

2017 AMICUS BRIEFS SUMMARY

1. Luke v. Cplace Forest Park SNF, LLC (Fifth Circuit) dated 1/26/17

Pregnancy discrimination

Author: American Civil Liberties Union (ACLU), A Better Balance and the Center for WorkLife Law

The amicus brief argues for reversal of the district court's decision finding the denial of Ms. Luke's request for a pregnancy accommodation by her employer was not a violation of the law. The brief argues that the district court (1) incorrectly collapsed the *McDonnell Douglas* framework by accepting as true the employer's claimed reason for not accommodating Ms. Luke, (2) incorrectly read *Young v. United Parcel Service, Inc.* as permitting employers to unilaterally deny accommodations proposed by the pregnant worker without engaging in a dialogue about alternatives, and (3) read *Young* as precluding evidence of favorable treatment of pregnant comparators.

2. Whitaker v. Kenosha Unified School District (Seventh Circuit) filed 1/30/17

3. Gloucester County School Board v. G.G. (Fourth Circuit) filed 3/2/17

Transgender bathroom discrimination

Author: National Women's Law Center (NWLC), ACLU

The amicus brief argues that the bathroom policy discriminating against transgender students is improper policy. It focuses on three major points: (1) discrimination against cisgender women and transgender people are rooted in the same biases, which is why the same laws and legal principles protect them, (2) protecting trans students is required to fulfill the purpose of Title IX: eradicating discrimination based on gender in educational programs, and (3) fearmongering about invented threats to women and girls in bathrooms has historically been used to perpetuate discrimination (including against people of color) and subvert civil rights movements.

4. Sathokvorasat v. Snyder (CA Court of Appeal) dated 2/6/17

Domestic violence

Author: Los Angeles Center for Law and Justice (LACLJ), Family Violence Appellate Center (FVAP)

The Request for Publication argues that the appellate decision should be published because it would be the first opinion to discuss disturbing the peace within the context of a custody exchange. Notably, the appellate court found that filming and restricting the survivor's movements during an exchange may disturb the survivor's peace. Abusers will often use custody exchanges to continue to abuse the survivor, including using tactics such as filming the survivor and restricting her or his movements. Therefore, the case would provide important guidance to trial courts that such actions may constitute disturbing the peace.

5. Chavez v. Chavez (CA Court of Appeal) filed 2/23/17

Domestic violence

Author: FVAP

The amicus brief argues that domestic abuse should be considered by trial courts when determining whether the survivor of abuse really did receive more "benefits" under a marital settlement agreement. In addition, if an agreement is unbalanced, the spouse obtaining greater benefits must rebut a presumption of undue influence. Where, as in this case, that spouse is the survivor of abuse, the brief argues that domestic violence should be considered and should weigh heavily in rebutting the

presumption. Finally, the brief discusses stereotypes regarding “victims” of abuse and how these stereotypes may unfairly color trial courts’ assessments in these matters. In this case the court relied on the disparate educational backgrounds of the parties, but survivors can both be well-educated and have less power in a relationship.

6. Fryberger v. The University of Arkansas (Eighth Circuit) filed 3/8/17

Title IX campus sexual assault

Author: Equal Rights Advocates

The amicus brief was filed in response to a brief filed by the states of Arizona, Louisiana, Kansas, Nebraska, South Carolina, and Texas arguing that monetary damages cannot be sought against states (or state universities) in Title IX actions because of Eleventh Amendment immunity. The amicus brief makes clear that Title IX, as amended by the Civil Rights Remedies Equalization Act, unequivocally requires states to waive sovereign immunity from monetary liability as a condition of receiving federal funding.

7. In re LT (CA Court of Appeal) dated 3/15/17

Domestic violence

Author: FVAP

The Request for Publication emphasizes that the underlying opinion should be published because it explains that the lack of incidents since the dependency proceeding was filed does not constitute an abuse of discretion in issuing a juvenile restraining order protecting a survivor from intimate partner violence. The opinion also explains the circumstances under which a court does not abuse its discretion in adding a child as a protected party on a juvenile restraining order. The Second District Court of Appeal specifically concluded that the father in this case posed a risk to the child’s safety because of the domestic violence the child witnessed, the father’s later abusive outbursts against others, and the father’s inability to abide by the visitation schedule.

