

Memorandum
National Organization for Women Foundation

TO: NOW Foundation Board Members

**FROM: Jan Erickson, NOW Foundation Director of Programs and Rebecca Amadi,
NOW Foundation Public Policy Intern**

DATE: Sept. 20, 2018

Litigation:

Mike Carpenter, Interim Warden, Oklahoma State Penitentiary v Patrick Dwayne Murphy

Case No. 17-1107 – Supreme Court Argument Date: October 10, 2018

Issue(s): Violence against Native Women

In August 1999, Patrick D. Murphy and his two friends, Billy Long and Kevin King, murdered and mutilated George Jacobs. In 2000, a jury in McIntosh County convicted Murphy of first-degree murder and imposed the death penalty. After two appeals, both denied by the OCCA and a federal district court, Murphy's third appeal was accepted by the 10th Circuit Court of Appeals. Recently, the Tenth Circuit determined that the Creek Nation's reservation had never been disestablished, and ultimately, found that the State of Oklahoma was without jurisdiction to criminally prosecute Murphy because his crime was against an Indian victim on tribal trust land within the border of the Creek Nation's reservation.

To reach this conclusion, the Tenth Circuit considered whether Congress showed explicit intent or language to disestablish the Muscogee Creeks' 1886 tribal boundaries through the Creek Allotment Act of 1901 or any later acts related to the Tribe. The Court applied disestablishment criteria under *Solem v. Bartlett* (1984) and ruled that Congress hadn't showed explicit intent or language to disestablish the Creek reservation through any Congressional act. The Court's decision states that "Oklahoma lacked jurisdiction" to prosecute Murphy for a crime that happened in Indian Country – thus overturning his prior conviction and sentence on August 7, 2017. In May, the U.S. Supreme Court said it will review the Murphy case and both parties will argue, once again, if the Creek reservation has been diminished or disestablished in any way.

Although the Supreme Court's analysis will most likely focus on the three-part test set out in *Solem* to determine whether the Creek Nation's reservation has been disestablished, the Court's determination of what gives rise to the disestablishment of a "reservation" under 18 U.S.C. § 1151(a) will have significant implications for Tribal Nations seeking to utilize VAWA § 904's restored tribal criminal jurisdiction to protect their citizens from non-Indian offenders. That is, the Court's decision in Murphy could result in a decision that expands or severely limits the restored criminal jurisdiction the area of land over which Tribal Nations may now exercise criminal jurisdiction under VAWA 904. The Supreme Court needs to hear the perspective of organizations and survivors working to end domestic violence and sexual assault against Native women,

as the Court's decision will likely have serious consequences for Tribal Nations seeking to protect their women and children from domestic violence and dating violence on tribal lands. Beyond VAWA, the National Indigenous Women's Resource Center (NIWRC) Amicus brief will assert that for tribal citizens, justice over violent crimes is best served in Tribal Court, and ultimately, stripping Tribal Nations of their jurisdiction over crimes committed against their own citizens undermines the safety of all tribal citizens.

United States Court of Appeals for the Fifth Circuit
On State of Texas v. Equal Employment Opportunity Commission, Victoria Lipnic, in her official capacity as Acting Chair of the EEOC; Jefferson B. Sessions III, in his official capacity as Attorney General for the United States
Case No. 18-10638
Issue(s): Racial and Hiring Discrimination of Persons with Criminal Records

September 13, 2018 | The NAACP Legal Defense and Educational Fund, Inc. ("LDF"), along with the National Employment Law Project ("NELP"), Texas State Conference of the NAACP, and Beverly Harrison, a worker once fired because of a criminal conviction, filed an amicus brief in the United States Court of Appeals for the Fifth Circuit. Their brief defends the U.S. Equal Employment Opportunity Commission's ("EEOC") Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions (the "Guidance"), which aims to reduce employment discrimination against people with conviction and arrest records, who are disproportionately people of color.

In February 2018, a federal court issued a limited ruling—which the *amicus* brief urges the Fifth Circuit to reverse—preventing the EEOC and the U.S. Attorney General from enforcing the Guidance against the State of Texas. If allowed to stand, the ruling would make it more difficult for employers to comply with existing federal civil rights laws and for job-seekers with criminal histories, including more than 70 million people across the country, to secure employment. The Guidance warns employers that some policies excluding applicants with records may have a disparate impact on racial minorities and violate Title VII of the Civil Rights Act of 1964. In addition to defending the Guidance, the brief provides data on the consequences of exclusionary hiring policies for individuals like Beverly Harrison, and for communities of color served by organizations like the Texas State Conference of the NAACP. In 2013, Ms. Harrison was fired as a crossing guard by the Dallas County Schools because of a conviction from 1975.

