

Amicus Curiae Briefs Civil Rights/Equal Rights

Discrimination-language proficiency

Case: *Alexander v. Sandoval*

Court: The Supreme Court of the United States, December 2000

Amicus Brief: National Women's Law Center

Case: Alabama, by constitutional amendment, made English the state language and the Alabama Department of Public Safety refused to accommodate those individuals who were not fluid in English in obtaining a driver's license. Maria Sandoval filed suit as a representative of the class of Alabama residents who are otherwise qualified to obtain a driver's license but cannot do so because they are not sufficiently fluent in English. Sandoval asserted claims under 42 U.S.C. §§ 1981 and 1983, the Equal Protection Clause of the Fourteenth Amendment, and Title VI of the Civil Rights Act of 1964. The District Court ruled for the plaintiffs and rejected the defendant's claim that the plaintiffs lacked a private right of action to enforce Title VI's disparate impact regulations. The Eleventh Circuit affirmed the District Court's decision.

Amicus Brief: The brief states that the private right of action to enforce Title VI of the Civil Rights Act of 1964 and the disparate impact regulations are well-established elements of the federal civil rights enforcement scheme. The brief also argues that full private enforcement of civil rights laws is essential in order to provide equal opportunities.

CWEALF: CWEALF joined the brief because of its commitment to ending discrimination against racial and ethnic minorities and because of its belief that laws limiting opportunities to those fluent in English perpetuates discrimination against racial and ethnic minorities.

Holding: The Supreme Court reversed and remanded the case for further hearings. The Court held that there is no private right of action to enforce disparate impact regulations under Title VI of the Civil Rights Acts of 1964. The only private action suits permitted under Title VI are those based on intentional discrimination, not merely on disparate impact.

Discrimination—Sexual orientation

Case: *Steffan v. Aspin* (later proceeding *Steffan v. Perry*)

Court: United States Court of Appeals for the District of Columbia Circuit, 1993;
United States Court of Appeals for the District of Columbia Circuit, en banc, 1994

Amicus Brief: NOW Legal Defense and Education Fund

Case: Steffan had been an outstanding student at the United States Naval Academy, receiving only commendation throughout his four years of attendance. During his senior year, the Academy sent a report to the Naval Intelligence Service (NIS) stating that Steffan has told another student he was gay. The NIS started an investigation. Steffan sought out the Superintendent to see if there was a way he could graduate. Prior to seeing the Superintendent, he was asked by a Captain if he was a homosexual, a question Steffan answered truthfully in the affirmative. The Academy convened a performance board, changed Steffan's military performance rating from an "A" to an "F," suspended him from classes, and recommended his discharge. All this was done because of a Department of Defense Directive that "homosexuality is incompatible with military service." Faced with the reality that he would be discharged and his record would be marked that this was due to his homosexuality. Instead of such a discharge, Steffan resigned in April 1987, six weeks before he would have graduated from the Academy. Steffan wrote to the Secretary of the Navy in December 1988, requesting that his resignation be withdrawn and that he be awarded his diploma. The Secretary, on the advice of the Superintendent of the Academy, denied this request on the sole basis of Steffan's homosexuality. Steffan filed suit in the District Court, claiming that he was denied the equal protection of the laws when he was forced to resign from the Naval Academy solely because of his sexual orientation. The District Court found for the defendants, and this appeal followed.

Amicus Brief: The brief focuses on the disparate impact the military's anti-homosexual policy has on women. The brief first notes that an overwhelming number of military personnel discharged on the basis of sexual orientation are women. During times when more men are enlisting in the military, the number of women discharged for sexual orientation rises. In order to root out and discharge lesbians, the military investigates women for lesbianism on a large-scale basis, encouraging women to turn in the names of their friends and colleagues. Investigations often are triggered when women hold untraditional jobs, play on a softball team, or have civilian friends who are lesbians. When a woman is being investigated, she often is told that she can save her career by naming other lesbians. The brief argues that the labeling of women in the military as lesbians is based on stereotypes of traditional male and female roles. This causes particular difficulty because the very traits that make for a successful military career are the traits that make women most suspected of being lesbians (i.e. strength and aggressiveness). This also makes women in the military easy victims of sexual harassment, for if they refuse a request for sex, then they are deemed to be lesbians or face worsening job conditions. That means, that women are forced to acquiesce if they wish to remain in the military.

CWEALF: CWEALF joined the brief because of its belief that women and men, regardless of sexual orientation, are entitled to equal employment opportunities. Furthermore, CWEALF believes that the threat of discharge because of sexual orientation leaves all women, regardless of sexual orientation, vulnerable to sexual harassment, which perpetuates the subjugation of women.

Holding: The Court found that Steffan's resignation amounted to a constructive discharge. Applying rational review, the Court found the Department of Defense policy to violate the Equal Protection Clause. The Court found that there was no rational relationship between an individual identifying as a homosexual and his commission of homosexual acts in the future. To otherwise draw such a conclusion and penalize someone for that conclusion is to attempt to control individuals' minds, an idea our Constitution abhors. The Court also found that the Secretary's fears that the presence of homosexuals in the military would negatively affect the morale and discipline of the military was insufficient to justify a discriminatory policy, for the government cannot discriminate against one class in order to give way to the prejudices of another class. Likewise, the Court found irrational the objective of keeping AIDS from spreading throughout the military for it is conduct not status that could lead to the spread of AIDS. Therefore, the Court ordered that Steffan receive his diploma from the Naval Academy, be reinstated to military service, and be commissioned as an officer. This decision was subsequently vacated and the District of Columbia Circuit sat en banc to hear Steffan's appeal.

