Issue Advisory: A String of Important Wins and One Loss in Court Rulings

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A RESOUNDING VICTORY FOR WOMEN'S HEALTH

NOW Welcomes SCOTUS Ruling – Upon hearing the news, NOW President Terry O'Neill said, "This decision put the focus back on the constitutional rights of women, proven science and medical fact, and away from partisan politics and draconian attacks on women's health."

The Supreme Court issued a ruling on Monday, June 27, in ***Whole Woman's Health v. Hellerstedt***, signaling one of the decade's most significant victories for reproductive rights. In a 5-3 ruling, the Court invalidated several provisions of House Bill 2 (H.B. 2), one of Texas's notorious TRAP laws (Targeted Regulation of Abortion Providers) adopted in 2013. The provisions required abortion providers to obtain admitting privileges at local hospitals within 30 miles of where the abortion was performed, and meet the standards of ambulatory surgical centers, causing roughly half the state's 44 clinics to close.

The good news is that former Justice Sandra Day O'Connor's "undue burden" standard remains a strong protection against these continual attacks on abortion rights. The second piece of good news in this ruling is that TRAP laws in many other states can now be dismantled.

TRAP Laws To Be Dismantled - At the time of the decision, five states – Michigan, Missouri, Pennsylvania, Virginia, and Tennessee – required abortion clinics to operate under similar hospital-like standards, and nine states – Wisconsin, Kansas, Oklahoma, Louisiana, Mississippi, Alabama, North Dakota, Missouri, Tennessee – required doctors to have hospital admitting privileges. Merely hours after the Court's ruling, Alabama Attorney General Luther Strange announced that he would drop his appeal of a District Court ruling that invalidated the state's requirement for abortion providers to have admitting privileges. Several more are enjoined and Planned Parenthood Federation of America has announced that it will target TRAP laws in Michigan, Virginia, Arizona, Pennsylvania, Florida, Missouri, Tennessee and remaining TRAP laws in Texas.

H.B. 2 was the multi-faceted package of legislation that, in addition to two TRAP laws addressed in the Supreme Court case, also banned abortions after 20 weeks with very narrow exceptions and imposed unnecessary and potentially harmful requirements for the use of abortion-inducing drugs. The bill was famously filibustered for 11 hours in 2013 by then Texas State Senator Wendy Davis, a Democrat. Davis's stand caught the

attention of hundreds of thousands around the country as it was broadcast live and drew thousands of abortion rights supporters to Senate chambers. By holding the floor past the midnight adjournment deadline, Davis effectively killed the bill.

But Texas's hard-core anti-abortion politicians, led by then Gov. Rick Perry (R), convened a special session and adopted H.B. 2. To provide cover for adopting such severe restrictions, advocates claimed that the regulations were necessary to protect women's health and lives.

Since then, there has been a stark scaling back of reproductive health care services in Texas, a state with five million women of child bearing age and a substantial population of low-income women with limited access to health care services. Data that the ACLU of Texas recently loosened from a cover-up by the Texas Department of State Health Services show a precipitous decline in the number of abortions. Anecdotally reported, there has been a dramatic rise in the number of women travelling outside Texas to obtain abortion care in New Mexico or Oklahoma.

Wendy Davis – "We've Won The War Now" -- Upon hearing the Supreme Court decision in *Whole Woman's Health,* Wendy Davis (no longer a state legislator, having been "gender-mandered" out of her district) told the *Star-Telegram,* "I immediately burst into tears – It felt like such a relief, such a happy relief, because there was so much at stake."

Oral arguments in the case before the Supreme Court were heard on March 2. The Center for Reproductive Rights (CRR) took the lead in representing Whole Woman's Health, a group of women's reproductive health clinics suing the State of Texas. The CRR argued that the restrictions do not make abortions any more safe, but merely more difficult to obtain, while the respondents held that the regulations protected women's safety, a claim unsupported by medical experts. Scores of amicus briefs on both sides were submitted; NOW Foundation joined a brief prepared by the National Women's Law Center.

