

## MEMORANDUM

### Now Foundation Public Policy

**To: NOW Foundation Board Members**

**From: Bonnie Grabenhofer, Vice President, and Jan Erickson, Director of Programs**

**Date: Nov. 4, 2015**

#### **GLOBAL FEMINISM**

##### **Report Details Gaps in U.S. Implementation of Beijing Declaration, Plan of Action**

NOW Foundation contributed to preparation of “Women’s Rights at Home and Abroad: A Call to Action – U.S. Civil Society Shadow Report on Beijing + 20,” a thorough documentation of actions the U.S. government must undertake to fully implement its share of responsibilities under the Beijing Declaration and Platform for Action. This report was issued in response to the U.S. Government’s 2015 Report on U.S. activities related to the Twentieth Anniversary of the Fourth World Conference on Women and the adoption of the declaration and plan of action which addressed sustainable development goals.

A group of NOW members, including former NOW Vice President Karen Johnson, attended that historic conference in 1995. The U.S. Delegation was headed by then First Lady Hillary Clinton. We strongly recommend that NOW Foundation board members review this important document which can be found at <http://civilrightsdocs.info/pdf/reports/2015/Womens-Rights-at-Home-and-Abroad-Report.pdf>

The 28-page document makes specific recommendations in a wide range of areas, both domestic and international, in which the federal government must take action to fill critical gaps in the implementation of the Beijing Declaration’s Critical Areas of Concern. Among the general topics are: Women and Poverty, Education and Training of Women, Women and Health, Violence Against Women, Women and Armed Conflict, Women and the Economy, Women in Power and Decision-Making, Institutional Mechanism for the Advancement of Women, Human Rights of Women, Women and the Media, Women and the Environment and The Girl Child.

The Leadership Conference for Civil and Human Rights and the Leadership Conference Education Fund headed up the effort to produce the shadow report, assisted by CHANGE, the Center for Health and Gender Equity. Some 21 women’s and human rights organizations contributed their knowledge and expertise in the preparation of each section.

“Women’s Rights at Home and Abroad...” provides an extensive agenda for women’s rights activists to continue pressing with the current administration, Congress and with the incoming administration in 2017.

## **EQUAL RIGHTS, EDUCATIONAL EQUITY AND WOMEN'S HEALTH**

### **Critical Cases coming before the U.S. Supreme Court**

The U.S. Supreme Court will consider a number of high profile cases this term – cases that cover a broad swath of American life, from access to reproductive health care, to affirmative action, public sector unions, voting rights, and (again) contraceptive insurance coverage exceptions under of the Affordable Care Act (ACA). They are nearly all products of conservative legal advocacy organizations that have been strategically selected and guided to the Supreme Court as part a larger right wing agenda to erode workers' rights, make access abortion care difficult, restrict citizen's access to the courts by limiting class action law suits, reduce access to higher education for students of color, and enhance conservative Republican candidates' electoral chances by changing the way that election districts are formed.

Because of the conservative majority on the Roberts' Court, prospects for what NOW and our allies would find as good outcomes are dim. It could well be that burdensome limitations on abortion access will be upheld; affirmative action in university admissions will be banned; political representation of areas with large Hispanic communities will be undermined; public sector unions could be gutted; and some women's access to affordable contraception could become more complicated. In one year. Deep breaths, and here we go.

(NOW Foundation will be signing on to amicus briefs in a number of these cases; initially, the foundation has joined in a brief for the defendants in *Fisher v. UT Austin* (Fisher II) and will likely be joining in a brief for the *Whole Women's Health v. Cole*, if the Supreme Court grants cert. Another possibility may be with the case involving a challenge brought by Little Sisters of the Poor (and perhaps additional non-profit organizations) to the accommodation which is offered to religiously-affiliated organizations relating contraceptive insurance coverage mandate of the Affordable Care Act (ACA).)

### **The Future of TRAP Laws: Texas and Mississippi**

Since 2011, hundreds of TRAP (Targeted Regulation of Abortion Providers) laws have been adopted in 44 states – all going beyond what is necessary to ensure patients' safety, [http://www.gutmacher.org/statecenter/spibs/spib\\_TRAP.pdf](http://www.gutmacher.org/statecenter/spibs/spib_TRAP.pdf). These laws, part of a right-wing, anti-choice strategy to severely limit access to abortion, unfortunately, have been very effective. Some have forced women's health clinics to close, particularly in southern states like Texas and Mississippi. Bit by bit they are chipping away at women's access to a vital component of modern women's healthcare.

Two types of TRAP laws — those that require abortion providers' facilities to meet the regulations for an ambulatory surgical center and those that require the facility to have admitting privileges at a nearby hospital — have become an especially popular tactic and resulted in widespread clinic closures across many states.

Two potentially upcoming Supreme Court cases (they have both petitioned for the Court to hear their cases, but cert has not yet been granted in either case) challenge such TRAP laws. Both involve a requirement that the abortion providers have admitting privileges at local hospitals, and the Texas case also involves a requirement that the facility meet building specifications for ambulatory surgical centers. The American Medical Association (AMA) and the American College of Obstetricians and Gynecologists (ACOG) oppose these requirements.

