NATIONAL WOMEN'S LAW CENTER

Justice for Her. Justice for All.

DECEMBER 2023

National Women's Law Center 2023 Litigation Highlights

INTRODUCTION & SUMMARY

This has been a busy year for NWLC's growing litigation efforts in state and federal courts. This year, NWLC litigators have brought novel sex discrimination cases, secured important administrative enforcement actions from the federal government, and submitted over two dozen amicus curiae briefs in courts across the country, pushing the law forward and centering those most impacted by pending cases. Litigation continues to be a vital tool in NWLC's arsenal to combat harmful laws and policies and advance gender justice nationwide.

As we provide these updates and share our victories, we also need to name that this continues to be a time of outrage and urgency given the rise in lawless rulings from the federal judiciary following the overturning of *Roe*. To do this work without naming our continued anger and grief first would be normalizing these threats to our democracy. But, as our President and CEO Fatima Goss Graves has made clear, NWLC "will never stop fighting for what's right and a future where we, not the courts or anti-abortion extremists, can control our own bodies, lives, and futures."

In 2023, our administrative complaint on behalf of Mylissa Farmer, a woman denied emergency medical treatment for pregnancy complications following the legal chaos caused by the U.S. Supreme Court's devastating and unjustifiable *Dobbs* decision, garnered the first federal enforcement actions against hospitals for refusing to provide emergency abortion care. We also achieved important interim victories in two of our cases—our state Establishment Clause challenge to Missouri's abortion restrictions and our equal pay case in New Jersey—both allowing those cases to proceed while building novel case law. We filed new matters this year, including a second class action challenging Aetna's discriminatory practices against LGBTQ+ policyholders seeking fertility treatments—this time asserting a nationwide injunctive class—as well as an EEOC charge on behalf of female truck drivers to challenge a policy that in the name of preventing sex harassment has led to refusing to hire women as truck drivers. And we are continuing to press the Biden Administration to issue new regulations under federal civil rights laws via our several cases challenging harmful Trump-era rules. NWLC also filed 26 amicus briefs this year in a range of cases that implicated important civil rights protections, including five before the U.S. Supreme Court.

NWLC's dedicated team of litigators includes Michelle Banker, Director of Litigation for Reproductive Rights and Health, Alison Tanner, Senior Litigation Counsel for Reproductive Rights and Health, Rachel Smith, Senior Litigation Counsel for Education and Workplace Justice, K.M. Bell, Senior Litigation Counsel for Reproductive Rights and Health, Christen Hammock Jones, Litigation Counsel for Reproductive Rights and Health, Donya Khadem, Litigation Fellow for Reproductive Rights and Health, and the soon-to-be-hired Director of Litigation for Education and Workplace Justice. The intense work involved in NWLC's cases and amicus briefs is further supported by NWLC attorneys on each program team, many of whom work on these cases alongside their important policy work. And our colleagues throughout the Law Center provide invaluable contributions to our litigation efforts: the Development team helps secure pro bono law firm co-counsel; the Finance team helps track our litigators' time and supports our filing crucial attorneys' fees petitions; and the Campaigns and Communications team amplifies NWLC's litigation work to change the public narrative and our culture.

While it is always exciting to obtain a positive court ruling, settle a case in our clients' favor, or have our amicus brief cited by a court, we know that each litigation action we take is an opportunity to lift up the stories of the real people impacted by the law. We know these efforts are one part of our organization's collective work towards gender justice. Thank you for supporting NWLC's litigation work across the organization.

NWLC CASES

- ***Blackmon v. Missouri* (Mo.)** - Challenging Missouri's abortion ban and several abortion restrictions under the State's Establishment Clause

  On January 19, 2023, NWLC and Americans United for Separation of Church and State, alongside law firm Arnold & Porter and local counsel Denise Lieberman, filed a lawsuit on behalf of clergy members from various faith traditions against the state of Missouri challenging the state's abortion ban and several abortion restrictions. The lawsuit, *Rev. Traci Blackmon v. State of Missouri*, argues that these restrictions establish one religious view about abortion as the law of the land, in violation of the Missouri constitution's robust protections for separation of church and state.

  After Plaintiffs amended our complaint, Defendants moved to dismiss our case in late April 2023. NWLC attorney Christen Hammock Jones presented oral arguments on Plaintiffs' behalf before the trial court in St. Louis on June 13.

  On June 30, 2023, the state trial court judge issued orders to allow the case to go forward. The first ruling responded to a motion to dismiss brought by the state Defendants, who argued that the 14 Plaintiffs did not have standing as taxpayers and citizens of Missouri to challenge the laws, and that the significant threat posed by the abortion ban to Reverend Gordon's life and health was too hypothetical. The Court rejected these arguments and held that all 14 Plaintiffs had a right to proceed to discovery to establish their standing to sue as taxpayers. We are also especially proud to have won on the novel legal claim that a currently non-pregnant woman whose health and life is threatened by an abortion ban has standing to challenge that ban in court! The Court did find that several abortion restrictions, including a 72-hour waiting period and other restrictions that have decimated abortion access in Missouri, were not yet ripe for review. In a narrow, technical ruling, the judge also dismissed five local prosecutors' offices from the case.

  NWLC's work in this case continues. Discovery is ongoing, and on September 20, 2023, the state Defendants filed a motion for judgment on the pleadings. We filed our response to the motion on October 27, and NWLC attorney K.M. Bell presented oral arguments on Plaintiffs' behalf before the trial court in St. Louis on November 16. We are awaiting a decision, expected in January 2024.

- ***Schulman v. Zoetis, Inc.*** (D.N.J.) - Challenging unequal pay

  This year, NWLC continued to litigate our lawsuit against Zoetis, Inc. in New Jersey federal district court, alongside our law firm partners Kakalec Law PLLC and Harrison, Harrison & Associates, Ltd. Zoetis paid our client, a female veterinary pathologist, a fraction of what it paid less-experienced men doing the same job. This disparity arose, at least in part, because Zoetis based the men's pay on their prior salaries. Dr. Schulman filed an amended complaint on March 24, 2023. Zoetis filed a motion to dismiss Dr. Schulman's New Jersey equal pay and antidiscrimination claims on April 21, 2023, arguing that New Jersey law shouldn't apply, despite Zoetis being headquartered in New Jersey and key decisions about Dr. Schulman's pay being made in New Jersey, because Dr. Schulman didn't physically work in New Jersey, but instead worked from her home in New Hampshire. On July 14, 2023, the district judge issued a significant ruling allowing Dr. Schulman's case to move forward. This is an important win in a developing area of law, given that more and more employees now work remotely. That should not be a reason to deny workers their civil rights protections. The case is now moving through discovery, with summary judgment briefing due in spring 2024.

- ***Berton v. Aetna Inc.*** **(N.D. Cal.)** - Advocating for equal access to insurance coverage for fertility treatments

  On April 17, 2023, NWLC, alongside law firms Liu Peterson-Fisher LLP and Altshuler Berzon LLP filed a lawsuit in the U.S. District Court for the Northern District of California against Aetna alleging that their coverage policies discriminate nationwide against LGBTQ people seeking to get pregnant using fertility treatments. The plaintiff in this case, Mara Berton, was required by Aetna's policy to incur significant out-of-pocket expenses and delay building her family while heterosexual couples are provided immediate access to coverage for the same fertility treatments. The lawsuit alleges that Aetna's policy, which requires LGBTQ people seeking fertility treatments to become pregnant to pay more and wait longer to access the fertility benefits covered by their health plans, violates Section 1557 of the Affordable Care Act, which prohibits discrimination based on sex, including sexual orientation and gender identity. The suit seeks damages on behalf of LGBTQ Californians harmed by Aetna's discriminatory fertility policy, as well as nationwide injunctive relief to end Aetna's discriminatory policy once and for all.

