

Amicus Curiae Briefs Civil Rights/Equal Rights

Reproductive Health – Other

Case: *Ohio v. Akron Center for Reproductive Health*

Court: Supreme Court of the United States, 1989

Amicus Brief: The Center for Population Options

Case: Ohio's Amended Substitute House Bill 319 (H.B. 319) made it a crime for a doctor to perform an abortion on an unmarried minor unless the physician provides timely notice to the minor's parents or a juvenile court issues an order authorizing the minor to consent. To overcome this, the minor must present clear and convincing proof that she's mature enough to make the decision herself, one of her parents has engaged in abuse, or that notice is not in her best interests.

Amicus Brief: The brief argues that it would "devastate" teenage girls if their right to choose was constrained by mandated parental notification/consent. This requirement would have the adverse effect of increasing unwanted teenage pregnancy. The brief further argues that although the minor's right to choose should not be conditioned on parental notification/consent, if this requirement is upheld, there must be the possibility of judicial bypass.

CWEALF: CWEALF joined this brief because of its belief that a woman's access to an abortion should not be hindered by undue burdens. Both of these statutes seem to impose such a burden on minors and make it more difficult for them to exercise their "right to choose." CWEALF supports an unencumbered right to abortion.

Holding: The Court of Appeals had held this statute invalid and the Supreme Court of the United States reversed holding that the statute, "accords with [the Court's] precedents on parental notice and consent in the abortion context and does not violate the Fourteenth Amendment."

Case: *Hodgson v. Minnesota*

Court: Supreme Court of the United States, 1989

Amicus Brief: The Center for Population Options

Case: A Minnesota statute provided that a physician was required to give written notice to both parents forty-eight hours prior to performing an abortion on a woman who was under eighteen years old. Such written notification was excused only if: (1) the physician certified that an immediate abortion was necessary to prevent the woman's death, thereby giving the physician insufficient time to notify the minor's parents; (2) both of the woman's parents had already given written consent; or (3) the woman declares that she is the victim of abuse or neglect, after which statement the physician would have to notify the proper authorities. The Eighth Circuit, sitting en banc, declared the provisions unconstitutional, and the State appealed.

Amicus Brief: See brief for *Ohio v. Akron Center for Reproductive Health* (above)– one brief was filed for both cases

Holding: The Court held that two-parent notification failed to further any legitimate state interest. The Court further held that the compulsory notification requirement is valid if it provides the minor with the option of an alternative court proceeding in which she can demonstrate either her maturity or that performance of an abortion without notification would be in her best interests.

Case: *Webster v. Reproductive Health Services*

Court: Supreme Court of the United States, 1989

Amicus Brief: American Civil Liberties Union – Reproductive Freedom Project

Case: Missouri passed a law regulating abortion which was challenged by five health professionals employed by the state and two non-profit corporations. The challenged provisions included: (1) defining life as beginning at conception; (2) requiring doctors to perform tests to determine whether or not a fetus is viable if the woman is more than 20 weeks pregnant; (3) prohibiting abortions in public facilities or by public employees when the abortion is not necessary to save the woman's life; and (4) prohibiting the use of public funds for the purpose of counseling or encouraging women to have an abortion, regardless of the general health risks posed by an ongoing pregnancy, unless the abortion would be necessary to save the woman's life. The plaintiffs filed suit in District Court seeking a declaratory judgment that the provisions were unconstitutional and appropriate injunctive relief against the statute's enforcement. The District Court declared the statute unconstitutional and the Eighth Circuit affirmed. The provisions above are those on which the State appealed to the Supreme Court.

Amicus Brief: The brief argues that the abortion statute interferes with women's Fourteenth Amendment constitutional right to liberty by restricting their ability to make fundamental decisions about their bodies and their lives. This also places women on unequal footing with men since men's freedom to make their own reproductive choices is not stifled. The brief also argues that the Court should not retreat from viability as the dividing line of when a State's interest in potential life becomes compelling and, consequently, when a state can interfere with a woman's access to abortion. The theory that the state has a compelling interest in potential life prior to viability has been used to force women to undergo unwanted medical procedures or to place her in jail to keep her from ingesting drugs that might be harmful to the fetus. The brief argues that the acceptance of this theory could be used to interfere much more with a pregnant woman's liberty, including her ability to work or to access medical aid for her own health and safety. That the inclusion of this theory burdens only women also serves to perpetuate outmoded stereotypes of women's role as that of mother or child-bearer.

CWEALF: CWEALF joined the brief because of its belief that every woman, regardless of her circumstances, should have an equal opportunity to control her own health and reproduction.