Holding (en banc): Stating that excluding those who engage in homosexual conduct from the military is a legitimate governmental purpose, the Court found it reasonable for the government to assume that an individual who admitted his homosexuality would be someone who would be likely to engage in homosexual conduct. As such, the Court affirmed the District Court's decision, finding no constitutional violation. Note: In 1996, the current "Don't Ask, Don't Tell" policy went into effect. Under this policy, the type of "witch-hunts" which were the focus of the amicus brief are no longer permitted. However, under this same policy, an individual like Steffan, who admits his sexual orientation, can still be discharged.

Case: *Romer v. Evans*

Court: United States Supreme Court, 1996

Amicus Brief: Lambda Legal Defense and Education Fund

Case: Colorado voters passed a referendum adding an amendment to the State Constitution. This amendment (Amendment 2) precludes all action, be it judicial, legislative, or executive, at all levels of government designed to protect persons based on their sexual orientation. The amendment had the effect of repealing several local ordinances passed by various municipalities that protected individuals from discrimination based on sexual orientation. The Colorado Supreme Court struck down the amendment under strict scrutiny, claiming that it denied gay men and lesbians the right to vote, thereby denying them a fundamental right under the Equal Protection Clause of the United States Constitution. An appeal to the United States Supreme Court followed.

Amicus Brief: The brief first states that the Court need not reach the issue of whether classifications based on sexual orientation should be reviewed under heightened scrutiny. It then addresses solely this issue. The brief argues that classifications based on sexual orientation should be reviewed under heightened scrutiny because, like classifications

based on sex, the classifications have no relation to the group's ability to perform or contribute to society, the group has suffered a history of discrimination, the group is somewhat politically powerless, and the characteristic is immutable. The brief also argues that the Court should not use *Bowers v. Hardwick* (which held that there is no substantive due process right to engage in homosexual sodomy and that the right to privacy does not extend to encompass such a right) as sound reasoning to examine classifications based on sexual orientation under rational review for the privacy right, or lack thereof, that some individuals in the group might claim is not indicative of equal protection class status nor does it extend to every individual within the group. The Court has never specified an absolute checklist of criteria for heightened judicial review. Rather, the Court has applied strict scrutiny when it has concluded that ordinary process of governmental decision making with regard to classification is not working properly. The Court has identified various warning signs and a number of them are present in this case of classifications based on sexual orientation and indicate that strict scrutiny is warranted.

CWEALF: CWEALF joined the brief because of its commitment to ending discrimination based on sexual orientation. CWEALF believes that one way of effectuating this change is through anti-discrimination laws that take sexual orientation into account. The amendment at issue in this case would prohibit the passing of such anti-discrimination laws and thus stifle any movement to ending discrimination.

Holding: The Court struck down Colorado's anti-gay measure holding that it was unconstitutional under rational review. The Court did not address the issue of whether classifications based on sexual orientation should be reviewed under rational review or under heightened scrutiny.

Case: *Thomas v. Anchorage*

Court: The United States Court of Appeals for the Ninth Circuit, 2000

Amicus Brief: Northwest Women's Law Center

Case: Two Christian landlords in Anchorage refused to rent property to unmarried cohabitants, stating that to do so would offend their religious beliefs. The landlords brought suit as a pre-enforcement action against the possible enforcement of Alaska's new provisions prohibiting discrimination on the basis of marital status. The Ninth Circuit originally affirmed the District Court's decision allowing an exemption from the anti-discrimination laws when such discrimination stemmed from a religious belief. The Ninth Circuit, however, granted the motion for rehearing.

Amicus Brief: The brief argues that the lower court decision effectively invites not only landlords, but all business, to exempt themselves from anti-discrimination laws by claiming some deep-seeded religious belief. This would be effectuated in one of two ways: (1) strict adherence to Establishment Clause jurisprudence would require any proffered religious or moral belief to be taken at face value, effectively permitting discrimination for any reason at all or (2) recognition solely of widely held religious beliefs would result

in severe discrimination against women, considering the numerous religious sects that still consider women second-class citizens.

CWEALF: CWEALF joined the brief because of its pursuit of equality for women and the eradication of discrimination based on sexual orientation. CWEALF recognized the implications this case could have on women in the workplace and LGBT individuals and couples in securing housing.

Holding: The Ninth Circuit remanding the case to the District Court with instructions for the case to be dismissed. The Court held that the landlords had suffered no injury for they could not show circumstances in which they had been penalized for violating the new law nor circumstances in which they had actually violated the new provisions of the anti-discrimination statute. Because no injury had been suffered, the case was not ripe for review. Thus, the issue of whether a religious exemption existed to the anti-discrimination law remained undecided.

Case: *CHRO/John-Jane Doe*

Court: Connecticut Commission on Human Rights and Opportunities, 2000

Amicus Brief: Connecticut Coalition for Lesbian, Gay, Bisexual, Transgender Civil Rights

Case: CWEALF, along with several other organizations, intervened in a petition for a declaratory judgment from the Commission on Human Rights and Opportunities regarding whether the prohibition of discrimination on the basis of sex, as used in Connecticut's anti-discrimination laws, includes the prohibition of discrimination against transsexual and transgender individuals.