  On July 24, 2023, Aetna filed a motion to dismiss, asserting among other grounds for dismissal that its policy at most had a disparate impact based on sex and that Section 1557 does not permit private suits based on unintentional discrimination. We filed our opposition on September 1. NWLC attorney Alison Tanner presented oral argument on the Plaintiff's behalf before Hon. Haywood S. Gilliam on October 12 in Oakland, California. We are awaiting a decision.

- ***Mylissa Farmer*** **(Ctrs. for Medicare & Medicaid Servs.)** - Challenging denial of emergency abortion for pregnancy complications

  On November 8, 2022, NWLC filed a complaint with the Centers for Medicare & Medicaid Services on behalf of Mylissa Farmer pursuant to the Emergency Medical Treatment and Active Labor Act (EMTALA), a federal law that ensures patients receive the emergency medical care they need. In our complaint, NWLC makes clear that it is critical that the federal government take swift and decisive action to investigate whether health care providers are acting in compliance with EMTALA and enforce this law when there are violations.

  On May 1, 2023, the Centers for Medicare and Medicaid (CMS) announced that it had issued notices of deficiency against both hospitals for violating EMTALA. These were the first federal enforcement actions against hospitals for denying emergency abortion care following the U.S. Supreme Court's decision taking away the federal constitutional right to abortion in Dobbs. Alongside these actions by CMS, Secretary Becerra issued a letter putting hospitals nationwide on notice that there would be consequences under federal law for refusing to provide emergency abortion care to pregnant patients, regardless of state abortion laws. We believe these enforcement decisions have caused many hospitals throughout the country to change their policies and practices, which will ultimately save countless lives.

NWLC also filed a complaint with the U.S. Department of Health and Human Services Office for Civil Rights on January 29, 2023 on Mylissa's behalf, explaining that all four hospitals discriminated against her on the basis of sex in violation of Section 1557 of the Affordable Care Act, the first federal law to broadly prohibit sex discrimination in health care, by denying her the care necessary to preserve her life and health. NWLC has also filed sex discrimination charges with the Missouri Commission on Human Rights and the Kansas Human Rights Commission. We are still awaiting resolutions of these administrative complaints, and we pursuing additional legal advocacy on Mylissa's behalf.

- ***Goidel v. Aetna* (S.D.N.Y.)** - Challenging healthcare discrimination against LGBTQ individuals

  NWLC and co-counsel Emery Celli Brinckerhoff Abady Ward & Maazel LLP continue to litigate our class action lawsuit in federal court in New York challenging Aetna's discriminatory practices against LGBTQ policyholders seeking fertility treatments. On June 21, 2023, the parties agreed to stay the case pending serious settlement discussions. On September 22, 2023, the parties agreed to a term sheet.

- ***A.P. v. Fayette County Board of Education* (N.D. Ga. & 11th Cir.)** - Protecting student survivors' rights under Title IX

  NWLC filed a lawsuit in 2019 on behalf of A.P., a former Fayette County High School student who was expelled after reporting that another student had sexually assaulted her at school. In June 2021, a federal district court granted summary judgment in favor of the school district on all claims, dismissing A.P.'s case. NWLC, along with co-counsel Mastando & Artrip LLP and the Georgetown Appellate Immersion Clinic, filed an appeal to the U.S. Court of Appeals for the Eleventh Circuit, asking the court to reverse the district court's decision.

  In June 2023, the Eleventh Circuit affirmed the lower court decision dismissing the survivor student's Title IX and other claims. We strongly disagree with the Court's conclusion that the sexual assault our client A.P. described in her complaint—being forced by a classmate to perform oral sex—and her school district's response of expelling her for reporting her assault did not constitute "severe, pervasive, and objectively offensive" harassment, and thus did not invoke Title IX's protections. We are proud of A.P. and her family's courage in bringing this case forward and grateful for the work of the attorneys and amicus partners on this case. We also take this moment to highlight the amicus brief filed in this case by 20 mental health professionals and specialists with expertise in sexual violence, victim behaviors, and institutional betrayal, explaining the many ways that survivors' behaviors around and after the time of an assault are not necessarily indicative of whether an assault occurred. This case also highlights the need for Congress to pass the Students' Access to Freedom and Educational Rights (SAFER) Act, which would strengthen civil rights protections against harassment, and for the Biden Administration's Department of Education to swiftly finalize a strong Title IX rule followed by enforcement to protect survivors' rights.

  Adding insult to injury, the school district sought to recover the costs of this litigation from A.P. We opposed their motion. The district court ultimately reduced the costs awarded by two-thirds, accepting our argument that the public importance of this case, A.P.'s good faith, and the risk of chilling other potential Title IX plaintiffs required a reduction to the costs requested.

- ***REAL Women in Trucking et al. v. Stevens Transport* (EEOC)** - Fighting obstacles to women working in male-dominated fields

  On October 5, 2023, NWLC and co-counsel Peter Romer-Friedman filed a class action hiring discrimination charge on behalf of REAL Women in Trucking, a non-profit organization that advocates for women truck drivers, and three women truck drivers against Stevens Transport, one of the nation's largest refrigerated trucking companies. The charge, filed with the Equal Employment Opportunity Commission (EEOC), alleges that the trucking company routinely refuses to hire women truck drivers, or substantially delays hiring them, under the guise of protecting women. The company only allows women to train for driving positions with

women trainers, and Stevens does not have enough women trainers to provide timely training to the qualified women drivers who apply. In 2014, a federal judge declared in a case against a different trucking company that such same-sex training policies violate Title VII of the Civil Rights Act. Yet, almost 10 years later, Stevens continues to use discriminatory same-sex training practices. On the day the charge was filed, the New York Times published this article about the litigation.

The EEOC charge describes how our clients Kim Howard, Ashli Streeter, and a third woman applied for truck driver positions at Stevens Transport but were all denied jobs due to the company's same-sex training policy and lack of female trainers. The charge details how, despite Stevens advertising immediate openings for drivers, women who contacted the company were informed of a "freeze on hiring women" and a lengthy waitlist for women who wanted to start the required training. The case is currently in the investigation stage at the EEOC.

- ***American Alliance for Equal Rights v. Fearless Fund Management, LLC* (11th Cir.)** - Defending remedial race-conscious charitable giving

  In August 2023, NWLC agreed to serve as consulting counsel for Fearless Fund, a nonprofit organization that seeks to increase access to capital for small businesses owned by Black women. Fearless Fund was sued by unnamed white and Asian female business owners who claimed that they wished to apply for its funding. This lawsuit is part of Ed Blum's orchestrated attack on measures intended to advance racial equity. The plaintiffs moved for a preliminary injunction, which the district court denied in September, holding that they had failed to establish a likelihood of success on the merits because of the possibility that the First Amendment protected Fearless Fund's expressive giving. The Eleventh Circuit then promptly granted an injunction pending appeal, holding that the First Amendment does not give Fearless Fund the right to exclude based on race. The case remains on appeal. NWLC withdrew as consulting counsel in October 2023, but is supporting Fearless Fund as amicus.

Our Cases Against Trump-Era Rules

We are continuing to press the Biden Administration to rescind or replace harmful anti-civil-rights rules promulgated by the Trump Administration by moving forward with our litigation under the Administrative Procedures Act. These cases include our lawsuit challenging the Trump Administration's refusal of care rule, filed alongside Planned Parenthood, Democracy Forward, and Covington and Burling LLP, in which we won a district court victory vacating the rule; a lawsuit fighting a discriminatory rule on the implementation of Section 1557 of the ACA, filed with the Harvard Center for Health Law & Policy Innovation, the Transgender Legal Defense and Education Fund, the Transgender Law Center, and Hogan Lovells US LLP; our lawsuit challenging rules creating sweeping religious and moral exemptions to the ACA's contraceptive coverage requirement, filed alongside Americans United for Separation of Church and State, the Center for Reproductive Rights, Fried, Frank, Harris, Shriver & Jacobson LLP, and Macey Swanson LLP; our lawsuit challenging a Title IX rule weakening civil rights protections against sexual harassment in schools, filed with Morrison & Foerster LLP and Diane Rosenfeld of Harvard Law School in her individual capacity; and our lawsuit challenging an OFCCP rule that unlawfully expanded the "religious exemption" to federal contractors' nondiscrimination obligation, filed alongside Democracy Forward and Albies & Stark LLC. All but one of these cases are currently paused pending rulemaking; in our challenge to the Trump Administration's Section 1557 rules, the district court has granted the plaintiffs permission to file a motion for summary judgment as early as December 2023.