8. In re Marriage of McGinty (CA Court of Appeal) dated 3/27/17

Domestic violence

Author: FVAP

The Request for Publication emphasizes that the mother in this case, who alleged domestic violence, was entitled to a fair hearing on the merits regarding custody and did not have any additional burdens, despite the finding that she did not meet her burden of proving that domestic violence occurred. Since trial courts often discount evidence of abuse—and then go on to hold that allegation against the party who raised the allegation when determining custody—this is an important case for domestic violence survivors.

9. Bianka M. v. Superior Court (CA Supreme Court) filed 4/10/17

Domestic violence and immigration

Author: FVAP

This amicus brief urging reversal discusses how the Court of Appeal’s decision rested on the mistaken premise that Special Immigrant Juvenile (SIJ) status findings and custody determinations under the Uniform Parentage Act require a parentage determination of (and thus personal jurisdiction over) an absent parent who abandoned the child after abusing the proposed custodial parent. It explains that

the California laws addressing domestic violence plainly permit the entry of custody orders without determining the parentage of an abuser, and instead, only require notice and an opportunity to be heard. Moreover, the brief argues that the appellate court's ruling places children of abused parents and survivors of abuse in the untenable and dangerous position of having to ask their abusive parent to cooperate in order to establish entitlement to protection against being released back into the abusive parent's care.

10. Cargian v. Breitling USA, Inc. (Second Circuit) filed 2/2/17

11. Evans v. Georgia Regional Hospital (Eleventh Circuit) filed 4/10/17

12. Christiansen v. Obmicom Group, Inc. (Second Circuit) filed 5/5/17

13. Zarda v. Altitude Express (Second Circuit) filed 5/9/17

LGBT employment discrimination

Author: ACLU

The amicus briefs argue that Title VII's prohibition of discrimination "because of sex" encompasses discrimination based on sexual orientation. They argue that Title VII's sex provision has undergone a nearly continual evolution to encompass ever-broader interpretations of the kinds of employment practices that constitute discrimination "because of sex."

14. In re A.S. (CA Court of Appeal), filed 5/24/17

Domestic violence

Author: FVAP

The Request for Publication emphasizes that the underlying opinion should be published because it provides helpful guidance as to when reunification services under Welfare and Institutions Code section 366.21(g) should be terminated when a dependency is brought solely based on domestic violence between the parents. Section 366.21(g)(1)(B) bars the extension of reunification services to a parent beyond twelve months unless the parent has "made significant progress in resolving problems that led to the child's removal from the home." Previously-published cases provide little guidance on what constitutes "significant progress" under this statute, particularly in cases where DV prompted the removal. A.S. would be the first published case to make it explicitly clear that in a section 366.21(g) proceeding, violent behavior equals non-progress even when perpetrated against new individuals, or when taking the form of a restraining order violation. This guidance is of public interest because witnessing DV can have significant adverse effects on children. The opinion also explains that successful visitations and mere attendance of DV classes or counseling sessions do not themselves demonstrate compliance with a reunification services case plan. This is an issue of continuing public interest.

15. Hogue v. Hogue (CA Court of Appeal) filed 5/30/17

Domestic violence

Author: University of Oregon School of Law's Domestic Violence Clinic

The amicus brief urging reversal emphasizes three key problems with the Court of Appeal's ruling: (1) by incorrectly characterizing domestic violence as episodic, rather than as a continuous pattern of coercive control, the court failed to recognize that the abuse in Georgia is inextricably linked to the abuse in California, (2) the trial court erred when it assumed that domestic violence affects only the victim, and not also the California economy, society, and political system, and (3) failing to treat the effects of domestic violence in the state as sufficient for a restraining order jeopardizes the safety of domestic violence victims by penalizing them for fleeing from their abusers.

16. In re Douglas G. Jr. (CA Court of Appeal) filed 5/30/17

Domestic violence

Author: FVAP

The Request for Publication states that this case should be published because it clarifies when it is proper for a juvenile dependency court to issue a restraining order protecting children from intimate partner violence. If published, this case would provide helpful guidance on this important issue, where there is currently a dearth of case law. Notably, the appellate court held that courts may consider evidence that a father abused a mother during pregnancy when determining whether the later-born children should be included in a restraining order against him. The court also held that threats against older siblings or half-siblings may be considered in assessing whether a younger child's safety may be jeopardized.

