



# Department of Justice

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**STATEMENT OF**

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PRINCIPAL DEPUTY ASSISTANT ATTORNEY GENERAL  
CIVIL RIGHTS DIVISION**

**BEFORE THE**

**COMMITTEE ON JUDICIARY  
UNITED STATES SENATE**

**HEARING ON  
THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION  
AGAINST WOMEN (CEDAW)**

**PRESENTED**

**NOVEMBER 18, 2010**

**TESTIMONY OF SAMUEL R. BAGENSTOS**  
**PRINCIPAL DEPUTY ASSISTANT ATTORNEY GENERAL FOR CIVIL RIGHTS**  
**UNITED STATES DEPARTMENT OF JUSTICE**  
**BEFORE THE SUBCOMMITTEE ON HUMAN RIGHTS AND THE LAW, COMMITTEE ON**  
**THE JUDICIARY, UNITED STATES SENATE**  
**NOVEMBER 18, 2010**

Chairman Durbin and Members of the Committee, it is a privilege to be here today to testify in support of the U.N. Convention on the Elimination of all Forms of Discrimination Against Women, or CEDAW. United States ratification of CEDAW would signal our nation's unequivocal and continued commitment to advancing the rights and freedoms of women around the world. We know that when women are denied access to their basic rights, families, communities and entire nations suffer. CEDAW provides an important framework through which the United States can work with other governments, the international community, and individuals around the world to advance and promote the rights of women.

The protection of women's rights has long been a core national commitment of the United States. Our laws strongly protect against sex discrimination and violence against women, and we as a government are committed to their robust enforcement. As a result, our nation is already a global leader in the field of women's rights, and our existing laws and practices are broadly consistent with the requirements of CEDAW.

The protection of women's rights in United States law starts with the Equal Protection Clause of the Fourteenth Amendment to the Constitution, which provides that "[n]o state shall \* \* \* deny to any person within its jurisdiction the equal protection of the laws." This proscription applies to both federal and state governments and bars distinctions on the basis of sex unless the distinction meets the standard of "intermediate scrutiny." Under that standard, sex-based classifications are permissible only if they have an "exceedingly persuasive justification."<sup>1</sup> Our nation's constitutional standard provides a level of protection that is consistent with CEDAW and imposes a substantial burden of justification on the government when it treats women differently than men.

This standard has evolved to ensure that governmental classifications based on sex are not predicated on stereotypical or archaic ideas about the role women should play in our society. The Supreme Court has struck down discriminatory laws that make impermissible sex distinctions. The Court struck down a state statute that gave a preference to men in administering estates, Reed v. Reed, 404 U.S. 71 (1971); held that married women in the military should be allowed the same fringe benefits as married men in the military, Frontiero v. Richardson, 411 U.S. 677 (1973); and invalidated sex-based classifications in federal and state social security and welfare laws, Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Califano v. Goldfarb, 430 U.S. 199 (1977); Califano v. Westcott, 443 U.S. 76 (1979); Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142 (1980).

Congress has adopted an array of statutes that build on these constitutional guarantees. These laws include: the Equal Pay Act of 1963, Title VII and Title IV of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, the Fair Housing Act, the Pregnancy Discrimination Act, the Trafficking Victims Protection Act of 2000, the Violence Against Women Acts of 1994, 2000, and 2005, the

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<sup>1</sup> United States v. Virginia, 518 U.S. 515 (1996).

Freedom of Access to Clinic Entrances Act, the Lilly Ledbetter Fair Pay Act, and the Family and Medical Leave Act. The Department of Justice is a primary enforcement agency for almost all of these statutes. In our enforcement, we have achieved significant gains for women and girls at home, at school, and in the workplace. It is my pleasure to discuss with you today a sampling of our extensive efforts to ensure compliance with our nation's laws that prohibit discrimination on the basis of sex and that address violence against women.

I. The Department of Justice Enforces and Administers Numerous Laws that Protect the Rights of Women and that are Consistent with CEDAW

a. Violence Against Women

One of the key goals of CEDAW is to end violence against women. Congress and the Administration share this goal. Although the rate of intimate partner violence against women in the United States declined 53% between 1993 and 2008, too many women are still victims of domestic violence in America. One in four women will be physically or sexually assaulted by a partner at some point in her lifetime, and protecting women from domestic violence is a top priority of this Administration. President Obama has appointed one of the nation's foremost experts in domestic violence policy as the first-ever White House Advisor on Violence Against Women to collaborate with the many Federal agencies working together to end domestic violence.

