No. 21-1346

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

JANE ROE

Plaintiff-Appellant,

—v.—

UNITED STATES, ET AL.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN
DISTRICT OF NORTH CAROLINA AT ASHEVILLE
THE HONORABLE WILLIAM G. YOUNG, DISTRICT JUDGE
CASE NO. 1:20-CV-00066-WGY

BRIEF OF *AMICI CURIAE* LEGAL MOMENTUM, NATIONAL WOMEN'S LAW CENTER, THE PURPLE CAMPAIGN, AND 42 ADDITIONAL ORGANIZATIONS IN SUPPORT OF PLAINTIFF-APPELLANT

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Feminist Majority Foundation
Gender Justice
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Kentucky Association of Sexual Assault Programs
KWH Law Center for Social Justice and Change
LatinoJustice PRLDEF
Legal Aid at Work
Legal Voice
NARAL Pro-Choice America
National Alliance to End Sexual Violence
National Association of Social Workers (NASW)
National Association of Women Lawyers
National Council of Jewish Women
National Crittenton
National Network to End Domestic Violence
National Organization for Women Foundation
National Partnership for Women & Families
National Resource Center on Domestic Violence
National Women's Political Caucus
People For the American Way
People's Parity Project

Rape, Abuse & Incest National Network (RAINN)
Religious Coalition for Reproductive Choice
Sikh Coalition
SisterReach
The Coalition of Labor Union Women
The Women's Law Center of Maryland
Women Employed
Women Lawyers Association of Los Angeles
Women Lawyers On Guard Inc.
Women With A Vision, Inc.
Women's Bar Association of the District of Columbia
Women's Bar Association of the State of New York
Women's Institute for Freedom of the Press
Women's Law Project

DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER ENTITIES WITH A DIRECT FINANCIAL INTEREST

Under Federal Rule of Appellate Procedure 26.1 and Local Rules 26.1(a)(2)(A) and (a)(2)(C), Legal Momentum, The Women's Legal Defense and Education Fund; the National Women's Law Center; the Purple Campaign; and the additional *amici curiae* make the following disclosures:

1. The proposed amicus curiae parties, individually and collectively, have no parent corporation(s);
2. There is no publicly held corporation that owns more than 10 percent of stock in the proposed amicus curiae parties, either individually or collectively; and
3. The amicus curiae parties certify that they are unaware of any publicly held corporation or similarly situated legal entity that has a direct financial interest in the outcome of the litigation by reason of a franchise, lease, other profit-sharing agreement, insurance, or indemnity agreement.

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INTERESTS OF *AMICI CURIAE*

Legal Momentum, the Women's Legal Defense and Education Fund is a leading national non-profit civil rights organization that, for over 50 years, has used the power of the law to define and defend the rights of women and girls. Legal Momentum has worked for decades to ensure that all employees are treated fairly in the workplace across a wide range of issues related to sex discrimination, gender equity, and gender bias. Legal Momentum has been co-counsel or *amicus curiae* in leading sexual harassment cases, including *Faragher v. Boca Raton*, 524 U.S. 775 (1998).

The National Women's Law Center ("NWLC") is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights, and the right of all persons to be free from sex discrimination. NWLC fights for gender justice in the courts, in public policy, and in society to ensure that women can live free of sex discrimination. Since its founding in 1972, NWLC has focused on issues of key importance to women and girls, including economic security, workplace justice, education, and reproductive rights and health, with special attention to the needs of low-income women and those who face multiple and intersecting forms of discrimination. NWLC has participated as counsel or *amicus curiae* in a range of cases before the Supreme Court, federal Courts of Appeals, and state courts to secure equal treatment and opportunity in all aspects of society

through enforcement of the Constitution and other laws prohibiting sex discrimination. NWLC also houses the TIME'S UP Legal Defense Fund, which helps people facing sexual discrimination and harassment at work, in education, and in health care to find attorneys and funds selected cases of workplace sexual harassment.

The Purple Campaign is a non-profit organization whose mission is to address workplace harassment by implementing stronger corporate policies and establishing better laws. The Purple Campaign has successfully advocated for the enactment of stronger anti-harassment workplace protections in Congress and other federal workplaces through its support for bills such as the Congressional Accountability Reform Act ("CAA"), in the private sector through its development of a corporate certification program to recognize employers taking steps to address harassment in their workplaces, and in the courts as *amicus curiae* in various cases implicating workplace harassment issues.

The three organizations that led this amicus brief are joined by 42 additional public interest and civil rights organizations committed to gender justice and civil rights.[1] *Amici* file this brief with the consent of all parties. Fed. R. App. P. 29(a)(2).

[1]Pursuant to Fed. R. App. P. 29(a)(4)(E), *amici curiae* state that no party's counsel authored this brief in whole or in part; that no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and that no person

Based on the arguments herein, amici file this amicus brief to urge the Court to reverse the lower court's granting of Defendants' motion to dismiss Roe's Complaint and, in doing so, affirm that its own employees are entitled to the Constitution's basic guarantee of the right to work in an environment free from sexual harassment and other discrimination. Notably, these employees include not only federal defenders like Roe, but approximately 30,000 other people employed by the Federal Judiciary, including judges, law clerks, staff attorneys, federal public defenders, in-house counsel, pretrial service officers, probation officers, investigators, and operational staff including IT specialists, interpreters, and accountants. *See Who Works for the Judiciary?* United States Courts, https://www.uscourts.gov/careers/who-works-judiciary; *Annual Report 2020*, United States Courts, https://www.uscourts.gov/statistics-reports/annual-report-2020.