The brief also calls out the U.S. Department of Justice ("DOJ") for its about-face on the issue of whether hiring policies that disproportionately burden applicants with criminal records can be considered racially discriminatory under Title VII. Until recently, the DOJ shared the EEOC's long-held view that because people of color are more likely to have conviction and arrest records on account of racial disparities in the criminal justice system, hiring policies that improperly use criminal backgrounds to screen applicants can be considered violations of federal civil rights law. This helped hold employers accountable for policies that have racially discriminatory effects. But on appeal in this case, DOJ no longer stands with the EEOC on this vital point. The amicus brief,

however, agrees with the DOJ that Texas’s lawsuit is improperly in federal court and that Title VII—regardless of the outcome of this case—is the law of the land and protects against discriminatory hiring policies, including those related to criminal history.

United States District Court for the Eastern District of Pennsylvania
On *The Chamber of Commerce for Greater Philadelphia, on behalf of its members v. City of Philadelphia and Philadelphia Commission on Human Relations*
Case No. 2:17-cv-01548
Issue(s): Gender pay equity

This case is about 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.

Last year, the Women’s Law Project and 27 organizations 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 plan to argue 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.

On *Commonwealth of Massachusetts v. United States Department of Health and Human Services, et al.*
Case No. 1:17-cv-11930-NMG – On Appeal from the U.S. District Court for the District of Massachusetts

**(Related: On *State of California, et al v. Eric D. Hargan, et al*
Case No. 4:17-cv5783-HSG)**

Issue(s): Brief providing evidence of the harm done to contraception care users, especially users who have intersecting marginalizations, if religious and moral exemptions to providing contraceptives are allowed to go through

Amici, the National Women’s Law Center, the National Latina Institute for Reproductive Health, SisterLove, Inc., the National Asian Pacific American Women’s Forum, National Organization for Women Foundation and the 39 additional national and regional joined in this *amicus* brief are committed to obtaining racial justice, economic security, gender equity, and reproductive justice for all, including an assurance that individuals who may become pregnant have access to full and equal health coverage, including contraceptive coverage without cost-sharing, as guaranteed by the Affordable Care Act (“ACA”). At stake in this litigation are the health and livelihoods of people in Massachusetts and across the U.S. who will suffer harm under the Administration’s two interim final rules regarding the ACA’s contraceptive coverage requirement (“IFRs”)— 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 interpersonal violence, and others who face multiple and intersecting forms of discrimination.

The ACA’s contraceptive coverage requirement obligates employers to provide insurance coverage without cost-sharing for all FDA-approved methods of contraception for women, and related education, counseling, and services. Congress intended the ACA to reduce gender discrimination in health insurance by ensuring that it covers women’s major health needs and that women no longer pay more for health care than men, including by decreasing the cost of contraception. The ACA contraceptive coverage requirement has furthered these aims by eliminating the out-of-pocket cost of contraception and ensuring coverage of the full range of FDA-approved contraceptives and related services. The IFRs (Interim Final Rules) would reverse these gains by establishing a sweeping exemption permitted by neither the text nor the legislative history of the ACA allowing virtually any employer or university to deny insurance coverage for contraception and related services to employees, students, and their dependents. These expansive exemptions would undermine gender equality by reintroducing the very inequities that Congress meant to remedy.

This brief first establishes that Massachusetts has standing to challenge the IFRs because many individuals in Massachusetts are likely to lose contraceptive coverage, particularly people who face multiple and intersecting forms of discrimination. Second, the brief provides data showing that the IFRs will make contraception cost-prohibitive and will create other non-financial barriers to contraception for many who lose coverage. Third, the brief discusses the multiple ways the IFRs will harm those who lose contraceptive coverage. The IFRs will: (1) jeopardize health by increasing unintended pregnancies and aggravating medical conditions managed by contraception; (2)

undermine individuals' autonomy and control over their lives; and (3) threaten individuals' economic security. As highlighted throughout this brief, the IFRs will particularly harm people of color and others who already face systemic discrimination in Massachusetts and nationwide.