AMICUS BRIEFS

U.S. Supreme Court

- ***Counterman v. Colorado* (U.S.)** - Urging Supreme Court to continue protecting civil rights plaintiffs from true threats

  On March 31, 2023, NWLC joined an amicus brief led by the Lawyers' Committee for Civil Rights Under Law in the Supreme Court in support of the State of Colorado in *Counterman v. Colorado*. The case arose when Billy Counterman was convicted under Colorado's criminal stalking statute for conduct that included likely more than 1 million messages to his victim over a two-year period, including messages indicating he was physically surveilling her and threatening that she should die. Counterman challenged his conviction, arguing that speech cannot constitute a "true threat" unless the speaker had subjective intent to threaten.

  The amicus brief explains that numerous federal and state civil rights laws passed since the Civil War have not required subjective intent, and that requiring subjective intent would harm civil rights plaintiffs, especially those who are Black, women, LGBTQI+, students, low-paid workers, or victims of sexual harassment or stalking (particularly victims who are women of color). Therefore, the brief asks the Court to adopt a "totality of the circumstances" test like Colorado's, which ensures that courts properly balance the interests of victims with the rights of the defendants, including by protecting Black and other marginalized people from being falsely prosecuted for "threatening" speech when they engage in social justice activism. Finally, the brief urges that, if the Court must require subjective intent, it should only be required in criminal cases, where consequences for defendants are more serious, to ensure that civil rights laws can continue to protect essential rights.

- ***Alliance for Hippocratic Medicine v. FDA* (5th Cir. & U.S.)** - Supporting access to medication abortion

  NWLC joined an amicus brief filed in the U.S. Court of Appeals for the Fifth Circuit on April 11, 2023, an amicus brief in the U.S. Supreme Court on April 14, 2023, and another amicus brief in the Fifth Circuit on May 1, 2023, alongside more than 200 reproductive health, rights, and justice organizations, as well as other organizations with a strong interest in access to reproductive care, in support of the Biden Administration's appeal of Judge Kascmaryk's decision in *Alliance for Hippocratic Medicine et al. v. FDA*. This unprecedented and dangerous decision would have overturned the federal Food and Drug Administration's expertise and nearly 25-year-long approval of mifepristone, one of the medications in a two-drug protocol that is now used in over half of the abortions in this country. As the amicus brief explained, mifepristone is safe, effective, widely used, and has been critical to filling the gaps in abortion care for the most underserved communities. Judge Kacsmaryk's opinion adopted anti-abortion talking points, cherry-picked discredited studies, and incorporated junk-science. Our amicus brief debunked these false assertions about mifepristone and underscored how this decision will harm providers and patients nationwide. The brief further explained how suspending the FDA's approval of the drug would have immediate and severe consequences to the administrative process and our systems of democracy.

- ***Consumer Financial Protection Bureau v. Community Financial Services Association of America* (U.S.)** - Defending CFPB's constitutionality

  On May 15, 2023, NWLC—along with Lawyers' Committee for Civil Rights Under Law and fourteen other organizations committed to ending discrimination against people of color, including those with low incomes—filed an amicus brief with the U.S. Supreme Court in *Consumer Financial Protection Bureau v. Community Financial Services Association of America*. In this case, the lower court held that the statute providing funding for the Consumer Financial Protection Bureau (CFPB) violates the Appropriations Clause of the U.S. Constitution. Our brief urges the Supreme Court to reverse and hold that the CFPB's funding structure is consistent with the plain text of the Appropriations Clause.

Our amicus brief also explains why the CFPB's constitutionality matters: because it is integral to the federal government's efforts to stop predatory and discriminatory lending practices. The CFPB was created in the wake of the subprime mortgage foreclosure crisis to make sure that such a crisis would not happen again. The agency is critical to counteracting the long history of state-sanctioned financial discrimination in the United States. Financial discrimination, while now illegal, remains all too pervasive today. Our brief therefore urges the Court to uphold the CFPB's constitutionality, preserving its ability to protect consumers from racial discrimination and deceptive lending practices.

- ***Acheson Hotels, LLC v. Laufer*** **(U.S.)** - Defending precedent holding that dignitary harm from discrimination

  On August 9, 2023, NWLC joined an amicus brief in the U.S. Supreme Court led by the NAACP Legal Defense Fund. The case is about whether "testers" whose rights under the Americans with Disabilities Act (ADA) are violated by a hotel failing to provide disability accessibility information have standing to challenge the violation of their rights if they aren't planning to stay at the hotel.

  Our brief argues that, as the Supreme Court has long held, people who have personally experienced unlawful discrimination suffer dignitary harm, and that dignitary harm gives them standing to sue in federal court. The brief rebuts the hotel's argument that dignitary harms from discrimination can be "self-inflicted." It explains that the person who discriminates—not the person who endures the discrimination—is always the one who inflicts the harm.

  Update: The Supreme Court vacated and remanded this case on December 5, 2023, holding that it was moot because the plaintiff had voluntarily dismissed it.

- ***Muldrow v. City of St. Louis*** **(U.S.)** - Opposing unduly restrictive interpretation of Title VII

  In September 2023, NWLC co-led an amicus brief to the U.S. Supreme Court along with our partners at the National Employment Lawyers Association and the NAACP Legal Defense and Education Fund, and pro bono counsel Katz Banks Kumin. The case involves Jatonya Muldrow, a sergeant with the St. Louis Police Department, who was transferred to a different job because her boss wanted to hire a man for her position. The Eighth Circuit ruled that Ms. Muldrow's forced transfer was not actionable sex discrimination under Title VII because she did not suffer a "materially significant disadvantage" because of the transfer.

  Our amicus brief argues that requiring an additional showing of some "significant disadvantage" beyond the discriminatory transfer is an improper reading of Title VII that ignores the text and intent of the statute. We shared with the Court how allowing employers to discriminatorily transfer employees perpetuates serious dignitary harms by treating people differently based on a protected characteristic, even when the transfer doesn't result in a "significant disadvantage," like a demotion or pay cut. Our brief also discussed how discriminatory transfers will exacerbate the economic harm of occupational segregation for women of color.

Other Courts

EDUCATION

- ***Doe v. University of Kentucky*** **(6th Cir.)** - Fighting Title IX retaliation

  On February 27, 2023, NWLC joined an amicus brief led by Public Justice to the U.S. Court of Appeals for the Sixth in support of Jane Doe, a student survivor at the University of Kentucky. When Jane withdrew from the University's program and sued it for mishandling her sexual assault complaint, the University retaliated against her in its investigation of her complaint, citing her lawsuit. A district court dismissed Jane's Title IX retaliation claim against the University, holding that Title IX did not protect her because she had already left the University by the time of the retaliation, and because a school's actions during a disciplinary proceeding

are not "school-related." The brief explains the Title IX statute is broad, as it protects all "persons" (not just current students) against sex discrimination in "all the operations" of a school (including in disciplinary proceedings, which are inherently "school-related").

Note: In May 2019, NWLC led a different amicus brief to the Sixth Circuit in support of Jane's standing to file a Title IX claim of deliberate indifference against the University. In August 2020, the Sixth Circuit agreed that Jane had standing to bring her claim because she lived on the University's campus, used its dining hall, and participated in its student activities.

