

MEMORANDUM

National Organization for Women Foundation

To: NOW Foundation Board Members

From: Jan Erickson, Director of Foundation Programs

Date: Sept. 19, 2021 (Updated)

LITIGATION

Reproductive Rights

Supporting the right to abortion and *Roe v. Wade's* prohibition on pre-viability abortion bans

Dobbs v. Jackson Women's Health Organization

U.S. Supreme Court

Case No. 19-1392

The long-expected challenge to *Roe v. Wade's* protection of abortion up to the point of fetal viability will be presented in a case from Mississippi, *Dobbs v. Jackson Women's Health Organization*. Fetal viability is set at around the 24th week of pregnancy and Dobbs would scale this back to 15 weeks, a direct attack on a core principle of *Roe*.

Mississippi is asking the Court to weigh in on the state's Gestational Age Act, which bans abortions after 15 weeks of pregnancy except in cases of medical emergencies or severe fetal abnormalities. The essential question to be considered by the Court is: Whether all pre-viability prohibitions on elective abortions are unconstitutional

Some 50 amicus briefs are to be filed with the Court by Sept. 20. NOW Foundation will be joining an amicus brief being prepared by the Feminist Majority Foundation, with *pro bono* partners at Covington and Burling LLP. The focus of the brief is clinic violence and the impact that it has had on access to abortion care. There were 14 women's health clinics in the state years ago, but with attacks on clinics and erosions to access through state legislation, there is only one clinic remaining. NOW's history of our members volunteering as clinic escorts to protect patients in the face of screaming anti-abortion activists underlines the importance of this aspect.

Oral arguments will likely take place in late November or early December. The October 2021 term for the Court will be the first time since the pandemic began that the session will be held in person. Interested parties can listen to the live audio streaming service linked from the Supreme Court's website,

https://www.supremecourt.gov/oral_arguments/argument_audio/2020

NOW Foundation signed on to an amicus brief prepared by the Feminist Majority Foundation, with counsel Covington & Burling, a prestigious law firm. The brief addresses the impact that violence against women's clinics has had on reducing access to women's health clinics and to undermining access to abortion rights in general.

Here is the Statement of Interest NOW Foundation submitted for the brief:

Statement of Interest

Dobbs v. Jackson Women's Health Organization

The National Organization for Women (NOW) Foundation is a 501 (c)(3) entity affiliated with the National Organization for Women, the largest grassroots feminist activist organization in the United States. NOW has a long history of advocacy for the right to abortion, dating back to our founding in 1966. For nearly five decades NOW members have bravely volunteered to escort patients past threatening anti-abortion rights opponents blocking women's clinic entrances. NOW filed a lawsuit (NOW v. Scheidler) to call anti-abortion rights extremists to account for their role in organizing the violence. Such intimidation is the principal cause of the disappearance of hundreds of women's health clinics. In Mississippi the number of women's health clinics declined from 14 to just one. As part of NOW Foundation's focus on women's health, we believe that denial of abortion care has lifelong consequences for many women, especially poverty-impacted women. The constitutional right to abortion is vital to the autonomy, health and economic opportunity of people who can get pregnant.

You can read the brief, itself, by clicking on to this link (this is the near final version, pls do not distribute): [FMF Amicus Brief - Dobbs](#).

DOBBS v. JACKSON WOMEN'S HEALTH ORGANIZATION ANALYSIS

The Center for Reproductive Rights is the lead organization to argue for abortion rights and against the ban in Dobbs. CRR Senior Vice President, Lourdes Rivera, spoke at the National NOW Conference in July about this case. Here is a great analysis of what is at stake, from the Center's website, www.reproductiverights.org

Stakes are High in Upcoming Supreme Court Case Challenging Mississippi Abortion Ban

In its brief for *Dobbs v. Jackson Women’s Health*, the Center highlights the consequences of banning abortion—as the reality of Texas’s recent ban already demonstrates.

