

## **Amicus Curiae Briefs Employment Issues**

### **Sex Discrimination**

**Case:** *Board of Directors of Rotary International v. Rotary Club of Duarte*

**Court:** Supreme Court of the United States, 1987

**Amicus Brief:** NOW Legal Defense and Education Fund

**Case:** The Rotary Club of Duarte, California was a member club of the larger Rotary international. Membership in Rotary Clubs traditionally had been limited to men, though women were invited to attend meetings, give speeches, and receive awards. The Duarte Club admitted three women to active membership in 1977. As a result, the Duarte club was notified that admitting women to the club violated Rotary International's constitution, and Rotary International revoked the Duarte Club's charter, terminating its membership in Rotary International. The Duarte Club filed a complaint in California, claiming that the charter revocation violated California's Civil Rights Act. The trial court concluded that neither Rotary International nor the Duarte Club were business establishments covered by the act and, accordingly, found for Rotary International. The California Court of Appeal reversed. Upon the California Supreme Court's refusal of certiorari, Rotary International appealed to the United States Supreme Court, claiming that forcing Rotary International to admit women violates the organization's First Amendment rights.

**Amicus Brief:** The brief explains that exclusion of women to Rotary Clubs results in women being denied business opportunities and access to business leaders worldwide. The brief argues that states have a compelling interest to protect the right of women to nondiscriminatory access to commercial opportunities. Rotary International is not entitled to First Amendment Protection of intimate associations since the club itself has sacrificed such intimate association by its large size, its welcoming of publicity, its inclusion of non-members in most events, and its selection of members based on business attributes. When looking at these characteristics, it is obvious that Rotary International cannot claim protection geared towards the formation and preservation of certain kinds of highly personalized relationships. The brief also argues that Rotary International cannot claim protection under the First Amendment's right to expressional association because that protection, by its very nature, applies only to those who associate for the advancement of beliefs and ideas, not for commercial activity. Rotary International has not made a showing that its members come together in order to advance a particular belief or idea. However, even if Rotary International were entitled to some protection for expressive association, the application of California's Civil Rights Act does not interfere with that expressive association for the inclusion of women does not affect the advancement of any particular belief or idea the business-related organization could advance other than one based solely on the members' social preference of not involving women. The brief explains that this social preference has never been enough to warrant First Amendment Protection or to insulate a group from a state's Civil Rights legislation. Furthermore, any infringement on the right to expressive association is constitutional since the application of the statute burdens this association only so much as is necessary to serve California's compelling interest in protecting women from discrimination and the statute is not aimed at suppressing speech or other expressive activity.

**CWEALF:** CWEALF joined the brief because it believes that women need to have the same access as men to the social circles in which business associations are created in order to equalize the commercial playing-field. Only by making these associations with business leaders can women obtain equal footing.

**Holding:** The Court affirmed the California Court of Appeals' decision. The Court held that, in part due to its size, Rotary International cannot claim protection of intimate associations. Likewise, the Court found that admitting women will not have a limiting or adverse effect on the rotary club's ability to pursue or carry out expressive purposes, whether the activities in which they are engaged are political, service, or community-based. Furthermore, the Court held that any infringement on expressive activity that does occur is justified because such infringement serves the state's compelling interest in eliminating discrimination against women. This is especially so because the Civil Rights Act is viewpoint neutral.

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**Case:** *United Auto Workers (UAW) v. Johnson Controls*

**Court:** Supreme Court of the United States, 1991

**Amicus Brief:** American Civil Liberties Union—Women's Rights Project

**Case:** Johnson Controls manufactures batteries, and during the manufacturing process, employees may be exposed to lead, which is a primary ingredient. This exposure can lead to health risks, including the risk of harm to a fetus carried by a female employee. In seeming response to eight employees becoming pregnant while having high levels of lead in their blood, Johnson developed a policy that women who were capable of bearing children would not be placed into jobs involving lead exposure or into jobs which could lead them to jobs involving lead exposure through job bidding, promotion, transfer or bumping. If a woman wanted to work in such a job, she had to provide medical documentation that she was incapable of bearing children. The UAW filed suit, claiming that this "fetal protection" policy constituted sex discrimination in violation of Title VII. The District Court found for Johnson Controls on summary judgment, holding that the policy was a business necessity. This holding was affirmed by the Seventh Circuit, which would have found for Johnson either under a business necessity defense or under a bona fide occupational qualification analysis. The UAW appealed to the Supreme Court.