Amicus Brief: The position statement of the intervenors argues that excluding transgender and transsexual individuals from the anti-discrimination laws raises serious state and federal constitutional concerns, for prohibitions against sex discrimination must extend to all people, regardless of their gender identity. This fact has been recognized even by those federal circuit courts that have refused to extend Title VII protection to those individuals discriminated against because of their gender identity. The statement explains that the recent trends in other states' anti-discrimination case law and in federal anti-discrimination law is to recognize discrimination against transsexual and transgender individuals as sex discrimination. This trend is based on the recognition that such discrimination often stems from sex stereotyping. The statement also argues that with the advent of cases recognizing discrimination based on sex stereotyping against non-transsexual or non-transgender individuals, the ancient differentiation between sex discrimination and gender identity discrimination is no longer applicable.

CWEALF: CWEALF joined in the petition for intervenor status because of its commitment to eradicating discrimination based on sex, sexual orientation, and gender identity, and CWEALF believes that extending the current laws to include discrimination against transsexual and transgender individuals will help to further this goal.

Holding: The CHRO ruled that transsexual and transgender individuals could pursue sex discrimination claims under the current anti-discrimination statute.

Case: *Boy Scouts of America v. Nancy Wyman, as Comptroller of the State of Connecticut*

Court: United States Court of Appeals for the Second Circuit, 2003

Amicus Brief: Gay and Lesbian Advocates and Defenders

Case: The State of Connecticut permits the State Employee Campaign Committee to run an annual workplace charitable campaign. The Committee accepts organizations for membership into the campaign via an application process; part of the application includes a signed statement by the organization that the organization has a non-discrimination policy. The Boy Scouts of America had participated in the campaign for thirty years, always stating that it had a written non-discrimination policy. The CHRO questioned the Committee regarding the BSA's non-discrimination policy, specifically questioning whether it covered sexual orientation; it does not. In fact, the BSA responded that it had an affirmative policy of refusing to hire or recognize any scout leader or scout who was "a known or avowed homosexual." In light of this policy, the Committee sought a declaratory ruling from the CHRO regarding legal implications of the inclusion of the BSA in the Campaign. The CHRO concluded that to include the BSA in the state campaign was to violate Connecticut's anti-discrimination statutes. The Committee notified the BSA that it would not be included in further campaigns. The BSA filed suit in the District Court alleging that the exclusion amounted to an infringement on its First Amendment rights. The District Court found no such violation and the BSA appealed.

Amicus Brief: The brief argues that the United States Supreme Court decision in *Dale v. Boy Scouts of America* (in which the Supreme Court held that BSA did not have to allow gay adult volunteer leaders) does not speak to this case. The exclusion does not affect the BSA's First Amendment right of association, for it does not force the BSA to include members it wishes to exclude. Nor does the exclusion of discriminatory groups violate the First Amendment for it operates on a viewpoint neutral basis—no group that discriminates, regardless of against whom it discriminates, may be included in the campaign. The brief also argues that because the campaign operates as a limited public forum and not a subsidy, the fact that the BSA could be included in the campaign if it did not discriminate does not constitute an unconstitutional condition.

CWEALF: CWEALF joined the brief because of its belief in the importance of eliminating discrimination based on sexual orientation.

Holding: The Court found that the removal of the BSA from the campaign was, in part, in response to the BSA's exercise of its constitutionally protected right to freedom of

association, whereby it could exclude gay activists from leadership positions. The Court held that removing the BSA from the campaign, however, did not rise to the level of compelling the BSA to include gay activists in its organization. The campaign could either be considered a nonpublic forum or a government benefit. If the campaign were a nonpublic forum, organizations could be excluded from the campaign so long as the restrictions were reasonable and were not an effort to suppress expression to which the public officials were opposed. Likewise, if the campaign were viewed as a government benefit, the government could choose to restrict access, so long as the aim of the restrictions were not the suppression of ideas with which the government disagrees (i.e. so long as the restrictions were viewpoint neutral and reasonable). The Court held that Connecticut's anti-discrimination statutes regulate conduct (employment and membership policies that effectively deny homosexuals social benefits) and was intended to regulate conduct, not expression. That the law has a differentially adverse impact on those who wish to disseminate a message of discrimination against homosexuals is not enough to constitute proof of viewpoint discrimination in a facially neutral law. The Court also held that the BSA presented no evidence that the law was applied in a discriminatory manner. The Court held that the exclusion of the BSA as a way in which to prevent the further violation of Connecticut State Law by the Campaign was a reasonable response.

Domestic Violence

Case: *Freedom of Information Commission v. Domestic Violence Services of Greater New Haven, Inc.*

Court: Appellate Court of Connecticut, 1998

Amicus Brief: The Connecticut Association of Residential Facilities

Case: The plaintiff, Domestic Violence Services of Greater New Haven, is a non-profit organization that provided many services for women and children. The issue is whether the trial court's decision should be correctly sustained because it correctly held that Domestic Violence Services of Greater New Haven, Inc. is not the functional equivalent of a public agency for the purposes of the Freedom of information Act.

Amicus Brief: The brief argues that receipt of public funds alone does not make an organization a public agency. An organization that receives funds from the State but is not controlled by the State is not a functional public agency. Such control can be evidenced by day-to-day supervision, something that is lacking in this situation. The brief also explains that the impact of a finding that DVS is a public agency is that all agencies which receive public funds would be relegated to public agency status.

CWEALF: CWEALF joined this brief because it believes that mere receipt of state funding does not make an organization a public agency whose records are thereby open to public scrutiny. If all such organizations, including CWEALF, DVS, and other organizations whose callers depend on some modicum of confidentiality were forced to open its records to anyone who desired information, fewer women in need of aid would call for fear of being discovered. These women would not only suffer because they

would not benefit from legal information, they would also be in greater jeopardy for they would be less likely to find methods by which they could help themselves.

