

A state has a state employee grievance system that requires any state employee who wishes to file a grievance against the state to submit that grievance for final resolution to a panel of three arbitrators chosen by the parties from a statewide board of 13 arbitrators. In any given case, the grievant and the state alternate in exercising the right of each party to eliminate five members of the board, leaving a panel of three members to decide their case. At the present time, the full board is composed of seven male arbitrators and six female arbitrators.

A female state employee filed a sexual harassment grievance against her male supervisor and the state. The state's attorney exercised all of her five strikes to eliminate five of the female arbitrators. At the time she did so, the state's attorney stated that she struck the five female arbitrators solely because she believed women, as a group, would necessarily be biased in favor of another woman who was claiming sexual harassment. Counsel for the state employee eliminated four males and one female arbitrator, all solely on grounds of specific bias or conflicts of interest. As a result, the panel was all male.

When the panel ruled against the state employee on the merits of her case, she filed an action in an appropriate state court, challenging the panel-selection process as a gender-based denial of equal protection of the laws.

In this case, how should the court rule as to the constitutionality of the panel-selection process?

- A. Constitutional, because the gender classification used by the state's attorney in this case satisfies the requirements of the rational basis test.
- B. Constitutional, because the gender classification used by the state's attorney in this case satisfies the requirements of the strict scrutiny test.
- C. Unconstitutional, because the gender classification used by the state's attorney in this case denies the grievant the right to a jury made up of her peers.
- D. Unconstitutional, because the gender classification used by the state's attorney in this case does not satisfy the requirements of intermediate scrutiny.

Explanation:

Equal protection

(standards of review)

Standard	Applicability	Test
Rational basis	Default test	<i>Challenger</i> must show <ul style="list-style-type: none">• action is not rationally related to legitimate government interest
Intermediate scrutiny	Discriminates against quasi-suspect class: <ul style="list-style-type: none">• Sex/gender• Legitimacy	<i>Government</i> must show <ul style="list-style-type: none">• action is substantially related to important government interest
Strict scrutiny	Discriminates against suspect class: <ul style="list-style-type: none">• Ethnicity• Citizenship (state law only)• Race• Nationality Impacts fundamental right (First VIP): <ul style="list-style-type: none">• First Amendment rights• Voting• Interstate travel• Privacy: family, marriage, parental rights, sexual acts, contraceptives	<i>Government</i> must show <ul style="list-style-type: none">• action is necessary (ie, least restrictive means)• to achieve compelling government interest

When a government action is challenged under the **equal protection clause**, it must survive **intermediate scrutiny** if it discriminates against a **quasi-suspect class**—ie, **gender/sex**, nonmarital birth. Intermediate scrutiny requires the state to prove that its action was **substantially related** to an **important government interest**.

Here, the state's attorney removed female arbitrators from the panel (government action) because she believed that women would be biased in favor of another woman claiming sexual harassment (gender discrimination). But as the Supreme Court reasoned in *J.E.B. v.*

Alabama ex rel. T.B., a juror's or arbitrator's competence and impartiality (important government interest) cannot be evaluated based on gender (no substantial relationship). Therefore, the attorney's actions cannot survive intermediate scrutiny and should be ruled unconstitutional.

(Choice A) The rational basis test requires the challenger to prove that the government action has no rational relationship to a legitimate government interest. But since this test only applies when the government action does *not* affect a fundamental right, suspect class, or quasi-suspect class, it does not apply here.

(Choice B) Strict scrutiny requires the state to prove that its action is necessary to achieve a compelling government interest when it substantially impacts a fundamental right or suspect class—not a quasi-suspect class (as seen here).

(Choice C) Most **criminal and civil litigants** have the **right to a jury** made up of their peers—ie, an impartial group of citizens selected from a fair cross-section of the community. But this right does not apply to non-judicial proceedings like arbitration (as seen here).

Educational objective:

Gender discrimination in the jury (or arbitrator) selection process cannot survive intermediate scrutiny since it is not substantially related to the government's important interest in having grievances decided by competent and impartial individuals. Therefore, such discrimination violates the equal protection clause.

References

- U.S. Const. amend. XIV (equal protection clause).
- *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136 (1994) (explaining that the government cannot rely on gender stereotypes to justify gender-based discrimination).

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