The stakes are high for abortion rights in the upcoming U.S. Supreme Court case challenging a Mississippi abortion ban. In its [brief filed today](#) in *Dobbs v. Jackson Women’s Health Organization*, the Center for Reproductive Rights and its co-counsel make clear the consequences of banning abortion if the Court were to overrule almost 50 years of precedent and uphold the Mississippi ban.

Earlier this month, in a separate case, the [Supreme Court denied the Center’s request to block a Texas ban](#) on abortion after approximately six weeks of pregnancy. Since taking effect September 1, Texans’ need for abortion has not diminished, but the provision of almost all abortion care has ended in the state. The Texas law incentivizes private individuals to sue abortion providers and anyone who assists someone in obtaining an abortion after the time limit, adding to the fear and chaos surrounding the new ban.

Desperate for care, many Texans are being forced to drive hundreds of miles to other states to obtain abortions, while others may attempt to end their own pregnancies despite potential legal risk. For some, the barriers will simply be too high, and they will be compelled to accept the risks of continued pregnancy and childbirth as they are forced carry their pregnancies to term. As a result of systemic barriers, these harms will fall hardest on young people, people of color, and people who are poor or living with low incomes.

“Right now, Texas has managed to ban abortion even as *Roe* stands, and other states have said they will follow in its footsteps,” said Nancy Northup, president and CEO of the Center in a [statement](#) issued today. “While Texas is circumventing *Roe* and the Constitution, Mississippi is openly asking the Court to overturn *Roe*. If the Court grants Mississippi’s request to overturn *Roe*, large swaths of the South and Midwest—where abortion is already hard to access—will eliminate abortion completely.”

Supreme Court to Review Mississippi’s Request to Overturn *Roe*

The Mississippi ban being challenged in *Jackson Women’s Health*—expected to be argued later this year—prohibits abortion after 15 weeks of pregnancy. The ban was enacted in direct violation of the core holding of *Roe v. Wade* (1973) that, prior to viability, every person has the right to decide whether to continue their pregnancy. The Mississippi ban was struck down by both the district court and the Fifth Circuit Court of Appeals before the Supreme Court agreed

to hear the state's request to review the law—marking the first time the Court agreed to review the constitutionality of a pre-viability abortion ban.

In response to the question before the Court in this case, “whether all pre-viability prohibitions on elective abortion are unconstitutional,” in its brief today, the Center answers “yes.”

Last month, Mississippi's brief in *Jackson Women's Health* explicitly and repeatedly asked the Court to overrule *Roe v. Wade* (1973) and *Planned Parenthood v. Casey* (1992) and rule that there is no right to abortion protected by the U.S. Constitution. In response, the Center points out that every one of the state's arguments has been considered and rejected by the Court before: “In *Casey*, this Court carefully considered every argument Mississippi makes here for overruling *Roe*. After doing so, the Court reaffirmed the ‘most central principle’ of its abortion jurisprudence: that states cannot prohibit abortion until viability.” Because pregnancy so intensely impacts a person's bodily integrity, before viability, the Court has repeatedly held, the decision must be for the pregnant person—and not the State—to make.

In the 1992 *Casey* case, the Court also outlined the importance of the right to abortion to women's participation in the social and economic life of the nation and pointed out that an entire generation of Americans had relied on the right to abortion to shape their lives and futures.

Today, two generations—spanning almost a half century—have relied on this right to make basic decisions about their bodies, lives, and futures. The Center states that Mississippi disregards the “vital liberty and equality interests of those who would be affected by the radical change in the law it requests—the nearly one in four women who decide to end a pregnancy at some point during their lives.”

Center Warns of Consequences of Banning Abortion

The Center warns in its brief that “half the states in the Nation are poised to ban abortion” should the Court uphold Mississippi's ban. Serious harm and significant chaos would ensue.

The Court has repeatedly reaffirmed precedent that states cannot ban abortion before viability, the Center's brief states, and “Mississippi is forced into its extreme position because it has nothing serious to offer in place of the viability line.” None of the State's supposed alternatives to the stable and principled viability line could “be administered against the cascade of abortion bans that await.” Nor would any of Mississippi's arguments to replace *Roe* and *Casey* provide any stable right to abortion.