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other than the *amici curiae* or their counsel contributed money that was intended to fund preparing or submitting the brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiff Jane Roe is a former employee of the U.S. Federal Judiciary who endured months of pervasive sex discrimination, including sexual harassment, and related retaliation from early 2018 through March 2019. Roe first reported this misconduct informally and then formally pursuant to the Fourth Circuit's internal complaint process, the Consolidated Equal Employment Opportunity and Employment Dispute Resolution ("EDR") Plan. JA-659. Although she had long dreamed of becoming a federal public defender and planned to continue that career path until retirement, Roe was constructively discharged from her position in March 2019 based on the sexual harassment, related retaliation, and Defendants' failure to provide her with adequate safeguards or procedures.

Upon starting her employment with the Federal Defender's Office ("FDO"), and after receiving reassurances from colleagues that the FDO, which had a reputation as a "troubled office," would be undergoing positive reforms, JA-26 ¶¶ 39, 43, Roe was placed under the supervision of the First Assistant, who had control over the FDO's operations, JA-28 ¶ 52; JA-30 ¶ 63. He targeted Roe almost immediately, paying her excessive, unwelcome attention; singling her out to be his mentee; and assigning her almost exclusively to his cases. JA-30 ¶ 63. Co-workers noticed the First Assistant's unprofessional conduct toward Roe, describing him as "lustful," "fixated," "sexually attracted," and "smothering." JA-31 ¶¶ 73–74.

The First Assistant's repeated efforts to engage one-on-one or outside the office became increasingly obsessive, and when Roe attempted to distance herself, he aggressively interfered with her job duties. JA-33 ¶ 86; JA-34–37 ¶¶ 87–109. After she reported this misconduct, Roe felt so unsafe and unprotected that she began carrying pepper spray to work, where she remained stationed in an isolated, converted utility closet. JA-48 ¶ 174. Ultimately, for her own safety, she was forced to both take leave and work remotely. JA-21 ¶ 7; JA-45 ¶ 157, JA-48 ¶ 173, JA-52–53 ¶¶ 210–12, 219; JA-73 ¶ 338.

From the beginning, Roe's experience with the EDR Plan, the Judiciary's sole and self-policed avenue for redress, was ineffective and nightmarish. Far from "provid[ing] a means for addressing wrongful conduct," JA-725, the EDR Plan's existing mechanisms proved opaque, intimidating, and inflexible, and failed to provide Roe with the workplace protections to which she was entitled.[2]

Roe initially informally reported the conduct to the Administrative Office's ("AO") Fair Employment Opportunity Officer ("FEOO"), who immediately identified the First Assistant's conduct as "classic sexual harassment." JA-45 ¶ 160. Roe's attempts to address this sex discrimination—which included sexual harassment, discriminatory harassment, and deliberate indifference—through

[2] The facts of this case occurred under the Fourth Circuit's 2013 EDR Plan. *See* JA-659. The EDR Plan now in effect was adopted in 2020. *See* JA-725.

informal channels proved fruitless. For example, before formally reporting the First Assistant's conduct, Roe attempted to resolve his inappropriate behavior by engaging with the Defender, the most senior manager in the office, confidentially. JA-39–40 ¶¶ 123–26. The Defender failed to take Roe's concerns seriously. Instead, the Defender held a meeting with Roe and the First Assistant, during which the Defender compared the situation to a "marriage" requiring "compromise," allowed the First Assistant to verbally berate Roe, and intimidated Roe by ordering that she stop taking notes of the meeting. JA-41 ¶¶ 135–36; JA-43 ¶ 144.

Roe filed a formal report of wrongful conduct, a request for counseling,[3] and a request to disqualify the Defender, one of the subjects of her complaint, from serving as the employing office's representative under the EDR Plan. JA-62 ¶¶ 274–76. While Roe was navigating the EDR process, the narrative of her grievances was shared, without prior notice, with the Defender during a confidential mediation, JA-92 ¶¶ 451–52; she was kept on administrative leave for six months while the investigation ambled on without deadlines, JA-21 ¶ 7; JA-68 ¶ 313; JA-77–78 ¶ 365; and she was never informed of the nature of the belated "disciplinary action" that the EDR Coordinator later told her was taken in response to her complaint, JA-97 ¶¶ 484–85.

[3] The term "counseling" refers to the EDR Plan's mandatory prerequisite to filing a complaint. JA-666.

In March 2020, Roe filed a Complaint in the United States District Court for the Western District of North Carolina, alleging violations of due process and equal protection under the Fifth Amendment of the U.S. Constitution, and statutory claims for conspiracy to violate Roe's civil rights under 42 U.S.C. §§ 1985, 1986. *See* JA-99–101 ¶¶ 494–505. In December 2020, the district court granted Defendants' motions to dismiss and entered judgment for Defendants. JA-1490, JA-1527. Thereafter, Roe filed a motion for reconsideration underscoring the significant factual and legal errors in the district court's decision. JA-1530. Three days later, the court denied the motion for reconsideration in a text-only order. JA-17. Roe filed notice of appeal to this Court on March 29, 2021. *Id.*

Part I of this *amicus* brief explains how, by dismissing Roe's complaint, the district court denied her the right to be free from sexual harassment under the Equal Protection Clause of the U.S. Constitution. Part II details the Judiciary's long and public history of perpetuating and allowing sex discrimination, including sexual harassment, that has been oft acknowledged but never meaningfully addressed. Part III explains the insufficient complaint processes that pervade the Judiciary to this day, and how affirming the district court's decision would signal that this Court is content to tolerate the Judiciary's increasingly singular status as a workplace lacking in meaningful and effective protections against sexual harassment.