The Department of Justice is committed to reducing domestic and sexual violence, and we continue to use the tools that Congress has provided in the Violence Against Women Act (VAWA) and subsequent legislation. Since the enactment of this landmark legislation in 1994, the Justice Department has prosecuted more than 2,600 cases under criminal provisions that target domestic violence abusers. These cases often involve the most aggressive and violent abusers who cross state lines to pursue their victims. The Department has also used stronger cyber stalking laws and the latest technology to prosecute cases that would be difficult for the states to pursue.

The Department's Office on Violence Against Women (OVW) administers grant programs that support: training for police, prosecutors, and court personnel in responding to violence against women; solutions for the unique barriers faced by rural communities in addressing such violence; the provision of legal assistance, transitional housing, and supervised visitation services to victims; tools to address the special needs of victims who are elderly and those with disabilities; and responses to the high rate of violence against American Indian and Alaska Native women. Since 1994, OVW has awarded more than \$4 billion in grant funds to state, tribal, and local governments, non-profit victim services providers, and universities. In the six-month reporting period from January to June 2009 alone, OVW grantees reported that more than 125,300 victims were served and over 253,000 services (including shelter, civil legal assistance and crisis intervention) were provided to victims.

The Violence Against Women Act provides more than dollars. Through state certifications and funding conditions, VAWA requires states and local communities to implement best practices that improve the safety of victims and hold offenders accountable for these crimes.

The Office of Justice Programs' Office for Victims of Crime (OVC), administers the Crime Victims Fund (Fund) through the Victims of Crime Act (VOCA). The Fund is unique in that it is composed primarily of fines, special assessments, and bond forfeitures from convicted federal offenders, making it a self-sufficient source of support that does not rely on Americans' tax dollars to carry out its work. In FY 2010 OVC awarded over \$610 million through the Fund to support state victim assistance and compensation programs that provide critical services for all types of crime victims including victims of domestic violence. In FY 2007 and 2008, over 3.6 million domestic violence victims were served by VOCA-

funded assistance programs, accounting for close to half (46 percent) of all victims served by VOCA-funded assistance programs. OVC administers VOCA formula funding to the states, the District of Columbia, and territories, which awards the funding to over 5,000 victim service programs operating at the state and local levels. Domestic violence is one of OVC's priority areas, requiring that states and territories allocate a minimum of 10 percent of their VOCA assistance funds to serving victims of domestic violence, as well as sexual assault and child abuse. Domestic violence victims can receive compensation for medical and dental care, lost wages/support, mental health services, and other expenses. The Crime Victims Fund also supports emergency shelters, transportation, and counseling, and supports victim advocacy units in law enforcement agencies, prosecutors' offices, hospitals, and social service agencies.

CEDAW addresses the specific challenges facing women who live in rural areas, and the Office on Violence Against Women is addressing many of those concerns. OVW's Rural Program enhances the safety of victims of domestic violence, dating violence, sexual assault, and stalking in rural communities by supporting projects designed to address and prevent these crimes in rural jurisdictions. OVW also recently announced a new Sexual Assault Demonstration Initiative, which will support four rural project sites to develop tools and service models specifically to answer the challenges of serving sexual assault survivors in rural areas. The Administration has also placed a priority on addressing crimes involving violence against women on tribal lands. After extensive consultations with tribal leaders, the Department announced significant reforms and enhanced resources to increase prosecution of crimes committed on tribal lands, with a particular focus on crimes of violence against women and children. The Department is also working diligently to implement the recently-enacted Tribal Law and Order Act, a comprehensive bill aimed at improving public safety on tribal lands which, among other things, requires sexual assault protocols in Indian Health Service facilities and training on sexual assault for law enforcement officers serving tribal communities. This new law will help survivors of sexual assault get the medical attention, services, support, and justice they need.

#### b. Human Trafficking

Article 6 of CEDAW specifically addresses the evils of human trafficking—evils that are well known by this Subcommittee. The United States has been a leader in addressing this global problem, and, in passing the Trafficking Victims Protection Act of 2000 (TVPA), Congress expressly noted the disproportionate impact of human trafficking on women and children. TVPA establishes new penalties for perpetrators of sex trafficking, provides for immigration and other benefits for victims, and penalizes foreign countries that fail to address trafficking. The Department has vigorously enforced TVPA to vindicate the rights of women and girls who have been exploited for labor, services, or commercial sex. In fact, in each of the past two fiscal years, the Civil Rights Division and U.S. Attorneys' Offices nationwide have brought record numbers of human trafficking prosecutions. We have secured significant sentences against traffickers who held victims, the overwhelming majority of whom are female, in servitude for forced labor or commercial sex.

