Memorandum

National Organization for Women Foundation

To: NOW Foundation Board Members

From: Jan Erickson, Director of Programs, and Annaliese Keller, NOW Fdn. Intern

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June Medical Services LLC v. Gee – The Case to Further Weaken *Roe*?

On October 4, the Supreme Court decided that it will hear *June Medical Services LLC v. Gee*, the first big abortion case it has granted since President Donald Trump's two Supreme Court appointees who may be opposed to *Roe v. Wade* came to the Court.

June Medical Services LLC v. Gee brings a Louisiana law regulating abortion clinics into question, and is highly comparable to *Whole Woman's Health v. Hellerstedt*, a case that the Supreme Court decided in 2016 which found that a Texas law placed undue burdens on women pursuing abortions, severely limiting their access to the procedure. Reproductive rights activists celebrated the decision in *Whole Woman's Health vs. Hellerstedt* as a major victory, but that decision could be threatened.

Some observers believed that the Supreme Court has signaled that the justices would like to reverse this precedent by deciding to hear *June Medical Services*. The lower courts that have heard the case leading up to this point did not agree on the facts .While the Louisiana law in question requires that doctors who perform abortions have admitting privileges at local hospitals, the trial court discovered that doctors who tried to utilize these benefits were regularly denied. It also noted that the Supreme Court had just addressed an extremely similar situation in *Whole Woman's Health v. Hellerstedt* and in accordance with precedent struck down the law.

The Fifth Circuit Court disagreed with the trial court's claim on appeal, deciding that, in reality, the doctors did not attempt to obtain admitting privileges. This difference on the basic facts of the case was the reason for a reversal, in favor of the law. With this basis, the Fifth Circuit Court, which went against its legal abilities and conducted its own fact-finding, claimed that it was not required to consider the Supreme Court precedent set in *Whole Woman's Health* due to the differences in the two cases.

The fact that the Court is even hearing *June Medical Services* is concerning, since the Supreme Court's major duty is to establish interpretive frameworks for the courts below it to adhere to. If the Supreme Court cannot stick to a clear decision it made only three years ago, this will create instability and confusion in the rest of the courts. Likely, the Fifth Circuit Court ruled in the manner they did because they knew that Donald Trump has added two new Supreme Court Justices who will most likely view cases through an anti-choice lens.

The precedent set in *June Medical Services* might be in danger if the Court is willing to reverse

its prior decisions, marking the potential beginning of the end for essential cases that protect reproductive rights, such as *Roe v. Wade.*

Conservative, Anti-Women's Rights Judicial Nominees

The unrelenting process of appointing ultra-conservative, anti-abortion rights nominees to federal courts continues. With the repeal of the two-thirds vote requirement for Senate approval of judicial nominees, Donald Trump and Mitch McConnell are pushing though a seemingly endless parade of right-wing nominees.

Steven Menashi - Second Circuit Court of Appeals

Steven Menashi is currently the Special Assistant and Associate Counsel to the President. He also serves as part of the immigration working group that aims to support the racist and xenophobic immigration policies set forth by the Trump Administration. Menashi frustrated both Democrats and Republican members of the committee by refusing to answer questions about his tenure in the Trump White House.

Previously, he served as the Acting General Counsel of the Department of Education Under Secretary Betsy Devos; in this role, he tried to roll back Title IX protections for students who have experienced sexual assault, allowing schools to dismiss many complaints of sexual harassment and sexual assault. Menashi worked daily on a 2017 guidance that allowed schools to permit the person accused of assault to cross-examine the survivor, to permit questioning regarding a survivor's sexual history, and to use an inappropriate and more demanding standard of evidence that favors perpetrators over survivors.

Menashi has denied the existence of discrimination against women; he has sarcastically remarked that "women may be the majority, they may be the beneficiaries of special academic programs and institutional support, but they remain, by definition, an oppressed minority." He has also claimed that *Roe v. Wade* has codified "radical abortion rights." Steven Menashi has proved himself to be anti-reproductive rights, anti-women, and anti-survivor; his regressive agenda could be harmful to the rights of many for a lifetime on the Second Circuit Court of Appeals (New York, Connecticut and Vermont).

Sarah Pitlyk - Eastern District Court of Missouri

Sarah Pitlyk's career is marked with numerous attacks on reproductive rights and women's rights. She defended Iowa's law that banned abortion before a point at which most women may not know that they are pregnant and a case when an anti-abortion activist who secretly recorded videos and then distorted the footage to create a false narrative about Planned Parenthood. The later was part of an anti-abortion rights campaign carried on by Republican members of Congress to undermine Planned Parenthood's credibility, leading up to their successful effort to defund women's reproductive health clinics across the country.

Pitlyk is actively opposed *Roe v. Wade*,as indicated by her attempt to attack the legal basis of the ruling by using a divorce proceeding. She argued to secure legal rights for frozen fertilized eggs, which is a common strategy used by extremists who want to completely ban abortion,

without exceptions. Her ambush on reproductive rights goes beyond anti-abortion initiatives, as she once represented several employers challenging a non-discrimination law aimed to protect people from being fired or removed from their housing based on their reproductive decisions, such as using birth control or in vitro fertilization.