ARGUMENT

I. THE DISTRICT COURT IMPROPERLY DISMISSED ROE'S EQUAL PROTECTION CLAIM FOR SEX DISCRIMINATION BY DISCOUNTING TITLE VII PRINCIPLES AND MISCHARACTERIZING HER CLAIM AS PURE RETALIATION.

The district court misapplied this Court's equal protection precedent to find that Roe's Fifth Amendment claim was for retaliation alone, and therefore not cognizable under the Equal Protection Clause. JA-1523–25. To the contrary, Roe's Complaint alleges sex-based discrimination flowing directly from the Judiciary's failure to promptly and adequately remedy the prolonged sexual harassment, discriminatory harassment, deliberate indifference, and retaliation to which she was subjected.

A. Title VII Standards Inform Equal Protection Analyses.

The district court incorrectly stated that a "Title VII theory of discrimination on the basis of sex [does not] state[] a claim . . . under the Fifth Amendment Equal Protection Clause." JA-1521. In fact, claims under Title VII and the Equal Protection Clause enjoy considerable overlap and the standards often inform each other. "Title VII and equal protection cases address the same wrong: discrimination." *Bator v. Hawaii*, 39 F.3d 1021, 1028 n.7 (9th Cir. 1994). "[I]t is well-settled that this court applies the standards developed in Title VII litigation to similar litigation arising under 42 U.S.C. § 1983." *Briggs v. Waters*, 484 F. Supp. 2d 466, 476–77 (E.D. Va. 2007) (citing *Beardsley v. Webb*, 30 F.3d 524, 529 (4th Cir. 1994)); *Holder v. City*

of Raleigh, 867 F.2d 823 (4th Cir. 1989) ("Our analysis with respect to Title VII also governs plaintiff's [Fourteenth Amendment] claims under 42 U.S.C. §§ 1981 and 1983."); *see also Duffy v. Wolle*, 123 F.3d 1026, 1036–37 (8th Cir. 1997) (applying Title VII burden-shifting framework to federal judicial applicant's *Bivens* claim for sex discrimination), *abrogated on other grounds in Torgerson v. City of Rochester*, 123 F.3d 1026 (8th Cir. 1997). In line with this precedent, Title VII principles should have guided the district court's evaluation of Roe's equal protection claim.

B. Roe's Complaint States a Claim for Sex Discrimination under the Equal Protection Clause of the Fifth Amendment.

In finding that Roe's claim did not involve "traditional class-based discrimination," JA-1524–25, the district court departed from well-established law that sexual harassment, and official actions that facilitate or fail to address that harassment, constitute prohibited sex discrimination under the Equal Protection Clause, *see Wilcox v. Lyons*, 970 F.3d 452, 461 (4th Cir. 2020) ("[C]ontinued sexual harassment and adverse treatment of a female employee unlike the treatment accorded male employees remains actionable as a violation of the Equal Protection Clause."); *Beardsley*, 30 F.3d at 529 ("[S]exual harassment of employees by persons acting under color of state law violates the Fourteenth Amendment."); *Bohen v. City of E. Chicago, Ind.*, 799 F.2d 1180, 1185–86 (7th Cir. 1986) ("Forcing women and not men to work in an environment of sexual harassment is . . unjustified unequal

treatment [and] is exactly the type of behavior prohibited by the equal protection clause.").

The district court also grossly mischaracterized Roe's claim as a sort of novel *Bivens* action. JA-1512, JA-1524. But Roe's sexual harassment claim is far from new. The sexual harassment and retaliation Roe was subjected to, and the Judiciary's complete failure to address them, are included in the kinds of sex discrimination with which the Equal Protection Clause is concerned. *See Davis v. Passman*, 442 U.S. 228 (1979) (*Bivens* claim for sex discrimination); *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986) (sexual harassment constitutes sex discrimination); *Wilcox*, 970 F.3d at 461; *Duffy*, 123 F.3d at 1036–37.

To reach its puzzling conclusion, the district court *sua sponte* mischaracterized Roe's equal protection claim as solely one of retaliation. JA-1523. However, Roe's equal protection claim is based on the Judiciary's failure to act on the "harassment, retaliation, and discrimination" to which she was subjected "based on her gender." JA-100 ¶ 498; *see also* JA-397 n.22 ("[Roe] is asserting she had a constitutional right to be free from unlawful discrimination, to have prompt and effective action taken on her complaints, and to have meaningful review and remedies.").