Holding: The Appellate Court ruled that the Domestic Violence Services are not a public agency for the purposes of the Freedom of Information Act. While DVS may provide a government service, it only does so by contract and plays no decision-making role in forming the policies or the programs of governmental services. Furthermore, the State does not provide daily control over DVS.

Case: *Doe v. Doe*

Court: United States District Court for the District of Connecticut; United States Court of Appeals for the Second Circuit, 1996

Amicus Brief: Connecticut Women's Education and Legal Fund

Case: A woman who was subjected to physical and mental abuse by her husband over a seventeen month period filed suit against him for money damages under the Violence Against Women Act's civil rights remedy. The husband claimed that Congress did not have the authority to impose liability on private citizens under the Fourteenth Amendment.

Amicus Briefs: The briefs defend the constitutionality of the Remedy under both the Commerce Clause and § 5 of the 14th Amendment. They argue that Congress could have reasonably believed that violence against women substantially affects commerce, based in part of the four years of legislative history devoted to such findings, and, as such, could have believed that VAWA was a rational response to that effect on commerce. In the alternative, the briefs argue that Congress has the power to redress discrimination under § 5 of the Fourteenth Amendment, and that the action Congress can redress by that section is not limited to state action but includes private action as well. Under this rubric, Congress' enactment of VAWA was rationally related to the ending gender-based violence, a type of discrimination that state and local laws have failed to address for years.

CWEALF: CWEALF wrote the brief because of its belief that in order to stop gender-based violence, the perpetrators of that violence need to be answerable both criminally and civilly. CWEALF believes that the right to recover damages for crimes motivated by gender-based animus is essential for the equalization of power in our society.

Holding: The District Court found that VAWA was a constitutional exercise of Congress' power under the commerce clause and that the civil rights remedy was narrowly tailored to meet the legitimate end of ending the gender-based violence that sufficiently affects interstate commerce. While this case was argued before the Second Circuit on appeal, the parties settled prior to that court issuing an opinion, thereby leaving intact the decision of the District Court.

Case: *Culberson v. Doan*

Court: United States District Court of the Southern District of Ohio Western Division, August 1998

Amicus Brief: NOW Legal Defense and Education Fund

Case: The victim and the defendant had been involved in a romantic relationship during and after which the defendant physically abused the victim. The victim allegedly filed several complaints with the local police, but these complaints were never investigated. On August 29, 1996, a neighbor witnessed the defendant hitting the victim in the head. He was also seen several hours later carrying a handgun and garbage bags out of a relative's home. The victim's mother telephoned the police later that day to report the victim missing; the police conducted a search of the relative's home several days later. During this search, dogs found the victim's scent in a pond; this was not searched until the next day. Though the pond was empty by then, footprints could be seen leading away from it. The victim's body was never found, but the defendant was convicted of her murder and sentenced to life in prison. The victim's family filed a civil action against the defendant, his accomplices, and the police chief pursuant to the Violence Against Women Act, 42 U.S.C. § 13981. The defendant filed a motion to dismiss for the plaintiffs' failure to state a claim and on the basis that VAWA is unconstitutional.

Amicus Brief: The brief focuses on the constitutionality of VAWA, first arguing that it is a constitutional exercise of Congress' commerce power and, in the alternative, arguing that it is a constitutional exercise of Congress' power under § 5 of the Fourteenth Amendment. The brief argues that Congress could have reasonably believed that violence against women substantially affects commerce, based in part of the four years of legislative history devoted to such findings, and, as such, could have believed that VAWA was a rational response to that effect on commerce. In the alternative, the brief argues that Congress has the power to redress discrimination under § 5 of the Fourteenth Amendment, and that the action Congress can redress by that section is not limited to state action but includes private action as well. Under this rubric, Congress' enactment of VAWA was rationally related to the ending gender-based violence. The brief also suggests that when determining whether an action constitutes gender-based violence, the courts should apply a "totality of the circumstances" test that looks at circumstantial evidence of gender bias. This is the same test applied in Title VII discrimination cases and in criminal cases in several jurisdictions.

CWEALF: CWEALF joins the brief because it recognizes that violence against women is a societal epidemic to which the Violence Against Women Act provides a partial response. By upholding the constitutionality of this law, CWEALF believes the courts will help put a negative image on violence against women and set forth the view that such gender-motivated violence will not be silently condoned.

Holding: The Court held that threats that the victim stay away from other men was conduct sufficient to show gender-based animus, thus providing a claim under VAWA.

The Court also found VAWA to be a valid exercise of Congress' commerce power, finding that the legislative history provided ample evidence that violence against women affected commerce substantially. The Court did not address the validity of VAWA under the Fourteenth Amendment.

Note: The United Supreme Court, in United States v. Morrison (2000), held that the remedy section of VAWA was an unconstitutional exercise of Congress' power under either the Commerce Clause or § 5 of the Fourteenth Amendment.

Case: *White v. El Gabri; Bentley v. El Gabri*

Court: United States District Court for the District of Rhode Island, 1998

Amicus Brief: NOW Legal Defense and Education Fund

Case: White and Bentley were sexually assaulted during the course of their professional patient-doctor relationship with El Gabri. After filing their complaints with the state medical board, Dr. El Gabri's license was revoked. The women then filed a claim against El Gabri under VAWA.

