MEMORANDUM
National Organization for Women Foundation

To: NOW Foundation Board Members
From: Jan Erickson, NOW Foundation Director of Programs*
Date: February 18, 2020

June Medical Services v. Russo (Formerly Gee)
Supreme Court of the United States
Issue(s): Abortion access, admitting privilege
Docket No, 18-1323

This case, *June Medical Services v. Russo,* challenges a Louisiana law that would require abortion providers to have admitting privileges at a hospital within 30 miles of the clinic. If the law were to take effect, it would force two of Louisiana's three remaining abortion clinics to close and leave just one doctor to provide abortion care for the entire state.

Admitting privileges laws do not improve patient health or safety. The purpose of this law is to close down abortion clinics and push abortion care out of reach for Louisianians. Louisiana's admitting privileges law is virtually identical to a Texas law that the Supreme Court already struck down as unconstitutional just a few years ago, in the 2016 case *Whole Woman's Health v. Hellerstedt.* This law is still unconstitutional four years later and one state away in Louisiana.

The **Feminist Majority Foundation**, the **National Organization for Women Foundation**, the **Southern Poverty Law Center** and the **Women's Law Project** submitted an *amicus* brief in the case of *June Medical Services v. Gee (now retitled June Medical Services v. Russo)* which calls attention to the history of clinic violence as it has affected women's abortion care clinics for decades. The District Court found that this climate of violence and fear causes difficulty in the hiring and retention of physicians with admitting privileges to a nearby hospital. There has been violence and harassment of women's clinics in Louisiana reducing the number of abortion providers and there is evidence that Louisiana hospital do deny admitting privileges because of a fear of threats and violence.

Brief in support of petitioner - Summary

Louisiana's Act 620 would require abortion providers to have hospital admitting privileges, a credential that hospitals can freely deny. This is not an abstract concern. Violence and threats of violence against abortion providers are widespread in the United States and Louisiana. Hospitals deny admitting privileges to abortion providers for reasons unrelated to healthcare and because of a real fear of violence, threats of violence, and harassment. As a result, abortion providers will be unable to continue their practice, and access to abortion care will become severely restricted.

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The Constitution protects a woman from unduly burdensome interference when exercising her right to seek abortion care. In determining whether a regulation is an undue burden, this Court's precedent requires considering the real world setting in which the restriction functions. The real world setting in which Act 620 would function is startling. While not all anti-abortion opponents turn to violent methods, since the 1970s, individual extremists and extremist groups have targeted abortion providers. Providers and staff were murdered, maimed, stalked, and subjected to death threats. Patients have also been assaulted and harassed. Clinics were destroyed by bombs and arson attacks. The widespread violence that abortion providers face, in type and in frequency, is pervasive and inescapable. Recent acts show that anti-abortion extremists advocating for violence against abortion providers are still active.

The violence and harassment abortion providers face in Louisiana is no different. Anti-abortion extremists threaten the safety and security of Louisiana abortion providers, their patients, the clinics where they work, and the hospitals where they may try to obtain admitting privileges. They stalk the providers, and show up at their homes and offices, requiring police intervention. It is not surprising that Louisiana hospitals, where no laws govern admitting privileges, choose to deny abortion providers those privileges for fear that they will face violence and harassment. Act 620 would leave a single abortion provider with admitting privileges. Dr. Doe 3 testified that his fears of being the sole focus of anti-abortion extremists in Louisiana would create an intolerable safety risk and force him to stop providing abortion care.

After evaluating Dr. Doe3's credibility and observing his demeanor, the District Court ruled that his testimony credible, and that the evidence of harassment and targeting Dr. Doe 3 described was corroborated and undisputed. There is much evidence that the climate of fear has influenced hospitals making admitting privileges decisions, covering physicians who must be secured to obtain admitting privileges, abortion providers who find themselves isolated when a law shutters bother clinics, and clinics seeking to employ doctors with local admitting privileges. With Act 620 in effect, and given the status quo of harassment and violence, finding a new physician willing to provide abortion care who could satisfy the Act's requirement would be difficult—if not impossible. Act 620 easily constitutes an undue burden on Louisiana women's access to abortion care.

Oral arguments begin on March 4th. Read the brief in full here.