The district court's reliance on this Court's decision in *Wilcox v. Lyons* ignores the Fourth Circuit's clear statement that "the continued sexual harassment

and adverse treatment of a female employee unlike the treatment accorded male employees *remains actionable as a violation of the Equal Protection Clause* even when the sex discrimination and harassment continue *after*, and partially in response to, the female employee's report of prior discrimination and harassment." 970 F.3d at 461 (citing *Beardsley*, 30 F.3d at 530) (emphases added). Indeed, the Fourth Circuit has specifically permitted retaliation claims under the Equal Protection Clause where the harasser "continued to discriminate" after the conduct was reported and "maintained and reinforced the hostile work environment that he had created." *Beardsley*, 30 F.3d at 530. Put plainly, "the notion that retaliation claims that are linked to gender constitute part of an equal protection gender discrimination claim is not novel." *Harman v. Oklahoma*, 2007 WL 1674205, at *5 (W.D. Okla. June 7, 2007) (citing *Watkins v. Bowden*, 105 F.3d 1344, 1354 (11th Cir. 1997); *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173–74 (2005)). Thus, contrary to the district court's decision, sexual harassment claims and related retaliation that arise from circumstances like Roe's are cognizable under the Equal Protection Clause.

The allegations in Roe's Complaint, which must be taken as true on a motion to dismiss, describe the many ways the Judiciary officials authorized to take action on Roe's grievances not only failed to do so, but instead directly facilitated an environment of sexual harassment. *See Feminist Maj. Found. v. Hurley*, 911 F.3d 690, 690, 703 (4th Cir. 2018) (finding intentional sex discrimination under Title IX

where university administrators took only "limited steps" to address sexual harassment). The Judiciary's deficient process effectively sanctioned Roe's harassment by signaling that such complaints would not be taken seriously or addressed in a meaningful, timely manner. Other employees watched as Roe's reputation was demeaned, her complaints mocked, and her job responsibilities diminished—sending a clear message that in the Fourth Circuit, it is better to stay quiet than report sexual harassment.

As the EDR Plan process and subsequent disciplinary action dragged on for nearly *an entire year*, JA-97 ¶ 485, Roe was subjected to an increasingly hostile work environment by her direct harasser, other supervisors, and colleagues, that was exacerbated by the EDR process's deficiencies. For example, Roe continued to be required to report directly to her harasser for months after exposing his behavior, JA-43–44 ¶¶ 150–51; JA-47 ¶ 168; JA-53 ¶ 216; JA-57 ¶ 244, even as he took increasingly disturbing steps in response to her rejection of his advances, including continuing his obsessive behavior, stalking, recruiting other employees to eavesdrop on her, making disparaging jokes about her, and sending her harassing emails. JA-48–49 ¶¶ 177–82; JA-58 ¶¶ 252–53; JA-59 ¶¶ 255–56. Meanwhile, Roe was "ostracized and ridiculed by her colleagues, who treated her as an office joke and spread rumors about her." JA-74 ¶ 344; *see also id.* ¶¶ 343, 345; JA-75–76 ¶¶ 348–54 ("Roe's Team Leader openly ridiculed and disparaged her" and encouraged

others to do the same). Making matters worse, Roe's narrative was shared without notice during the *confidential* mediation process, contrary to the EDR Plan's express terms promising confidentiality of "any information or records obtained through, or prepared specifically for, the mediation process." JA-667; JA-92 ¶ 451. This official action directly contributed to Roe's conclusion that "she would never be able to return to work normally . . . and that she would be compelled to resign." JA-92 ¶ 452.

These actions and the lack of a timely remedy throughout the EDR process directly contributed to the ongoing sexual harassment and retaliation to which Roe was subjected. The Judiciary, despite being notified repeatedly, failed to conduct a prompt investigation or take any steps to meaningfully protect Roe from the increasing sexual harassment, discriminatory harassment, retaliation, and ensuing humiliation and reputational damage to which she was subjected.

Roe's experience underscores the importance of ensuring that equal protection claims survive in cases like this one. *See Davis*, 442 U.S. at 242 ("[L]itigants who allege that their own constitutional rights have been violated, and who at the same time have no effective means other than the judiciary to enforce these rights, must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights."). Allowing the district court to reduce Roe's robust equal protection claim to one of retaliation alone, completely divorced from the severe and prolonged sexual harassment to which she was subjected due to her

employer's inaction, would leave Judiciary employees at serious risk of increased sexual harassment and other forms of workplace discrimination. This Court should reverse the district court's erroneous dismissal of Roe's equal protection claim.

II. THE JUDICIARY HAS LONG BEEN AWARE OF ITS SERIOUS PROBLEM WITH SEXUAL HARASSMENT, BUT HAS MADE LITTLE MEANINGFUL CHANGE TO ADDRESS IT.

The Judiciary has been well aware of its problem with sexual harassment for decades, yet despite its expertise in establishing sound processes and procedures, there remains a status quo that fails to protect its employees. The Judiciary has justified its failure to adopt the types of policies and procedures that apply to most other workplaces by reasoning that it is "an independent branch of the government, and we think we can police our own." Josh Gerstein, *Judges make rules changes to address #MeToo complaints*, Politico (Mar. 12, 2019), https://www.politico.com/story/2019/03/12/judges-sexual-misconduct-me-too-1218482 (quoting then-D.C. Circuit Chief Judge Merrick Garland). But Roe's case demonstrates plainly that this system of self-regulation has failed, and that requisite safeguards against sexual harassment, and indeed, other forms of discrimination,[4] remain lacking in the Judiciary. The history that follows puts Roe's case into the

[4] *See* JA-1108 ("Discrimination against employees based on race, color, religion, sex (including pregnancy and sexual harassment), national origin, age (at least 40 years of age at the time of the alleged discrimination), and disability is prohibited.").

larger context of the Judiciary's sluggish progress toward confronting sexual harassment—progress that, even when it has taken place, remains inadequate.

