MEMORANDUM
National Organization for Women Foundation

TO: National Organization for Women (NOW) Foundation Board Members
FROM: Jan Erickson, NOW Foundation Director of Programs, with the assistance of Brigid Rawdon, NOW Foundation Public Policy Intern
Date: June 2023

Florida's 15-week Abortion Ban and Intimate Partner Violence
Planned Parenthood of Southwest and Central Florida v. State of Florida
No. SC2022-1127
January 23, 2023

On June 1, 2022, healthcare providers filed a lawsuit challenging the constitutional validity of House Bill 5, a 15-week abortion ban, a ban made possible by the overturning of *Roe v. Wade* which prevented bans on abortion before viability, usually at 22 to 24 weeks gestation. Plaintiffs are arguing that, because Florida voters amended the state constitution in 1980 to provide broad protections for individual privacy rights such as abortion, HB 5 is unconstitutional and must be struck down. Furthermore, in 2012 Florida voters overwhelmingly rejected a constitutional amendment that would have taken those protections away.

In July of 2022, a state trial court issued an injunction blocking the law because the ban likely violated the state constitution. However, the state appealed the ruling which triggered an automatic stay of that injunction under Florida state law, preventing Floridians from accessing crucial abortion care while the case is adjudicated. On January 23, 2023, the Florida Supreme Court accepted a request to hear arguments in their case against House Bill 5.

The NOW Foundation has signed on to an amicus brief by Sanctuary for Families New York assisted by Cleary Gottlieb Steen & Hamilton in support of Floridian healthcare providers and abortion access. This brief specifically highlights how HB 5 would lead to significantly increased domestic violence and related forms of gender-based violence in Florida, issues that Florida Governor Ron DeSantis is purportedly committed to tackling. Intimate partner violence (IPV) can both cause unwanted pregnancy and can be exacerbated by pregnancy. Specifically, nearly one in six pregnant women in the United States are a victim of IPV. IPV is also highly correlated with rape and controlling behaviors related to the victim's reproductive health, including tampering with contraception or blocking access to reproductive healthcare. After becoming pregnant or giving birth, women in the United States are more than twice as likely to die by homicide than by any other cause. Consequently, Florida's 15-week ban on abortion is inextricably linked to increasing women's risk of experiencing intimate partner violence. Shortly after this case was heard, the Florida legislature passed a law banning abortion after 6 weeks of pregnancy.

VICTORY! Employer Liability for Out-of-Office Stalking
LaRose v. King County
No. 56455-6-II
March 2019

Sheila LaRose was a public defender in King County, Washington when she began being stalked by one of her clients. The client began to make repeated sexually motivated, harassing phone calls to LaRose at work and the behavior eventually escalated to the client harassing and threatening LaRose at her home. Despite the distress and danger caused by these actions, LaRose's supervisors did not remove her from the case when she reported that her client was stalking her. Eventually, the harm caused by the stalking became so severe that LaRose developed PTSD and took an extended period of leave from her job as a public defender. These events culminated in LaRose suing King County and the Public Defender Association (PDA) claiming they violated the Washington State Law Against Discrimination (WLAD) by failing to provide a non-hostile work environment free of harassment and engaging in other discriminatory conduct.

Despite the client being prosecuted for stalking the woman, King County and the PDA claimed the harm LaRose suffered was not foreseeable. Additionally, King County and the PDA stated that they should not be held liable for sexual harassment by a third party and sexual harassment that occurred outside of the workplace. Although no Washington case has addressed whether an employer can be held liable for a client's harassment, LaRose instead relied on federal cases holding under Title VII of the Civil Rights Act of 1964 that employers may be liable for hostile work environments created by nonemployees.

The NOW Foundation joined an amicus brief by the National Women's Law Center assisted by Outten & Golden and the Washington Employment Lawyers Association highlighting this point, stating that limiting protections to one's place of employment ignores types of harassment workers face and the blurred parameters of today's work environment, such as working from home, where LaRose faced harassment. We also agreed that requiring a more arduous approach than informing your direct supervisor of workplace discrimination, as LaRose did, such as informing top or "upper" management, would create further barriers to reporting discrimination and frustrate the purpose of workplace civil rights laws. After years of litigation, the Pierce County Superior Court jury awarded LaRose $7 million in damages for her "fear and anxiety, loss of enjoyment of life, anguish, emotional distress, and pain and suffering," in addition to the loss of past and future wages and benefits.