**Amicus Brief:** The brief argues that by utilizing this policy, Johnson Controls effectively ignores any health risk to its male employees and "protects" women by denying them employment opportunities. The appropriate step to take would be for Johnson to hire both men and women and create a workplace environment that complies with OSHA standards. The policy is in direct contradiction to the objectives Congress sought to achieve by enacting Title VII, subsequently amended by the addition of the Pregnancy Discrimination Act. Congress believed that women were entitled to employment opportunities based on their ability or inability to work, not based on their ability or inability to bear children. While Johnson may argue that the policy is aimed only at child-bearing women, the classifications are drawn along gender lines—only reproductively capable women, not reproductively capable men, are barred from working in lead-exposed areas. The brief explains that access to higher-paid jobs for unskilled workers are

as important, if not more important, for women as for men. Without these jobs, many women and their children face poverty. The brief argues that Johnson's policy assumes that all women who are capable of bearing children may be pregnant at any time—a gross generalization that has nothing to do with the individual characteristics of the women who might choose to work at Johnson Controls given the opportunity. The brief notes that one of the underlying purposes of Title VII was for women to be able to combine work and family life. This policy, which makes infertility a prerequisite to employment, is in direct contradiction to Congress' intention. The brief argues that infertility cannot be a BFOQ, for being pregnant has nothing to do with actual job performance, the main focus of a BFOQ. This is unchanged even if the employer must suffer an increase in costs in order to comply with an act of Congress.

**CWEALF:** CWEALF joined this brief because of its dedication to ending sex discrimination in employment. CWEALF believes that if female infertility is a recognized bona fide occupational qualification, numerous jobs will be closed to women. Such a policy supports a paternalistic view serving only to perpetuate gender stereotypes and gender discrimination. It also places women at an extreme economic loss under the guise of protecting them.

**Holding:** The Court found that the policy was not facially neutral for it did not seek to protect the unconceived children of all its employees. Instead, the policy concerned only the unborn offspring of its female employees. Thus, the policy is facially discriminatory on the basis of sex. The Court further held that even if Johnson Controls was not motivated by gender bias, its lack of a discriminatory motive does not change a discriminatory policy into a benign policy. The Court explained that a BFOQ defense is extremely narrow and the discrimination it permits must be reasonably necessary to the normal operation of a particular business. As such, more than mere generalizations are required to satisfy a BFOQ. The Court noted its previous holding in *Dothard v. Rawlinson*, that danger to women was not enough to justify discrimination under a BFOQ. While the health or safety of third parties may be considered for a BFOQ, possible fetal health is a concern that must rest solely with the parent(s).

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**Case:** *J.E.B. v. Alabama ex. rel. T.B.*

**Court:** Supreme Court of the United States, 1994

**Amicus Brief:** National Women's Law Center

**Case:** Alabama instituted a paternity and child support action against J.E.B. At trial, Alabama used nine of its ten peremptory challenges to exclude males from the jury, with the jury eventually being comprised entirely of women. Relying on the Supreme Court's decision in *Batson v. Kentucky* (which held that peremptory strikes based solely on race violated the Equal Protection Clause), J.E.B. claimed that peremptory strikes based solely on gender violated the Equal Protection Clause. The trial court rejected this claim, a decision that the court affirmed on a post-judgement motion. The Alabama Court of Civil Appeals affirmed and the Alabama Supreme Court denied certiorari. J.E.B. appealed to the United States Supreme Court.