Almost fifty-five years ago, the Judiciary publicly recognized for the first time the necessity of civil rights protections in employment by endorsing a "national policy in favor of a positive program for equal opportunity of employment." *Report of the Proceedings of the Judicial Conference of the United States*, at 62 (Sept. 1966).[5] But the endorsement of the Judicial Conference was not followed by swift and concrete implementation by the Judiciary itself. Progress was instead achieved by others pressing for reforms.

In December 1978, twenty-nine Members and three employees of the United States House of Representatives, as *amici curiae* in *Davis v. Passman*, *see supra* at 10, 13, successfully urged the Supreme Court to find that a congressional employee's sex discrimination allegations gave rise to a viable constitutional claim, notwithstanding the omission of congressional employees from Title VII. *See* Brief for 29 Members of the United States Congress as Amici Curiae Supporting Petitioner at 11, *Davis v. Passman*, 442 U.S. 228 (1979) (No. 78-5072), 1978 WL 223687. As the *amici* stated, congressional efforts to establish an effective internal mechanism for handling employees' discrimination complaints had been "inadequate and

[5] The Judicial Conference is the principal policy-making body of the Judiciary. *See* JA-23–24 ¶ 24.

unsuccessful," making judicial relief "the *only relief available* to vindicate [employee] constitutional rights." *Id.* at 5 (emphasis added). Similarly, less than a year later, various civil rights organizations urged the Judicial Conference to take concrete actions to ensure that federal courts promulgate equal employment opportunity plans, given that it did "not appear that the Federal Judiciary [wa]s taking any action whatsoever to provide equal employment opportunity." *In re Employment Discrimination in the Federal Judiciary*, Petition Seeking the Adoption of Equal Opportunity Plans by the Federal Judiciary, at 18–19 (June 5, 1979).

This cycle—promising acknowledgment of the problem, disappointing inaction to correct it, and external pressure for meaningful change—repeated itself in the decades that followed. In 1980, in response to mounting pressure to improve Judiciary workplace policies and procedures, the Judicial Conference adopted its first model equal employment opportunity ("EEO") Plan. The EEO Plan aimed to facilitate "equal employment opportunity through a program encompassing all facets of personnel management." Judicial Conference of the United States, *Model Equal Employment Opportunity Plan*, at 1 (Mar. 1980), https://www.uscourts.gov/sites/default/files/guide-vol12-ch02-appx2a-model-eeo-plan_0.pdf. However, it was Congress, not the Judiciary, that took action where the EEO Plan fell short. It did so by creating the Federal Courts Study Committee in 1988 to examine problems and issues facing federal courts, and by establishing the

National Commission on Judicial Discipline and Removal in 1990 to evaluate disciplinary and impeachment processes as to federal judges. *See* Judicial Improvements and Access to Justice Act, PL 100–702 (HR 4807), November 19, 1988, 102 Stat 4642; Judicial Improvements Act of 1990, PL 101–650, December 1, 1990, 104 Stat 5124. But the Judiciary again did little to move forward on Congress's directive for self-examination. *See* Lynn Hecht Schafran, *Will Inquiry Produce Action? Studying the Effects of Gender in the Federal Courts*, 32 U. Rich. L. Rev. 615, 616 (1998) (noting that "[s]everal witnesses urged" the Federal Courts Study Committee to recommend formation of a national task force on gender bias, to no avail) [hereinafter "Schafran Gender Study"].

It briefly appeared that the Judiciary would at last take meaningful steps when the Judicial Conference publicly acknowledged its discrimination problem. *See, e.g.*, Report of the Proceedings of the Judicial Conference of the United States 64 (Sept. 22, 1992) ("[B]ias, in all of its forms, presents a danger to the effective administration of justice."); *id.* (encouraging circuits to sponsor educational programs relating to bias, including "bias based on . . . gender"); Report of the Proceedings of the Judicial Conference of the United States 13 (Mar. 14, 1995) (declaring that discrimination had no place in the Judiciary and encouraging circuits to study "whether bias exists in the federal courts, based on gender, race or other invidious discrimination, and whether additional education programs are

necessary"). However, despite promising efforts, the circuits were free to disagree as to whether such action was necessary, and some did—vehemently opposing the creation of task forces for that purpose. For example, the Fourth Circuit Judicial Council claimed that it *already* had "procedures in place for addressing complaints arising from any alleged act of . . . bias" and determined that a study on workplace bias was unnecessary. Samuel W. Phillips, *Fourth Circuit: The Judicial Council's Review on the Need for a Gender Bias Study*, 32 U. Rich. L. Rev. 721, 722 (1998), https://scholarship.richmond.edu/cgi/viewcontent.cgi?article=2289&context=lawreview; *see also* Schafran Gender Study at 626 (set of D.C. Circuit judges "denounced their task force as 'improper,' 'inappropriate,' and 'the advance guard of a radical political movement to politicize the courts.'") (citations omitted). Given this reluctance, it is unsurprising that these efforts effected little change.