They are not meant to. Mississippi has already enacted a six-week abortion ban, and is one of at least a dozen states that has a law in place that are intended to ban abortion if *Roe* is overruled. Even further, Mississippi officials—and their counterparts in many states—have announced their intent to replicate Texas’s law and its vigilante enforcement scheme.

The Center continues, “As abortion bans are enforced—or the threat of enforcement looms—large swaths of the South and Midwest would likely be without access to legal abortion. Some people with the means to travel may be able to access legal abortion—but only after crossing multiple state lines.” Many others—especially young people and others without such means, many of whom are women of color—will not. They will, instead, attempt to “end their own pregnancies outside the medical system, which could expose them and anyone who helps them to criminal investigation and prosecution. Some would attempt abortion by unsafe or ineffective methods. . . . For many, the barriers will simply be too high, and they will be forced to endure the substantial risks of continued pregnancy and childbirth.”

“There are no half-measures here.”

In its conclusion, the Center states, “There are no half-measures here.” The State’s “alternatives” would upend the balance struck in *Casey* and ultimately extinguish ‘the woman’s liberty to determine whether to carry her pregnancy to full term.’ Upholding Mississippi’s ban “would lead to the same thing: attempts by half of the states in the Nation to forbid abortion entirely, and a judiciary left without tools to manage the resulting litigation. The only way to avoid that outcome is to recognize, as the Court reaffirmed thirty years ago, that ‘a State’s interest in the protection of [fetal] life falls short of justifying any plenary override of [the] individual liberty claims’ at stake here. Until viability, a state may regulate, but not ban, abortion.”

Read more:

- [**Response brief filed 09.13.21 in *Dobbs v. Jackson Women’s Health Organization***](#)
- [**Case overview: *Dobbs v. Jackson Women’s Health Organization***](#)
- [**Full statement by Nancy Northup**](#), president and CEO of the Center for Reproductive Rights, 09.13.21

TRANSGENDER RIGHTS

Supporting transgender person's rights to have accurate driver's licenses that reflect their gender

Darcy Corbitt, et al. v. Hon. Hal Taylor in his capacity as Secretary of Alabama Law Enforcement, et al.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

CASE NO. 2:18-CV-00091-MHT-SMD

NOW Foundation joined this amicus brief challenging a restrictive policy that discriminates against transgender persons. On August 2, the National Women’s Law Center, along with the law firm partner Allen & Overy LLP, led a group of 32 organizations to file an [amicus brief](#) to the Eleventh Circuit in support of three transgender women who were denied accurate gender markers on their driver’s licenses by the state of Alabama.

The appeal involves a constitutional challenge to an Alabama policy that deprives transgender people of driver licenses that accurately reflect their gender. Alabama’s policy only allows people to change the gender marker on their driver licenses if they undergo surgical procedures and submit proof to the state, meaning that transgender people who do not want, cannot afford, or are medically unable to have the required surgeries are prevented from having a license that accurately reflects their gender. The policy puts transgender Alabamans at risk of discrimination and attack, and violates the privacy, due process, free speech, and equal protection rights of the plaintiffs.

As our amicus brief explains, such a restrictive policy unlawfully discriminates against transgender people in violation of the Equal Protection Clause of the Constitution. Carrying a license with an inaccurate gender marker also puts transgender people—especially Black and brown trans women—at a heightened risk of discrimination, harassment, and attack.

