there are differences between the histories of race and sex discrimination in this country, the important truth remains that women continue to suffer the effects of historic and persistent sex discrimination. See J.E.B., 114 S. Ct. at 1422-1425. Moreover, attempts to establish "a pecking order of oppression" are both divisive and unproductive. See Henry Louis Gates, Jr., Blacklash?, The New Yorker, May 17, 1993, at 42, 43.

[32] This Court has applied strict scrutiny to other suspect classes without a finding of absolute parity with race. See e.g., Graham v. Richardson, 403 U.S. 365, 371-72 (1971) (applying strict scrutiny to classification based on alienage). Moreover, attempts to prioritize the historic significance and impact of race and sex discrimination ignore the interrelation between both types of discrimination and their combined effect in American society. See Kimberle Crenshaw, Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics, 1989 U. Chi. Legal F. 139 (exploring the intersection of race and gender discrimination); Patricia J. Williams, The Alchemy of Race and Rights (1991) (same).

[33] Nor does the presence of actual physical differences between men and women justify a more lenient standard of review for sex discrimination than race discrimination. To the extent that sex-based

There is likewise no valid argument that strict scrutiny is so rigid as to prohibit all sex-based classifications in affirmative remedial programs. Strict scrutiny, as applied to classifications designed to remedy past discrimination, is not inevitably fatal to the classification. Justice O'Connor specifically addressed this very issue in Adarand. See 115 S. Ct. 2097, 2117 (1995). See also id. at 2134 (Ginsburg, J., dissenting) (note that affirmative action programs can satisfy strict scrutiny).[34] The application of strict scrutiny in the sex discrimination context will not preclude the government's ability to adopt genuine affirmative action programs for women.

CONCLUSION

For the reasons set forth above, the Court should reverse the decision below and hold that discrimination based on gender is inherently suspect and warrants the highest level of judicial scrutiny.

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classifications are required by physical characteristics unique to one sex, a strict scrutiny analysis can accommodate those differences. See Jennifer Friesen, State Constitutional Law: Litigating Individual Rights Claims and Defenses ¶ 3.02(c)(i) (1994) (discussing state equal rights amendments).

[34] Thus, for example, single-sex educational programs could withstand strict scrutiny if they were narrowly tailored to serve a genuinely remedial purpose. Cf. Hogan, 458 U.S. at 729-30.

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