Majority Opinion Upholds Undue Burden - Justice Stephen Breyer delivered the opinion of the majority, joined by Justices Ruth Bader Ginsburg, Sonia Sotomayor, Elena Kagan, and Anthony Kennedy. The Court held that the provisions of H.B. 2 pose significant burdens on women wishing to exercise their constitutional right to abortion, and the provisions do not provide any medical benefits that may counteract this burden. Thus the provisions violate the "undue burden" standard established in the 1992 ruling in *Planned Parenthood v. Casey*, which established that creating "undue burden" to obtain an abortion is unconstitutional.

Justice Breyer wrote that the majority has "found nothing" in Texas' record evidence to demonstrate that the law "advanced Texas' legitimate interest in protecting women's health," and further that when asked about a "single instance" in which the law had helped women obtain better care, Texas "admitted that there was no evidence in the record of such a case." In addition, the Court found that if H.B. 2 were to take full effect,

the number of Texas women living more than 200 miles from the nearest abortion clinic would increase dramatically, rising from 10,000 to 750,000, and approximately 7 or 8 clinics would remain open in the entire state, itself a significant burden on women seeking abortions.

Beyond Belief That H.B. 2 Protects Health - In her concurrence, Justice Ginsburg held that given the safety of abortions, especially compared to other far more dangerous procedures such as childbirth, "it is beyond rational belief that H. B. 2 could genuinely protect the health of women." Justice Ginsburg asserted that "when a State severely limits access to safe and legal procedures, women in desperate circumstances may resort to unlicensed rogue practitioners," at risk to their health and well-being.

Indeed, after the passage of H.B. 2, the number of Texas women crossing the border into Mexico surged, apparently to purchase misoprostol, one of two drugs used in a non-surgical abortion. According to NPR, more and more Texas women are purchasing the drug to perform "risky, do-it-yourself" medical abortions. These women not only lack access to the second drug that in combination with misoprostol makes the procedure 95% effective, but also lack the guidance and supervision of a medical professional, in addition to directions as to how to use the pill properly. This surge points to the stark reality that an alternate ruling would have led to one in which restricted access to abortion significantly endangers the health and safety of millions of women, punishing them for exercising a fundamental constitutional right.

Conservative Make Their (Weak) Case - In his dissenting opinion, Justice Thomas stated that the majority had misconstrued the undue burden standard for abortion access, instead creating a "benefits-and-burdens balancing test" that should have been left to state legislators to resolve, and in turn provided lower courts with little guidance. Justice Thomas argued that the majority had used a standard of review similar to strict scrutiny, despite the lack of precedent for using this level of scrutiny in abortion-related cases.

In a separate dissent Justice Alito, joined by Justice Thomas and Chief Justice Roberts, held that the majority opinion did not apply the principle of claim preclusion. In addition, Justice Alito argued that there exists no direct link between the law and the closings of abortion clinics in Texas, as the closings may have been caused by such factors as decreasing demand for abortion and the withdrawal of state funds, and that Texas has a rational reason to protect women in the wake of the Kermit Gosnell case. Alito asserted that the petitioners did not adequately demonstrate that the closure of some clinics would impact the number of women able to access abortions, and the majority should not have declared the provisions wholly unconstitutional, as they should be upheld in any area in which an undue burden was not imposed.

Ginsburg: TRAP Laws Cannot Survive - Justice Ginsburg ended her concurrence with the declaration that so long as the Court adheres to *Roe* and *Casey*, TRAP laws "cannot survive judicial inspection," as they do little or nothing for women's health and act as impediments to abortion. The court's decision in this case was a reaffirmation of

a woman's right to choose, of her constitutional, unburdened right to safe and legal abortion. Although the fight for reproductive justice is far from over, the ruling demonstrates the court's grasp of the deceptive means used to deny women choice, and its willingness to step in when this fundamental right is denied. Because it too often has been, and it too often continues to be.

"By striking down the admitting privileges requirement and the surgical-center construction mandate, the decision in *Whole Woman's Health v. Hellerstedt* helps expose TRAP laws for what they are: medically unnecessary regulations designed to be so burdensome that abortion clinics will be forced to close," Justice Ginsburg wrote.

A SECOND GREAT RULING IN *VOISINE*

DV Offenders: Recklessness No Excuse - the Supreme Court took a positive step in protecting survivors of intimate partner violence in its ruling in ***Voisine v. United States,*** also announced on June 27. In a 6-2 ruling, the majority held that a misdemeanor crime that requires only a show of recklessness constitutes a misdemeanor crime of domestic violence under federal statutes, and is enough to deny the assailant access to firearms.