Access to Contraception for Young People
Deanda v. Becerra
No. 23-10159

Dec 2022

The Title X Family Planning Program was created to provide comprehensive and, importantly, confidential family planning services, especially to low-income people. *Deanda v. Becerra* deals with the ability of minors to obtain birth control through the Title X program without parental consent. This lawsuit was filed by a parent in the Amarillo Division of the United States District Court for the Northern District of Texas before District Judge Matthew J. Kacsmaryk, the same judge who recently ruled that the Food and Drug Administration's approval of Mifepristone should be suspended. The plaintiff's suit alleged that the federal government's administration of the Title X program violated Section 151.001(a)(6) of the Texas Family Code which provides parents the right to consent to various medical treatments for their child with some exceptions. The initial ruling in *Deanda v. Becerra* held that it violates Texas state law and the U.S. Constitution for minors to get their birth control through the Title X program without parental consent.

Mandatory parental involvement, as would be required due to this initial ruling, causes delays or preventions in youth obtaining prescription birth control for reasons including unavailable parents or young people being uncomfortable discussing contraception with their parents. This initial ruling could increase the risk of the young person becoming pregnant or prolong issues they were seeking contraception to treat such as acne, fibroids, or polycystic ovary syndrome. Furthermore, people of color are historically disproportionately affected by policies that decrease access to reproductive health care.

The U.S. Department of Justice has appealed this initial ruling. Alongside Jane’s Due Process, a Texas-based organization helping young people navigate parental consent laws and abortion bans to confidentially access reproductive healthcare, the NOW Foundation has joined an amicus brief led by the Center for Reproductive Rights, in support of allowing minors to access birth control without parental consent. This brief argues that, when independent, confidential access is available, such as in the case of the Title X program, young people are more likely to seek and obtain birth control and make decisions about their health and futures proactively.

Transgender Girls in School Sports
A.M. v. Indiana
No. 1:22-cv-1075-JMS-DLP
July 2022

As of 2023, roughly 30% of trans youth live in the 21 states that ban transgender students from joining single-sex sports teams consistent with their gender identity. A.M., a 10-year-old transgender girl was barred from playing on a local girls' softball team because her home state of Indiana recently joined the growing list of states that prevent transgender athletes from competing on teams consistent with their gender identity. This new law states that students may only join sports teams in accordance with their “biological sex at birth in accordance with the

student's genetics and reproductive biology," barring A.M. from continuing to play on the girls' softball team despite changing her legal name and gender marker on her birth certificate. A.M.'s mother, who has taken countless steps to support her daughter's transition, initiated this litigation in the United States District Court for the Southern District of Indiana against Indianapolis Public Schools and the Superintendent of IPS alleging that the Indiana law violates Title IX and the Equal Protection Clause of the Fourteenth Amendment.

NOW Foundation joined the National Women's Law Center in an amicus brief assisted by Hogan Lovells Us LLP supporting A.M.'s right to continue playing on her local girls' softball team. The brief defends that both this law and its enforcement violate Title IX by discriminating against women and girls who are transgender and non-transgender girls who do not conform to female stereotypes. Additionally, discriminatory laws that rely on sex-based stereotypes for enforcement disproportionately disadvantage Black women and girls.

A.M., represented by the ACLU, won a strong preliminary injunction finding the anti-trans ban on sports participation likely violates Title IX, especially given the Supreme Court's *Bostock* decision which stated provided important anti-discrimination protections for gay and transgender employees. However, The State of Indiana has appealed the preliminary injunction and before a new decision could be issued, the lawsuit was dropped because A.M. began attending a private charter school rather than a public school under the authority of IPS, possibly to avoid complying with the law and potentially being outed to her classmates, potentially placing her in danger.