Amicus Brief: The brief defends the constitutionality of the Remedy under both the Commerce Clause and § 5 of the 14th Amendment. It argues that Congress could have reasonably believed that violence against women substantially affects commerce, based in part of the four years of legislative history devoted to such findings, and, as such, could have believed that VAWA was a rational response to that effect on commerce. In the alternative, the brief argues that Congress has the power to redress discrimination under § 5 of the Fourteenth Amendment, and that the action Congress can redress by that section is not limited to state action but includes private action as well. Under this rubric, Congress' enactment of VAWA was rationally related to the ending gender-based violence.

CWEALF: CWEALF joins the brief because it recognizes that violence against women is a societal epidemic to which the Violence Against Women Act provides a partial response. By upholding the constitutionality of this law, CWEALF believes the courts will help put a negative image on violence against women and set forth the view that such gender-motivated violence will not be silently condoned.

Holding: The Court denied the motion for leave to file an amicus brief in support of the constitutionality of the civil rights remedy of the Violence Against Women's Act. No further information is available.

Reproductive Health – Buffer Zones

Case: *Pro-Choice Network of Western New York v. Schenck*

Court: United States Court of Appeals for the Second Circuit, 1995

Amicus Brief: NOW Legal Defense and Education Fund

Case: The Pro-Choice Network filed in District Court for an injunction against Schenck, as well as several organizations that created a blockade surrounding the plaintiffs' medical facilities, which the defendants used to harass patients and staff entering and exiting the building. The District Court issued the injunction, creating a 15-foot buffer zone that was stationary around the facility and floating around individuals and motor vehicles approaching the facility. Two "sidewalk" counselors could enter the buffer zone, with the counselors having to remove themselves from the buffer zone once anyone walking within the buffer zone refused such counseling. The Second Circuit struck down the injunction, but it then granted a rehearing en banc.

Amicus Brief: The brief focuses only on the "cease-and-desist" provision of the injunction, which requires all "sidewalk counselors" to cease and desist their counseling upon refusal of such counseling by an approached individual who is within the buffer zone. The brief argues that the speech restrictions on the place where such speech may take place must be looked at within the context of that place, where tension, anxiety, and stress can carry special medical risks. The brief also argues that because the cease-and-desist provision is triggered by an individual's refusal to be counseled further, it operates as a constitutional "notice remedy," whereby the listener gives notice that further communication is not desired. The speaker is still free to pursue other willing listeners. The brief further argues that the speech restriction protects a captive audience, for the individuals are held captive at the facility by medical circumstance. The speech is intended to frighten and scare away this captive audience. The brief argues that the captive audience doctrine, which has been used to protect individuals within their home, should be extended to other areas, specifically medical facilities, where individuals are attempting to exercise privacy rights. The brief explains that the minimal restriction on speech is necessary to serve the government's interest in protecting women's constitutional rights. The brief concludes by drawing analogies between injunctions against speech at clinics aimed at harassing prospective patients and restraining orders permitted by domestic violence statutes. Such restraining orders have been permitted even though they invade the free speech of the batterer because of the countervailing interest in protecting an individual's safety.

CWEALF: CWEALF joined the brief because of its belief that women should be free from harassment when attempting to exercise their reproductive choices. CWEALF believes that continual harassment has the effect of denying a woman her right to make her own reproductive choices.

Holding: The Court found that the injunction was content neutral, even though aimed at protestors who shared the same viewpoint. The Court held that there existed important governmental interests of ensuring individuals' medical safety, public safety, and access to abortions. The Court also found that the restrictions did not burden more speech than was necessary in order to meet the governmental interests, for the women seeking access to the clinic were a "captive audience," in the sense that they were unable to walk away, and the provisions provided them with relief from duress while leaving the speakers with ample opportunity to speak to willing listeners. Note: Schenck appealed and the United States Supreme Court granted certiorari. See below.

Case: *Schenck v. Pro-Choice Network of Western New York*

Court: United States Supreme Court, 1997

Amicus Brief: The Center for Reproductive Law and Policy

Case: The Pro-Choice Network filed in District Court for an injunction against Schenck, as well as several organizations that created a blockade surrounding the plaintiffs' medical facilities, which the defendants used to harass patients and staff entering and exiting the building. The District Court issued the injunction, creating a 15-foot buffer zone that was stationary around the facility and floating around individuals and motor vehicles approaching the facility. Two "sidewalk" counselors could enter the buffer zone, with the counselors having to remove themselves from the buffer zone once anyone walking within the buffer zone refused such counseling. The Second Circuit upheld the provisions on appeal (see above).

Amicus Brief: The brief focuses on the floating buffer zone and cease-and-desist provisions of the injunction. The brief argues that such provisions are constitutional because the women seeking access to the clinics are a captive audience who have a privacy right to make their own reproductive choices. The injunction protects a captive audience from serious harm, allows them to exercise their constitutional right to reproductive choice, without precluding many forms of communication. The constitutionality is also supported by analogous decisions in the contexts of domestic violence and sexual harassment. In these settings, courts have protected unwilling listener's privacy rights by limiting harassing and intimidating speech and activities that cause harm to the recipients.

CWEALF: CWEALF joined the brief because of its belief that women should be free from harassment when attempting to exercise their reproductive choices. CWEALF believes that continual harassment has the effect of denying a woman her right to make her own reproductive choices.

Holding: The Court upheld the stationary fifteen-foot buffer zone around the clinic entrances because no more speech than necessary was restricted in order to meet the governmental interests in preserving public safety, medical safety, and access to abortion. However, the Court struck down the floating buffer zone, holding that it restricted more speech than was necessary. By preventing all speakers, with the exception of two, from entering a given area, the restriction was too broad. Because the Court struck down the floating buffer zone provision, it did not address the cease-and-desist provision.