**Amicus Brief:** The brief argues that gender-based peremptory challenges are based on gender stereotypes and these stereotypes perpetuate the history of discrimination in the jury system that women have suffered. The brief notes that it was not until 1975 that the Court held that the

systematic exclusion of women from juries violated a defendant's Sixth Amendment rights. However, by allowing peremptory strikes based on gender, the harm suffered by excluding women continues. In addition to harming women and men because such strikes reinforce gender stereotypes, the use of peremptory strikes undermines the public's confidence in the jury selection process and the justice juries dispense. The brief also argues that the use of peremptory challenges based solely on gender violates the Equal Protection Clause, much as the Court determined that peremptory challenges based solely on race violated the Equal Protection Clause in *Batson v. Kentucky*. Under Equal Protection analysis, the use of such challenges must be substantially related to an important governmental interest in order to survive intermediate scrutiny. In this case, Alabama is unable to show any important governmental interest. While empanelling an impartial jury is an important interest, the use of gender stereotypes to exclude women (or men) from a jury does not create the required nexus between the use of peremptory challenges based solely on gender and obtaining an impartial jury.

**CWEALF:** CWEALF joined this brief because of its belief that the continued use of peremptory challenges based solely on gender perpetuates discrimination against women. CWEALF believes that such discrimination has no place in a system that has its fundamental structures based in fairness and equity.

**Holding:** The Court reversed the decision of the Alabama Civil Court of Appeals and remanded the case for further proceedings. The Court held that peremptory challenges based solely on gender violated the Equal Protection Clause and the use of such challenges constituted intentional and invidious discrimination on the basis of gender. Using intermediate scrutiny, the Court found that discrimination on the basis of gender in jury selection does not substantially further the state's legitimate interest in achieving a fair and impartial trial. The Court further found that there existed no evidence that gender could be used as a proxy for a more individualized determination of a particular juror's biases.

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**Case:** *State of Connecticut v. Walker*

**Court:** Connecticut Appellate Court, 1994

**Amicus Brief:** Connecticut Women's Education and Legal Fund

**Case:** The defendant had been charged with murder, a crime for which the jury found the defendant guilty after laborious deliberations (the jury was deadlocked twice). The defendant appealed the convictions charging (1) that the trial court's instructions given prior to voir dire violated the defendant's constitutional rights, (2) the trial court's jury instructions violated the defendant's constitutional rights, and (3) the evidence was insufficient to sustain a conviction. At trial, four eyewitnesses testified. Two of them were unable to identify the defendant at trial and one of them had deliberately misled the police at first. Three other eyewitnesses testified that the shooter was not the defendant. One of these had told the police he had not seen the shooting and the other two never spoke to the police about what they had seen. The instructions the trial court gave prior to voir dire regarded what constituted a "reasonable doubt." The court said, "You know, women, of course, if you ask them well, why did they do certain things...if a woman's only answer is my woman's intuition told me it was the proper thing to do...then you may not use your women's intuition to determine reasonable doubt, or facts or issues in a criminal case."

The jury instructions did not discuss “women’s intuition,” and the defendant did not protest the instructions at the time they were given.

**Amicus Brief:** The brief argues that the trial court’s preliminary instructions is a prime example of gender stereotyping, which has the effect of placing women in an inferior social and legal status without regard to individual capabilities. This comment also reinforced the idea that the legal sphere is a male sphere in which a woman’s thought processes have no place. Judicial expressions of gender bias cannot be condoned by the Court for it is this Court’s role to be a leader in the judicial system in eradicating gender bias.

**CWEALF:** CWEALF authored the brief because it believes that the trial judge’s instructions perpetuate the impression that women do not make decisions in a rational manner. The bald stereotyping has no place in a court in which equality of treatment and fairness are supposed to be the hallmarks of justice.

**Holding:** The court specifically found that the trial judge’s preliminary instructions regarding “women’s intuition,” were inappropriate for gender bias has no place in the courtroom. However, the court held that this preliminary instruction, when not reinforced by jury instructions that also included the imprimatur of gender bias and non-legal definitions of reasonable doubt, could not have affected the jury’s determination of reasonable doubt in the case. Therefore, the court determined that there had been no constitutional violation and affirmed the defendant’s conviction.