Both plaintiffs in the case, Stephen Voisine and William Armstrong, were convicted of domestic assault, defined in Maine as "knowingly, intentionally, or recklessly causes bodily injury or offensive physical contact to another person," and were later found to possess a rifle during the course of other investigations.

Due to the Lautenberg Amendment, a law authored by the late New Jersey Senator Frank Lautenberg (D), the plaintiffs were charged with the federal crime of possessing a firearm as a result of their prior domestic violence convictions. The amendment prevents individuals convicted of crimes of domestic violence from accessing firearms, a measure well-supported by evidence. According to the Law Center to Prevent Gun Violence, abused women are five times more likely to be killed by their abuser if the abuser owns a firearm, and domestic violence assaults involving a firearm are 12 times more likely to result in death than those involving other weapons or bodily force.

Plaintiffs Argued That Recklessness Should Not Count - The court heard oral arguments for the case on February 29. The plaintiffs argued that Maine's misdemeanor domestic violence assault statutes do not constitute misdemeanor domestic violence under the federal statute because "recklessness," while it is sufficient for conviction under the Maine statute, is insufficient under the federal statute. Consequently they held that their right to bear arms must be returned, as it did not fall under the Lautenberg Amendment.

In a surprising turn of events, Justice Clarence Thomas asked a question during oral arguments for the first time in ten years. Justice Thomas asked Ilana Eisenstein, assistant to the solicitor general, whether she could "think of another constitutional right that can be suspended based upon a misdemeanor violation of a state law," holding that "at least as of now," possession of a gun is "still a constitutional right."

Justice Kagan authored the majority opinion, joined by Justices Ginsburg, Breyer, Roberts, Kennedy, and Alito. The majority ruled that reckless domestic assault qualifies as a "misdemeanor crime of domestic violence," and is sufficient to result in prohibitions on gun ownership and usage under the Lautenberg Amendment.

Thomas Says Statute Too Wide - In his dissent, Justice Thomas held that while the Maine assault statute requires the "use of force," yet recklessness is sufficient under the federal statute, a conviction does not necessarily involve the use of physical force and the consequent ban on firearm possession. Justice Thomas also argued that "purely reckless conduct" does not constitute a use of physical force, rendering most state assault statutes too wide. He was joined by Justice Sotomayor on both points. Justice Thomas also expressed concern regarding the restrictions the ruling may place on the right to bear arms, finding that the majority opinion narrowed the right excessively. The court's ruling is in line with abundant studies regarding the deleterious effects of allowing abusers access to firearms, and guards the integrity of measures that protect the safety of survivors of intimate partner violence.

The case is one of several where opponents of the domestic violence offender gun ban – even one brought by a law enforcement organization – have tried to get the law narrowed or found unconstitutional.

AN UNEXPECTED VICTORY FOR AFFIRMATIVE ACTION

***Fisher v. University of Texas at Austin,* Round Two** – This case is another installment in the continuing saga of conservative politicians' efforts to end affirmative action. NOW and allies believe that affirmative action programs have helped to boost educational and employment achievements for women and people of color, but were concerned that a conservative majority on the Court would put an end to such policies.

By way of background, the 2003 ***Grutter v. Bollinger*** case allowed consideration of race in admissions by adopting a "top ten" admissions policy. The University of Texas had adopted a policy whereby any Texas student in the top ten percent of their graduating class may be offered admission to the university. In 2013, a lower court ruled against the plaintiff, a young woman who did not qualify under the ten percent policy, was denied admittance to UT Austin and filed a lawsuit against the university. The young woman, Abigail Fisher, cited UT Austin's affirmative action admission policy as the cause for her rejection. Outside of the ten percent policy, race is considered as part of a holistic admissions process. While race is the focus of this and other lawsuits, it should be noted that affirmative action initiatives have also significantly benefited women applicants to universities and professional schools.

Fourteenth Amendment Claim by Plaintiff - Fisher claimed that she was rejected because she is white; therefore her rejection violated the Equal Protection Clause of the Fourteenth Amendment. The case was then appealed to the Supreme Court, which remanded it back to the 5th Circuit Court because it had not, in the Supreme Court's

opinion, used strict enough scrutiny when deciding the case (strict scrutiny, the highest level of judicial scrutiny, is to be used when examining any policy that distinguishes individuals based on race). The lower court again ruled in favor of UT's admissions policy, the case was appealed again, and this term the Supreme Court finally heard the case.