Holding: The Court upheld the statement regarding the beginning of life in statute's preamble, stating that the statement was not being used in any way to justify a restriction on a woman's

access to abortion; it was merely the state's view. The Court also upheld the provisions of the statute prohibiting the use of public employees or facilities for the performance of non-therapeutic abortions. The Court vacated the lower courts' decisions regarding the provision on public funds in accordance with the wishes of the plaintiffs. The Court also upheld as constitutional the requirement that physicians test for the viability of a fetus.

Case: *Turner v. Ragsdale*

Court: Supreme Court of the United States, 1989

Amicus Brief: Planned Parenthood Federation of America; American Civil Liberties Union—Reproductive Freedom Project

Case: Illinois passed a statute requiring clinics where a majority of first trimester abortions are performed to be “licensed Ambulatory Surgical Treatment Centers,” equipped with a floor plan akin to that of a small hospital. Any physician who performed an abortion in a facility that did not comply with the statute would have his/her license revoked. Licenses were approved after a public hearing was conducted in the area where the permit was requested. The District Court granted a preliminary injunction against enforcement of the statutes, a decision affirmed by the Seventh Circuit. This appeal followed.

Amicus Brief: The brief focuses on the upholding of *Roe v. Wade*. It argues that because reproductive choice is essential to a woman's control over her body and over her life, it is rooted in the fundamental rights to liberty and privacy. Keeping a woman's ability to choose among her reproductive choices a private matter between a woman and herself, her family, or her doctor maintains the private and personal nature such choices encompass. The brief argues that even if privacy were not a fundamental right seen to encompass the right to have access to an abortion, abortion restrictions undeniably are sex-based classifications that interfere with the fundamental rights to bodily integrity and procreation. Because of the interference with such rights and the sex-based classifications such restrictions invoke, the objectives in utilizing such classifications must survive strict scrutiny—the state must have a compelling interest. The brief argues that these fundamental rights cannot be served up to the democratic process for their survival. The very point of fundamental rights is that they are those rights which the minority may access without having to seek the approval of the majority, and it is well documented that abortion restrictions harm poor women and women of color disproportionately.

The brief argues that because strict scrutiny is the correct standard to use, any abortion regulation that has a purpose other than to protect the mother's health or to save potential life is, by its very nature, insufficient to serve a compelling state interest. The strict scrutiny must be triggered for all abortion regulations, not merely those that criminalize abortions.

CWEALF: CWEALF joined this brief because of its belief that *Roe v. Wade* must be upheld. A woman's freedom to choose from all reproductive options is essential to women's liberty and women's equality.

Holding: The case was settled prior to oral argument, and the appeal was subsequently dismissed by the Court.

Case: *Rust v. Sullivan together with New York v. Sullivan*

Court: Supreme Court of the United States, 1991

Amicus Brief: NOW Legal Defense and Education Fund

Case: Congress enacted Title X of the Public Health Service Act in 1970. This act provides federal funding for family-planning services. Section 1008 of the Act states that “none of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning.” Title X funds are “to be used only to support *preventive* family planning services.” In two actions, which were consolidated, petitioners (grantees under Title X), challenged the validity of the Department of Health and Human Services regulations which limited the ability of Title X fund recipients to engage in abortion-related activities. The trial court granted summary judgment for respondent agency secretary, and the Appellate Court affirmed. The United States Supreme Court affirmed holding that the regulations were permissible construction of the underlying legislation and did not violate either U.S. Const. amend. I or U.S. Const., amend. V. It said that the Constitution did not require the government to distort the scope of its program in order to provide information about abortion to indigent women where the statute does not encroach on a doctor’s ability to provide or a woman’s right to receive information concerning abortion-related services outside the Title X project.

Amicus Brief: The brief argues that the decision below raises issues of “critical national importance” because they jeopardize the health of women, interfere with the integrity of the physician-patient relationship, and severely diminish the availability of quality health care for low-income women. Furthermore, the ruling below disregards rulings of the Court that have protected physician-patient dialogue regarding a woman’s decision to terminate her pregnancy.

CWEALF: CWEALF joined this brief because of its strong desire to protect a woman’s right to choose whether to have an abortion and to make an informed decision based on conversations with her physician. CWEALF strongly opposes any barriers to this open dialogue.

Holding: The Court upheld the health department regulations limiting the ability of Title X fund recipients to engage in abortion-related activities affirmed where the Court held that the regulations were a permissible construction of the underlying legislation and did not violate either the First or Fifth Amendments.