17. A.R. v. R.M. (CA Court of Appeal) filed 7/7/17

Domestic violence

Author: FVAP

The amicus brief argues that this case presents the CA Court of Appeal with the opportunity to provide much-needed guidance to help trial courts understand why Section 3044 is critical to protecting children and survivors of abuse and how the rebuttal factors should be weighed when considering a custody request made by an abusive parent. R.M. physically and emotionally abused A.R. While the trial court appropriately issued a DV restraining order against R.M., it also inappropriately awarded him joint custody of the parties' two young daughters without properly applying section 3044 and the rebuttal factors. The brief emphasizes the dangers of exposing children to domestic violence, as well as the need for the Court to provide guidance for trial courts which continue to misapply the law to the detriment of the children involved.

18. In re Marriage of Sukkary (CA Court of Appeal) dated 7/19/17

Domestic Violence

Author: FVAP; WEAVE

The Request for Publication emphasizes that this opinion should be published because it addresses three issues of first impression in civil actions brought under California's Domestic Violence Prevention Act (DVPA). Specifically, the opinion (1) holds that expert witness testimony that helps the trier of fact dispel misconceptions about how survivors of DV behave is relevant and admissible in DVPA actions, (2) applies existing credibility rules regarding survivors' delayed reporting and inconsistent statements in criminal cases and applies them to the civil context in a DVPA action, and (3) addresses Family Code section 6301, which has not yet been addressed in a published opinion. Section 6301 states that the right to petition for relief under the DVPA shall not be denied because the petitioner has vacated the household to avoid abuse. The Request argues that each of these issues is an important development in the law surrounding domestic abuse, an issue of continuing public interest, and warrants publication.

19. Fulcher, et al., v. Secretary of Veterans Affairs (Federal Circuit) dated 7/28/17

Transgender Veterans

Author: Impact Fund

The amicus brief highlights the growing national consensus among courts and federal agencies that discriminating against transgender people because of their perceived failure to conform to gender stereotypes, their transgender status, or their gender transition is unlawful sex discrimination. Petitioners requested that the Department of Veterans Affairs (“VA”) amend or repeal rules and regulations, including 38 C.F.R. § 17.38(c)(4) (2016), that deny coverage for medically necessary sex reassignment surgery for transgender veterans. The VA denied the request, and petitioners now seek review. The brief argues that the Supreme Court’s interpretation of laws prohibiting sex discrimination has evolved to ensure that protective laws remain relevant and meaningful, and that nearly all circuit and district courts that have considered the issue have held that transgender people are protected by laws prohibiting sex discrimination. It argues 38 C.F.R. § 17.38(c)(4) violates the equal protection clause because it specifically excludes medically necessary sex reassignment surgery for transgender veterans while providing identical or substantially similar surgeries for non-transgender veterans; it singles out transgender veterans for differential treatment, without any persuasive justification. It is also a violation of section 1557 of the Affordable Care Act, which prohibits any program administered by an Executive Agency from discrimination on the basis of sex in health care.

20. Epic Systems Corp., v. Lewis

Ernst & Young LLP, et al., v. Morris, et al.

National Labor Relations Board v. Murphy Oil USA, Inc., et al.

SCOTUS filed 8/16/17

Employment discrimination

Author: NAACP Legal Defense & Educational Fund, Impact Fund

The amicus brief emphasizes the importance of concerted action and class action suits in the employment context, as well as the profound consequences of the unrestrained use of arbitration clauses in individual employment agreements. The brief focuses on the historic partnership between civil rights and class actions. It emphasizes that individualized adjudication is not compatible with injunctive relief or most civil rights legal theories, such as disparate impact theory and pattern or practice theory.