Gender Affirming Surgery under Medicaid

Iowa District Court for Polk County

On *EerieAnna Good v Iowa Department of Human Services, Carol Beal v. Iowa Department of Human Services*

Case No. CVCV055470 (consolidated) - Iowa Supreme Court

Plaintiffs EerieAnna Good and Carol Beal (represented by ACLU of Iowa and the ACLU LGBT and HIV Project) challenged the Iowa Department of Human Services administrative regulation prohibiting Medicaid coverage for gender-affirming surgeries. Both plaintiffs sought coverage for sex reassignment surgeries and were denied, appealed these denials through the administrative process, and then filed cases before the Iowa state district court for Polk County. The plaintiffs challenged DHS's denial of coverage and the administrative regulation on four grounds: (1) the regulation violates the Iowa Civil Rights Act's prohibitions on sex and gender-identity discrimination; (2) the regulation violates the equal protection provisions of the Iowa Constitution' (3) the DHS's decision will result in a disproportionate negative impact on private rights' and (4) that the decision was arbitrary and capricious. The court (Gamble, J) agreed with the plaintiffs on all counts save one, holding the interpretation that the ICRA's provisions on sex discrimination includes discrimination against transgender individuals is precluded by the Iowa Supreme Court's ruling in *Sommers v. Iowa Civil Rights Commission*, 337 N.W.2s 470 (Iowa 1983). The state has appealed. The Iowa Supreme Court has the ability to hear all appeals in the first instant, and it has retained this case for decision.

The Impact Fund's brief argues that *Sommers* should be overturned in light of decades of development in the federal courts confirming that discrimination against transgender individuals on the basis of their gender identity or transgender status is sex discrimination. We may also highlight specific state-level action, including case law, statutes, and regulations, that illustrate a nuanced understanding of sex discrimination as encompassing discrimination on the basis of gender identity. The brief will be similar in part to amicus briefs we filed in *Fulcher v. Secretary of Veterans Affairs*, *Gloucester Country School Board v. G. g.*, and *Carcaño v McCrory*.

Transgender Employment Discrimination

United States District Court for the Western District of Oklahoma, Tenth Circuit

On *Tudor v. Southeastern Oklahoma State University*

Case No. 5:15-CV-00324-C

Dr. Rachel Tudor underwent a gender transition from male to female while employed as a tenure track professor at Southeastern Oklahoma State University ("Southeastern"). Tudor endured sex discrimination and retaliation in connection with

her application for tenure. In November 2017, a unanimous jury found that Southeastern's reasons for denying Dr. Tudor's 2009-2010 tenure application and refusing to allow Dr. Tudor to re-apply for tenure in the 2010-2011 cycle were pretext for sex discrimination and retaliation. The jury gave an omnibus award of \$1,165,000. After trial, Dr. Tudor moved for reinstatement as an Associate Professor with tenure or, in the alternative, for front pay for her remaining work life expectancy in order to make her whole, since undisputed evidence showed she had no prospects of obtaining a tenured professorship elsewhere. The District Court denied Dr. Tudor's request for reinstatement and interrelated motions for reconsideration and to supplement, and awarded Dr. Tudor front pay in the amount of \$60,040.77. The District Court also remitted the jury's award from \$1,165,000 to \$360,040.77.

The National Women's Law Center's *amicus* brief includes the following key points: 1) reinstatement is the preferred remedy under Title VII, and the Tenth Circuit should follow other circuits which have required full evidentiary hearings on the issue of reinstatement when discriminatory conduct has occurred; 2) the district court incorrectly used animus arising from the litigation as a driving factor to bar reinstatement; 3) the district court abused its discretion in determining that Dr. Tudor was only owed front pay for the 14 months between her firing from Southeastern and the commencement of a teaching job Dr. Tudor briefly held at a community college, and the Tenth Circuit should require a full analysis of the circumstances, using the correct "make whole" standard required by law; and 4) the Tenth Circuit should hold that it is inappropriate to rely heavily on the assumption that if an employee has found an interim job in the past, particularly one that is a step down from her former job, she will be able to find a position in the future and is thus not entitled to front pay beyond those interim earnings.

Attached information included the Plaintiff's Complaint and the Docketing Statement including the District Court's January 29th denial of Tudor's motion for reinstatement; February 12th denial of Tudor's motion for reconsideration; April 13th denial of Tudor's request for reinstatement, grant of only \$60,040.77 in front pay, and motions to supplement stricken as moot; June 6th denial of Tudor's motion seeking reconsideration of front pay and grant of Defendant's application of the statutory cap; and final judgment against Defendants in the amount of \$360,040.77 in back pay and compensatory damages and \$60,040.77 in front pay damages.