Our brief will urge the Eleventh Circuit to affirm the district court's decision, which held that Alabama’s policy violates the Equal Protection Clause because it discriminates based on sex. We will highlight the harms at stake here, particularly for Black and brown trans women in Alabama and how not having an ID that matches one's gender identity creates a multitude of harms in real peoples' lives. In its appeal, the state is also conflating the issues present in this case with classifications related to affirmative action and implying that unless Alabama is permitted to require surgery for trans folks before they are allowed licenses that match their gender identity, then this calls into question the entire basis for race-based affirmative action. As such, our brief will also distinguish between discriminatory classifications like Alabama’s, which serve no important governmental purpose, and classifications tied to remedial programs, like affirmative action, which serve the vital governmental interest of addressing historical discrimination and oppression.

The district court correctly decided that Alabama's policy violates equal protection because it discriminates against transgender people on the basis of sex, and amici urge the Eleventh Circuit to affirm the lower court's decision. The plaintiffs are represented by the American Civil Liberties Union (ACLU) and the Transgender Legal Defense & Education Fund (TLDEF).

SEXUAL HARASSMENT

Protecting survivors of workplace sexual harassment

Jane Roe v. United States of America, et al.

Fourth Circuit Court of Appeals

Case No. 21-1346

NOW Foundation is joining with The Purple Campaign, National Women's Law Center, Legal Momentum, and *pro bono* partners at Wilkie, Farr & Gallagher in filing an amicus brief in support of Jane Roe, who is being represented by Harvard Law School Professor Jeannie Suk Gersen.

The appeal, *Roe v. U.S.*, No. 21-1346, involves the scope of protections for employees of the federal judiciary who report harassment and other discrimination. Jane Roe, a former assistant federal defender, was sexually harassed by her supervisor who took an obsessive interest in her by, among other things, insisting on "mentoring" her, offering to drive her home, leaving the office at the same time as her, pressuring her to meet him outside of the office, and berating her when she did not respond to his advances. When she attempted to use the internal mechanisms available her to report the conduct, she was not taken seriously and repeatedly gaslit and stonewalled for requesting a safe workplace.

Roe was required to use the Fourth Circuit's mandatory alternative dispute resolution process, which she says denied her basic due process and equal protection rights, including by conducting an inadequate investigation of her claims, failing to resolve conflicts of interest, denying her a prompt resolution or written decision, and declining to provide her with a copy of the investigation report. Throughout the process, Roe was subjected to an increasingly hostile work environment due to her claims, forcing her to eventually resign to escape the harassment. She then filed this lawsuit to challenge the Fourth Circuit's alternative dispute process, bringing due process and equal protection claims under the Fifth Amendment. In December 2020, the district court dismissed Roe's complaint and Roe is now appealing.

The amicus brief will encourage the Fourth Circuit to revive Roe's claims, emphasizing that the federal judiciary should be held to the same standards as other employers when responding to employee reports of harassment and discrimination. The federal judiciary currently enjoys an anomalous exemption from Title VII, which would typically provide protections to employees who have been harassed at work, making it extremely difficult for judicial employees to report

misconduct and receive an adequate remedy. Judicial employees who are courageous enough to make a complaint are forced to instead use opaque and inadequate alternative dispute resolution processes, denying them full constitutional protections and failing to meaningfully remedy harassment and discrimination. In effect, the judicial exemption has created a problem where a significant population of employees are left unprotected from misconduct that could be addressed in nearly any other workplace. Our brief will call for the end of this judicial exceptionalism.

EQUAL EDUCATION

SCHOOL DRESS CODE – A PARTIAL WIN UNDER TITLE IX

Peltier v. Charter Day School

Fourth Circuit Court of Appeals

Case No. 20-1001

On August 9th, the 4th Circuit published its opinion in *Peltier v. Charter Day School*, siding with Peltier on the Title IX issue and concluded that dress codes are not categorically excluded from the scope of Title IX. In so doing, the court cited to the National Women’s Law Center’s amicus brief on page 33 of the opinion. As for the bad news, the court also reversed Peltier’s win on the equal protection issue, concluding that CDS was not a state actor and thus cannot be subjected to an equal protection claim.

You can read [this important amicus brief](#). An impressive 56 civil rights and public interest organizations joined the brief. The law firm partner Debevoise & Plimpton assisted in preparing the brief in which [as we raised a host of legal and policy concerns](#) in support of the three students who were represented by the ACLU Women’s Rights Project.