It is very clear why Trump has nominated Sarah Pitlyk for a lifetime nomination to the federal District Court of Eastern Missouri: she will aggressively press forward the administration's anti-reproductive rights, anti-health, and anti-women policies, therefore jeopardizing the rights of millions of women.

LITIGATION REPORTS

NATIONAL COALITION FOR MEN, ET AL. V. SELECTIVE SERVICE SYSTEM, ET AL.
Supreme Court of the United States, Brief in support of appellee
Issue(s): Sex Discrimination, Selective Service

In *Rostker v. Goldberg* , 453 U.S. 57 (1981), the Supreme Court rejected a Fifth Amendment equal protection challenge to the Act brought by male plaintiffs, premised largely on its conclusion that women's purported unreadiness for combat positions made them sufficiently dissimilar from men to justify the sex-specific rule, under the heightened scrutiny typically applied to gender-based classifications.

The National Coalition for Men, an organization whose interests with respect to gender justice could not be further from those of NOW and our allies, has sued the government to again challenge the male-only Selective Service system. The challenge is premised on the changed circumstances within the military – namely, the lifting of the Department of Defense ban that long kept women out of military occupational specialties implicated directly in combat, like infantry and artillery.

The amicus brief focuses the need for a proper level of scrutiny -- that is, strict scrutiny -- applicable in this and other gender-based constitutional challenges.

THERESA VICTORY* v. *COUNTY OF BERKS
Third Circuit Court, Brief in support of appellee
Issue(s): Sex Discrimination

Although incarcerated women still comprise only a small share of the incarcerated population, the number of incarcerated women has increased precipitously in recent years. Yet, prisons and jails have often provided inadequate and subpar housing facilities, medical care, and other necessities for incarcerated women, failing to bring their women's facilities to the same standard provided to incarcerated men.

Berks County is a case in point. Berks County houses all of its lowest-risk "Trusty" incarcerated men in its Community Reentry Center, where, relative to Berks County Jail, the men have more freedom and less direct supervision. Trusty men are free, for example, to move throughout their assigned unit for up to thirteen hours each day. Within each unit, sleeping rooms are separated from bathrooms and showers. Berks County refuses to allow "Trusty" incarcerated women—whom Berks County classifies as "Trusty" using the same security risk classification system it uses for incarcerated men—to live at the Reentry Center. All Trusty women must

instead live at the Jail, where they have less freedom and face more unpleasant conditions. Trusty women receive at most six hours each day when they can leave their locked cells. In addition, their locked cells include open toilets, which do not always flush and sometimes force Trusty women to remain in a cell with feces left in the toilet.

Berks County's second-tier treatment of Trusty women violates the Equal Protection Clause. Although Berks County tries to defend its unconstitutional conduct with arguments based on cost containment and deference to corrections officials' judgment, those arguments fall short because, in this case, Trusty women's right to be free from sex discrimination is not a right that "need necessarily be compromised for the sake of proper prison administration."

R.G. & G.R. HARRIS FUNERAL HOMES, INC. v. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and AIMEE STEPHENS
Sixth Circuit Court, Brief in support of appellee
Issue(s): Transgender Discrimination

This Court should decline Petitioner's invitation to write language into Title VII that would arbitrarily carve out 1.55 million people from that statute's protections against sex-based employment discrimination simply because they are transgender. Petitioner R.G. & G.R. Harris Funeral Homes Inc. ("Petitioner" or "Harris Homes") violated Title VII's prohibition against sex discrimination when it fired Aimee Stephens for living openly as a woman.

Even were the Court to accept Harris Homes' narrow definition of sex—which finds no support in Title VII—to mean only "anatomical and physiological factors, particularly those involved in reproduction," Pet. 6, Harris Homes terminated Ms. Stephens' employment "because of sex."3 42 U.S.C. § 2000e-2(a)(1). It is Harris Homes' acknowledged discomfort with Ms. Stephens' genitalia and physiology, and its resulting inability to accept her working openly as a woman, that led it to fire her. Plainly, but for Ms. Stephens' sex, even under Harris Homes' definition of "sex," her employment would not have been terminated.

Ms. Stephens' skills and experience remained consistent during the six years she was employed by Harris Homes. The only thing that changed was that Ms. Stephens would work at Harris Homes openly as a woman. Harris Homes was uncomfortable with this because Ms. Stephens was labeled male at birth. Terminating her employment on this basis violates Title VII. A holding otherwise would deny 1.55 million transgender people in the United States statutorily-guaranteed protections against discrimination "because of sex."

COMCAST v. NAAAOM
Ninth Circuit Court, Brief in support of appellee
Issue(s): Racial Discrimination

Originally enacted as part of the Civil Rights Act of 1866, 42 U.S.C. § 1981 is our nation's oldest civil rights law. It remains one of our most important. By mandating that all people in the United States have the same right "to make and enforce contracts . . . as white citizens," it is designed to ensure that all Americans have equal opportunities to work, to bank, to shop, to rent or buy a home, and to become entrepreneurs free from racial discrimination.