21. Garcia v. Escobar (CA Court of Appeal) dated 9/8/17

Domestic violence

Author: CWLC

The amicus brief argues for a reversal of the family court’s decision that it lacks jurisdiction under Family Code section 6345(a) to renew a domestic violence restraining order that was issued by the juvenile court and included in an “exit order” upon termination of a juvenile dependency case. Under section 6345(a) of the Family Code (part of the DVPA), a renewal may be granted without a showing of any further abuse, in contrast to the showing of a prior act of abuse required for an initial restraining order. The family court’s decision, if left to stand, would impose an arbitrary, different burden on victims of DV who obtain initial restraining orders in juvenile court, by requiring them to “start over” later in family court, rather than make the separate showing for renewal permitted under Family Code section 6345(a). The brief further argues that (1) the statutory hand-off from the juvenile court to the family court is designed to allow the family court to enforce, modify, and extend domestic violence protective orders issued by the juvenile court and (2) this construction is supported by the stated purpose of the CA legislature in enacting and amending the DVPA and related provisions of the Welfare & Institutions Code and Family Code: to increase protection of victims of domestic violence.

22. *The Chamber of Commerce for Greater Philadelphia v. City of Philadelphia and Philadelphia Commission on Human Relations* (Eastern District of Penn.) filed 09/14/17

Economic justice

Author: Women's Law Project

The amicus brief supports Defendant's opposition to Plaintiff's amended motion to preliminarily enjoin the implementation of Philadelphia's wage equity ordinance, which prohibits reliance on and inquiries about a prospective employee's wage history. The brief argues that the use of a job applicant's salary history in setting pay perpetuates the gender wage gap, and that this ordinance addresses this issue without harming business. Further, the ordinance is a rational legislative policy decision like many other longstanding laws regulating the employment relationship for the purpose of eliminating discrimination. This ordinance was enacted to eliminate the systemic and costly gender wage gap and its implementation should not be enjoined.

23. *Nancy R. v. Juan V.* (CA Court of Appeal) dated 9/18/17

Domestic violence

Author: FVAP, LACLI

The Request for Publication emphasizes that the underlying opinion should be published because it would provide substantial guidance to trial courts on how to properly apply the rebuttable presumption against awarding custody to a domestic abuser under Family Code section 3044. There has been confusion in the trial courts regarding this issue, and publication of this opinion could resolve it and safeguard children from the known harms associated with granting custody to domestic abusers.

24. *Leonardo G., v. Priscila N.* (CA Court of Appeal) dated 9/22/17

Domestic violence

Author: CWLC

The amicus brief argues that the family court erroneously denied Priscila's request for a renewal of a restraining order based on its belief that it did not have jurisdiction to renew a restraining order initially issued by the juvenile court. Six months after issuing Priscilla a restraining order, the juvenile court issued an "exit" order terminating the dependency proceeding. By operation of the statutory scheme, the juvenile court's restraining order was handed off for any further action to the family court, where Priscila's marriage dissolution was underway. The brief argues that the family court had jurisdiction to renew the restraining order, instead of treating the motion as an application for an initial restraining order. This is an important issue because the standards for an initial restraining order are harder to meet than those needed for the grant of an extension to an existing restraining order.

25. *In re Marriage of Carlisle* (CA Court of Appeal) dated 10/19/17

Domestic violence

Author: FVAP

The Request for Publication argues that the opinion should be certified for partial publication because two of its holdings involving the interplay between temporary restraining orders (TRO) and domestic violence restraining orders after hearing (DVRO) are the first of their kind for the DVPA. It emphasizes that a significant legal question was clarified through the holding that the facts supporting the grant of a DVRO need not all be pled in the initial TRO, but can instead be supplied by live testimony at the hearing and may include alleged incidents of abuse taking place between the initial TRO application and the

hearing. The opinion also sheds light on the important question of the application of *res judicata* to preliminary injunctions, holding that the denial of a TRO does not have preclusive effect on a later proceeding for a DVRO. The Request emphasizes that this is a particularly important issue of public interest in DVPA proceedings because this is not immediately clear from the language of Family Code section 6300, and often litigants are not represented by counsel in these cases.

26. Lazar v. Kroncke (SCOTUS) dated 11/6/17

Economic justice

Author: The Women's Law Project

The brief argues that the retroactive application of automatic revocation-on-divorce statutes without, at the very least, a case-by-case analysis of the divorcing spouses' intent violates the Contracts Clause of the Constitution, and also has a disproportionate impact on divorced women over divorced men. These statutes provide that the divorce or annulment of a marriage automatically revokes a decedent's designation of a former spouse as a beneficiary in nonprobate assets, including IRAs and life insurance policies. These statutes and their retroactive application have a substantial disparate impact on the ability of divorced women to achieve economic security. The brief focuses on how divorced women face greater economic insecurity in retirement and child-rearing than do divorced men. The disparate impact is compounded by the retroactive application of these statutes, which interferes with the settled expectations of divorced women.