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**Case:** *Faulkner v. Jones*

**Court:** United States Court of Appeals for the Fourth Circuit, 1995

**Amicus Brief:** National Women’s Law Center

**Case:** Faulkner had applied and been conditionally accepted to the all-male Citadel, a South Carolina military college. Upon discovering she was a female, however, the Citadel withdrew its acceptance. Faulkner filed suit to compel her admission, claiming that the Citadel’s males-only admissions policy violated the Fourteenth Amendment’s Equal Protection Clause. The District Court found insufficient the State’s claim that the reason for discriminating against women was the lack of substantial interest in a state-funded public education for women. Finding that the State had done nothing to quickly find and implement a remedy for this particular plaintiff, and that time for this plaintiff was running out, the District Court ordered her immediate admission to the Corps of Cadets. The District Court also permitted the State to construct a remedial plan for all other future female applicants.

**Amicus Brief:** The brief argues that the admissions policy facially discriminates against women and, therefore, the State needs to provide an exceedingly persuasive justification for that discrimination in order to satisfy intermediate scrutiny, the appropriate level of review for classifications drawn on the basis of sex. That South Carolina’s over-all system of higher education may be neutral is irrelevant; the Citadel only admits male students and it is the only publicly-funded program of its kind in South Carolina. The Citadel’s admissions policy, not the entire State higher education system, is at issue in this case. The brief also argues that South

Carolina's "rational" justification, that not enough women wish to attend a Citadel-type program, is insufficient. Rationality is not enough to survive heightened scrutiny, and the State's assessment of demand is flawed due to the long history of refusing to admit women to the Citadel. Furthermore, when speaking in terms of the Equal Protection Clause, constitutional rights are of a personal nature and it is irrelevant that the rights may be asserted by a class of one. The deprivation of this right requires an immediate remedy; the only available remedy is immediate admission to the Corps of Cadets program. This contention is supported even further by the fact that the State has delayed time and time again in developing a remedy other than that suggested by the District Court.

**CWEALF:** CWEALF joined the brief because it believes that equal opportunities for women in education are fundamental to ending sex discrimination.

**Holding:** The court affirmed the District Court's decision that the males-only admissions policy violated Faulkner's Equal Protection rights. The court remanded the case to the District Court with instructions that the court was to set forth a time schedule in which the State could remedy the constitutional violation. If the State could not put in place such a remedy prior to August 1995, then Faulkner was to be admitted into the Corps of Cadets. Note: Following the United States Supreme Court's decision in *VMI*, the Citadel immediately opened its doors to women and actively recruited women to apply to the school. The Citadel and the United States government entered into an agreement whereby the Citadel agreed to develop an assimilation plan for female cadets.

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**Case:** *United States of America v. Virginia*

**Court:** United States Court of Appeals for the Fourth Circuit, 1995

**Amicus Brief:** National Women's Law Center

**Case:** Virginia Military Institute (VMI) was the only all-male institution of fifteen state schools. The school's mission was to produce "citizen soldiers" and prepare men for leadership roles in both the military and civilian life. The United States sued VMI in response to a claim by a female high school student who sought admission to the university and claimed its males-only admissions policy violated the Fourteenth Amendment. The District Court found in favor of VMI, noting that the State had an important interest in providing a unique single-sex educational experience for men and that VMI's educational experience would be altered drastically if women were to attend. If women were admitted to VMI, the school would have to provide for some modicum of privacy for the students and for some alterations in the physical education requirements. These two alterations would have a disadvantageous impact on VMI's educational offerings. The Fourth Circuit reversed the District Court's finding that the State had an important interest in providing single-sex education for men, but the court accepted the District Court's finding that the educational environment of lack of privacy, physical training, and adversative approach would require alteration if women were admitted. The court gave three remedial options to VMI, one of which was for VMI to establish a parallel institution or program.