EQUAL PAY

Equal Pay for United States Women’s National Team professional soccer players

Morgan, et al. v. U.S Soccer Federation

United States Court of Appeals for the Ninth Circuit

Case No. 2:19-cv-01717-RGK-ACR

NOW Foundation joined with the National Women’s Law Center and the Women’s Sports Foundation, and with law firm partner Selendy & Gay PLLC, in filing an equal pay amicus brief in support of professional soccer players on the United States Women’s

National Team (“USWNT”). The USWNT players, represented by Mayer Brown, are appealing to the United States Court of Appeals for the Ninth Circuit after a California federal district court dismissed their equal pay claims, and following a negotiated settlement regarding their other claims.

For years, the U.S. Soccer Federation paid players on the USWNT less than the male players on the U.S. Men’s National Team, despite the USWNT being more successful and bringing in substantially more money than the men’s soccer team. The district court made several errors in analyzing plaintiffs’ claims under the Equal Pay Act—including leaving out a comparison of the rates at which the women’s players were paid to the rates of pay for the men’s team. In addition, the court weighed the evidence inappropriately on the summary judgment motion, when these issues should have been assessed by a jury. The U.S. Soccer Federation argues that it did not pay women players less when considering total compensation and focuses on the terms of the collective bargaining agreements. Amici argue that parties cannot negotiate terms that are discriminatory based on sex or any other protected basis, including through a collective bargaining agreement.

NWLC's amicus brief discusses the importance of equal pay, both in this context and generally, and the importance of following the applicable legal standard for women's equal pay claims.

SEX DISCRIMINATION

Supporting the Civil Rights Protections of a Schoolteacher at a Religious School

Crisitello v. St. Theresa School

New Jersey Supreme Court

Case. No. A-1294-16T4

NOW Foundation joined with the National Women’s Law Center, and with the law firm partner Lowenstein Sandler, on an amicus brief to the New Jersey Supreme Court in *Crisitello v. St. Theresa School*. The case involves an elementary school teacher at a Catholic school who was fired after her employer learned that she was pregnant and not married.

Victoria Crisitello worked as a kindergarten teacher and an art teacher at a Catholic elementary school. Notably, she was not a religion teacher and did not teach religion as any part of her duties. When Ms. Crisitello told her employer that she was pregnant, she was told that she should resign or she would be fired because her pregnancy violated the Catholic Church’s views

regarding premarital sex under their general employee ethics code. Ms. Crisitello filed a complaint against the school for violating her rights under the New Jersey Law Against Discrimination, claiming in part that the school discriminatorily singled her out for punishment under the employee handbook. The Appeals Court twice ruled in Ms. Crisitello's favor, finding that the school did not enforce their employee policies consistently and therefore firing Ms. Crisitello was discrimination based on sex (pregnancy) and marital status.

On appeal to the New Jersey Supreme Court, the school is claiming that Ms. Crisitello's claims should be blocked under *Our Lady of Guadalupe School v. Morrissey-Berru*, the 2020 Supreme Court decision regarding the ministerial exception. For more background on the case, you may review this article from the [New York Times](#).

This case is yet another troubling instance of employers attempting to use the ministerial exception to deny their employees protection under workplace civil rights laws. Our amicus brief will address the specific harms to women, people of color, LGBTQ individuals, and other groups at risk for further discrimination in the workplace through an unwarranted expansion of the ministerial exemption. NWLC has filed and joined amicus briefs in other cases regarding the ministerial exception and we anticipate raising similar concerns in this case. You may review summaries of previous NWLC amicus briefs in [Our Lady of Guadalupe](#), [Tucker v. Faith Bible Chapel](#), and [Demkovich v. St. Andrew the Apostle Parish](#). (See also last week's troubling [decision by the 7th Circuit en banc](#) in *Demkovich*, regarding harassment claims under the ministerial exception.)