- ***B.P.J. v. West Virginia State Board of Education et al.* (4th Cir.)** - Defending Title IX and the rights of all girls, women, and LGBTQIA+ athletes to participate in school sports consistent with their gender identity

  On April 3, 2023, NWLC, long with our law firm partner Hogan Lovells US LLP and 52 organizations committed to gender justice, filed an amicus brief in the U.S. Court of Appeals for the Fourth Circuit in *B.P.J. v. West Virginia State Board of Education*. This case was brought by a middle school girl who is transgender, B.P.J., who challenged West Virginia's anti-trans sports ban, H.B. 3293. In April 2021, West Virginia enacted H.B. 3293, a discriminatory law targeting transgender, nonbinary, and intersex girls by banning them from participating in school sports consistent with their gender identity in sixth grade through university. B.P.J. was then just 11 years old and wanted to try out for her middle school's cross-country team, but she and her family had to challenge this discriminatory law in court just to win a chance to try out for the team.

  Our amicus brief in support of B.P.J. explains to the court that anti-trans sports bans do not enhance participation in school sports for cisgender women and girls (contrary to state lawmakers' purported justifications for H.B. 3293), fail to address actual gender inequities in athletics, and are deeply connected to unlawful sex stereotypes that harm all girls and women. The harms from anti-trans sports bans especially fall on women and girls who are transgender, intersex (who are born with natural variations in sex-linked characteristics), and Black and brown women, who are disproportionately targeted for body policing and scrutiny based on racialized stereotypes of femininity.

- ***Doe v. Horne* (9th Cir.)** - Challenging anti-trans sports bans

  On October 13, 2023, the National Women's Law Center, our law firm partner, Hogan Lovells US LLP, and 33 organizations committed to gender justice filed an amicus brief to the U.S. Court of Appeals for the Ninth Circuit in *Doe v. Horne*. This case was brought by Jane Doe and Megan Roe, an 11 year-old middle schooler and a 15 year-old high schooler who challenged Arizona's anti-trans sports ban, S.B. 1165. Jane Doe, Megan Roe, and their families, represented by the National Center for Lesbian Rights, won a strong preliminary injunction at the district court level finding that Arizona's anti-trans sports ban likely violates Title IX and the Equal Protection Clause, especially given controlling Ninth Circuit precedent in *Hecox* (striking down Idaho's illegal ban targeting trans girls and women) and the Supreme Court's Bostock decision.

  Our amicus brief in support of Jane and Megan explains to the Court that trans-inclusive school policies, including for school sports, make schools safer and more equitable for trans girls, cisgender girls, and all students. Access to school sports is an important part of education for all students, associated with lifelong academic, social, and health benefits. The fearmongering that lawmakers relied on to pass this discriminatory ban is based in lies, falsely claiming that trans youth "threaten" other students, and unlawful sex stereotypes that harm all girls and women. Rules scrutinizing of whether girls are "feminine enough" perpetuate sexist and racist stereotypes that harm all girls and women, especially Black and brown girls and women and intersex women (who have natural variations in sex-linked traits.) The systemic inequities girls face in K-12 and college sports are the result of leaders and policymakers denying resources and funding for girls and women's sports in school, and full enforcement of Title IX depends on remedying these real issues while also supporting and including LGBTQI+ youth.

- ***Lange v. Houston County, Ga.* (11th Cir.)** - Protecting transgender employees' access to gender affirming health care

  On March 22, 2023, NWLC joined an amicus brief to the Eleventh Circuit led by the Lawyers' Committee for Civil Rights Under Law in *Lange v. Houston County, Ga.* The case was brought by Sgt. Anna Lange, a sheriff's deputy in Perry, Georgia, against the county where she works for refusing to allow her employer-sponsored health insurance plan to cover her gender-affirmation surgery. Our amicus brief in support of Ms. Lange explained to the court that when an employer uses a facially discriminatory policy, like the exclusion on coverage of gender-affirming care here, there is no additional burden on a plaintiff to prove that the employer acted with discriminatory intent. We further detailed that creating additional hurdles to workplace civil rights protections would harm women, immigrants, people of color, and workers at the intersections of those identities.

- ***LaRose v. King County* (Wash. Ct. App.)** - Protecting employees from stalking at work

  On June 22, 2023, NWLC filed an amicus brief in the Washington State Court of Appeals with law firm partner Outten & Golden and co-led by the Washington Employment Lawyers Association. We filed in support of Sheila LaRose, a former public defender who experienced sexual harassment, including stalking by a work-related third party. Her employer had no sex harassment policy and took no action for months after she reported harassment. Ms. LaRose won a multi-million-dollar judgment against King County, and the County is appealing this decision.

  Our amicus brief highlighted that employers are required to protect workers from workplace-related harassment by third parties, and this is true even if the harassment occurs outside the bounds of a physical place of employment. We emphasized that incorrectly limiting protections solely to a physical place of employment ignores both the types of harassment workers face as well as the parameters of today's work environments. We also underscored that requiring a more burdensome approach than informing a direct supervisor of workplace discrimination, such as informing top or "upper" management, would create even more barriers to reporting discrimination and frustrate the purpose of workplace civil rights laws.

- ***Huang v. Ohio State University* (6th Cir.)** - Clarifying graduate students' legal protections

  On September 7, 2023, NWLC joined an amicus brief led by Public Justice explaining that graduate students can simultaneously be employees and students—and therefore can be covered by both Title VII and Title IX's protections against sex harassment at the same time. In this case, the district court wrongly assumed that Ms. Huang, who brought suit against her supervisor and PhD advisor for sexual harassment, could not simultaneously be a student and an employee, protected by both laws.

  Our brief argues that courts should look to the reality of the student's relationship to the university to determine whether a graduate student is also an employee and therefore covered by Title VII—instead of deferring to schools' classifications of their graduate students. As the brief points out, this issue has significant implications for many graduate students, because Title VII offers more expansive protections and remedies than Title IX. A graduate student wrongly classified as only a student could, therefore, be deprived of any legal recourse.

- ***People v. Weinstein* (N.Y.)** - Defending Harvey Weinstein's conviction

  On October 20, 2023, NWLC and eighteen other organizations joined an amicus brief led by Sanctuary for Families and Women's Equal Justice in the case of *People v. Weinstein* in the New York Court of Appeals. In this case, Harvey Weinstein is asking the New York Court of Appeals to reverse one of his criminal convictions. He is arguing that the prosecution should not have been allowed to introduce the testimony of several other women, in addition to those he was charged with assaulting, who said that Weinstein also assaulted them.

This is known as "prior bad act" or "similar crimes" evidence. Its admissibility is limited to circumstances where it is used to prove intent or other specific issues, not to prove that the defendant has a criminal "propensity." The trial court—correctly, we argued—ruled that this kind of limited use was permissible here.

Our brief explained that such evidence that a defendant has assaulted other people can be particularly important in sexual assault cases, because it can help the jury understand the defendant's intent and the complainant's non-consent. Sexual assault cases often involve the complainant's word against the defendant's. And juries may have misconceptions about how a survivor should act that could cause them to disbelieve complainants who, for example, continue to have a relationship with their abuser due to unequal power dynamics, or who froze during an assault instead of fighting back. Evidence that the defendant has assaulted other people can help a jury to understand their methods of victim selection, perpetration, and concealment—and to be appropriately skeptical of their claim that the survivor consented.