As of the June 23 ruling, the central tenets of affirmative action in UT's college admissions were upheld. In a 4-3 decision, the Supreme Court upheld the right of the University of Texas at Austin to use race as a factor in its holistic admissions process. The decision was unexpected, as Justice Kennedy has generally not voted in favor or affirmative action in the past.

However, Justice Kennedy's majority opinion approved the use of race as a small factor of admissions, and specifically warned that not all affirmative action programs will be upheld by the Court. The dissenting opinion, written by Justice Alito, is vehemently anti-affirmative action. We must remember that the fight to keep affirmative action policies in place is ongoing. But for the moment, this ruling is a clear victory for affirmative action, benefiting women, people of color, and other marginalized groups.

DEADLOCK ON IMMIGRATION REFORM BLOCK DAPA PROGRAM

***United States v. Texas* means Uncertainty for Immigrants** - Since 2012, the DACA (Deferred Action for Childhood Arrivals) program has protected undocumented immigrants who arrived in childhood from deportation. In 2014, President Obama introduced the DAPA (Deferred Action for Parents of Americans and Lawful Permanent Residents) program to protect the undocumented parents of a U.S. citizen or lawful permanent resident. This law would give certain undocumented immigrants the right to live in the U.S. on a temporary, renewable basis as well as the right to apply for work authorization.

The state of Texas sued to prevent the implementation of DAPA, holding that the program oversteps executive power and is not compliant with the Administrative Procedure Act. DAPA does circumvent immigration laws passed by Congress, as part of Obama's efforts to bring about immigration reform.

On June 23, the Court issued a one-sentence opinion: "The judgment is affirmed by an equally divided Court." As the Court ruled in a 4-4 deadlock, Texas may continue to block DAPA's implementation. While this decision was issued the same day as the pro-affirmative-action *Fisher v. University of Texas at Austin* decision, it was not a victory for progressive lawmakers and especially distressing for the undocumented parents of U.S. citizens. In the meantime, there is continued uncertainty in the lives of at least five million immigrant parents who could be deported at any time. Hopefully, the Supreme Court will take up a similar case once the open seat on the bench is filled, so that parents of U.S. citizens can live without fear of deportation.

UNCERTAIN FUTURE FOR BIRTH CONTROL ACCESS

***Zubik v. Burwell*: Using Religion to Limit Access** – This case consolidates seven religious nonprofits' challenges to the Affordable Care Act's contraceptive mandate. An "accommodation" was offered by the Department of Health and Human Services to religiously affiliated non-profit entities to exempt them from providing insurance coverage for contraception. The federal government would help obtain contraceptive coverage for employees if the organization had a religious objection to covering them under the Religious Freedom Restoration Act (RFRA). But the challengers objected to even having to sign a form related to the accommodation.

Religious nonprofits, such as schools or charities, argued that their religious freedom rights are being violated as they are forced to "facilitate" contraceptive coverage through the accommodation system. Various other suggestions, such as a separate contraceptive plan that could be purchased or subsidies for companies that manufacture birth control to provide contraceptives free of charge, place the burden of acquiring birth control on women. According to the Guttmacher Institute, 98% of sexually active Catholic women have used birth control in their lives.

As of May 16, the Supreme Court vacated the case, knocking *Zubik v. Burwell* back down to the lower courts where all but one ruled that the accommodation was constitutional. Previous to the ruling, SCOTUS had requested of the parties additional information about possible alternatives, and in the May announcement the justices seemed to suggest that the parties needed to work out a resolution amongst themselves. The justices were careful to note that they were not ruling on the merits of the case in any capacity. It appears that the case will likely be heard again when the Supreme Court vacancy is filled.

RIGHT TO DAMAGES FOR WOMEN MILITARY SERVICEMEMBERS

***Ortiz v. United States:* Favoring Fathers -** NOW Foundation served as the principal sponsor of an amicus brief in this case, with the pro bono assistance of the University of Texas, School of Law, Supreme Court Clinic. The parties recently settled in the case, but advocates for women member of the Armed Forces are hoping to challenge this military policy which favors fathers – but not mothers – of children injured at birth.