Transgender Girls in School Sports
B.P.J. v. West Virginia
Nos. 23-1078(L), 23-1130
July 2021

Coming from a family of runners, B.P.J. was excited to try out for her school's cross-country team. However, when West Virginia Governor Jim Justice signed HB 3293 into law, banning transgender women and girls from participating in school sports, Becky's hopes of joining her school's cross-country team were put in jeopardy. B.P.J., through her mother, filed this lawsuit against the West Virginia State Board of Education and a variety of related parties, alleging that HB 3293 violated B.P.J.'s rights under Title IX because she was discriminated against based on her sex. Due to the United States District Court for the Southern District of West Virginia granting a preliminary injunction in July of 2021, B.P.J. was able to try out for and participate on her school's girls' cross country and track-and-field teams for three seasons without complaint.

The National Organization for Women Foundation joined an amicus brief led by the National Women's Law Center in support of the ability of transgender students to participate in sports teams congruent to their gender identity. This brief supported the appeal of the negative district court decision finding incorrectly that Title IX does not protect a transgender student's right to participate in school sports consistent with the student's gender identity. This brief highlighted

that Title IX protects all girls, women, and LGBTQIA+ athletes from sex discrimination tied to broad and harmful stereotypes. Policing surrounding these stereotypes disproportionately harms Black and brown women and girls because of the intersection between racism, sexism, and transphobia.

Establishing the Validity of "True Threats"
Counterman v. Colorado
No. 22-138
April 2023

In 2014, Billy Raymond Counterman began sending a female professional musician harassing messages on Facebook, causing her extreme emotional distress and fear for her safety. The musician, referred to in this case as C.W., reported Counterman to law enforcement, who arrested him in 2016 on one count of stalking (credible threat), one count of stalking (serious emotional distress, and one count of harassment. However, the prosecution dropped the count of stalking (credible threat) and Counterman claimed that the remaining charges violated his First Amendment right to free speech because they were not "true threats." This is because, although his messages included concerning statements such as "Die. Don't need you" and "[s]taying in cyber life is going to kill you," his statements did not include explicit statements of intent to harm her.

As a result, this case asks whether to establish that a statement is a 'true threat' unprotected by the First Amendment, the government must show that the speaker subjectively knew or intended the threatening nature of the statement, or whether it is enough to show that an objective 'reasonable person' would regard the statement as a threat of violence.

At Counterman's criminal trial, the jury convicted Petitioner of stalking and later the Colorado Court of Appeals affirmed. The Court of Appeals rejected Counterman's First Amendment challenge to the conviction because asserting that only explicit statements can be considered "true threats" risks excluding threats that may not be explicit but, when considered in context, are just as undeserving of First Amendment protection.
The amicus brief was led by Legal Momentum, The National Crime Victim Law Institute and AEquitas. The case has now been argued before the United States Supreme Court and the final decision is expected to be announced soon.

VICTORY! *Merrill v. Milligan*
No. 21-1086
October 2022

Black voters in Alabama recently won a decisive victory against racially motivated gerrymandering in a surprising Supreme Court decision that upheld protections codified in the Voting Rights Act of 1965. Following the 2020 census, Alabama created a redistricting plan for its seven seats in the U.S. House of Representatives. The census found that nearly 27% of

Alabama's population was Black. Despite this fact, only one of these seven redrawn districts was a majority-Black district, restricting the ability of Black voters in Alabama to elect Representatives that align with their values. This redistricting built upon a long history of discrimination against Black voters including poll taxes and complicated literacy tests.

As a result of this redistricting, a collection of Black voters and Black-led community and civil rights organizations caused by this redistricting, challenged the map, arguing that the state had illegally packed Black voters into a single district while cracking other clusters of Black voters across multiple districts, therefore diluting the voting power of the Black community. Specifically, the plaintiffs argued that this new electoral map violated the Voting Rights Act of 1965. Section 2 of the VRA prohibits voting practices or procedures that discriminate on the basis of race, such as by purposefully diminishing the number of majority-Black electoral districts in a state. Many civil rights advocates were extremely concerned that this case would be used by the courts, specifically the US Supreme Court, to dismantle the VRA, removing protections that are vital to preventing discrimination against Black voters.

On Janu-ary 24, 2022, the United States District Court for the Northern District of Alabama hearing the case agreed with the challengers that the map likely violated Section 2 of the VRA. The court prelim-in-ar-ily blocked Alabama's new congres-sional map, find-ing that the map and ordered the Alabama legislature to create a second Black oppor-tun-ity district in time for the upcoming 2022 midterms. However, Alabama asked the U.S. Supreme Court to freeze the district court's injunction, stating that the midterm election, which was nine months away, was too soon to redraw the maps to create a second majority-Black district. The Supreme Court granted Alabama's request to stay the district court's injunction while the case was litigated, allowing for the continued dilution of the power of Black voters during the 2022 midterms.

