

## **Amicus Curiae Briefs Civil Rights/Equal Rights**

### **Discrimination—Sexual orientation**

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

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

**Amicus Brief:** NOW Legal Defense and Education Fund

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 Steffan wrote to the Secretary of the Navy in December 1988, requesting that his resignation be withdrawn and that he be awarded his diploma.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

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

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

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

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

---

**Case:** *Romer v. Evans*

**Court:** United States Supreme Court, 1996

**Amicus Brief:** Lambda Legal Defense and Education Fund

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

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

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

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

---

**Case:** *Thomas v. Anchorage*

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

**Amicus Brief:** Northwest Women's Law Center

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

**Amicus Brief:** The brief argues that the lower court decision effectively invites not only landlords, but all business, to exempt themselves from anti-discrimination laws by claiming some deep-seeded religious belief. This would effectuated in one of two ways: (1) strict adherence to Establishment Clause jurisprudence would require any proffered religious or moral belief to be

taken at face value, effectively permitting discrimination for any reason at all or (2) recognition solely of widely held religious beliefs would result in severe discrimination against women, considering the numerous religious sects that still consider women second-class citizens.

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

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

---

**Case:** *CHRO/John-Jane Doe*

**Court:** Connecticut Commission on Human Rights and Opportunities, 2000

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

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

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

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

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

---

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

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

**Amicus Brief:** Gay and Lesbian Advocates and Defenders

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

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

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

**Holding:** The Court found that the removal of the BSA from the campaign was, in part, in response to the BSA's exercise of its constitutionally protected right to freedom of association, whereby it could exclude gay activists from leadership positions. The Court held that removing the BSA from the campaign, however, did not rise to the level of compelling the BSA to include gay activists in its organization. The campaign could either be considered a nonpublic forum or a government benefit. If the campaign were a nonpublic forum, organizations could be excluded from the campaign so long as the restrictions were reasonable and were not an effort to suppress expression to which the public officials were opposed. Likewise, if the campaign were viewed as a government benefit, the government could choose to restrict access, so long as the aim of the

restrictions were not the suppression of ideas with which the government disagrees (i.e. so long as the restrictions were viewpoint neutral and reasonable). The Court held that Connecticut's anti-discrimination statutes regulate conduct (employment and membership policies that effectively deny homosexuals social benefits) and was intended to regulate conduct, not expression. That the law has a differentially adverse impact on those who wish to disseminate a message of discrimination against homosexuals is not enough to constitute proof of viewpoint discrimination in a facially neutral law. The Court also held that the BSA presented no evidence that the law was applied in a discriminatory manner. The Court held that the exclusion of the BSA as a way in which to prevent the further violation of Connecticut State Law by the Campaign was a reasonable response.