The baby of an active-duty female officer in the U.S. Air Force suffered brain injury at birth when the mother was given a drug she was allergic to in labor by Army doctors. The baby was denied damages under the *Feres* doctrine, with the district court and the Tenth Circuit court ruling that because both mother and child were injured by army negligence, the baby could not recover under the Federal Tort Claims Act. The Feres doctrine does not allow active-duty military personnel to claim damages for injuries from "activity incident to service," creating a system where inequitable outcomes for service

members, particularly female service members, are inevitable. This case brought up an important question: can children of service members bring claims for birth injury?

In April 2016, the Ortiz plaintiffs decided to settle rather than let the Supreme Court decide the issue. It is this issue that may return to the Supreme Court in another case in the future.

A TEMPORARY WIN FOR PUBLIC SECTOR UNIONS

The case of ***Friedrichs v. California Teachers Association*** represents one of a long-running series of attacks by conservative business interests to undermine organized labor. The Supreme Court affirmed the judgment of the lower court in a 4-4 split on March 29, 2016. Unions may still represent all employees in a workplace and require fair share fees to be paid for the time being. No precedent was set, so a similar case may be argued in the future.

Currently, when a majority of workers at a job site or in a particular occupational sector vote to form a union that union is required by federal law to represent everyone in the workplace regardless of their membership status. Employees who do not belong to a union may still be required to pay “agency or fair share fees” for the cost of their representation. As all public employees enjoy the benefits that the union negotiates, all employees must contribute to the union. The Court previously decided in *Abood v. Detroit Board of Education* (1977) that it is constitutional for unions to collect agency “fair share” fees from employees who choose not to join the union but whom the union is required to represent.

The case is especially important to women: when women join unions, or otherwise enjoy union protection on their behalf, they have better job security, higher wages, and more benefits. This particular case, moreover, is particularly relevant to women’s lives as women comprise the vast majority of employees in the education field. However, the Supreme Court’s 4-4 deadlock leaves the question undecided for now.

ONE PERSON, ONE VOTE PREVAILS

In a surprising turn of events, conservatives asked the Supreme Court to limit states’ rights, specifically their right to draw voting districts in whichever manner they choose. The case, ***Evenwel v. Abbott*****,** determined who exactly deserves equal protection under the law in the context of voting — eligible voters, or the people who will be represented by elected officials, regardless of voting eligibility (children, non-citizens, felons).

Conservatives were pushing for an end to raw population being used to determine districts in favor of just voting population. This would result in many districts — especially those that are urban, poor, or mostly nonwhite — to effectively lose their ability to elect a candidate that represents the broader community. Ruling in favor of the

plaintiffs could ultimately favor rural areas since a higher proportion of rural residents vote and result in more Republican-leaning districts.

The case generally upheld the use of total population in determining voting districts. In an 8-0 decision on April 4, 2016, the court decided that states should have the ability to determine voting districts according to total population. This is how all states district their populations, and the Court believed that system should be upheld.

CLASS ACTIONS LAWSUITS LIVE ON

Class-action lawsuits, once an effective means for ending systemic patterns of discrimination or exploitation, are under fire. The right to bring class action litigation has been an important tool, especially for consumers and women who are often victims of systemic discrimination in the workplace. This year, however, two cases were heard and the rights of class-action suits were upheld.

Campbell-Ewald v. Gomez addressed a practice wherein defendants in a class-action suit may redress the grievances of a plaintiff before a class claim is certified (thus effectively ending the suit); the Court decided on January 20, 2016 that a case must proceed as other injured parties were meant to be represented whether a settlement is offered or not. Essentially, the outcome of Campbell does not allow defendants in class-action lawsuits (generally corporations) to head off a suit by simply paying damages to the principal plaintiff.

In **Tyson Foods, Inc. v. Bouaphakeo**, the Supreme Court revisited class-certification standards. On March 22, 2016, the Court decided that in a class-action lawsuit, damages might be awarded based on statistics that assume all class members are identical to an average observed in a sample. It also determined that a class action suit might be certified or maintained under the Fair Labor Standards Act when many members of the class suffered no injury and are not legally entitled to damages at all. The ability of individuals to collectively take action against large entities has been upheld in a 6-2 decision.