The arguments advanced by Petitioner Comcast Corporation are inconsistent with the plain text of Section 1981, and they would frustrate the fundamental purpose of the statute's drafters—to

place African Americans on equal footing as white citizens in our nation's economy without the taint of racial discrimination. Comcast urges the Court to hold not only that Section 1981 requires "but-for" causation, but also that "but-for" causation can be resolved on the pleadings and that the existence of non-racial justifications for a defendant's conduct means a Section 1981 claim should be dismissed without discovery or trial. If successful, Comcast's arguments would, in many cases, impose an impossible pleading burden on victims of discrimination and prevent them from vindicating meritorious claims.

Comcast argued that the potential existence of additional, non-racial explanations for its refusal to contract with Respondents defeats their Section 1981 claim. A "but- for" cause is not required to be the sole cause, and there can be multiple "but-for" causes for a defendant's action. These principles are especially important in racial discrimination cases. If an employer fires a Black employee for a mistake but gives white employees who make the same mistake only a mild reprimand, the employer has denied the Black employee the same right "to make and enforce contracts . . . as white citizens." 42 U.S.C. § 1981(a).

DHS v. University of California*, *Trump v. NAACP*, and *McAleenan v. Vidal
Supreme Court of the United States, Trio of Cases
Issue(s): Deferred Action for Childhood Arrivals

Consistent with past exercises of discretion, the Department of Homeland Security in 2012 established DACA, which authorized the temporary deferred removal of "certain young people who were brought to this country as children and know only this country as home." Pet. App. 97a-98a.2 In 2017, the current Administration ended DACA, citing its supposed "legal and constitutional defects." J.A. 878.

Contrary to the Administration's contentions when it rescinded the policy, DACA was a permissible exercise of the broad discretion that Congress conferred on the executive branch to implement the federal immigration laws. DACA was also a sensible response to the imperatives and realities of law enforcement: the immigration laws make a substantial number of noncitizens removable, but Congress has not provided sufficient resources to effectuate the removal of more than a small fraction of the nation's undocumented immigrants. DACA was a valid exercise of the broad discretion that Congress has delegated to the executive branch, regardless of whether Congress chooses to provide greater long-term protections for DACA recipients (or others) through new legislation.

Accordingly, the Administration's decision to rescind DACA on the ground that it was unlawful was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," in violation of the APA. 5 U.S.C. § 706(2)(A). At the time that it terminated DACA, the Administration also asserted that, if challenged in court, DACA would meet the same fate as the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) policy, which the Fifth Circuit enjoined in a decision this Court affirmed by an equally divided vote. The Administration reached this conclusion even though DACA is materially distinguishable from DAPA. Accordingly, this Court should hold that the decision to terminate DACA—a policy that lawfully deferred removal on a case-by-case basis of certain persons who were brought to the United States as children and who met other qualifications— on the ground that this effort was unlawful and contravened the APA.

Freyd v. University of Oregon
Ninth Circuit Court, Brief in support of appellee
Issue(s): Equal Pay, Gender Discrimination

The wage disparity in Professor Jennifer Freyd's case is an example of the ongoing gender-based salary inequalities in the academic profession, generally, and for women full professors in doctoral institutions, in particular. Professor Freyd's individual claim of wage discrimination should be evaluated within this broader context of higher education, including the persistence of gender-based inequities. This amicus brief argues that the standards and principles of the academic profession as defined by AAUP should inform the interpretation of "equal work" under the EPA and the "work of comparable character" standard under the Oregon equal pay law. The district court erred in finding that Professor Freyd could not prove a *prima facie* case of "equal work" under the EPA or "work of comparable character" under the Oregon equal pay law. The court failed to evaluate faculty work within the standards of the academic profession that define faculty core job duties as being teaching, research, and service. Further, the district court based its conclusion on its erroneous view that academic freedom enables faculty to "change their job duties" or "'remake their job.'" Academic freedom does not enable faculty to create different jobs with unequal work. Rather, academic freedom is a unifying condition of employment for faculty, which enables them to carry out their common core of job duties of teaching, research, and service.

Professor Freyd's prima facie case is supported by evidence that UO's practice of offering retention raises to faculty has a disparate impact on the basis of sex. UO's affirmative defense is flawed in relying on a "market forces" theory to justify the gender-based wage inequality resulting from its retention raise practice. As noted in a report by the AAUP Committee on the Status of Women in the Academic Profession, "Within disciplines, female faculty members may be 'less marketable' than male colleagues of equal merit, because discriminatory attitudes on other campuses reduce their likelihood of getting an outside offer." UO's affirmative defense under Title VII is not supported by evidence that its retention pay practice is a business necessity or job-related. If UO offers raises to retain faculty, it should correct for resulting gender-based wage inequalities by making equity adjustments in salaries