REPRODUCTIVE RIGHTS & HEALTH

- ***Lacks v. Thermo Fisher Scientific Inc* (D. Md.)** - Fighting medical exploitation and unjust enrichment

  On February 24, 2023, the National Women's Law Center joined the Lawyers' Committee for Civil Rights Under Law in a renewed amicus brief submitted to the U.S. District Court for the District of Maryland. NWLC originally joined an amicus brief in opposition to a motion to dismiss this case in February 2022. Later, the district court granted the plaintiffs leave to amend their complaint, and the defendant filed a second motion to dismiss. Our renewed brief continues to support the Lacks family's claim of unjust enrichment against Thermo Fisher Scientific, a multi-billion-dollar biotechnology corporation that continues to profit from sales of the "HeLa" cells that were non-consensually and non-therapeutically harvested by white doctors at John Hopkins Hospital from Mrs. Henrietta Lacks's cervix in the 1950's. Our brief places Thermo Fisher Scientific's actions within the disturbing history of systemic medical exploitation of poor, Black, and Indigenous people and argues that the discriminatory "norms" of the past must not insulate Thermo Fisher Scientific's ongoing wrongful conduct from liability.

  VICTORY: On July 31, 2023, the parties reached a historic settlement in a confidential agreement.

- ***Neese v. Becerra* (5th Cir.)** - Supporting protections against sexual orientation and gender identity discrimination under Section 1557

  On April 3, 2023, NWLC joined an amicus brief to the Fifth Circuit led by Public Justice in *Neese v. Becerra* to support the U.S. Department of Health and Human Services' (HHS) interpretation that Section 1557 of the Affordable Care Act prohibits discrimination based on gender identity and sexual orientation. Section 1557 is the first federal law to broadly prohibit sex discrimination in health care, and it incorporates Title IX's definition of what constitutes prohibited sex discrimination. In June 2020, the Supreme Court held in *Bostock v. Clayton County* that, under Title VII, discrimination based on sexual orientation or gender identity is always discrimination based on sex. The Biden Administration subsequently issued guidance explaining that the Court's reasoning about Title VII's prohibition on sex discrimination in the workplace applies with equal force to Title IX's prohibition on sex discrimination in education and Section 1557's prohibition on sex discrimination in health care. Two doctors in Texas challenged the Section 1557 guidance, distorting the reasoning in Bostock and the plain language of Title IX and Section 1557 to argue that Bostock should be limited to the employment context of Title VII. They brought the case before Judge Kacsmaryk, an extremist federal judge in Texas (the same judge attempted to withdraw FDA approval of mifepristone, a safe and effective drug and one of two medications most commonly used in medication abortion). Judge Kacsmaryk, who has a long record of opposing LGBTQ rights and access to abortion, predictably sided with the plaintiffs despite the lack of any principled basis for distinguishing Title IX and Section 1557 from Title VII.

Our amicus brief explained that HHS' guidance correctly interpreted Section 1557, Title IX, and the Supreme Court's decision in Bostock and detailed the harm that Plaintiffs' narrow and exclusionary interpretation of Title IX could cause students, especially those who face sex discrimination and discrimination based on other characteristics such as their race or parenting status. Because Bostock's reasoning clearly applies to both Title IX and Section 1557, our amicus brief urged the Fifth Circuit to vacate the district court's ruling and allow HHS to enforce its guidance.

- ***Anderson v. Aitkin Pharmacy Services* (Minn. Ct. App.)** - Challenging pharmacy refusals

  On July 7, 2023, NWLC filed an amicus brief to the Minnesota Court of Appeals, with the support of our local counsel Ava Cavaco at Nigh Goldenberg, in *Anderson v. Aitkin Pharmacy Services*. The brief was filed in support of Andrea Anderson, who experienced sex and pregnancy-status discrimination in a public accommodation after her local pharmacy effectively blocked her access to her prescription emergency contraception because of one of its pharmacists' religious objections to the medication. After a jury trial, during which Ms. Anderson was represented by Gender Justice, the jury issued a damages award but found that neither the pharmacy nor its pharmacist should be found liable for discrimination (an obviously confused result).

  Our brief argues that Ms. Anderson should have been granted judgment as a matter of law because the pharmacy's policy singled out a sex-specific medication and was therefore facially discriminatory. For that reason, the district court erred by requiring her to also prove that the defendants acted with discriminatory intent. Further, the district court erred by requiring Ms. Anderson to show greater injury than having been denied full and equal enjoyment of the pharmacy because of her protected characteristics; even so, we explain the serious harms caused by pharmacy refusals that meet even the unduly onerous standard set by the court.

- ***L.W. v. Skrmetti and Doe v. Thornbury* (7th Cir.)** - Challenging ban on gender-affirming care for minors

  On August 10, 2023, NWLC co-led an amicus brief to the Sixth Circuit, alongside GLBTQ Legal Advocates & Defenders (GLAD) and twelve additional organizations and law firm counsel Jenner & Block, in the consolidated appeals *L.W. v. Skrmetti* and *Doe v. Thornbury*. We filed our brief in support of transgender young people, and their parents and doctors, who have challenged new laws in Tennessee and Kentucky, respectively, that aim to block access to medically necessary gender-affirming health care. Our brief urges the appeals court to find these bans unlawfully discriminate based on sex by singling out transgender youth.

- ***K.C. v. Individual Members of the Medical Licensing Board of Indiana* (7th Cir.)** - Challenging ban on gender-affirming care

  On September 27, 2023, NWLC joined an amicus brief to the Seventh Circuit, led by GLBTQ Legal Advocates & Defenders (GLAD) and law firm counsel Jenner & Block. Our brief supports transgender young people, and their parents and doctors, who have challenged a new law in Indiana that aims to block access to medically necessary gender-affirming health care. Our brief urges the appeals court to uphold the district court's preliminary injunction, which blocks this law because it unlawfully discriminates based on sex by singling out transgender youth.

- ***Braidwood Management, Inc. v. Becerra* (5th Cir.)** - Standing up for the ACA

  On October 6, 2023, the National Women's Law Center submitted an amicus brief to the U.S. Court of Appeals for the Fifth Circuit in *Braidwood Management, Incorporated v. Xavier Becerra, et al*. Our brief supports the Government in its defense of the Affordable Care Act's requirement to provide preventive care without cost-sharing, which ensures that millions of women, particularly those who face multiple and intersecting forms of discrimination, retain access to care. We urge the appeals court to affirm the district court's decision to uphold Health Resources and Services Administration (HRSA)-supported women's preventive services

recommendations, including women-specific cancer and diabetes screenings, breastfeeding services and supplies, and contraception.

- ***Lacks v. Ultragenyx Pharmaceutical, Inc.* (D. Md.)** - Fighting medical exploitation and unjust enrichment

  On November 9, 2023, the National Women's Law Center joined the Lawyers' Committee for Civil Rights Under Law and the National Health Law Program in an amicus brief submitted to the U.S. District Court for the District of Maryland in *Lacks v. Ultragenyx Pharmaceutical, Inc*. Our brief supports the Lacks family's claim of unjust enrichment against Ultragenyx, a multi-billion-dollar biopharmaceutical corporation that profits from sales of products derived from the "HeLa" cells that were originally non-consensually and non-therapeutically harvested by white doctors at John Hopkins Hospital from Mrs. Henrietta Lacks's cervix in the 1950's. Our brief places Ultragenyx's actions within the disturbing history of systemic medical exploitation and disregard of the informed-consent rights of poor, Black, and Indigenous people and argues that Ultragenyx's continued profit from Mrs. Lacks' exploitation perpetuates that harm.

ADDITIONAL MATTERS

- ***Amos v. Miller* (D. Md.)** - Fighting sexual harassment in housing and retaliatory evictions

  On February 16, 2023, NWLC joined an amicus brief led by the National Housing Law Project to the Supreme Court of Colorado in support of Claire Miller and others who experience sexual harassment in housing and ensuing retaliatory evictions. Miller, a single mother of a young child, attempted to raise an affirmative defense alleging that her landlord, Jesse Amos, sexually harassed her and subsequently filed a retaliatory eviction after she rejected his sexual advances in violation of the Colorado and federal Fair Housing Act (FHA). The county court held that a month-to-month tenancy could be terminated for "any reason" and fair housing law violations could not be raised as an affirmative defense. On appeal, the district court affirmed. The amicus brief explains how preventing victims from raising harassment as a defense to a state eviction court action (1) undermines the purpose and effect of civil rights laws and (2) greenlights evictions by property owners who engage in or sanction harassment. Accordingly, the Supreme Court of Colorado should reverse.