An example of one of our successful prosecutions under this statute is the case of United States v. Afolabi. In this case, three defendants were convicted and the lead defendant was sentenced to 27 years in prison for holding young West African women and girls, aged 10 to 19, in servitude in hair braiding salons in New Jersey. The defendants worked these girls around the clock and seized all of the profit the victims generated each month. They held the victims in their service through threats, physical assaults, psychological intimidation, and sexual abuse. In addition to the sentences of imprisonment, the defendants were ordered to pay the victims over \$3.9 million in restitution.

In addition to our prosecutorial efforts, the Office of Justice Programs' Office for Victims of Crime and Bureau of Justice Assistance provide funding authorized by TVPA to law enforcement agencies and

crime victim service organizations to combat human trafficking within the United States. This funding supports a multidisciplinary task force model designed to proactively identify and rescue victims of human trafficking and provide comprehensive victim services. Additionally, funds are used to support community-level outreach and awareness activities and a national-scope training and technical assistance initiative.

### c. Discrimination in Education

Physical safety is only the starting point for all people in all parts of the world to live full and productive lives. As reflected in CEDAW and under U.S. law, women are also entitled to broad and comprehensive protections from discrimination and to equality of opportunity in myriad aspects of their lives.

Article 10 of CEDAW addresses discrimination on the basis of sex in education, and emphasizes the importance of access by girls and women to equal educational opportunities, including access to scholarships, continuing education programs and athletic opportunities. The Justice Department, together with the Department of Education, takes active measures to combat such discrimination in the United States by enforcing a number of laws that seek to ensure that women and girls have an equal opportunity at every level of education and are free from harassment at school.

Title IV of the 1964 Civil Rights Act prohibits discrimination on the basis of race, color, sex, religion or national origin by public elementary and secondary schools and public institutions of higher education. In a case brought by the Department of Justice under this statute, the Supreme Court invalidated the Virginia Military Institute's (VMI) restriction of admissions to men. The Court rejected VMI's claims that women weren't capable of handling the school's "adversative" curriculum and made clear that women may not be treated on the basis of stereotype.<sup>2</sup> The Court also found that VMI's purported remedy -- to create a separate program for women at another, less prestigious and rigorous college -- did not afford both genders equal benefits. As the Court recognized, the Constitution requires *true* equality of educational opportunity; the Court found the separate program for women lacking because it failed, for example, to provide the extensive network of alumni contacts or the prestige that the male graduates of VMI enjoyed. This approach is consistent with CEDAW, which requires States to take appropriate measures to ensure equal access to equal educational opportunities.

The Justice Department, along with the Department of Education, also enforces Title IX of the Education Amendments of 1972, which prohibits discrimination in education programs receiving Federal financial assistance on the basis of sex. Title IX protects students from sex discrimination in all education programs and activities, including course offerings, academic advising, grading and discipline, financial aid, and extracurricular activities. The Justice Department has applied Title IX in numerous lawsuits alleging sex discrimination in education, including those involving the denial of equal opportunities for female students to participate in athletics and those involving sexual harassment by school administrators, teachers, and students.

Just last month, the Department of Education, after consulting with the Department of Justice, released new guidance advising schools across the country of their responsibilities under Title IX to protect every student from harassment. The letter also provided technical assistance on how to ensure school safety. All students are entitled to be safe at school, and federal law prohibits conduct -- whether perpetrated by peers, teachers, or other adults in the school system -- that creates a hostile environment interfering with students' ability to participate in educational activities because of their sex.

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<sup>2</sup> *Virginia*, 518 U.S. 515, 542 (1996) ("State actors controlling gates to opportunity, we have instructed, may not exclude qualified individuals based on 'fixed notions concerning the roles and abilities of males and females.'").