John Doe, et. al, v. Donald Trump, et. al
Ninth Circuit Court of Appeals, Brief in support of appellees
Issue(s): Affordable Care Act, Immigrant Rights

Presidential Proclamation 9945 (Proclamation), bars the entry of immigrants to the United States unless they demonstrate that they have what the Proclamation deems "approved" coverage, or financial resources to pay for their reasonably foreseeable health care costs. The Government tries to characterize the Proclamation as an exercise of the President's foreign relations authority. This framing, however, ignores that the Proclamation has a distinct, domestic purpose and effect: to undermine Congress' chosen scheme for providing health care to newly arrived immigrants.

Congress, through the Affordable Care Act and the Medicaid program, has already prescribed how different categories of newly arrived immigrants may obtain health coverage. It made

comprehensive, affordable coverage available through subsidized private plans on the Affordable Care Act's Marketplaces, and, at state option, through Medicaid coverage for lawfully residing children and pregnant women. Notwithstanding Congress' directives, the Proclamation excludes Medicaid for adults and subsidized Marketplace coverage for all individuals subject to the Proclamation from the list of "approved" plans, meaning that an immigrant must obtain some other form of insurance to satisfy the Proclamation's mandates and enter the country. The plans that will be most readily available are short-term, limited-duration plans that do not comply with the Affordable Care Act—including that they typically do not provide all categories of "essential health benefits" and often exclude coverage for pre-existing conditions. The Proclamation, therefore, directs immigrants away from the coverage Congress intended them to have, and towards other coverage the President prefers (but which, in many cases, may ultimately not be available to them).

Moreover, the Proclamation, for the first time ever, seeks to use foreign policy powers to regulate domestic health care policy, relying on consular officers at the State Department to implement the policy. The Supreme Court has rejected the suggestion that "Congress would have delegated," important health care policy choices to an agency "which has no expertise in crafting health insurance policy of this sort." But that is exactly what the Proclamation does: it delegates authority for evaluating the adequacy of various health insurance options to consular officers at the State Department, who lack the necessary health care expertise for such evaluations. In short, the Proclamation represents an effort to disregard a comprehensive health care policy established by Congress. The Court should reject the President's efforts to supplant Congress's chosen health care policy with his own.

On the Chamber of Commerce for Greater Philadelphia, on behalf of its members v. City of Philadelphia and Philadelphia Commission on Human Relations
Third Circuit Court of Appeals
Issue(s): Gender pay equity

The Philadelphia Chamber of Commerce filed this lawsuit to obtain declaratory and injunctive relief to prevent the implementation of Philadelphia's Wage Equity Ordinance. This ordinance, passed unanimously by City Council, prohibits employer reliance on, and inquiries into, wage history unless the applicant "knowingly and willingly" discloses that information. The Chamber has challenged the ordinance as violating the First Amendment as well as other federal and state constitutional provisions. In 2017, the Women's Law Project and 27 organizations (of which NOW Foundation was a member organization) committed to gender wage equity filed an amicus brief in support of the ordinance at the trial court level in opposition to the Chamber's request for a preliminary injunction. On April 30, the District Court granted the Chamber's motion for Preliminary Injunction in part and denied it in part, finding that the ordinance's inquiry provision violates the First Amendment while the reliance provision does not. Both parties appealed to the Third Circuit. This case has implications for the prior pay/salary history laws being adopted and proposed across the country.

Defendants argued before the U.S. Third Circuit Court of Appeals that the District Court's grant of the Chamber's motion for preliminary injunction on the inquiry provision should be reversed because (1) legislatures have the constitutional power to prohibit reliance on salary history (or other characteristics); (2) It was sound policy for Philadelphia to pass this ordinance because (a) evidence establishes the existence of a pay gap; (b) a portion of this pay gap is due to discrimination; (c) current salaries reflect this discrimination and reliance on salary history perpetuates it; (d) employer inquiries into salary history are unprotected commercial speech

because these inquiries are related to the illegal activity of relying on wage history; and (e) even if intermediate scrutiny applies, the trial court erred in its application, because the inquiry ban promotes the city's substantial interest in pay equity and is an enforcement tool to ensure that employers do not perpetuate gender and race-based discrimination in pay.