- ***A.W. v. Coweta County School District* (11th Cir.)** - Protecting remedies under the Americans with Disabilities Act

  On April 5, 2023, NWLC joined an amicus brief submitted by a group of 14 disability rights and other civil rights organizations to the Eleventh Circuit in support of 4 disabled students—A.W., E.M., M.F., and D.G.—who sued their Georgia school district under Title II of the American with Disabilities Act (ADA). A federal district court held that they could recover neither emotional distress damages (citing the Supreme Court's decision in *Cummings*) nor other compensatory damages that were not based on emotional distress.

  The amicus brief explains that the district court erred on both counts. First, Cummings prohibited emotional distress damages only under Section 504 of the Rehabilitation Act of 1973 (Section 504) and the Affordable Care Act (ACA), statutes that were enacted under Congress's Spending Clause authority. In contrast, Congress enacted the ADA under its Fourteenth Amendment and Commerce powers and never intended for emotional distress damages to be foreclosed under the ADA. Second, the Supreme Court prohibited emotional distress damages under Section 504 and the ACA because the Court has held that Spending Clause statutes operate as a quasi-contract between the federal government and recipients of federal financial assistance, and in *Cummings* the Court concluded that emotional distress is generally not compensable under contract law. But there is no plausible reading of *Cummings* that extends this prohibition to other types of compensatory damages, which are traditionally widely available under contract law. In summary, the Eleventh Circuit must reverse the district court's decision to ensure full enforcement of the ADA and to protect the ability of victims of disability discrimination—and indeed, all forms of discrimination—to seek justice in the courts.

- ***Florio v. Wayside Youth and Family Support Network* (Mass.)** - Protecting Sexual Assault Survivors' Counseling Records from Disclosure

  On April 18, 2023, NWLC joined an amicus brief led by Victim Rights Law Center and Jane Doe, Inc. on behalf of nine survivor advocate organizations in Massachusetts' highest court. The brief supported a counseling center in the state that is resisting turning over a minor survivor's sexual assault counseling records. Massachusetts law creates an important privilege for confidential communications between a sexual assault survivor and a sexual assault counselor. Thus, criminal defendants cannot access these communications unless they can establish that there is a "specific need" for the records and that disclosing the records would not cause an "undue hardship" on the recordholder. However, in this case, a Massachusetts lower court ordered the counseling center to release the survivor's records to the assailant, who is being prosecuted in Rhode Island, without ensuring that the request met these requirements.

  The amicus brief explains that the Massachusetts lower court made three errors. First, it wrongly relied on the Rhode Island court's determination that the counseling records could be *generally* relevant to the assailant's defense, even though that analysis did not apply Massachusetts' "specific need" requirement. Second, the lower court did not adequately consider that disclosing the records would impose an "undue hardship" on either the minor survivor, who would suffer significant psychological harm, or to the counseling center, which would be unable to generally assure confidentiality as part of its sexual assault counseling services to any of its clients if there was always a risk of the records being so easily disclosed. And third, the lower court incorrectly held that any objections to the disclosure of counseling records should be made to the requesting court, even if it is not a Massachusetts court, which would create great uncertainty for both survivors of sexual assault and the counselors who treat them. Therefore, the amicus brief urges the court to properly apply the "specific need" and "undue hardship" requirements in all cases concerning survivors receiving care in Massachusetts and to require Massachusetts courts to make these determinations, regardless of where the assault occurred or where a criminal defendant is seeking the records.

- ***Earls v. North Carolina Judicial Standards Commission* (M.D.N.C.)** - Supporting judges' right to speak publicly on issues of racial and gender diversity on the bench

  In September 2023, NWCL joined an amicus brief authored by Lawyers' Committee for Civil Rights Under Law in support of Justice Anita Earls of the North Carolina Supreme Court. After Justice Earls publicly spoke about the lack of diversity among appellate advocates in North Carolina and how judges' unconscious biases may result in disparate treatment of male and female advocates, the North Carolina Judicial Standards Commission launched an investigation into her. The brief details the wealth of empirical evidence supporting Justice Earls' remarks. It explains why her remarks bolster—not undermine—the court's integrity. Finally, it explains how the investigation violates Justice Earls' First Amendment rights. NWLC also joined a similar open letter authored by the NAACP.

- ***People v. Weinstein* (N.Y. Ct. App.)** - Supporting survivors

  On October 20, 2023, NWLC and eighteen other organizations joined an amicus brief led by Sanctuary for Families and Women's Equal Justice in the case of *People v. Weinstein* in the New York Court of Appeals. In this case, Harvey Weinstein is asking the New York Court of Appeals to reverse one of his criminal convictions. He is arguing that the prosecution should not have been allowed to introduce the testimony of several other women, in addition to those he was charged with assaulting, who said that Weinstein also assaulted them. This is known as "prior bad act" or "similar crimes" evidence. Its admissibility is limited to circumstances where it is used to prove intent or other specific issues, not to prove that the defendant has a criminal "propensity." The trial court—correctly, we argue—ruled that this kind of limited use was permissible here.

  Our brief explains that such evidence that a defendant has assaulted other people can be particularly important in sexual assault cases, because it can help the jury understand the defendant's intent and the complainant's non-consent. Sexual assault cases often involve the complainant's word against the defendant's. And juries may have misconceptions about how a survivor should act that could cause them to

disbelieve complainants who, for example, continue to have a relationship with their abuser due to unequal power dynamics, or who froze during an assault instead of fighting back. Evidence that the defendant has assaulted other people can help a jury to understand their methods of victim selection, perpetration, and concealment—and to be appropriately skeptical of their claim that the survivor consented.

- ***American Alliance for Equal Rights v. Fearless Fund Management*** **(11th Cir.)** - Defending remedial race-conscious charitable giving

  In December 2023, NWLC joined an amicus brief led by Lawyers' Committee for Civil Rights Under Law. The brief argues that Congress enacted § 1981 as a remedial measure during the Reconstruction era to secure the rights of newly emancipated Black citizens who historically had been, and were being, deprived of the rights to make and enforce economic contracts. Therefore, Plaintiff's challenge to the Fearless Foundation's Fearless Strivers Grant program, a philanthropic, remedial program that awards grants to Black women-owned small businesses that have been disadvantaged in their ability to obtain funding, is contrary to § 1981's congressional purpose and intent and should not succeed.

VICTORIES AND OTHER UPDATES FROM EARLIER AMICUS BRIEF CASES

In addition to the wins noted above in our 2023 amicus cases, this year we also learned of important wins and other decisions in cases in which we filed amicus briefs in 2022 and earlier.

- ***Hamilton v. Dallas County*** **(5th Cir.)** - Opposing unduly restrictive interpretation of Title VII

  In May 2021, NWLC, along with the ACLU Women's Rights Project, ACLU of Texas, our pro bono partners at Katz, Marshall & Banks, and 41 other organizations, filed an amicus brief supporting nine Black women working at the Dallas County Jail. The Jail had instituted a policy wherein schedules were restricted by sex—women working at the Jail were not allowed to schedule off the full weekend, but men were allowed to take off both Saturday and Sunday. Our amicus brief detailed why this policy was sex discrimination under Title VII and the harm to all women—particularly women of color and those with caregiving responsibilities—that occurred when employees were denied the ability to control their work schedules.