Case: *United States and Connecticut v. Scott*

Court: The United States Court of Appeals for the Second Circuit, 1999

Amicus Brief: Connecticut Women's Education and Legal Fund

Case: This case first arose from allegations that the defendant, Scott, violated provisions of FACE (Freedom of Access to Clinic Entrances Act). Scott's original defense was that

Congress had exceeded its power under the Commerce Clause in enacting FACE. The District Court held that Congress's enactment of FACE was a constitutional exercise of its authority to control those activities that substantially affect interstate commerce. According to the District Court, Congress, after finding that women seeking abortions may travel between states to do so, thus affecting interstate commerce, found that this interstate activity was significantly hindered or affected by those individuals who blockade access to clinics. Congress further found that this occurred on a national level. The District Court held, therefore, that Congress's enactment of FACE was rationally related to its goal of regulating access to clinics. Once the District Court found FACE constitutional, it issued an injunction against Scott that created a stationary fourteen foot buffer zone around the clinic's entrance and a floating five foot buffer zone around any individual or motor vehicle in the vicinity of the clinic once the individual had indicated that s/he did not wish to communicate with Scott. The District Court found Scott in violation of the injunction and, therefore, expanded the injunction to include a twenty-eight foot stationary buffer zone around the clinic's entrance and a floating buffer zone of eight feet around any individual or motor vehicle within the clinic's vicinity after the individual has expressed a desire to cease communications with Scott. Scott appealed to the Second Circuit, claiming the eight-foot floating buffer zone unduly restricted his First Amendment freedom of speech for it made communication virtually impossible.

Amicus Brief: The brief argues that Supreme Court precedent supports the issuing of an injunction separating protestors from individuals seeking access to clinics when a history of abusive conduct supports the finding that such a restriction is necessary for the government to advance its interests in protecting the public safety and preserving access to reproductive health facilities. The brief argues that since the floating buffer does not go into affect until Scott is signaled that his counsel is unwanted, Scott's First Amendment right to communicate with a willing listener is not infringed. In fact, Scott still has the ability to speak his message; he is simply prohibited from coercing an unwilling listener with pervasive and daunting conduct. The brief further argues that the expansion of the original injunction was justified because of Scott's violation of the original injunction, and this previous violation illustrates the Court's care in fashioning an injunction that is no more restrictive if speech than is necessary to advance the government's interests.

CWEALF: CWEALF authored the brief because of its belief in the importance of safeguarding a woman's ability to make her own reproductive choices, free of harassment and violence.

Holding: The Second Circuit affirmed the District Court's decision, finding that, in light of the record of abusive conduct, the District Court fashioned the injunction so that it was no more restrictive of speech than was necessary to advance the government's interests.

Case: *Hill v. State of Colorado*

Court: United States Supreme Court, 2000

Amicus Brief: National Abortion and Reproductive Rights Action League

Case: Petitioners filed suit, requesting injunctive relief against the State's enforcement of a statute which made it unlawful within the regulated areas for any person to "knowingly approach" within eight feet of another person, without that person's consent, "for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person." The face of the law did not prohibit the content of any speech, only the manner in which the view was conveyed, though petitioners claimed that its application was viewpoint-biased and, therefore, in violation of their First Amendment freedom of speech rights. The trial court granted summary judgment in favor of the State, holding that the statute was a valid time, place, and manner restriction on speech that was content-neutral. This decision was affirmed by the Colorado Court of Appeals. The Colorado Supreme Court denied certiorari.

Amicus Brief: The brief argues that the law restricts conduct, not speech, and therefore implicates no free speech rights. In the alternative the brief argues that the law is a valid time, place, and manner restriction on speech. The restrictions do not silence the speech; they only regulate the proximity from which they message may be conveyed. The underlying purposes of the law are the State's legitimate interests in preserving the psychological and physical safety of individuals and their unfettered access to health care. In pursuing this purpose, the statute limits no more speech than is necessary to protect the State's interest and, therefore, it is narrowly tailored to that interest. Furthermore, ample alternatives are left open to the speakers to use in conveying their message, whatever the content.

CWEALF: CWEALF joined the brief because of its belief in the importance of safeguarding a woman's ability to make her own reproductive choices, free of harassment and violence.

Holding: The Court found that the statute, which was adopted in order to preserve the safety of individuals and their access to healthcare, was content neutral for it was not adopted in response to the State's disagreement with any message conveyed. The Court held that the statute was a valid time, place, and manner restriction for it was narrowly tailored to substantial governmental interests and left open ample alternatives.

Case: *People of the State of New York v. Operation Rescue National*

Court: United States Court of Appeals for the Second Circuit, 2001

Amicus Brief: Summit Women's Center, Inc

Case: This suit arose from the facts of *Schenck v. Pro-Choice Network* (see above). After *Schenck* was decided, and in anticipation of a large-scale protest, the plaintiffs (which include the State of New York, and several health care providers) sought a preliminary injunction against protestors from the District Court. The plaintiffs alleged violations of FACE (Freedom of Access to Clinic Entrances Act) as well as claims of nuisance and trespass. The District Court issued a preliminary injunction that included a stationary fifteen-foot buffer zone around all doorways, driveways, and walkways of

clinics, increased these buffer zones at two specific facilities, eliminated the previous “sidewalk counselor” exception (see *Schenck*), and banned the use of sound amplification devices. The defendants, two individual protestors, appealed, claiming the injunction violated their First Amendment right to freedom of speech.