Earlier, the Third Circuit Court of Appeals ruled in favor of equal pay, affirming the District Court's ruling that the reliance provision is not a violation of the First Amendment and reversing the District Court's ruling on the preliminary injunction. As such, the ban may move forward as written if the appellate ruling goes unchallenged.

DeOtte v. Azar.
Fifth Circuit Court of Appeals, Brief in support of Movant Appellant State of Nevada
Issue(s): Affordable Care Act, Contraceptive Access

Nevada sought to intervene in this case to defend itself, its residents, and millions of individuals nationwide from this attack on the ACA contraceptive coverage requirement. Unless this Court permits Nevada to appeal and reverses the nationwide class injunction issued below, the health and livelihoods of millions of people are at risk—particularly Black, Latinx, Asian American and Pacific Islander ("AAPI") women and other people of color, young people, people with limited resources, transgender men and gender non-conforming people, immigrants, people with limited English proficiency, survivors of sexual and intimate-partner violence, and others who face multiple and intersecting forms of discrimination. Without Nevada's intervention, there is no adversity between the parties and thus no party to defend the contraceptive coverage requirement.

The ACA's contraceptive coverage requirement directs health plans to cover, without cost-sharing, all FDA-approved methods of contraception for women, and the ACA's contraceptive coverage requirement directs health plans to cover, without cost-sharing, all FDA-approved methods of contraception for women, and related education, counseling, and services. Congress intended the Women's Health Amendment ("WHA") of the ACA to reduce gender discrimination in health insurance by ensuring that women's major health needs are covered and that women no longer pay more than men for health care. The Departments of Health and Human Services, Treasury, and Labor (the "Departments") have acknowledged this intent, explaining that Congress added the WHA because "women have unique health care needs and burdens . . . includ[ing] contraceptive services," and the "Departments aim to reduce these disparities by providing women broad access to preventive services, including contraceptive services."

Accordingly, the ACA contraceptive coverage requirement eliminates out-of-pocket costs for contraception and ensures coverage of the full range of FDA-approved contraceptives and related services for women. Today, roughly 61.4 million women are eligible for coverage of the contraceptive method that works best for them, irrespective of the cost. Consequently, the use of contraception—especially highly effective, long-acting reversible contraceptives ("LARCs") such as intrauterine devices ("IUDs") and contraceptive implants—has increased.

The nationwide class injunction threatens to reverse these gains by allowing employers unilaterally to opt-out of the ACA contraceptive coverage requirement and deny coverage for contraception and related services to employees and their dependents. This will undermine gender equality by reintroducing the very inequities that Congress meant to remedy. Nonetheless, the Administration is now refusing to defend the contraceptive coverage

requirement. Consequently, unless Nevada is permitted to intervene, no party will defend the interests of the millions of individuals whose coverage is at stake.

The brief establishes that Nevada has standing to appeal, as well as a legally protectable interest supporting intervention. It also establishes that the injunction will substantially harm individuals in Nevada and nationwide, a factor the district court ignored, that was not adequately presented given the lack of adversity between parties, and that when properly considered tips the balance of equities and public interest against the permanent injunction. To illustrate these harms, the brief explains that the injunction will (i) cause many individuals in Nevada and nationwide to lose contraceptive coverage, particularly those already facing multiple and intersecting barriers to care; (ii) make contraception cost-prohibitive and create other non-financial barriers to contraception for many who lose coverage; and (iii) harm the health, autonomy, and economic security of those who lose contraceptive coverage, especially people of color and others already facing systemic discrimination.

National Women's Law Center, et al. v. Office of Management and Budget, et al.
D.C. Court of Appeals, Brief in support of Appellees
Issue(s): Pay Equity

The U.S. Equal Employment Opportunity Commission's (EEOC) and U.S. Office of Federal Contract Compliance Program's (OFCCP) decision to use the annual EEO-1 report to begin collecting pay data from employers by race, national origin, and gender across occupational categories represent a crucial step in addressing the problem of pay disparities based on sex, race, and national origin that are caused in substantial part by discrimination. Component 2 of the EEO-1 report promises new transparency with respect to private-sector pay—information that is typically shrouded in secrecy.