Case: *Planned Parenthood of Southeastern Pennsylvania v. Casey*

Court: Supreme Court of the United States, 1992

Amicus Brief: Planned Parenthood Federation of America

Case: Planned Parenthood brought suit against the State of Pennsylvania as abortion providers seeking declaratory judgment and injunctive relief against several provisions of the Pennsylvania Abortion Control Act. The challenged provisions included: (1) an informed consent which a woman was required to sign prior to having an abortion; (2) a mandatory twenty-four hour waiting period between the time a clinic gives certain information to a woman seeking an

abortion and the time the procedure can be conducted; (3) informed consent of one parent for a minor seeking an abortion with a built-in judicial bypass option; (4) spousal consent to an abortion by a married woman; and (5) mandatory reporting of information both about the clinic in which the abortion is being performed and about the woman who sought the abortion. Prior to the Act taking effect, a suit was brought in District Court. The District Court ruled that each of the provisions was unconstitutional on its face. The Court of Appeals affirmed in part and reversed in part, upholding all of the provisions with the exception of the spousal notification provision. The Supreme Court granted certiorari.

Amicus Brief: The brief argues for the affirmation of *Roe v. Wade* both because of its constitutional importance of outlining a fundamental right and because of the Court's own policy of stare decisis. The brief explains how a generation of women have come to rely on *Roe* as standing for their ability to control their own reproductive choices and that stripping women of this choice would be disastrous. Also disastrous would be the other constitutional questions that could arise, including the criminal repercussions for having an abortion and the breadth of a state's ability to discover violations of abortion law. Furthermore, lower courts have relied on *Roe* in order to identify other liberty interests which have been accorded heightened scrutiny, including the ability to refuse unwanted medical treatment as well as the ability to choose from a wide range of reproductive choices.

CWEALF: CWEALF joined the brief because it believes that the freedom to make their own reproductive choices without anyone else's consent, including the choice to terminate a pregnancy, is essential to women's equality.

Holding: The Supreme Court affirmed in part and reversed in part. The Court first explained that it was not overruling *Roe* but neither was it adhering to its strict trimester framework. Instead, the Court held that a statute regulating abortion was constitutional so long as that regulation did not place an undue burden on a woman's ability to choose to have an abortion. The Court held unconstitutional the spousal notification provision and that part of the reporting provisions that referred to spousal notification. The Court upheld the parental consent requirement, the informed consent requirement, the remaining reporting provisions, and the twenty-four hour waiting period.

Case: *Winters v. Costco*

Court: Supreme Court of the United States (petition for certiorari), 1995

Amicus Brief: Northwest Women's Law Center

Case: Winters, a Costco employee, participated in the company's self-insured Employee Retirement Income Security Act (ERISA) health benefits plan. Winters attempted to obtain reimbursement for a gamete intrafallopian transfer (GIFT) procedure, however, the health plan excludes "charges not reasonably necessary for the diagnosis and treatment of illness or injury," and the plan administrators refused to cover the procedure. The District Court held that the GIFT procedure Winters received was reimbursable under an ERISA. Defendants appealed and claimed that the Court applied the wrong standard of review (*contra proferentem* – the doctrine which requires courts to construe ambiguities in insurance contracts in favor of coverage for the

beneficiaries - was applied) and that the Court's interpretation of the plan under *contra proferentem* was incomplete because it did not address or consider plan provisions concerning covered charges. The Ninth Circuit reversed and remanded. The Ninth Circuit held that the District Court failed to afford the requisite deference to defendant's denial decision. The Ninth Circuit also held that the defendant did not abuse its discretion in denying reimbursement for plaintiff's procedure because the procedure was different than the in vitro fertilization covered under the plan. The Ninth Circuit further held that the plan gave defendant administrator explicit discretion to interpret the plan.

Amicus Brief: The brief argues that because of the Ninth Circuit decision ERISA plan administrators will have broader discretion to deny insurance coverage for medical treatments unless these treatments are supported by an abundance of scientific data. This will cause women to suffer as historically women's health issues have been under-funded and under-researched, which has resulted in rather incomplete medical data. In *Winters* the Ninth Circuit held that the rule of *contra proferentem* does not apply to self-funded health plans under ERISA where the plan administrator has expressly reserved authority to determine benefit eligibility. The brief argues that there is no basis for creating a distinction between consumers whose health insurance is under ERISA and those whose health insurance is private. According to the Ninth Circuit ruling, plan administrators must only show that the denial was not an abuse of discretion and do not need to show that it was reasonable. By failing to apply *contra proferentem* the Court essentially approved the practice of orally amending insurance contracts to exclude coverage for treatment after a request for a payment. This violates the spirit of ERISA which was enacted to guarantee the benefits promised to employee beneficiaries and their families.