Amicus Brief: The brief argues that trial courts should be given deference and leeway when fashioning injunctions for they have the most comprehensive information about a given situation. This is extremely important in light of the significant governmental interests of protecting the safety, both physical and psychological, of health care patients and preserving access to reproductive health care facilities.

CWEALF: CWEALF joined the brief because of its commitment to preserving women’s access to all reproductive choices. CWEALF believes that unfettered access can only be secured when those who threaten the choices are restrained from thrusting their views onto unwilling listeners.

Holding: The Second Circuit found the record insufficient to sustain the injunction against one of the protestors but found it sufficient to sustain the injunction against the other protestor. Reviewing the constitutionality of the injunction as a content-neutral time, place, and manner restriction, the Second Circuit found that the provision eliminating “sidewalk counselors” was narrowly tailored to serve the significant governmental interests of ensuring public safety and order, protecting access to reproductive health facilities, and safeguarding private property as well and the physical and psychological health of patients. The Court, however, found that the expanded buffer zones and the flat ban on sound amplification equipment restricted more speech than was necessary in order to advance the government’s interests.

Case: *McGuire v. Reilly*

Court: United States Court of Appeals for the First Circuit, 2001

Amicus Brief: Connecticut Women’s Education and Legal Fund

Case: Protestors filed suit in District Court claiming that a Massachusetts law creating a floating 6-foot buffer zone around individuals and motor vehicles as they tried to enter a reproductive health care facility violated the protestors’ First Amendment freedom of speech and freedom of association and their Fourteenth Amendment right to equal protection and due process of law. The District Court struck down the law, holding that the law was viewpoint-biased for it permitted clinic employees and/or agents to enter the buffer zone.

Amicus Brief: The brief argues that the law restricts the conduct or proximity of the protestors, not their speech or their ability to convey their message. In the alternative, the brief argues that any regulations on speech are content neutral for they are not prohibiting any particular view, but rather the manner in which that view is expressed or the place from which it may be expressed. The exception for agents and employees is not exception for their speech but rather an exception for their employment-related conduct. The brief argues that this time, place, and manner restriction on speech, if it is indeed

speech and not conduct that is being regulated, is necessary to protect the physical and psychological well being of both patients and providers. By placing only a small floating buffer around those entering the clinic, the State has narrowly tailored the regulation so that only a minimal amount of speech is burdened in the State's efforts to reach its legitimate ends.

CWEALF: CWEALF co-authored the brief because of its belief that only by providing for the security of individuals attempting to access reproductive health care facilities can those individuals truly remain free to make reproductive choices. When women are blockaded from exercising their reproductive choices, the choices cease to exist.

HOLDING: The First Circuit found this case analogous to *Hill v. Colorado* (see above) despite the exceptions for clinic agents and employees. Even though the law may have burdened the speech of abortion protestors more than it burdened the speech of other individuals, this was not the underlying purpose of the Act. The State's underlying legitimate interest in public safety, personal security, and access to medical facilities made the law a constitutional time, place, and manner restriction on speech that was viewpoint neutral.

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.

Sexual Assault

Case: *United States v. Lanier*

Court: United States Supreme Court, 1997

Amicus Brief: NOW Legal Defense and Education Fund

Case: David Lanier, a former Tennessee Court Judge, was convicted of criminally violating the constitutional rights of five women by sexually assaulting them while in service as a state judge. The Sixth Circuit, sitting en banc, reversed his conviction, stating that the defendant did not have sufficient notice that he was violating the constitutional rights of his victims as a constitutional right to be free from sexual assault had not been explicitly found in previous court decisions.

Amicus Brief: The brief argues that implicit in the constitutional right to bodily integrity is the right to be free from sexual assault. This implicit right has been recognized explicitly by several lower courts. The brief explains that along with the physical violation of sexual assault, its victims are left with both physical and psychological harm. Where such acts are committed under the color of state law, as they were done so here by a judge sitting in his chambers, the government's interest in protecting women from gender-based violence can be advanced only by prosecuting them as criminal constitutional violations.

CWEALF: CWEALF joined the brief because it believes that the right to bodily integrity clearly encompasses the right to be free from sexual assault. CWEALF believes that assaults committed by those acting under the color of state law must be treated as constitutional violations committed by state actors. Only by prosecuting locally powerful individuals in this manner will the victims be vindicated.

Holding: The Supreme Court vacated the Sixth Circuit's decision and remanded the case to the Sixth Circuit for that Court to determine whether fair notice had been given to the defendant that his actions violated his victim's constitutional rights. When determining the question of notice, the Court stated that the Sixth Circuit need not look only to Supreme Court decisions but could look to decisions of other circuit courts as well, including decisions based on civil claims for violations of constitutional rights by state actors. On remand, the Sixth Circuit dismissed the defendant's appeal of his conviction for he failed to surrender himself to the authorities when his release was vacated.