#### d. Discrimination in the Workplace

Our laws that prohibit sex-based employment discrimination are broadly consistent with Article 11 of CEDAW, the provision that addresses the equal opportunity in the workplace. The Department of Justice, along with the Equal Employment Opportunity Commission, enforces Title VII of the Civil Rights Act of 1964. In addition to prohibiting intentional sex discrimination, that statute also protects against pregnancy discrimination, sexual harassment, and selection criteria that disproportionately exclude women from jobs and are not job related and consistent with business necessity. We bring cases on behalf of individuals, as well as cases challenging patterns or practices of discrimination. Under these laws, we seek monetary relief for individuals who have been harmed and seek systemic modifications to ensure that the workplace provides equal opportunity for all employees. Importantly, Title VII's prohibitions include broad anti-retaliation protections for employees who challenge discrimination – a key means to protect the enforcement scheme.<sup>3</sup>

We recently filed a lawsuit against the Commonwealth of Massachusetts and its Department of Corrections alleging that the State is engaged in a pattern or practice of employment discrimination against women based on its use of a physical fitness test that disproportionately screens out female applicants for entry-level correctional officer jobs. In 2007 and 2008, female applicants for the entry-level jobs of correctional officer and correctional program officer passed the physical fitness test at a rate of approximately 58.8 percent; the corresponding pass rate for male applicants was approximately 96.3 percent. There is no evidence that the State's use of the test is job related and consistent with business necessity – for example, that the test effectively predicts job performance. As a result, we are seeking a Court order that the State stop using the challenged test, adopt and use a physical fitness test for correctional officer that complies with Title VII, and provide remedial relief for those female applicants who were harmed by the use of the unlawful test.

The Department of Justice also has brought several pregnancy discrimination cases, such as United States v. Chicago Board of Education, where we alleged that the Board of Education discriminated against one of its teachers by: (1) rescinding her accrued seniority after she took a leave associated with her pregnancy; (2) demoting her to a position with less pay and benefits after she announced her second pregnancy; and (3) denying her request for a second maternity leave. Our settlement in that case included not only monetary damages for the teacher, but also changes to the Board's leave policies to ensure that pregnancy leave is treated as favorably as other forms of leave and that mandatory training on the modified policies is provided city-wide.

In United States and Sally Ramirez v. Board of County Commissioners of the County of Dona Ana, New Mexico, the United States government alleged that the County violated Title VII by subjecting female custodians to sexual harassment by their male supervisor over the course of almost a year when he regularly used derogatory and offensive terms to describe women and would comment on the sexual activities of women. Despite the County's receipt of multiple complaints about the harassment, the County repeatedly failed to take action. The Court approved and entered a settlement agreement awarding damages for the victims and injunctive relief requiring that the County change its policies and procedures to improve its investigation of complaints of discrimination and to require the county to discipline individuals who receive reports of discrimination but fail to take appropriate action.

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<sup>3</sup> See Burlington N. & Santa Fe Ry. v. White, 548 U.S. 53, 68 (2006) (holding that Title VII's anti-retaliation provision, 42 U.S.C. § 2000e-3(a), protects against actions that "well might have dissuaded a reasonable worker from making or supporting a charge of [sex] discrimination," regardless of whether such actions relate to employment or occur at work (internal quotation marks omitted)); Crawford v. Metropolitan Gov't of Nashville & Davidson County, Tennessee, 129 S. Ct. 846 (2009) (holding that Title VII's anti-retaliation provision, 42 U.S.C. § 2000e-3(a), protects female employees who answer questions during, but did not complain about sexual harassment prior to, an employer's internal investigation of such conduct).

In United States v. Policía de Puerto Rico, we filed a lawsuit alleging that the Puerto Rico Police Department (“PRPD”) discriminated against a female officer on the basis of her sex, among other ways, by requiring her to perform secretarial tasks not required of male officers, and subjecting her to sexually discriminatory comments, such as that the division in the PRPD where she worked was “not for females.” Under the terms of the consent decree resolving that case, the PRPD had to pay the female officer a monetary award of \$125,000 and provide training on the law of equal employment opportunity, including discrimination based on sex, to all supervisors in the area.

e. Discrimination in Housing

The Department enforces the Fair Housing Act, which prohibits discrimination by direct providers of housing, such as landlords and real estate companies, as well as other entities, such as municipalities, banks or other lending institutions and homeowners’ insurance companies whose discriminatory practices make housing unavailable to persons because of race or color, religion, sex, national origin, familial status or disability. The Department has brought numerous cases alleging sexual harassment in housing. These cases have resulted in the payment of millions of dollars in damages to female tenants, as well as orders permanently barring sexual harassers from managing rental properties.