The District Court correctly invalidated the Office of Management and Budget's (OMB) stay of the EEOC's data collection. Appellants (together, the Government) do not appeal the merits of this ruling, but instead, challenge Appellees' standing and the propriety of the District Court's remedial order directing that the EEOC proceed with the data collection. They are supported, however, by amici that dispute the public benefit of collecting pay data and thus call for remand to OMB in part on that basis.

NOW Foundation and our co-amici believe it is essential to counter these contentions. We do so in two parts: first, by providing a brief background on the systemic wage disparities that motivated the EEOC's pay data collection efforts; and second, by explaining how collecting such data provides a substantial public benefit, including by enabling amici to more efficiently and effectively combat the pay gap problem.

Following the lower court ruling, the EEOC was cleared to close the data collection, having reached a sufficient response rate of 88%. However, if the EEOC intends to destroy the data, they must get approval from the Court. In response, the EEOC has said they will keep the data for the time being but have yet to decide what to do with it. In some ways, this has raised questions from the appellate court in oral arguments this month as to if the case is moot. Until a ruling or dismissal from the Court of Appeals, however, the objective remains to pressure the EEOC to analyze the data in good faith and release it with public-facing relief or discussion.

Department of Homeland Security, et al. v. Regents of the University of California, et al.
Supreme Court of the United States
Issue(s): Immigrant rights, DACA

An amicus brief was compiled by the Lawyers Committee for Civil Rights Under Law, the Anti-Defamation League, and the Leadership Conference on Civil and Human Rights on behalf of the respondents argues for the unlawfulness of withdrawing the Deferred Action for Childhood Arrivals (DACA) program. They argue: The DACA program, announced on June 15, 2012, provided eligible undocumented immigrants protection from deportation and granted them work authorization subject to the approval of an initial application and renewal every two years thereafter. The program's coverage was limited in scope to children present in the country on or after June 12, 2012 and who were brought to the United States before the age of sixteen. Thus, while the DACA program was available to a limited number of persons already living in the United States, foreign-born persons currently trying to enter the country are ineligible.

Imbued with the spirit of the American dream, and in reliance on the DACA program, enrollees have made substantial investments in themselves, their families, and their communities. Contrary to the government's assertion in its brief, the DACA enrollees are not engaged in "ongoing illegal activity" or "ongoing violation of federal law." To the contrary, under DACA and with the government's permission, enrollees are legally engaged in educational, tax-paying, teaching and military activities.

Without any consideration for these substantial reliance interests engendered by DACA over more than five years, the Department of Homeland Security (DHS) abruptly terminated the program. In doing so, the government threw the lives of nearly 700,000 undocumented childhood arrivals into turmoil. These DACA recipients, in an effort to play by the rules, came out of the shadows to enroll in the program.

The Administrative Procedure Act's requirements are designed to protect against arbitrary and capricious reversals or terminations of policies and programs that induce serious reliance interests of the type found here. With the government's encouragement, DACA enrollees invested in job-specific training programs, enrolled in universities, obtained jobs as educators, purchased homes, and enlisted in the military in service of our country. In turn, educational institutions, local communities, and employers invested in and have come to rely on the substantial benefits provided by DACA enrollees. Yet the administrative record is void of any mention, let alone consideration of these interests.

The government's complete failure to consider such serious reliance interests before abruptly rescinding DACA is the hallmark of arbitrary and capricious conduct.

Oral arguments on this case were made before the Supreme Court in November 2019, with a decision expected before June, 2020.

Parents for Privacy v. Dallas School Dist. No. 2
Ninth Circuit Court of Appeals, Brief in support of appellee
Issue(s): Transgender discrimination

NOW signed onto a brief in support of transgender students and the Student Safety Plan (the Plan) implemented by the Oregon public schools in Dallas, Oregon, which permits transgender students to use restrooms and other facilities consistent with their gender identities. The District

'Court properly rejected Appellants' conclusory assertions that the District's Plan violates Title IX and the Constitution and dismissed this case. The brief urged the Appeals Court to affirm. Appellants seek a reversal of the Plan and instead want a policy that requires students to use facilities that match their sex as assigned at birth. However, unsubstantiated concerns do not justify policies that would subject transgender students to a hostile educational environment, including sex-based harassment. As the District Court concluded, the purported discomfort of some students did not justify the exclusion of transgender students from facilities that correspond with their gender identities. See July 24, 2018 Opinion & Order at 38-43 ("Order"). The relief Appellants seek, to bar transgender students from facilities consistent with their gender identities, would constitute sex-based discrimination in violation of Title IX and the U.S. Constitution, and would harm transgender students.