CWEALF: CWEALF joined the brief due to the fact that women will suffer as a result of this decision. Historically, women's health issues have benefited from disproportionately less research than men's and therefore women's health procedures will be denied more than men's. CWEALF believes in gender equity and in the importance of insurance providers to cover both men's and women's health procedures equally.

Holding: The Supreme Court denied certiorari.

Case: *Hope v. Perales*

Court: Supreme Court of New York, Appellate Division, First Department, 1993; New York Court of Appeals, 1995

Amicus Brief: New York Civil Liberties Union—Reproductive Rights Project

Case: New York passed a statute for a Prenatal Care Assistance Program in accordance with the federal Prenatal Care Assistance Program (PCAP), which provided federal reimbursement to states providing prenatal care and related services for needed pregnant women whose incomes exceeded the level for Medicaid eligibility. The New York program did not provide funding for medically necessary abortions or for transportation needed to obtain such a procedure. A group of plaintiffs, including PCAP eligible women, ob/gyns, a nurse midwife, several health care clinics serving low income women, and several reproductive rights advocacy organizations, filed suit in Supreme Court challenging the constitutionality of the statute under the State

Constitution. The trial found that the statute violated several provisions of the State Constitution, including the due process, equal protection, aid to the needy, and public health clauses of the New York State Constitution. The Court enlarged the statute to include medically necessary abortions. The defendants appealed to the appellate division.

Amicus Brief: The brief argues that the right to choose abortion as one reproductive option is encompassed within the rights to privacy and bodily integrity, as those rights are protected under the New York State Constitution. The brief notes that the New York State Constitution grants broader protection of such rights than does the Federal Constitution and, as such, the Court must construe the protection the State Constitution affords women independently. The brief then argues that the statute is unconstitutional because it burdens a woman's fundamental right to make her own reproductive choices and, therefore, must be reviewed under strict scrutiny. The statute cannot withstand this scrutiny because it does not employ the least restrictive means to achieve the government's objective of improving infant health.

Holding: The Appellate Division affirmed the decision of the Supreme Court, stating that the statute was unconstitutional, because it coerced, steered, or pressured low income women to choose childbirth thereby abridging their freedom to make their own reproductive choices. Because the state funds childbirth-related services for needy women but not abortion-related services, it effectively pressures women to choose childbirth. Because the right to make reproductive choices is a fundamental right, the Court reviewed the statute under strict scrutiny. The Court found that the relationship between the state's interest in promoting healthy births and excluding coverage for medically necessary abortions was not reasonable and, therefore, could not withstand constitutional review. The defendants appealed to the New York Court of Appeals.

Holding (Court of Appeals): The Court reversed the decisions of the Supreme Court and the appellate division. The Court first stated that the statute was entitled to a strong presumption of validity since it was enacted by a co-equal branch of government. The Court held that the plaintiffs had failed to establish that the statute infringes on the right of reproductive choice. The very nature of the PCAP program is to help women who presumptively can afford to make their own reproductive choices, for these are women not eligible for Medicaid. That the legislature has chosen to further subsidize certain services cannot be evidence of coercion.

Case/Issue: *Letter to EEOC on Contraceptive Coverage*

Court: EEOC, June 1999

Amicus Brief: National Women's Law Center

Background: Ninety-seven percent of health insurance plans offered by employers included coverage for prescription drugs but sixty-six percent of those plans excluded coverage for prescription contraceptives.

Letter: In the letter, the organizations urge the Equal Employment Opportunity Commission to adopt and issue a guidance statement explaining that the Commission considers it to be a violation of Title VII for those employers offering prescription drug coverage to exclude prescription contraceptives from that coverage. The letter argues that this exclusion singles out

female employees for disparate treatment and as such, constitutes a violation of both Title VII and the Pregnancy Discrimination Act. The Supreme Court has held that the singling out of pregnancy-related expenses for exclusion constitutes sex discrimination; likewise, the singling out of prescription contraceptives for exclusion from coverage constitutes sex discrimination. The letter also argues that such exclusion of coverage violates the PDA for the prevention of pregnancy by use of contraceptives is a pregnancy-related medical condition.

CWEALF: CWEALF joined in the letter because of its commitment to preserving a woman's access to all reproductive choices and in ending gender inequality in the workplace. CWEALF believes that the disparate treatment of prescription contraceptives in relation to all prescription drugs places women at a financial disadvantage, making access to prescription contraceptive an extra burden that has the effect of removing it from a woman's possible reproductive choices. CWEALF believes that legal freedom to make reproductive choices means little when unaccompanied by financial access to those choices.