On June 8, 2023, the Supreme Court issued a surprising final decision in the case, stating that the electoral maps in Alabama did violate Section 2 of the Voting Rights Act. Contrary to the general presumption that the conservative Supreme Court majority would use this case to severely weaken protections to Black voters provided by the VRA, the court ruled that an electoral map that created a disproportionately low number of majority-Black districts. By issuing this decision, the Supreme Court upheld the remaining protection provided by the VRA, meaning that the electoral maps will need to be redrawn and Black voters will be given more power through the creation of another majority-Black district. The Court has previously demolished other provisions of the Voting Rights Act (Shelby County v. Holder - Wikipedia) and almost immediately Republican-controlled states began adopting legislation to restrict voting rights, particularly affecting Black communities.

REGULATORY CHANGES

Crafting Stronger Protections for Transgender Student Athletes

Title IX Athletics Comment regarding Proposed Biden Administration Regulatory Revision

In April 2023, the Department of Education proposed a new rule affirming that Title IX secures the right of transgender, non-binary, and intersex students to play school sports free from discriminatory rules that seek to ban them from doing so. This is the first time that the Title IX rules would address trans students' eligibility to participate on sex-separated athletic teams.

This means that the 21 states with blanket bans on trans students playing on sports teams consistent with their gender identity would be in violation of Title IX. The proposed rule does, however, allow for some restrictions specific to a sport, level of competition, and grade level. These restrictions may be permitted if they are substantially related to achieving an important educational objective, such as "fairness" or "injury prevention" and minimize harms to trans students who would be limited or denied participation consistent with their gender identity.

This rule change is incredibly relevant currently because countless transgender students across the United States are being barred from participating in their school's sports teams in a manner that is affirming of their gender identity. Two recent cases that exemplify these attacks are *A.M. v. Indiana* and *B.P.J. v. West Virginia,* both involving transgender girls under the age of 15 who were both removed from sports teams following the passage of anti-transgender athlete laws in their states. Transgender student-athletes such as these two girls face substantial barriers to equal opportunity in school sports, including being prevented or discouraged from playing sports by school staff or coaches and being forced to use locker rooms that do not correspond with their gender identity, which may risk outing them or putting them in physical danger.

The National Organization for Women Foundation joined with 40 LGBTQI+ justice, civil rights, and education organizations to sign on to a formal comment prepared by the National Womens Law Center and submitted in response to this proposed rule. The comment vigorously supports the Title IX clarification and states that transgender, nonbinary, and intersex students should have equal opportunity to participate in school sports consistent with their gender identity and that prohibiting these students from doing so should not be permissible. This comment further recommends that the Department of Education mandate that sex verification procedures violate Title IX and that restrictions that are impossible or impracticable to reasonably meet are unlawful.

Additionally, the National Organization for Women Foundation, along with 211 LGBTQI+ justice, civil rights, and education organizations submitted an excellent comment on this rule. One statistic from GLSEN's National School Climate Survey (NSCS) cited in this comment found that 46% of transgender secondary students, including those who identify as nonbinary, were prevented from playing on a school sports team consistent with gender identity. The comment expertly explains that anti-LGBTQI+ discrimination, including in the form of being barred from playing school sports consistent with gender identity, must not be permissible because it is associated with a nearly threefold increase in absences due, lower GPAs, decreased

educational aspirations, and higher levels of depression. Protecting the mental, emotional, and educational wellbeing of all women and young girls is at the forefront of this comment. It is therefore vitally important this rule is issued with expediency to prevent further discrimination against transgender student-athletes.

https://www.federalregister.gov/documents/2023/04/13/2023-07601/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal
https://nwlc.org/wp-content/uploads/2023/05/NWLC-Comment-on-88-Fed.-Reg.-22860-Title-IX-Athletics-Rule-5.15.2023.pdf
https://www.glsen.org/sites/default/files/2022-09/GLSEN-Title_IX-NPRM_Public_Comment.pdf