The first, *Whole Woman's Health v. Cole*, regards Texas' stringent anti-abortion bill, HB 2, which passed in 2013 and requires all abortion clinics to meet the standards for an ambulatory surgical center (ASC) and to have admitting privileges at a nearby hospital (especially problematic as hospitals can refuse on moral or ethical, not legal, grounds). About half of the state's 44 pre-HB 2 clinics have closed down as a result of the law; only ten would remain if those last two provisions were fully enacted. Texas is a big state — if the law were fully enacted, many women in Texas would be hundreds of miles from the nearest abortion provider. Of course, that is exactly what conservative, anti-abortion rights lawmakers want.

The second case, *Currier v. Jackson Women's Health Organization*, challenges one of Mississippi's TRAP laws, an admitting privileges requirement which was aimed at shutting down the only abortion provider in the entire state.

These cases will likely hinge on Justice Anthony Kennedy's vote (his record on abortion rights is shaky) and the Court's possible application an element of a decision in *Planned Parenthood v. Casey* (1992). The justices ruled in Casey that a law which restricts abortion access is unconstitutional if it imposes an "undue burden." Undue burden is defined as a "substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability."

According to ACOG, abortion is one of the safest medical procedures, with less than 0.5% of abortions involving major complications. Yet, in many states, it has been increasingly and unnecessarily regulated. Procedures that are also low-risk – like colonoscopies – have not been similarly scrutinized or restricted. Abortion rights opponents are not trying to improve the quality of women's healthcare; this is all part of the ongoing campaign to regulate abortion into oblivion. More information is at <http://www.reproductiverights.org/project/targeted-regulation-of-abortion-providers-trap>

### **In the Wake of *Hobby Lobby*: More Barriers to Birth Control Access**

Another case, *Little Sisters of the Poor Home for the Aged v. Burwell*, may be another step in fleshing out exceptions and "accommodations" to the contraceptive coverage mandates in the Affordable Care Act. *Hobby Lobby* determined that for-profit corporations, if they are "closely held" by owners who have sincere religious objections to certain kinds of medical care (even if those objections are scientifically bogus), may choose to opt out of directly paying for it and instead make their objections known to HHS, which then modifies their insurance contracts so their insurers cover the objected-to items.

Little Sisters (an order of nuns), however, object even to the act of signing off on their religious objection. They argue that doing so makes them complicit in sin. It seems that the Sisters, and

other organizations like them, are willing to go to what is an extreme and some would say “irrational” length to avoid the very idea of contraception. Perhaps they are not aware that the vast majority of Catholic women of child-bear age use or have used contraception.

Little Sisters along with dozens of other religious non-profits were recruited by right wing legal advocacy groups – and some say that the Catholic bishops had a heavy hand in this – bring a lawsuit against the ACA’s contraceptive coverage insurance mandate. These actions tie in with a related campaign of claiming objections based on religious beliefs to certain laws and policies under the Religious Freedom Restoration Act (RFRA). Read more about this at *Hobby Lobby Strikes Again as Christians Seek Exemptions from Birth Control and Marriage Laws*, <http://www.rawstory.com/2015/10/hobby-lobby-strikes-again-as-christians-seek-exemptions-from-birth-control-and-marriage-laws/>

The Little Sisters case will determine whether requiring an organization to state their religious objection to a form of medical care (with the knowledge that this will allow for other arrangements for employees to obtain the care) poses a "substantial burden" on their faith. Lower courts have held that it does not. If the Supreme Court upholds the 10th Circuit Court's decision, employers will *have* to sign off on their objections and, however indirectly, provide contraceptive insurance coverage for their employees.

#### **Affirmative Action: Will It Last?**

In 2003, the Supreme Court ruled in *Grutter v. Bollinger* that, while universities cannot use a quota system to ensure racial diversity in their student bodies, they may still consider race, among other factors, as part of a holistic admissions approach. Now that ruling may be in danger as *Fisher v. University of Texas at Austin* returns to the Supreme Court. While race is the focus of this and other lawsuits, it should be noted that affirmative action initiatives have also significantly benefitted women applicants to universities and professional schools.

The University of Texas adapted to *Grutter* primarily by adopting a "top ten" admissions policy, whereby any Texas student in the top ten percent of their graduating class may be offered admission to the University. While this policy has done wonders to increase racial diversity at UT Austin, other applicants — those from out of state or those, like Ms. Fisher, who were not in the top ten percent of their graduating class — are admitted through a more traditional, holistic admissions policy, which does take race into account.

In 2013, a lower court ruled against the plaintiff, a young woman who was denied admittance to UT Austin and filed a lawsuit against the university, citing its affirmative action admission policy as the cause for her rejection. 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 will finally hear the case.

Said Judge Patrick E. Higginbotham, in the lower court's majority opinion, "we are persuaded that to deny UT Austin its limited use of race in its search for holistic diversity would hobble the richness of the educational experience."

As with so many other cases, the deciding vote will likely be Justice Kennedy's. He has never voted to uphold affirmative action. Justice Kagan will again recuse herself, as she did in 2013, because she worked on the case as Solicitor General before her appointment to the Supreme Court.