When Tarana Burke's long-standing "Me Too" movement went viral in 2017, sparking a renewed societal awakening to sexual harassment, the Judiciary's failings again entered the spotlight, presenting a renewed opportunity for change. *See* Niraj Chokshi, *Federal Judge Alex Kozinski Retires Abruptly After Sexual Harassment Allegations*, N.Y. Times (Dec. 18, 2017), https://www.nytimes.com/2017/12/18/us/alex-kozinski-retires.html. In response, Chief Justice John G. Roberts Jr. directed the Administrative Office of the U.S. Courts to establish a Working Group to examine the Judiciary's safeguards for

protecting court employees from wrongful conduct in the workplace. *See, e.g.*, *Confronting Sexual Harassment and Other Workplace Misconduct in the Federal Judiciary: Hearing Before the Sen. Judiciary Comm.*, 115th Cong. (June 13, 2018) (statement of Chuck E. Grassley, Chairman, Sen. Judiciary Comm.), https://www.judiciary.senate.gov/grassley-judicial-employees-deserve-protection-from-harassment-misconduct (discussing letter by nearly 700 law clerks and law professors urging change); 2017 Year-End Report on the Federal Judiciary, at 11 (Dec. 31, 2017), https://www.supremecourt.gov/publicinfo/year-end/2017year-endreport.pdf (code of conduct concerns "warrant serious attention from all quarters of the judicial branch").

In its June 2018 report to the Judicial Conference, the Working Group recognized that inappropriate conduct in the Judiciary "is not limited to a few isolated instances," and issued sweeping recommendations for the Judiciary to revise and improve its codes of conduct and corrective procedures. *See* Report of the Federal Judiciary Workplace Conduct Working Group to the Judicial Conference of the United States, at 6–7, 20–21 (June 1, 2018), https://www.uscourts.gov/sites/default/files/workplace_conduct_working_group_final_report_0.pdf [hereinafter "Working Group Report"]. The Working Group and its recommendations brought the promise of real change, not only for Roe but for

many other current and former employees of the Judiciary. *See* JA-46 ¶ 162 (FEOO expressing "hope").

But the status quo remains inadequate, as evidenced by both Roe's case and the 2020 congressional testimony of Olivia Warren, a former clerk of the late Judge Stephen Reinhardt. Warren testified that "the frustrations and obstacles" she encountered in attempting to use the Judiciary's EDR procedures to report the harassment to which she was subjected "indelibly colored [her] view of the judiciary and its ability to comprehend and adjudicate harm." Testimony of Olivia Warren Before the Subcomm. on Cts., Intell. Prop. & the Internet of the H. Comm. on the Judiciary, 116th Cong., at 1, 17 (Feb. 13, 2020) [hereinafter "Warren Testimony"]; *see also* Olivia Warren, *Enough is Not Enough: Reflection on Sexual Harassment in the Federal Judiciary*, 134 Harv. L. Rev. F. 446, 453 (June 20, 2021) ("There continue to be some 30,000 employees of the federal judiciary subject to harassment and discrimination without many basic employment protections.").

Affirming the lower court's decision in this case would therefore not only deprive Roe of her constitutionally guaranteed rights but would also send a dangerous message to all Judiciary employees that their current lack of basic workplace protections is acceptable, and that the Judiciary's work here is done.

III. AFFIRMING THE LOWER COURT DECISION WOULD PERPETUATE THE JUDICIARY'S DEFICIENT APPROACH CONCERNING WORKPLACE SEXUAL HARASSMENT.

As Roe's experience highlights, the Judiciary's EDR Plan continues to lack clarity around its policies and procedures for addressing harassment and retaliation. Myriad sources—including the Judicial Working Group's conclusions and unheeded recommendations, congressional testimony, and a cache of recent data and statistics regarding the judicial system, the legal industry, and other professional workplaces—corroborate that these problems persist *even after* the Judiciary's 2018 changes, further highlighting the inadequacies of the outdated processes Roe was forced to navigate. While the Judiciary is far from the only workplace to face challenges with sexual harassment, it stands in stark contrast to the many that have taken necessary steps to protect their workers.[6]

A. The Judiciary's Policies and Procedures Lack Clarity.

The EDR process, both then and now, lacks transparency from start to finish. In Roe's case, the process for reporting sexual harassment was hopelessly opaque

[6] While significant protections against workplace discrimination already exist under current federal statutes and the Constitution, a range of efforts are also underway to make such statutory civil rights protections even stronger. Notably, versions of the Judiciary Accountability Act of 2021 were recently introduced in the House and Senate. *See* S. 2553, 117th Cong. (2021); H.R. 4827 117th Cong. (2021). *See also* Bringing an End to Harassment by Enhancing Accountability and Rejecting Discrimination in the Workplace Act, S. 1082, 116th Cong. (2019–2020).

because the FDO did not have an employee manual, nor had it provided its employees with any form of sexual harassment training. JA-45 ¶ 159. Such protocols are so routine in other workplaces that even the Judiciary's own HR Specialist expressed surprise at their absence and opined that proper training would have helped and could have avoided Roe's harassment. JA-66 ¶¶ 303–04. Moreover, despite being informed that an investigation would take place "promptly" after she reported, Roe learned the hard way that the Judiciary's investigation process lacks deadlines, leaving her in "a limbo where basic procedural matters remain[ed] outstanding." JA-59 ¶ 258; JA-77 ¶ 365. All the while, Roe was forced to continue working in an unsafe environment despite her repeated requests for protective accommodations. JA-48 ¶¶ 173–76; JA- 52 ¶¶ 207–09; JA-64 ¶¶ 289–90.

