

MEMORANDUM

TO: NOW Foundation Board Members

FROM: Jan Erickson, NOW Foundation Director of Programs and Samantha Chen, NOW Government Relations intern

DATE: July 9, 2019

NOW Foundation Litigation Summary:

The Supreme Court ended its first term with staunch conservative Justice Brett Kavanaugh sitting in place of longtime swing-voter, Justice Anthony M. Kennedy, changing the conservative-liberal makeup of the court to 5-4 respectively. This was a year of big cases with profound implications. Below are several cases from SCOTUS and U.S. Circuit Courts that are important to note.

A Cautious Win and a Big Loss for Democracy: *Department of Commerce v. New York, Rucho v. Common Cause, Lamone v. Benisek*

Starting with the slightly better news, SCOTUS ruled 5-4 to reject the Department of Commerce's reason for adding a citizenship question on to the 2020 Census. The citizenship question would have unfairly targeted communities of color, especially black and Latinx communities, and resulted in a gross underestimate of populations Justice Roberts wrote the majority opinion for *Department of Commerce v. New York* and stated that the Department's explanation for the adding the question was inadequate, but did not rule out that the Department could return with an adequate explanation. Essentially, Justice Roberts' opinion is that the way the question was added was wrong, but the legality of the question itself is still up for debate. Justices Sotomayor, Ginsburg, Kagan, and Breyer joined the majority opinion. The four justices also wrote a separate opinion in which they argue that the addition of the citizenship question violates the Administrative Procedure Act and that the Secretary actions were "arbitrary, capricious, and an abuse of discretion."

However, with the census fast approaching on April 1, 2020 and nearly one billion papers to print, there is little time for the Commerce Department to come up with a better explanation for the citizenship question. The SCOTUS decision came on June 27 and the deadline for beginning to print forms is on June 30. For now, the delay in adding the citizenship question should mean that the question does not end up on the 2020 Census, but it would not be out of character for the administration to break precedence and delay printing. This is a win for democracy, but, as recent news reports detail, the Trump administration is not done fighting; vigilance is key.

In troubling news, SCOTUS ruled on two cases regarding partisan gerrymandering, *Rucho v. Common Cause, Lamone v. Benisek*. With Roberts writing the 5-4 majority opinion, the Supreme Court decided that federal courts are not capable of ruling on partisan gerrymandering cases. There is little stopping state legislatures from redrawing district maps to deprive citizens, historically minority citizens, from the right to participate equally in the election process. Instead of voters picking their representatives, there is the possibility that bad faith representatives can now pick their voters. Grassroots activists now must work harder than ever during state legislature elections to ensure that good-faith politicians are in charge of future redistricting efforts.

Native American Land in Oklahoma

Native American women are 2.5 times more likely to experience sexual assault in their lifetime. Colonial oppression and a long history of violence against Native Americans by settlers and the U.S. military underlies an extensive pattern of violence against Native American women, who are more likely to be attacked by non-Native men than Native men. However, part of the injustice Native American women face is attached to Native land and problems of jurisdiction. Tribal borders, land ownership, and jurisdiction are often not well defined, creating confusion when a Native woman seeks justice through. Oftentimes, the result is that the perpetrators escape any sort of punishment.

This year, the Supreme Court heard *Carpenter v. Murphy*, a case that could potentially decide ownership of nearly half the land in Oklahoma. The case dates back to a homicide involving two members of the Muscogee (Creek) Nation on tribal land and a dispute over whether the case should be heard in Oklahoma's courts or Creek Nation's tribal courts.

Justice Neil Gorsuch recused himself from the case due to his position as a federal appellate judge when the case was heard in lower courts, creating the possibility of a deadlock between the eight remaining justices. The Supreme Court was supposed to decide this case in June 2019 but announced that they would be rearguing the case next term, creating a rare and puzzling situation. Due to the possible implications on the safety of Native women, NOW should keep a close eye on this case.

Texas v. United States

In December 2018, U.S. District Court Judge Reed O'Connor issued a dangerous ruling that would strike down the entire Affordable Care Act (ACA), including provisions that protect people with preexisting conditions and expand Medicaid. The Fifth Circuit Court of Appeals in New Orleans are hearing oral arguments for the case today, July 9.

In an unprecedented decision, the Department of Justice refused to defend ACA, completely ignoring its statutory responsibility to defend federal laws. Instead, California Attorney General Xavier Becerra is leading a group of 21 Democratic attorneys general who have intervened to defend the law (California, Colorado, Connecticut, the District of Columbia, Delaware, Hawaii, Iowa, Illinois, Kentucky, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New York, North Carolina, Oregon, Rhode Island, Vermont, Virginia, and Washington). The U.S. House of Representatives has also intervened to defend the law.