  On August 18, 2023, the Fifth Circuit Court of Appeals, sitting en banc, eliminated the requirement that actionable claims of adverse employment decisions under Title VII must involve an "ultimate employment decision." For decades, the Fifth Circuit limited liability for employers under Title VII disparate treatment claims to "ultimate employment decisions," like hiring, firing, promotion, or pay. In this ruling, the court recognized that the text of Title VII contains no such limitation, and instead clearly allows for liability for other discriminatory decisions. The court further ruled that an employee's work schedule—which in this case, were restricted so women could not take full weekends off—are "quintessential" terms and conditions of employment. The plaintiffs, nine female detention service officers, are now free to demonstrate that the scheduling policy put in place by Dallas County illegally discriminated against them based on sex.

- ***Balow v. Michigan State University*** **(6th Cir.)** - Fighting sex discrimination in school sports

  On January 13, 2023, the parties in *Balow v. Michigan State University* reached a settlement agreement that prohibits MSU from cutting any women's team from now until the end of the 2029-30 school year. Leading to the settlement, on May 26, 2021, NWLC, along with co-counsel Legal Aid At Work and Simpson Thacher & Bartlett LLP, led a group of 25 other civil rights organizations in a Sixth Circuit amicus brief in support of Sophia Balow and her varsity swim and diving teammates, who wanted to stop MSU from cutting their team. Title IX prohibits sex discrimination in school sports, including a "participation gap" that occurs when the number of spots for each gender on all sports teams is disproportionate to each gender's enrollment. The ensuing settlement agreement prohibits MSU from cutting any women's team from now until the end

of the 2029-30 school year. The agreement also requires MSU's athletic program to come into full Title IX compliance by the end of the 2026-27 school year, including by requiring the appointment of an independent Gender Equity Review Director and the creation of a Gender Equity Plan.

- ***Hecox v. Little* (9th Cir.)** - Fighting discrimination against trans women and girls in sports

  NWLC, the Lawyers' Committee for Civil Rights, and our firm partners Hogan Lovells led 60 organizations committed to racial, gender, and LGBTQ justice and filed an amicus brief in *Hecox v. Little* challenging Idaho's "Fairness in Women's Sport's Act" (H.B. 500) which imposes a statewide ban on all women and girls who are transgender from participating in sports consistent with their gender identity. Our brief argues that targeting trans women and girls is sex discrimination that violates Title IX, and further warns the court that this provision will harm women who are intersex and women who are cisgender, particularly Black and brown women and girls whose bodies are more often policed.

  On January 30, 2023, the Ninth Circuit affirmed the district court's July 2022 decision that Lindsey's lawsuit challenging H.B. 500 is not moot and, therefore, can continue. The Court noted that although Lindsey withdrew from her college in fall 2020, she intended to re-enroll, later did re-enroll, and has been playing on the women's club soccer team since fall 2022. Furthermore, she intends to try out for the women's cross-country and track teams. Without the district court's preliminary injunction against H.B. 500, which was issued in August 2020, she would be banned from playing on the club soccer team and from even trying out for the cross-country and track teams. Therefore, the Court affirmed that Lindsey has the right to continue her lawsuit, which seeks to strike down this law. For more information about the case and our brief, read our blog here.

- ***Arizona v. Walsh* (D. Ariz.)** - Defending the $15 minimum wage for workers on federal contracts

  On January 6, 2023, the district court granted the federal government's motion to dismiss this challenge to the federal contractor minimum wage Executive Order and Rule. The court rejected the states' arguments, finding that neither the Executive Order nor the Rule exceeded President Biden's authority under the law. The court also held that the Executive Order and the Rule were not substantively reviewable under Administrative Procedures Act and did not violate either the non-delegation doctrine or the Spending Clause. Prior to this decision, NWLC co-led a proposed amicus brief on May 9, 2022, defending the $15 minimum wage for workers on federal contracts, and urging the court to uphold the Biden Administration rule governing wages for federal contractors

- ***303 Creative v. Elenis* (U.S.)** - Defending antidiscrimination laws

  On June 30, 2023, the Supreme Court ruled that a website designer can refuse to provide custom wedding website services to LGBTQ+ couples. This decision, while technically legally narrow and focused on creative and expressive services, and specifically the wedding website service, will embolden businesses who wish to turn away LGBTQ+ or other individuals based on identity.

  NWLC, along with our law firm partner Covington & Burling LLP, and 35 additional advocacy organizations, filed an amicus brief supporting Colorado and its state civil rights law, the Colorado Anti- Discrimination Act, which prohibits businesses that serve the public from discriminating against customers based on protected characteristics, like race, sex, sexual orientation, national origin, or disability. Our amicus brief explained why the Supreme Court should not allow businesses to violate public accommodations laws merely because they claim a "free speech" right to discriminate against customers. In practice, we pointed out, creating such a broad exemption from anti-discrimination laws would mean that any business could deny service to any customer based on their identity, unraveling vital legal protections and decades of progress. Our brief highlighted the importance of public accommodations laws and the wide-ranging harms that would be caused by allowing these kinds of exceptions, particularly for LGBTQ people, women, and people of color.

- ***Students for Fair Admissions v. Harvard College and Students for Fair Admissions v. University of North Carolina* (U.S.)** - Defending race-conscious college admissions

  On June 29, the U.S. Supreme Court issued a ruling restricting the consideration of race in college and university admissions processes. As outlined powerfully in the dissent by Justices Sotomayor, Kagan, and Jackson, the majority ignored decades of precedent and the reality of continued racism in our nation.

  NWLC led an amicus brief in these related cases, alongside our law firm partner Linklaters LLP and 37 additional civil rights and gender justice organizations, urging the Court not to overrule or narrow decades of precedent upholding affirmative action policies. Our amicus brief defended the universities' interest in maintaining a diverse student body and ensuring that past discrimination does not perpetuate ongoing exclusion. The brief highlighted the ways that affirmative action policies are necessary for addressing race and sex discrimination based on stereotypes and the effects of historic and current discrimination that uniquely harm women of color, who continue to remain underrepresented in higher education and across various fields.

- ***Yost v. Everyrealm, Inc. and Johnson v. Everyrealm, Inc.* (S.D.N.Y.)** - Supporting broad access to the courts for survivors of sexual harassment

  On December 7, 2022, NWLC joined Public Justice, the American Association for Justice, the National Employment Lawyers Association, RAINN, RISE, and Lift Our Voices to submit an amicus brief in *Yost v. Everyrealm, Inc*. and *Johnson v. Everyrealm, Inc*. on the proper application of the Ending Forced Arbitration in Sexual Assault and Sexual Harassment Act ("EFASASHA"). The Act prevents employers and other businesses from sweeping sexual misconduct under the rug by providing plaintiffs with the right to pursue their claims in court, instead of being forced into secretive and unfair arbitration procedures. Our amicus briefs explains why courts must interpret and apply EFASASHA broadly whenever there is a "sexual harassment dispute" raised in the plaintiff's complaint, encompassing not only claims for sexual harassment but also any related claims.

  On February 24, 2023, NWLC celebrated an incredible victory in the *Johnson* case, as the Court denied the Defendants' motion to compel arbitration and agreed with NWLC and the plaintiff that EFASASHA applies to the entire case and not just the sexual harassment claims. Although it did not have occasion to make a holding on the issue, it endorsed our argument that "sexual harassment dispute" can include claims other than hostile work environment such as retaliation, making it the first case to decide these issues.

  Less fortunately, in the *Yost* case, the Court found that the complaint did not state a plausible claim for sexual harassment, and subsequently rejected NWLC's argument that EFASASHA applies even if the sexual harassment claim does not ultimately survive. As a result, the Court held that EFASASHA does not bar arbitration of the plaintiff's remaining claims. We disagree with the Court's decision on these issues, and recognize how important it will be to continue to push courts to decide the EFASASHA issue at the outset of the case before briefing on the merits.