The brief urges the Ninth Circuit Court to affirm the dismissal of Appellants' case for the following reasons: (1) The mere presence of transgender students in a restroom does not create a hostile environment under Title IX or implicate a privacy concern under the U.S. Constitution; (2) Sex-based protections in federal civil rights laws and the U.S. Constitution include protections for transgender students, and banning them from using restrooms that comport with their gender identities constitutes impermissible sex-based discrimination; (3) Transgender students face documented harms when they are not permitted to use facilities that align with their gender identities; and (4) Appellants' arguments against the Plan rest on the same brand of sex stereotyping historically used to justify sex discrimination, including in the context of racial segregation, and such arguments are rejected by courts today. Accordingly, we urged the Court to reject Appellant's conclusory arguments and affirm the District Court's decision to dismiss this case.

The Ninth Circuit Court ruled in favor of the rights of transgender students. Their ruling clarified that the policy is not a violation of Title IX, but rather allowing students to use the bathroom of their gender identity is to "avoid discrimination and ensure the safety and well-being of transgender students."

Department of Homeland Security, et al. v. New York
Second District Court of Appeals, Brief filed in support of Appellees
Issues: Immigrant Rights, Public Hold

The most recent attempt by the Trump Administration to exclude immigrants of color, this time by modifying the current standards for a "public charge," viewed in light of the Administration's anti-immigrant statements and combined with the disproportionate impact of this new regulation on immigrants of color, establishes a discriminatory intent violative of the Equal Protection Clause. Such discriminatory conduct that is "contrary to constitutional right" or arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law must also be set aside pursuant to Administrative Procedures Act. 5 U.S.C. § 706(2) (APA). Agency action cannot stand if the agency "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or [made a decision that] is so implausible that it could not be ascribed to a difference of view or the product of agency expertise.

Although the preliminary injunction was granted under the Administrative Procedures Act, the history of public charge and the current background surrounding the modification of the public charge rule and its impact on the community remains vital context for the Court to consider when deciding whether to accord Chevron deference to the agency.

The new Department of Homeland Security ("DHS") Regulation (the "Regulation") upends how public charge determinations have been implemented, adding a host of non-cash-based programs as well as other factors that may be considered. Throughout the history of the "public charge" rule, one thing has remained constant—"public charge" has always meant primary dependency on the government. Currently, the rule is implemented via explicit standards narrowly focused on people primarily dependent on the government through cash assistance or institutionalization for long-term care. The punitive and subjective nature of the new Regulation is emblematic of the Trump Administration's well-documented animus toward immigrant communities of color, which has been recognized by courts around the country and by the media. As the architect of this Administration's immigration policy Stephen Miller acknowledges, the new public charge rule is "transformative." And the "transformation" will disproportionately fall on the shoulders of immigrant communities of color, which comprise approximately 90 percent of the 25.9 million people who would be impacted by the Regulation. The Regulation's changes also create particular harms for immigrant women of color, including those who are elderly, pregnant, survivors of intimate partner violence, have disabilities and/or are lesbian, gay, bisexual, transgender, and queer ("LGBTQ") individuals.

The Regulation is unconstitutional because its promulgation was motivated, at least in part, by racial animus; and, further, that the racial animus compels a finding that the public charge rule is arbitrary and capricious. Further, amici, who serve immigrant communities impacted by the public charge rule change across the country, urge the court to uphold the nationwide injunction. "Allowing uneven application of nationwide immigration policy flies in the face" of the requirements for uniform immigration rules. A nationwide preliminary injunction is the standard remedy for the enjoinment under the APA of agency regulations that will echo nationally.

In January, the Supreme Court lifted the preliminary injunction which had been stopping the rule from going into effect. Litigation regarding the constitutionality of the Regulation, however, such as *DHS v. New York* will continue.