For example, on August 6, 2010, a federal jury in Detroit, Michigan returned a \$115,000 verdict against Glenn Johnson, Ronnie Peterson and First Pitch Properties, LLC in United States v. Peterson, a case under the Fair Housing Act alleging sexual harassment against female tenants. The United States presented evidence that a maintenance man subjected six women to severe and pervasive sexual harassment, ranging from unwelcome sexual comments and sexual advances, to requiring sexual favors in exchange for their tenancy. One woman testified that the harasser refused to give her keys to her apartment until she agreed to have sex with him. Another woman testified that she had sex with him at least 20 times because he threatened that the owner would evict her if she did not. The United States also presented evidence that a Washtenaw County Commissioner, who owned the properties, knew that Johnson was sexually harassing tenants but did nothing to stop it.

The Department of Housing and Urban Development (HUD) enforces the housing provisions of the Violence Against Women Act of 2005, which protect victims of domestic violence, dating violence and stalking who reside in publicly assisted housing from unfair eviction or denial of housing. Last month, HUD Secretary Shaun Donovan released rules that provide guidance to housing authorities and landlords to evict perpetrators of abuse, keep their properties safe, and make sure victims do not lose their housing due to crimes committed against them.

f. Discrimination in Credit

The Equal Credit Opportunity Act (ECOA) prohibits creditors from discriminating against credit applicants on the basis of sex or marital status, among other things. An example of a case brought under this statute is United States v. First National Bank of Pontotoc, where the Department alleged that a bank vice president, made offensive comments, engaged in unwanted sexual touching, and requested or demanded sexual favors from female customers in connection with the extension of credit. The lawsuit also alleged that the bank was liable for those actions and that these actions violated both ECOA and the FHA. The consent decree, entered in 2007, requires the defendants to pay \$250,000 to 15 identified victims, up to \$50,000 for any additional victims, and \$50,000 to the United States as a civil penalty.

II. Other Federal Government Actions to Protect the Rights of Women

In addition to the laws discussed above, of course, there are numerous other provisions in U.S. laws that combat sex discrimination. Just this year, the Patient Protection and Affordable Care Act (ACA) became law, and it adds new protections against discrimination in the provision of health care services. For

example, under ACA, insurers will no longer be able to sell insurance at higher rates to women. To avoid creating disincentives for women to report domestic violence, the ACA also provides that, starting in 2014, health insurance companies will no longer be able to impose pre-existing condition exclusions, including domestic violence. Accordingly, victims need not fear the additional burden of increased medical bills as they attempt to protect themselves and rebuild their lives. ACA also contains a new Pregnancy Assistance Fund that will aid states in providing help for pregnant women who are victims of domestic and sexual violence. It additionally amended the Federal Labor Standards Act to require covered employers to provide new mothers returning to the workplace with time and an appropriate space to breastfeed or express breast milk while at work.

Another recent example of new federal efforts to promote women's participation at all levels of the economy is in the recently enacted Dodd-Frank Wall Street Reform and Consumer Protection Act. The law requires that federal agencies that regulate the financial services industry create Offices of Minority and Women Inclusion to ensure that women and minorities have equal access to federal employment and contracting opportunities. In addition, the Small Business Administration recently released a rule, ten years in the making, governing the Women Owned Small Business Procurement Program. This rule will implement a statutorily- authorized program to respond to barriers that women-owned firms have faced in gaining equal access to federal contracting opportunities.

President Obama has made a commitment to promoting the rights of women and girls a priority of this Administration. The first bill he signed upon taking office was the Lilly Ledbetter Fair Pay Act, which restored the interpretation of the law that a pay discrimination claim accrues whenever a discriminatory compensation decision affects an employee, including each time wages are paid. To further address the wage gap, the President established a National Equal Pay Enforcement Task Force, bringing together the Department of Justice, the Equal Employment Opportunity Commission, the Department of Labor, and the Office of Personnel Management. These agencies have committed to coordinating enforcement, developing policy and educational tools, and establishing data collection mechanisms to ensure that the government is bringing its enforcement resources to bear in effective ways to combat the persistent wage gap between men and women. In addition, the President established the White House Council on Women and Girls, which advises the Administration on issues such as equal pay, family leave, child care, violence against women, and women's health care.

In sum, in the United States today, we have an extensive system of legal protections that prohibit sex discrimination in all its forms and that protect women from violence. We are strongly committed to the vigorous enforcement and implementation of these laws at home, and we support the ratification of CEDAW both to express more forcefully our commitment to the rights of women in the United States and to further opportunities for girls and women around the world.

Thank you for the opportunity to speak with you today. I look forward to your questions.