In response to the Fourth Circuit's opinion, Virginia proposed the Virginia Women's Institute for Leadership (VWIL), which was opened, originally, to 25 women on the campus of Mary

Baldwin College (a private liberal arts college for women). Some of the differences between VMI and this program include: (1) lower SAT scores for VWIL freshmen; (2) fewer faculty holding PhDs at VWIL; (3) a more limited offering of degrees at VWIL; (4) a smaller endowment for VWIL; (5) a lack of military format at VWIL; (6) a cooperative as opposed to adversative method of education at VWIL; and a relatively non-existent as opposed to a well cultivated alumni network at VWIL. The District Court found the new VWIL program to be a constitutional remedy, finding that “controlling legal principles do not require the Commonwealth to provide a mirror image VMI for women.”

**Amicus Brief:** The brief argues that the District Court’s assessment of the VWIL program was based on stereotypes of what women needed from an educational program. The court’s opinion effectively said that women who were capable of succeeding in VMI’s environment were not entitled to the same rights and benefits that environment provided men, especially since VWIL’s program fails to provide comparable benefits. Therefore, in addition to being segregated, the VWIL and VMI programs are inherently unequal. The brief argues that, for these reasons, Virginia’s refusal to admit women to the VMI program violates the Fourteenth Amendment’s Equal Protection Clause.

**CWEALF:** CWEALF joined the brief because it believes that equal opportunities for women in education are fundamental to ending sex discrimination. Unlike private schools offering single-sex education, VMI receives funding from the State to offer a unique educational experience unmatched by any other university. This state-funded unique experience and all the benefits that flow from it are unilaterally denied to female students. Such a deprivation of opportunity hinders rather than helps the final goal of ending sex discrimination.

**Holding:** The Fourth Circuit affirmed the District Court’s decision. The court reaffirmed its finding that single-sex education was pedagogically justifiable; regardless of to which sex it was tailored. The court also reaffirmed its finding that admitting women to VMI would require alterations to the program that would destroy the program’s very essence. According much deference to the Virginia Legislature, the court determined that the State’s choice of single-sex education as a pedagogical technique was a legitimate and important governmental objective. The court also determined that single-sex education was a means substantially related to the State’s objective of achieving the results provided by an adversative educational environment; as such an environment could not be successful with a sexually heterogeneous population. The court determined that the sexually exclusive programs would be constitutional so long as the benefits provided by the programs were substantially comparable. The court, after determining that the intended results were comparable, concluded that the method by which those results were reached was something that should be left to professional educators, not to the courts.

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**Case:** *United States of America v. Virginia*

**Court:** Supreme Court of the United States, 1996

**Amicus Brief:** National Women’s Law Center

**Case:** See above.

**Amicus Brief:** The brief argues that intermediate scrutiny has become an unworkable standard under which to review classifications based on sex. This is due, in large part, to the varied applications of the test that make it strong in some situations and weak in others. The brief argues that classifications based on sex should be subjected to strict scrutiny since (1) sex is an immutable characteristic, unrelated to ability, (2) there exists a long history of discrimination against women, and (3) women remain relatively underrepresented in the political process and, therefore, remain politically powerless.

**CWEALF:** CWEALF joined the brief because it believes that equal opportunities for women in education are fundamental to ending sex discrimination. CWEALF believes that so long as classifications based on sex can be reviewed under the weaker intermediate scrutiny, those classifications may be seen as constitutional when they are based on nothing more than stereotypes. CWEALF believes that it is essential that classifications based on sex be fashioned in the narrowest manner possible so as to keep from perpetuating the very gender stereotypes upon which the Fourth Circuit, the District Court, and the State of Virginia based its new VWIL program.

**Holding:** The Supreme Court, applying a very strict intermediate scrutiny standard, found the VWIL program incapable of curing the constitutional violation presented by the single-sex education available at state-sponsored VMI, especially as both programs were based solely on the “inherent” differences between men and women and the way in which both sexes learned best. The Court reversed the decision of the Fourth Circuit, finding the program at VMI not to be inherently unsuited to women.