The Equal Employment Opportunity Commission ("EEOC") advises explicitly that to protect employees from harassment, "an organization must have *effective policies and procedures* and must conduct *effective trainings* on those policies and procedures." Chai R. Feldblum & Victoria A. Lipnic, *EEOC Report: Select Task Force on the Study of Harassment in the Workplace* (June 2016), https://www.eeoc.gov/select-task-force-study-harassment-workplace (emphases added) [hereinafter "EEOC Task Force Report"]; *see also id.* ("Policies, reporting procedures, investigations, and corrective actions are essential components of the holistic effort that employers must engage in to prevent harassment."). Employees

in workplaces without clear policies report the highest levels of harassment. Working Group Report, at 14 ("The EEOC Study co-chairs have observed that employees in workplaces without express anti-harassment policies report the highest levels of harassment."). Thus, it is important for workplaces to not only develop clear policies and processes for dealing with harassment at work, but also to ensure that employees are informed about those processes and trust their employers to follow them consistently. *See generally* Emily Tiry et al., *The New World of Work: Principles and Practices to Address Harassment*, 4–6 (June 23, 2021), https://www.urban.org/research/publication/new-world-work-principles-and-practices-addressing-harassment/view/full_report.

The Judiciary's continued failure to implement and train its employees on basic anti-harassment policies stands in stark contrast to most other U.S. workplaces. By 1997, 75% of American companies had developed mandatory anti-harassment training programs and 95% had policies in place explaining how to report misconduct and seek redress. *See* Frank Dobbin & Alexandra Kalev, *Why Sexual Harassment Programs Backfire*, Harv. Bus. Rev., 45 (2020). The Supreme Court affirmed the importance of such practices in *Burlington Industries Inc. v. Ellerth*, 524 U.S. 741 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). In 2018, catalyzed by the resurgence of the #MeToo movement, ten states and New York City enacted legislation requiring measures such as mandatory training and

policy requirements for employers. *See* Andrea Johnson et al., *Progress in Advancing Me Too Workplace Reforms in #20StatesBy2020*, National Women's Law Center (Dec. 2019), https://nwlc.org/wp-content/uploads/2019/07/final_2020States_Report-12.20.19-v2.pdf.

The Judiciary has been on notice that its existing policies and procedures lack clarity. *See* Working Group Report, at 11 (summarizing feedback that complainants "should receive more communication and updates during the investigatory phase of the proceedings"); *id.* at 30 (suggesting "more specific substantive guidance on the subject of harassment and impermissible behavior in the codes of conduct"); *see also* U.S. District Court Judge, District of Massachusetts (Ret.) Judge Nancy Gertner, *Sexual Harassment and the Bench*, 71 Stan. L. Rev. Online 88, 89 (June 2018) (stating, in response to Working Group Report: "There is no question that the judiciary can do better, not just in making its procedures more transparent but also in giving them meaningful content."). Yet, as Roe's experience highlights, the Judiciary's failure to establish the clear and transparent policies and practices that exist in many other workplaces in the United States continues to harm its employees.

B. The Judiciary Inadequately Protects against Retaliation.

The Judiciary's existing system is also deficient by virtue of its failure to provide adequate reporting channels and protect employees who exercise their rights under the EDR Plan from retaliation. Roe was understandably hesitant to involve

senior judiciary officials like the Fourth Circuit's Chief Judge in the process because of the "devastating" effect she knew reporting could have on her professional reputation. JA-49 ¶ 184; JA-63 ¶ 280. Roe initially reported to the AO's FEOO, but the Defender was "furious at her" for reporting the harassment to the AO and contacted the AO's Office of the General Counsel and the Circuit Executive to prevent the FEOO from taking action on Roe's complaints. JA-54 ¶¶ 223, 225. Roe was subsequently informed that she would be barred from speaking with the FEOO, her chosen avenue for guidance and advice. JA-55 ¶¶ 231–32. *Cf.* JA-66 ¶ 302 ("[T]he HR Specialist told Roe that she believed there was 'nothing wrong' with going to the AO for advice . . ."). Further, although the 2013 EDR Plan expressly promised confidentiality during the mediation process, JA-667, Roe's narrative was shared with multiple individuals without notice, including the Defender, who was also representing the employing office (creating an obvious conflict of interest), JA-91–92 ¶¶ 449–52; *see also* JA-62 ¶¶ 274–76.

As a result of these procedural failings, Roe was not only denied opportunities for professional advancement, but also actively put in harm's way. Shockingly, the Defender placed Roe more directly under the supervisory control of her harasser, despite being on notice of the harassment. JA-43–44 ¶¶ 150–51; *see also* JA-47 ¶ 168. These acts of retaliation, discriminatory harassment, and deliberate indifference allowed the First Assistant to continue making decisions about the terms

and conditions of Roe's job and advancement even after she reported his misconduct. JA-56 ¶ 238. After reporting, Roe's already limited caseload was taken away and she was not considered for, or given an opportunity to request, an increase in salary or job responsibilities. *Id*. ¶ 242; JA-65 ¶ 295. The Defender's biased decision to give Roe's harasser more supervisory authority and access to her emboldened his terrifying and dangerous behavior, JA-47–49 ¶¶ 172–83, while Roe was ostracized and ridiculed by her colleagues and other supervisors in the office. JA-74 ¶¶ 343–45; JA-75–76 ¶¶ 348–54.