The outcome of this case could potentially take away healthcare from 20 million people who may already be in vulnerable positions. NOW is closely keeping an eye on this case.

Wendy Vitter Confirmed to U.S. District Court for the Eastern District of Louisiana

In a vote of 52-45, Wendy Vitter was confirmed to a lifetime judicial seat on the U.S. District Court. She is a Roman Catholic Church lawyer who holds extreme views on reproductive rights. During her confirmation process, she withheld information about her previous role as a moderator for anti-abortion panels where she made baseless claims about contraceptive pills. She also

could not answer whether or not she believed *Brown v. Board of Education* was correctly decided. Her views are dangerous and do not represent the views of a majority of the public.

Donald Trump is keeping his pledge to only appoint abortion rights opponents to the federal judiciary and to key administration posts.

Attacks on *Roe* Continue

Following Kavanaugh's confirmation, states like Alabama and West Virginia have also prepared abortion-ban legislation for a post-*Roe* world. In hopes that their bill will rise to the Supreme Court and overturn *Roe*, anti-abortion activists have been filing similar restrictions across the nation, such as *June Medical Services v. Gee* which concerns a Louisiana law almost identical to the Texas one reversed in *Whole Woman's Health v. Hellerstedt*. If *Roe* is overturned, regulation will fall back on the states, many of which, as we have seen, are sure to criminalize abortion or increase restrictions.

On May 28, SCOTUS issued a very limited opinion on *Box v. Planned Parenthood of Indiana and Kentucky Inc.* The Supreme Court decided to uphold part of the Indiana state law which requires the cremation or burial of fetal remains but denied the appeal to reinstate the part of the law banning abortions based on the sex or disability of the fetus. This was the closest these state abortion bans have come to testing the Supreme Court on *Roe v. Wade*. The Supreme Court's actions signal that they are not yet willing to reconsider the rulings made in *Roe*, but with more cases in the pipeline, SCOTUS will have plenty of opportunities to issue broader opinions.

NOW is carefully tracking anti-abortion cases that have the potential to reach SCOTUS. Our tracker can be found here: <https://now.org/keeping-track-of-possible-supreme-court-abortion-cases/>

AMICUS BRIEFS:

***Jane Doe v. University of Kentucky* Sixth Circuit Court, Brief in support of the appellant Issue(s): Sex Discrimination/Violence, Title IX**

This case addresses Title IX's protections against sex-based discrimination by federally-funded institutions. The appellant was a student at Bluegrass Community and Technical College (BCTC) which is a partner with the University of Kentucky (UK). Due to this partnership, the appellant was able to live on UK's campus and access UK's facilities. During her first year, the appellant was raped by a UK student on UK's campus. She then suffered from sexual harassment that was so severe that she felt she could no longer continue education. The appellant alleges that UK was indifferent to her harassment and ultimately retaliated against her for reporting the harassment, violating Title IX. Under Title IX, universities are liable if they do not implement policies to protect individuals from sex discrimination.

The District Court's decision ruled that UK did not violate Title IX because the appellant was not a student enrolled at UK. According to the court's opinion, the school was not liable for students

enrolled in BCTC, despite the fact that BCTC students lived and worked next to UK students. The decision was then appealed to the Sixth Circuit Court.

This brief argues that the District Court's narrow reading of the scope of the statute is incorrect and asks the Sixth Circuit Court to vacate the District Court's order and remand. The historical intent and usage of Title IX is much broader than the narrow usage the District Court suggested. Previous decisions have expanded Title IX to allow both university applicants and employees to sue for violations of Title IX. Therefore, Title IX is not, as has never been, a statute that only protects enrolled students. Using correct logic, the appellant should be protected by Title IX and should be able to sue for a violation of Title IX.

Kesterson v. Kent State University
Sixth Circuit Court, Brief in support of the appellant
Issue(s): Sex Discrimination/Violence, Title IX

The plaintiff, Lauren Kesterson, was a student-athlete who was raped by her softball coach's son (a Kent State baseball player) during her freshman year. Over the course of her sophomore and junior years, she reported the rape to her coach and four more school officials. It was not until her sixth report, in the fall of her senior year, that the school took any action. In response to Lauren's initial report, Coach Karen Linder, who controlled Lauren's scholarship, forbade her from discussing her rape with anyone who didn't already know about it. Linder then waged a campaign of retaliation and intimidation against Lauren, which eventually drove Lauren and her twin sister from the softball program, depriving them of their senior season.

Plaintiff brought claims under Title IX, the Equal Protection Clause, and the First Amendment. The district court entered summary judgment in the school's favor on all claims, holding that the university did not have "actual notice" under Title IX. Schools can be held liable under Title IX only if they have actual notice of the misconduct and are deliberately indifferent to it. Yet the district court held that the report to the softball coach did not constitute actual notice (and it failed to analyze whether the reports to the other four school officials did).