Case: *Commonwealth v. Fischer*

Court: The Supreme Court of Pennsylvania, 1998

Amicus Brief: Pennsylvania Coalition Against Rape

Case: Kurt Fischer, a college freshman, was charged with raping a fellow student. The victim testified that Fischer forced oral sex on her, penetrated her with his fingers, and attempted to penetrate her anally. The victim went on to testify that only after striking him in the groin was she able to leave. Fischer testified that the conduct was consensual and as soon as the victim told him she wanted to leave he ceased to touch her. On appeal,

appellant obtained new counsel and raised the claim of ineffectiveness. He argued that trial counsel was ineffective in failing to request a jury charge on mistake of fact. Appellant claimed that counsel should have asked the Court to instruct the jurors that, “if they found appellant reasonably, though mistakenly, believed that the victim was consenting to his sexual advances, they should find him not guilty.” Appellant must establish: an underlying issue of arguable merit; the absence of a reasonable strategy on the part of counsel in acting or failing to act; and prejudice as a result of counsel’s action or inaction [*Commonwealth v. Johnson*, 527 Pa. 118, 558 A.2d 1303, 1305 (1991).] The Court held that the relief appellant sought was a significant departure from the current state of the law (no such defense exists in a sexual assault case). It further rejected defendant’s attempt to distinguish the prior Superior Court decision on the ground that this case involved an acquaintance rape as opposed to a stranger rape and that the evolution of rape law to include psychological compulsion compelled a change in law. The Court held that this could not be the basis for an ineffective assistance of counsel claim. However, the Court expressed agreement with the defendant that the defense of reasonable mistake of fact was appropriate in “date rape” cases.

Amicus Brief: The brief argues that there is no defense of reasonable mistake of fact as to consent in a sexual assault crime based on forcible compulsion or non-consent. Defendants are not permitted to a defense of a reasonable mistake of fact as to consent where there is no overt expression of consent or there is expressed non-consent. Finally, Fischer’s claims of ineffective counsel are without merit. Fischer is seeking to change the law through this claim of ineffective assistance of counsel, however, this is barred by the Court.

CWEALF: CWEALF joined this brief because it believes that the law must protect women from rape. Specifically, the law must treat rape by acquaintances with the same degree of severity as rape by strangers. CWEALF does not support weakening the rape law or allowing unreasonable defenses that favor the accused rapist.

Holding: Appeal dismissed as having been improvidently granted.

Case: Letter to the FBI regarding the definition of rape for purposes of the Uniform Crime Report (UCR), 2001

Amicus Brief: Women’s Law Project

Facts: The UCR is an annual publication of crime statistics gathered and recorded by local law enforcement agencies and compiled by the FBI for publication. As of 2001, rape was the only Part I (serious crime) offense for which all reports of the offense were collected. All other sex crimes were classified together, with one type of offense undifferentiated from another. The definition of rape used for the purposes of the UCR was “the carnal knowledge of a female, forcibly and against her will.”

Letter: The letter explains how the definition of rape leaves many sex crimes unreported or under-reported to the American public and, likewise, sends a message to law enforcement officers that these crimes are not as important or not as serious as the UCR

definition of rape. Victims, who feel that the police response is inadequate and therefore become distrustful of the police, are then less likely to report sex crimes, especially those crimes that do not conform to the narrow definition of rape in the UCR. The letter then suggests that while the National Incident-Based Reporting System (NIBRS) is a much better system than the UCR, because it separates all sex crimes into those which are against the victim's will and those which are not, even this system is inadequate because it has been adopted by relatively few law enforcement agencies. The letter suggests that, instead, the UCR definition of rape needs to include all rape, regardless of whether force is used, and needs to be broadened to encompass more than penile/vaginal penetration. The letter also recommends enlarging the victim class so that both men and women can be considered victims of rape and so that a blood relationship between the victim and the rapist does not cause the rape to be categorized as incest.

CWEALF: CWEALF signed onto the letter because it believes that the narrow definition of rape used by the UCR contributes to the under-reporting of sex crimes which, in turn, contributes to the continued victimization of women, both by individual perpetrators of sex crimes and by society at large. CWEALF believes that by broadening the definition of rape to include the types of rape that are actually occurring, women who are the victims of sex crimes will be encouraged to report those crimes to the police.

Outcome: The FBI has yet to change the definition of rape for purposes of the UCR.

Case: *In re Jonathan; Matthew G. v. State of Connecticut*

Court: Connecticut Supreme Court, 2002

Amicus Brief: Connecticut Sexual Assault Crisis Services

Case: The defendant, Matthew G. was charged with sexual assault in a juvenile delinquency petition for an incident occurring when he was thirteen years old, perpetrated against the victim, Jonathan S., when the victim was ten years old. The trial court denied the victim's mother access to the courtroom for pre-trial adjudication, though allowed the victim and his mother into the courtroom during sentencing. In doing so, however, the trial court found that the crime victim's rights statute did not apply to juvenile delinquency hearings and that permitting the victim in the courtroom was wholly within the trial judge's discretion. The victim filed a writ of error.

Amicus Brief: The brief argues that victims' rights should not be diminished merely because the accused is a juvenile; the perpetrator's age does not lessen the harm suffered, nor should it lessen the salve of victim's rights meant to minimize the impact of that harm. The brief cites numerous studies supporting the participation of victims within the criminal justice system, citing such participation as a way in which the psychological harm suffered by victims because of the crime can be ameliorated and a way in which future victims can be encouraged to report crimes.

CWEALF: CWEALF joined the brief because of its belief that recognition by the criminal justice system is one of the ways in which the trauma suffered by a victim of sexual assault can be somewhat rectified. The importance of helping victims recover

from this trauma is in no way lessened because the perpetrator was a juvenile at the time of committing the offense.

Holding: The Court dismissed the case after finding that the victim was not injured by the trial court's actions for there was no evidence in the record that he stated any legal basis for his disagreement with the trial court on appearing at pre-trial adjudication. Furthermore, the victim effectively waived his appeal by his failure to address the issue of standing, which was raised by the State. Because there was no "case in controversy," the issue of whether the Crime Victims Bill of Rights is applicable to juvenile delinquency proceedings remained undecided.