As the Judiciary is undoubtedly aware, safe and confidential reporting processes are necessary to mitigate the foremost reasons individuals decline to come forward about harassment: "receipt of blame for causing the offending actions; social retaliation (including humiliation and ostracism); and professional retaliation, such as damage to their career and reputation." EEOC Task Force Report; *id.* (also finding that 70% of those subjected to workplace harassment do not report it and 75% of those who do report are subjected to retaliation, indicating that employees fear reporting misconduct because of the likelihood of ensuing retaliation); *see also* Frank Dobbin & Alexandra Kalev, *Can Anti-Harassment Programs Reduce Sexual Harassment?* 46 Footnotes 2 (2018), https://www.asanet.org/sites/default/files/can_anti_harassment_programs_reduce_sexual_harassment.pdf (finding that individuals choose not to report sexual

harassment because they fear lack of confidentiality and do not trust the integrity of the processes in place); Ariane Hegewisch et al., *Paying Today and Tomorrow: Charting the Financial Costs of Workplace Sexual Discrimination*, at 12, 17 (July 2021) (intake data suggests 22% of individuals face "financial effects that are directly attributable to the harassment or retaliation that may occur as a result of quitting, being fired, speaking up, or making a complaint"), https://iwpr.org/wp-content/uploads/2021/07/Paying-Today-and-Tomorrow_Charting-the-Financial-Costs-of-Workplace-Sexual-Harassment_FINAL.pdf. For this reason, employers increasingly provide multiple channels for reporting, giving options to speak to someone in person or to report anonymously via email, text, phone, or online. Tiry et al., *The New World of Work*, 10–12.

Yet to this day, the Judiciary has failed to create reporting mechanisms that protect its employees from retaliation. As Olivia Warren testified last year, she did not feel comfortable reporting directly to the Ninth Circuit because she "could not trust that they would receive the information confidentially or with an open mind." Warren Testimony, at 15. But when she tried to invoke the Judiciary's new EDR process to report confidentially, the Judicial Integrity Officer told Warren that confidentiality was not guaranteed, that Warren should "*contact the appropriate circuit representativ*e . . . if she would like to raise a specific concern," and that she could not answer Warren's questions about how to interpret the Judiciary's rules or

reporting processes. Letter from Judicial Integrity Officer for the Federal Judiciary Jill B. Langley to Jamie A. Santos, Goodwin Proctor LLP (June 17, 2019) (Attachment to Warren Testimony), at 2. As a result of these failings, Warren was forced to make the difficult decision to testify publicly before Congress, despite knowing that by doing so she would experience "fallout from the network of former Reinhardt clerks" and "that some professional doors might close" to her forever. Warren, *Enough is Not Enough*, *supra* at 20.[7]

CONCLUSION

As more than 70 former federal law clerks wrote in a statement in response to Warren's testimony last year, there is "no justification for a system in which antidiscrimination law applies to all those except those who interpret and enforce it." *See* Kathryn Rubino, *70+ Former Reinhardt Clerks Come Out In Support of Sexual Harassment Accuser*, Above the Law (Feb. 21, 2020), https://abovethelaw.com/2020/02/reinhardt-clerks/2. Yet, as this case demonstrates,

[7] Indeed, Warren's concerns about ensuing fallout were well-founded: shortly after her testimony, the former Executive of the Ninth Circuit Court of Appeals wrote a Letter to the Editor in the *Los Angeles Times* publicly criticizing Warren for choosing to "air her grievances." *See* Cathy Catterson, *Letters to the Editor: In defense of the late 9th Circuit 'liberal lion' Judge Stephen Reinhardt*, L.A. Times (Feb. 26, 2020), https://www.latimes.com/opinion/story/2020-02-26/9th-circuit-liberal-lion-judge-stephen-reinhardt. Neither Catterson nor the Federal Judiciary ever clarified that she was speaking in a personal capacity and not on behalf of the institution.

and despite decades of advocacy and Congressional oversight, that is the result of the Judiciary's failed efforts at self-policing. As a result, Judiciary employees like Roe are still denied the basic right to work in an environment free from sex discrimination, including sexual harassment and related retaliation, that is guaranteed in many other workplaces in America.

For the reasons stated here and in Appellant's brief, this Court should reverse the lower court's granting of Defendants' motion to dismiss Roe's Complaint and, in doing so, affirm that its own employees are entitled to the Constitution's basic guarantee of the right to work in an environment free from sexual harassment and other workplace discrimination.

Dated: August 26, 2021

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American Federation of State, County and Municipal Employees, AFL-CIO

Black Women's Blueprint

California Women Lawyers

Clearinghouse on Women's Issues

DC Coalition Against Domestic Violence

Equal Rights Advocates

Esperanza United (formerly Casa de Esperanza)

Feminist Majority Foundation

Gender Justice

Human Rights Campaign

Kentucky Association of Sexual Assault Programs

KWH Law Center for Social Justice and Change

LatinoJustice PRLDEF

Legal Aid at Work

Legal Voice

NARAL Pro-Choice America

National Alliance to End Sexual Violence

National Association of Social Workers (NASW)

National Association of Women Lawyers

National Council of Jewish Women

National Crittenton

National Network to End Domestic Violence

National Organization for Women Foundation

National Partnership for Women & Families

National Resource Center on Domestic Violence

National Women's Political Caucus

People For the American Way

People's Parity Project

Rape, Abuse & Incest National Network (RAINN)

Religious Coalition for Reproductive Choice

Sikh Coalition
SisterReach
The Coalition of Labor Union Women
The Women's Law Center of Maryland
Women Employed
Women Lawyers Association of Los Angeles
Women Lawyers On Guard Inc.
Women With A Vision, Inc.
Women's Bar Association of the District of Columbia
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