The amicus brief focuses on the district court's unduly narrow reading of the "actual notice" requirement and argues that if the district court's decision stands, it would make it exceedingly difficult for future victims to succeed on Title IX claims no matter how many different employees they told about the sexual misconduct. If schools are going to implement policies making all employees mandatory reporters, then students should be able to rely on those policies and reasonably believe that informing any employee about sexual misconduct by another student will "count" as a legitimate Title IX report and trigger appropriate action by the institution. (Summary from Women's Law Project)

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

This brief is in support of transgender students and the Student Safety Plan implemented by the public schools in Dallas, Oregon. “The Plan” permits transgender students to use restrooms and other facilities consistent with their gender identities. The appellants, Parents for Privacy, seek a reversal of the Plan and instead want a policy that requires students to only use facilities that match their sex as assigned at birth.

The district court concluded that the purported discomfort of some students did not justify the exclusion of transgender students from facilities that correspond with their gender identities. Removal of the Plan and the suggested policy would result in transgender students being subject to a hostile educational environment, including sex-based harassment. The brief asserts that barring 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. Furthermore, the brief urges this Court to reject Appellant’s conclusory arguments, and affirm the district court’s decision to dismiss this case.

Adams v. St. John's County School Board
Eleventh Circuit Court, Brief in support of appellee
Issue(s): Transgender Discrimination

This brief was submitted to highlight that the protections against sex discrimination based on the U.S. Constitution and contained in Title IX include protections against sex discrimination against transgender individuals. The district court held that Defendant’s bathroom policy for transgender students violates both the Constitution’s Equal Protection Clause and Title IX and this brief argues for the circuit court to affirm the district court’s decision.

The County School Board defended their discriminatory bathroom policy by stating that it is necessary to protect students, particularly the privacy and safety of cisgender women and girls. Their dated argument has historically been used in defense of rules that kept women out of many jobs and racial minorities out of public facilities; this is no different. Instead, such rules harm transgender students which only compounds the high rates of sex-based harassment they face. In sum, the Defendant’s argument—that transgender students must be excluded from bathrooms consistent with their gender identity to protect cisgender women and girls—is based on unfounded fears and stereotypes and violates the Constitution’s Equal Protection Clause and Title IX.

State of New York v. Department of Commerce
Supreme Court of the United States, Brief in support of respondents (New York)
Issue(s): Citizenship, Census

On April 3, 2018, in *New York v. Commerce*, the New York Attorney General's office, joined by several additional states, the District of Columbia, several cities, and the U.S. Conference of Mayors, brought a lawsuit in the Southern District of New York to stop the Commerce Department from adding a last minute, untested, harmful citizenship question to the 2020 Census. On January 15, Judge Jesse Furman found that Commerce Secretary Ross added the

citizenship question to the 2020 Census in violation of the Administrative Procedure Act and that Ross ignored the Bureau's own assessment that the question will have negative consequences. The Justice Department appealed the decision to the U.S. Supreme Court, bypassing the intermediate appellate court. On February 15, the Supreme Court announced it would be taking up directly the dispute over Secretary Ross' decision to add a citizenship question to the 2020 Census.

This brief is the vehicle for our coalition and state and local organizational allies to weigh in. It makes three main points that this group of amici are particularly well situated to address: (1) The brief will refute defendants' perverse argument that including a citizenship question is necessary to enforce Section 2 of the Voting Rights Act of 1965; (2) it will explain how the VRA can be adequately enforced without data collected pursuant to a citizenship question; indeed, the addition of a citizenship question will undermine the enforcement of the VRA; and (3) we will argue that the inclusion of a citizenship question will inevitably lead to an undercount of historically under-represented communities, which will in turn inexorably lead to a direct loss of federal funding and representation.

(Summary from The Leadership Conference on Civil and Human Rights)

Commonwealth v. Tighe
Supreme Court of Pennsylvania, Brief in support of appellee
Issue(s): Sexual Violence

The defendant, 58 years of age at the time of his crimes against the 15-year-old victim, was on trial for rape, involuntary deviate sexual intercourse, and sexual assault. Before the trial, he had violated a no-contact bail condition by calling her to beg that she not "put me in jail for life." He was ultimately convicted by a jury of those crimes, but during the trial, he attempted to personally cross-examine the child victim. The trial court ruled to disallow him from doing so, allowing him instead to direct the cross-examination through a standby counsel. He now alleges that he was wronged during the trial.

This brief emphasizes the important goals of reducing emotional harm to victims while also upholding the integrity of the justice system. In situations like this, it is appropriate for courts to place reasonable limitations on a defendant's right to self-representation. Requiring standby counsel to conduct cross-examination otherwise directed by the pro se defendant balances the defendant's rights while also ensuring that victims are not further traumatized. The brief urges the Court to affirm the decision of the Superior Court affirming the defendant's conviction.