Holding: While the EEOC has yet to publish a policy statement regarding this issue, it did issue an opinion in December 2000 that directly spoke to the exclusion of prescription contraceptives from coverage. In that controversy, the EEOC found such exclusion a violation of Title VII and the PDA. However, the decision is only binding on the parties and may not apply, except as precedent to all employers. This is especially true because the EEOC found the employer's argument that birth control is used for prevention and not for treatment unavailing in light of its coverage for Viagra, surgical sterilization, and vaccinations. If an employer were not to offer this other coverage, it is not clear whether exclusion of prescription contraceptives would be a Title VII or PDA violation.

Case: *Stenberg v. Carhart*

Court: United States Supreme Court, 2000

Amicus Brief: NOW Legal Defense and Education Fund and Women's Law Project

Case: Nebraska passed a law that banned "partial-birth" abortions unless necessary to save the life of the mother who is endangered by some physical condition. The performance of such procedures was punishable by up to 20 years in prison, a \$25,000 fine, and revocation of a medical license. The definition of "partial-birth" abortion was in non-medical terminology and encompassed the most common and safest of procedures used for terminating second-trimester pregnancies. Dr. Carhart challenged the law as an unconstitutional restriction on a woman's right to reproductive freedom. Both the District Court and the Eight Circuit found the statute unconstitutional.

Amicus Brief: The brief sets forth the difficulty women seeking to terminate their pregnancies will have in finding a doctor who will perform the procedure and in finding a safe procedure for that doctor to use, especially since the statute bans the two safest and most common procedures used to terminate second-trimester, pre-viability abortions. By banning these procedures, the State seeks to deprive women of their liberty, for it compels them to carry their unwanted pregnancies to term, depriving them of their ability to choose their own role. This also deprives women of equality, for it hoists on women the inability to make the same choices and take

advantage of the same opportunities that are open to men. The brief argues that the ban cannot stand in light of the government's interests in protecting fetal life for, as *Planned Parenthood v. Casey* and *Roe v. Wade* clearly state, the state's interests in fetal life cannot permit the state to impose a substantial burden on a woman's right to reproductive freedom when choosing a pre-viability abortion.

CWEALF: CWEALF joined the brief because of its belief in the importance of securing a woman's right to reproductive freedom. CWEALF believes that by criminalizing the safest procedures for terminating a pregnancy, a woman's right to choose abortion is severely hindered, both because fewer doctors will perform them and because it becomes more dangerous to a woman's health to pursue abortion as a reproductive option. CWEALF further believes that the fewer doctors who perform abortions, the more women will seek out other, more dangerous and illegal methods of abortion, thus engaging in dangerous and life-threatening behavior in order to exercise their constitutional rights.

Holding: The Court held the statute unconstitutional because it made no exception for the health of the mother, only for the mother's life. The Court further held that the statute, by making the most common and safest methods of abortion unavailable, the State places an undue burden on a woman's right to reproductive freedom.

Case: *Bost v. Low-Income Women of Texas*

Court: The Supreme Court of Texas, 2002

Amicus Brief: Women's Law Project

Case: After the Hyde Amendment was passed by the United States Congress, severely limiting the abortion procedures that would be covered by Medicaid, Texas refused to cover with its Medicaid program any procedures that were not covered by the Hyde Amendment. A group of low-income women filed suit, claiming that such refusal constituted sex discrimination and violated their equal protection rights under the Texas Constitution, under both its Equal Protection Clause and its Equal Rights Amendment. The trial court found for the State, but the Appellate Court reversed, holding that the abortion funding restrictions violated indigent women's rights under the ERA and the Equal Protection Clause.

Amicus Brief: The brief argues that the funding restrictions effectively deny low-income women the ability to choose to have an abortion. Statistical studies support the notion that these restrictions prevent between one-quarter and one-third of women who would otherwise seek abortions from doing so. The consequences of this are that low-income women are then subjected to increased health risks resulting from an unwanted pregnancy that affect both their mental and physical health. Furthermore, some of these same women may seek other methods of obtaining abortion, such as self-abortion or illegal procedures, both of which put them in severe jeopardy.

CWEALF: CWEALF joined the brief because of its belief in the importance of protecting women's access to reproductive choices, regardless of socioeconomic status. CWEALF also

believes that women are endangered when they are deprived of these choices, whether that deprivation comes from affirmative law or from lack of financial access.

Holding: The Court held that the funding restrictions did not violate the women's constitutional rights. The Court held that the restrictions did not target women as a class, but rather targeted abortion as a medical procedure. As such, the restrictions did not trigger heightened scrutiny and would be found constitutional so long as they were rationally related to a legitimate state interest. Because the Medicaid program was designed to fund only those services for which it was reimbursed by the federal government, the restrictions meet this test.