- ***Restaurant Law Center v. U.S. Department of Labor* (S.D.N.Y.)** - Protecting restaurant workers

  In July 2022, NWLC co-led an amicus brief to the Fifth Circuit in *Restaurant Law Center v. U.S. Department of Labor* to protect restaurant workers from wage theft and abusive labor practices. Alongside Democracy Forward, NWLC submitted a brief in support of the Department of Labor, urging the court to uphold the agency's final rule limiting the amount of time tipped employees can spend performing non-tip producing work while still receiving cash wages as low as $2.13 per hour.

  On May 2, 2023, the Fifth Circuit held that the plaintiffs submitted sufficient evidence to reverse and remand the district court's order denying their request for a preliminary injunction. The district court had denied the request on the grounds that the Restaurant Law Center (RLC) had not proven an "irreparable injury" due to the Department of Labor's rule, but the Fifth Circuit concluded that RLC showed the rule's estimated

compliance costs were enough to demonstrate irreparable harm, which need only be "more than *de minimis*."

On July 6, 2023, the district court upheld the Department of Labor's rule. The plaintiffs have appealed again to the Fifth Circuit.

- ***Vasquez v. Iowa Department of Human Services*** **(Iowa Supreme Court)** - Challenging state's gender-affirming-health-care Medicaid exclusion

  In June 2022, NWLC, alongside 12 groups dedicated to gender justice and LGBTQ rights and counsel Kaplan Hecker & Fink LLP, filed an amicus brief in *Vasquez v. Iowa Department of Human Services* before the Iowa Supreme Court. This case challenged Iowa's long-running attempt to bar Medicaid coverage for transgender Iowans seeking gender-affirming health care. Although the Iowa Supreme Court ruled in 2019 that such an exclusion violated the Iowa Civil Rights Act, the Iowa legislature subsequently amended the Act to provide that it would not require the state to cover gender-affirming health care. The plaintiffs, two transgender Iowans, challenged this amendment, arguing that it violates the Iowa Constitution's equal protection guarantee. Our brief argued that the amendment discriminates based on transgender status and should therefore be subject to—and struck down under—strict scrutiny under the Iowa Constitution.

  In May 2023, the Iowa Supreme Court dismissed the government's appeal as moot after the Iowa Department of Human Services agreed to pay for the plaintiffs' surgeries. It concluded that it would "save the constitutional issues for another day, presumably with a better-developed record."

- ***Gottwald v. Sebert*** **(Iowa Supreme Court)** - Opposing defamation lawsuits in response to reporting sexual abuse

  In April 2022, NWLC, alongside our law firm partner Latham & Watkins LLP, led an amicus brief on behalf of 35 other organizations to the New York Court of Appeals in *Gottwald v. Sebert* in support of singer songwriter Kesha, who has been sued for defamation by Dr. Luke, her former producer, who sexually abused her in 2005 when she was 18 years old.

  On June 13, 2023, the New York Court of Appeals issued an opinion holding that statements made in a lawsuit cannot ever form the basis of a defamation lawsuit. At the same time, the Court held that the statements made in preparation for a lawsuit, including sending a draft complaint to reporters before filing the lawsuit, are only protected by a qualified privilege, which means the statements must be made in good faith. Therefore, the Court concluded that Dr. Luke's defamation lawsuit against Kesha must still go to trial, so that a jury can decide whether she made her pre-lawsuit statements in good faith or as a "sham" (in order to pressure him into releasing her from her contracts with him). The court also held that New York's new anti-SLAPP law applies to lawsuits filed before the new law's effective date and continued after that date, starting from the effective date. So, if Kesha wins her anti- SLAPP motion against Dr. Luke, then he must pay all of the attorneys' fees she incurred starting from the effective date of the new anti-SLAPP law. The Court also decided that Dr. Luke is a "limited purpose public figure" due to his self-acknowledged prominence in the music industry, which means he must meet a higher standard than "private figures" when suing for defamation. Specifically, he must prove that Kesha knew her statements about him were either false or probably false, not merely that she did not do her due diligence before making her statements.

- ***Grabowski v. Arizona Board of Regents*** **(9th Cir.)** - Recognizing Title IX prohibits sexual-orientation based harassment

  In August 2022, NWLC joined an amicus brief led by Public Justice on behalf of 19 civil rights organizations to the Ninth Circuit in support of Michael Grabowski, a college track athlete at the University of Arizona. The case arose because Michael reported to his school that his teammates were harassing him because they thought he was gay. In response, the school dismissed him from the track team and canceled his athletics scholarship. A federal district court incorrectly held that Title IX does not prohibit sexual orientation-based

harassment, and that the harassment Michael faced was not sufficiently "severe and pervasive" to constitute actionable harassment. The district court also erroneously held that Michael's retaliation claim failed because, in the court's view, the harassment was not sufficiently "severe and pervasive" when he reported it to the school.

On June 13, 2023, the Ninth Circuit unanimously held that Michael's lawsuit can proceed. In reversing the district court's decision, the Court affirmed that Bostock applies to Title IX, meaning schools must address harassment based on actual or perceived sexual orientation. In addition, the Court held that Michael sufficiently alleged the harassment he faced was severe because it was so frequent, and that he stated a retaliation claim. It also added that when an athletics coach has knowledge of sex-based harassment, the school is considered to have actual notice of the harassment under Title IX. Finally, although the Court affirmed the district court's dismissal of Michael's harassment claim because, in the Court's view, he did not sufficiently allege that the harassment deprived him of education, it allowed him to amend his complaint to allege those facts in more detail.

- ***Victoria Crisitello v. St. Theresa School*** **(N.J.)** - Opposing overbroad application of the ministerial exception to antidiscrimination law

  In August 2021, NWLC, along with Americans United for Separation of Church and State, our pro bono partner Lowenstein Sandler LLP, and 26 additional organizations, filed an amicus brief in support of Ms. Crisitello. She was a teaching aide in the "toddler room," and later an art teacher, at a Catholic elementary school in New Jersey, and she was told she should resign or be fired when she became pregnant. The school argued, among other things, that it was insulated from liability because Ms. Crisitello was a "ministerial employee." We detailed for the New Jersey Supreme Court the range of harms that could flow from deciding that Ms. Crisitello is a "ministerial" employee—including, for example, losing protections against sexual harassment, unequal pay, disability discrimination, and claims for overtime pay.

  On August 14, 2023, the New Jersey Supreme Court held that the "religious tenets exception" to the New Jersey Law Against Discrimination provides an affirmative defense for religious employers facing claims of employment discrimination. This means that religious employers can use the exception to avoid liability under state antidiscrimination law. In this case, the school claimed Ms. Crisitello was fired because she violated their Code of Ethics, which follows Catholic teachings on premarital sex. The Court ruled for St. Theresa, holding that Ms. Crisitello did not show a genuine dispute as to whether the school's decision to fire her relied solely on religious tenets. Because the Court decided the case based on the New Jersey antidiscrimination statute, it did not rule on our arguments regarding the ministerial exception.

- ***Fellowship of Christian Athletes v. San Jose Unified School District*** **(9th Cir.)** - Supporting school antidiscrimination policies

  On September 13, 2023, the Ninth Circuit ruled en banc that the school district violated the First Amendment by selectively enforcing its nondiscrimination policy against the Fellowship of Christian Athletes, which conditioned students' full participation on signing a sexual purity statement that discriminated against LGBTQ students in violation of the district's nondiscrimination policies.

  In July 2022, NWLC filed an amicus brief in this case explaining that single-sex sports teams and open-membership clubs and programs geared towards particular communities are not "exceptions" to the district's nondiscrimination policies and are allowed by existing civil rights laws, which both protect against discrimination and promote inclusion. We explained that FCA's argument that the district's nondiscrimination policies do not allow for any consideration of demographic factors in any aspect of a school's operations would create absurd results and conflict with federal and state laws.