Civil Society Letter Opposing Nomination of Robert Destro for Assistant Sec. of State
46 human rights and civil society organizations, including NOW expressed grave concerns about Professor Robert A. Destro, nominated by President Trump on January 16, 2019, to be Assistant Secretary of State for Democracy, Human Rights, and Labor. If confirmed, Prof. Destro would head the Bureau of Democracy, Human Rights, and Labor (DRL) which leads U.S. government efforts to promote democracy, protect human rights and international religious freedom, and advance labor rights globally. Prof. Destro's record shows a strong hostility to the

health and human rights of women, girls, and LGBTQIA+ individuals. We do not believe that a nominee with this record should be confirmed to lead the State Department's Bureau dedicated to protecting, defending, and promoting the human rights of all persons around the world, especially members of vulnerable communities like women, girls, and LGBTQIA+ persons. We strongly urge you to oppose his confirmation based the clear conflict between his record and the Bureau's mission.

(Summary from Center for Reproductive Rights)

Statement Opposing Nomination of Shannon Goessling to Head the Office of Violence Against Women

NOW strongly opposed the nomination of Shannon Goessling, who is unqualified to head the Office of Violence Against Women (OVW) in the Department of Justice (DOJ). If confirmed, Goessling would bring detrimental – and even dangerous – views on domestic violence and firearms. We urged senators to oppose this nominee and to insist that an experienced and knowledgeable candidate for the OVW position be considered. Our statement can be read here: <https://now.org/media-center/press-release/shannon-goessling-unqualified-to-head-the-office-of-violence-against-women/>

NOW signed on to a joint letter with allies detailing Goessling's poor record which was then sent to members of the Senate. A hearing on Goessling's nomination has not yet been held by the Senate Judiciary Committee but could come up at any time.

Request for Advisory Opinion Regarding 2018 PA 368 and 2018 PA 369 **State of Michigan Supreme Court** **Issue(s): Fair Wage, Paid Sick Leave**

In 2017, Michigan One Fair Wage (MOFW) circulated statutory initiative petitions— a procedural prerequisite to submitting a statutory initiative— to create the Improved Workforce Opportunity Wage Act, a proposed law that would increase Michigan's minimum wage to \$12 an hour by 2022 and phase out the lower hourly tipped minimum wage by 2024. That same year, Michigan Time to Care (MTTC) circulated statutory initiative petitions to create the Michigan Earned Sick Time Act to put in place paid sick time for most employees in Michigan.

In May 2018, both MOFW and MTTC filed the requisite signatures with the Bureau of Elections and both proposals were certified by the Board of Canvassers. This means that both were eligible to appear on the ballot on election day in November 2018. Instead of appearing on the ballots, the Secretary of state filed with the Michigan Legislature to vote on the two Acts. The Legislature passed the bills, but with added amendments that significantly delayed or lessened the effects of the two Acts – a very underhanded move by conservative legislators.

This brief recognizes the harmful legislative actions that will likely have a negative effect on the well-being of women, especially women work in low-wage jobs (such as restaurant wait staff)

and survivors of gender-based violence. The brief urges the Court to uphold the integrity of Michigan's statutory initiative process and urges a finding that the Legislature violated Article 2, § 9 of the Michigan Constitution. Their actions prevented voters from using their voice and deprived them of a constitutionally prescribed opportunity to advance the rights of women.

The Michigan One Fair Wage Campaign was organized by Restaurant Opportunities Center United (ROC United), a national organization (<https://rocunited.org/>) that has grown into a broad movement to promote adoption of a fair wage (\$12 - \$15) for traditionally low-wage occupations – a majority of which are held by women. Various states are moving on their own to pass a one fair wage law and the U.S. House of Representatives will soon vote on a \$15 federal minimum wage.

ROC United is headed by the amazing Saru Jayaraman, who was honored with an award at a NOW Conference a few years ago, <https://rocunited.org/about-us/>. This spring, Saru contacted NOW to ask if we could help with an *amicus* brief in the Michigan case; we referred her to Legal Momentum, The Women's Legal Defense and Education Fund (formerly NOW Legal Defense and Education Fund) who moved very quickly to prepare and submit an excellent brief. The National Organization for Women Foundation, along with Michigan NOW State NOW. (President, Nina Muckenthaler), with the Michigan Coalition to End Domestic and Sexual Violence and the National Women's Law Center signed on to the brief. Legal Momentum's attorneys, including the legendary Lynn Hecht Shafran, Jennifer Becker and Seher Khawaja authored the brief. Copies of the brief will be made available to NOW Foundation Board members at the upcoming meeting.