27. Lacount v. South Lewis Sh Opco, LLC (Tenth Circuit) filed 11/13/17

Pregnancy discrimination

Author: ACLU, Center for WorkLife Law

The amicus brief argues that the District Court below imposed unfounded pleading standards that would in effect prevent many women facing pregnancy discrimination from pursuing their claims in court. The brief stated that the Supreme Court in *Young v. United Parcel Service, Inc.* reaffirmed that the central purpose of the Pregnancy Discrimination Act is to assure that employers do not force women out of the workplace due to pregnancy. In the case at hand, the District Court ignored allegations that would be sufficient to raise an inference of discrimination under *Young* and required that Appellant provide in her initial pleadings a level of specificity about other individuals whom her employer accommodated that goes beyond what *Young* demands even at the post-discovery, summary judgment stage.

28. Nicollette J. Martinez Jones v. Miguel Amezcua (CA Court of Appeal) dated 12/11/17

Domestic violence

Author: FVAP

The amicus brief urges the Court to issue an opinion focused on the inappropriateness of the trial court's application of the "gatekeeping" theory in lieu of the California Family Code Section 3044 rebuttal factors to remove custody from a protective parent. Section 3044 states that awarding custody to a perpetrator of domestic violence is not in the child's best interest, absent rebuttal evidence put forth by the perpetrator that goes towards the seven statutory rebuttal factors a court is mandated to consider. In this case, the trial court awarded custody to the abusive father based on the "gatekeeping" theory, rather than on the rebuttal factors. The amicus brief argues that the "gatekeeping" theory uses the victim's justified adaptive behaviors or appropriate protective parenting actions against her to claim that a mother is unjustifiably trying to keep the father away from the children, and that it is based on other discredited theories. The brief argues that this misapplication of Section 3044 is a state-wide problem

that is detrimental to the children in these cases, and that, through its opinion, this Court has an opportunity to provide helpful guidance that will protect the interest of these children.

29. Feminist Majority Foundation et al., v. University of Mary Washington, et al. (Fourth Circuit) dated 12/19/17

Title IX cyber harassment

Author: National Women's Law Center

The amicus brief urges the Fourth Circuit to reverse the trial court's decision which was in favor of the University of Mary Washington (UMW). After speaking out against sexual violence, female students (Plaintiffs) at UMW endured severe cyber harassment, including rape and death threats, over the anonymous social media app "Yik Yak," for an entire year. They reported the incidents to UMW, but the school did not intervene. The brief argues that the school acted in violation of Title IX, with deliberate indifference to Plaintiffs' complaints of sexual harassment. The brief emphasizes the pervasiveness of cyber harassment, and its disproportionate effect on women, people of color, LGBTQ people, individuals with disabilities, and religious minorities. Cyber harassment interferes with a student's ability to receive equal educational opportunities, and educational institutions can and must confront this issue.

30. Jessica V. v. Douglas M. (CA Court of Appeal) dated 1/3/18

Domestic violence

Author: CWLC, Legal Services for Children, Legal Advocates for Children

The amicus brief addresses and supports two bases on which Appellant claims the decision of the family court below was erroneous when it terminated a DV restraining order issued by the juvenile court ("JVRO") and denied Appellant's request for a new restraining order ("DVRO"). The brief argues that the family court acted in excess of its jurisdiction and in violation of the children's due process rights when it terminated the JVRO, which the juvenile court had included in its custody order as a condition of terminating juvenile dependency proceedings. Family courts are required to treat such orders as final judgments not to be modified absent specific findings. The family court did this *sua sponte* and without making the findings required. Second, the brief argues that the family court abused its discretion by refusing to grant a new DVRO to protect Appellant and her children without any factual basis, despite multiple adjudications finding Appellee to be an abuser and new evidence that he initiated stalking behavior. The brief notes that these public safety issues have not yet been addressed in a published decision by the Court of Appeal.