Should the Court choose to overturn the 5th Circuit Court's decision, it just may be the end of affirmative action as we know it. The case will be argued on Oct. 26. More information on this case, *The Mystery of Fisher II*, <http://www.scotusblog.com/2015/07/the-mystery-of-fisher-ii-review/>

### **Consumer Protection and Class-Action Lawsuits**

Class-action lawsuits, at one time an effective means for ending systemic patterns of discrimination or exploitation, are under fire. The Supreme Court, in recent years, has increasingly refused to review class-action lawsuits and Republicans in Congress have attempted to pass legislation limiting conditions under which such lawsuits can proceed. This term, the Court may approve of a limitation that would stymie class-action lawsuits by further empowering corporate interests.

*Campbell-Ewald v. Gomez* will address 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 will decide whether the case then becomes moot or whether it must proceed as other injured parties were meant to be represented. Essentially the outcome of *Campbell* will either allow defendants in class-action lawsuits (generally corporations) to head off a suit by simply paying damages to the principal plaintiff or it will limit such activity, as it occurs at the expense of all those who would have been represented had the case gone forward. The Court will hear arguments for this case on October 14th.

In *Tyson Foods, Inc. v. Bouaphakeo*, the Supreme Court will revisit class-certification standards. The case will decide whether, in a class-action lawsuit, damages may be awarded based on statistics that assume all class members are identical to an average observed in a sample or whether damages must be determined on an individual basis for each and every class member; it will also determine whether a class action suit may 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. Should the Court rule in favor of Tyson, the ability of individuals to collectively take action against large entities will again be curbed. The case will be argued on November 10th.

### **One Person, One Vote?**

In a surprising turn of events, Conservatives are actually asking the Supreme Court to *limit* states' rights, specifically their right to draw voting districts in whichever manner they choose. The case, *Evenwel v. Abbott*, will determine 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 are 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.

Though partisan politics may carry the day, as they sometimes do in the Court, legally this case will hinge on precedent (which doesn't explicitly tackle this issue) and justices' readings of the Equal Protection Clause of the 14th Amendment (whose right to equal representation is greater: eligible voters or everyone being represented?). A date for oral argument has not been set.

### **The Uncertain Future of Public-Sector Unions**

The future of public sector employees' ability to benefit from union intercession on their behalf may hinge on the Supreme Court's decision in an upcoming case, ***Friedrichs v. California Teachers Association***. 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.

The Center for Individual Rights is behind *Friedrichs* and it asks the Court to overrule a 1977 case that affirms as constitutional the collection of union fees (not dues) in the public sector from all employees, even from non-members – if a majority has chosen union representation. It is believed that wealthy right-wing political interests, like the Koch brothers, have funded this and other cases that are coming before the Supreme Court. If California Teachers Association loses, many fear that this may be the death knell for the large public sector unions. Additionally, some say that this will result in a serious erosion of progressives' organizing and effectiveness.

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 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 already 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. Agency fees may not be used for politics or supporting political candidates — workers may be required to contribute to the union that represents them, but they cannot be compelled to monetarily support a policy or politician. But in 2012 case, *Knox v. SEIU* the Supreme Court went out of its way to paint the *Abood* ruling as an "anomaly" (even though that precedent has followed, cited and relied upon hundreds of

times) and suggested that the Abood ruling approaches (if not crosses), the limit of what the First Amendment can tolerate.”

(Note: the First Amendment claim is being used to knock down other precedents and policies, such as most recently in *McCullen v. Coakley* buffer zone case.)

The Court was able to take “potshots” at Abood in the case of *Harris v. Quinn* (brought by the National Right to Work Legal Defense Foundation) when the Supreme Court struck down an Illinois statute (similar to ones in nine other states) that gave a million home health care providers better pay and the ability to address common workplace concerns. A particularly cruel ruling, it should be said.

*Friedrichs* is the case that may allow the Court to declare fair-share fees as unconstitutional, erasing 40 years of precedent. If the Court overturns *Abood* by ruling in favor of the plaintiffs in *Friedrichs*, many protections that public employees receive will vanish. The case has not yet been scheduled for argument. It is not at all clear how the case will proceed. Alito, along with most of the conservative side of the court, seems poised to rule against the unions. Scalia, usually a staunch conservative, has previously written about the problem of free-riders in a system where unions are compelled to represent nonmembers in such a way that his decision is not so easily foreseen, as it normally is. Kennedy is a swing voter; the liberal side of the court will likely vote to uphold union privileges.

(This review of upcoming Supreme Court cases was prepared by Hannah Brown, NOW Foundation public policy intern.)

### **Further Reading about the Supreme Court:**

*The Right Sees 2016 as a Chance to Take Over the Supreme Court, Reverse Marriage Equality,*

<http://blog.pfaw.org/content/right-sees-2016-chance-take-over-supreme-court-reverse-marriage-equality>

*Judgement Day: 2016,* <http://www.pfaw.org/media-center/publications/judgement-day-2016-future-supreme-court-critical-issue-2016-presidential-e>