MEMORANDUM

National Organization for Women Foundation

To: National Organization for Women Foundation Board Members

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

Date: March 3, 2016

LITIGATION

In addition to signing on as an amici in the very important reproductive rights cases of *Whole Women's Health v. Hellerstedt* and *Zubik v. Burwell*, discussed in the Government Relations Report, NOW Foundation has participated in other amicus brief activity, including becoming the lead in an *amicus* brief for a complicated case involving discriminatory and inconsistent policy in the military which persists in some circuit court jurisdictions, as described below.

Ortiz v. United States

NOW Foundation agreed to be the principle sponsor of a legal brief requesting that the U.S. Supreme Court grant a review of a case involving discriminatory military policy denying eligibility of the mother (an active duty service member) and her baby injured at birth due to Army negligence to receive compensation for the injury. The amicus brief was written by the University of Texas Law Clinic; with David C. Frederick, Counsel of Record, of Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C

The case, *Ortiz v. United States*, 2015 WL 2330230 (10th Cir. May 15, 2015), is currently at the certiorari stage when the Supreme Court is deciding whether to hear the case. A decision is expected in April.

Basic Facts: A baby of an active-duty mother in the U.S. Air Force suffered a serious brain injury at birth when Army doctors in Colorado gave the mother a drug she was allergic to during labor. The district court dismissed the child's claim under the *Feres* doctrine and the Tenth Circuit affirmed. The Tenth Circuit ruled that because both mother and child were "injured" by Army negligence, the baby could not recover under the Federal Tort Claims Act. With this decision, the Tenth Circuit expanded the *Feres* doctrine and created a circuit split regarding whether the *children* of service members can bring claims for birth injury. The Tenth Circuit's decision is attached below.

When Congress created the Federal Tort Claims Act (FTCA) to enable people injured by federal government negligence to receive compensation, it waived sovereign immunity for most claims against the United States. In *Feres v. United States*, the Supreme Court created a judicial

exception to the FTCA. The *Feres* doctrine bars active-duty military personnel from bringing claims against the government for injuries arising out of "activity incident to service." *Feres* does not apply to civilians, unless their claims are derivative of an injury to an active-duty service member.

Faced with cases similar to *Ortiz* where the service member is a mother and the injured claimant her civilian child, four U.S. Circuit Courts of Appeals have held that the child's claim was not barred by *Feres*. *See, e.g., Romero v. United States*, 954 F.2d 223, 225-27 (4th Cir. 1992); *Brown v. United States*, 462 F.3d 609, 615-16 (6th Cir. 2006); *Mossow v. United States*, 987 F.2d 1365, 1368-70 (8th Cir. 1993); *Del Rio v. United States*, 833 F.2d 282, 284-87 (11th Cir. 1987); *Lewis v. United States*, 173 F. Supp. 2d 52, 56-57 (D.D.C. 2001), *recon & vacated on other grounds in* 290 F. Supp. 2d 1 (D.D.C. 2003). The decision by the Tenth Circuit in *Ortiz* is contrary to those decisions and has created a circuit split on the issue.

This case presents an excellent vehicle for the Supreme Court to clarify that children of active-duty mothers are not barred from presenting birth injury claims under the FTCA. *Feres* has generated inconsistent and inequitable outcomes for active-duty military personnel for more than 60 years. Lower courts regularly call for the Supreme Court to reconsider it, and even the late Justice Scalia and Justice Thomas have both called for its complete reversal.

Arguments supporting a Supreme Court finding in favor of Ortiz:

Barring children in military families from bringing claims will have a negative impact on military morale and recruiting, particularly of women soldiers.

This ruling results in gender inequality among men and women in the military – only injured children of active duty mothers (not fathers) are Feres-barred. This is an unfair penalty to service women and raises equal protection concerns.

There is an unfair, inequitable geographic variation in the law for children of military families that depends on where the active duty mother is stationed. Four Circuits allow children of active duty mothers to bring birth-injury claims. But now in at least 10 states, these children are shut out of the legal system if the government alleges that the mother was also injured. The legal rights of children of military families should not depend on where an active duty mother is stationed within the United States.

This ruling places an unfair, unsustainable financial burden on military families, especially those already strained by deployment. Military families cannot afford to finance thousands or millions of dollars for lifelong, future medical and attendant care for their children. When a child is severely disabled, often one parent must stop working to care for the child 24 hours a day. This reduces the financial resources of the military family, particularly when one parent is deployed. The military mother in this case is deployed overseas and her disabled child remains behind, without adequate financial support.

Now Foundation signed on to the following *amicus* briefs over the past few months.

Voisine v. United States

This amicus brief was organized by the National Domestic Violence Hotline, the National Network to End Domestic Violence, Battered Women's Justice Project, and the Wisconsin Coalition Against Domestic Violence. Voisine is an attempt by gun owners to weaken the Lautenberg Domestic Violence Offenders Gun Ban by arguing that only intentional, purposeful acts of violence should trigger the loss of gun rights under the federal law.

Lawyers for the two men who brought the challenge, Stephen Voisine and William Armstrong III say that the gun ban should apply only to people who intend to hurt their partners, not those who merely act recklessly or impulsively. Government lawyers say that for most states simple assault and battery laws lump crimes committed recklessly or intentionally together. But the justices may view the language of the Lautenberg gun ban as vague and might agree that the charges against the two men should be dropped. For more discussion of this case, go to http://www.huffingtonpost.com/entry/supreme-court-lite-domestic-abusers-own-guns_us_56cf6822e4b0871f60eaa82b

The Court heard oral arguments in Voisine on Feb. 29 and the event made national news in that it was the first time in ten years that Justice Clarence Thomas spoke aloud Court, producing a gasp from the audience. This Slate.com article provides a good summary of the arguments made before the Court and essence of the case.
http://www.slate.com/articles/news_and_politics/supreme_court_dispatches/2016/02/why_voisine_v_united_states_a_case_about_domestic_violence_and_gun_rights.html

Synopsis of the *Amicus* brief:

Domestic violence abusers frequently engage in a pattern of abusive conduct that includes the use of firearms to control and terrorize their victims. As a result, Congress passed federal prohibition of misdemeanant firearm possession at issue in this case. This prohibition was intended to protect victims of domestic violence from further harm by prohibiting access to firearms by abusive individuals. In furtherance of this goal, ensuring that misdemeanor domestic violence crimes with the *mens rea* of recklessness are included within the firearm prohibition of 18 U.S.C. § 922(g)(9) is crucial to preventing many forms of domestic violence and limiting the severity of abuse that does occur.

The Supreme Court wrote in the earlier *Castleman* case that "domestic violence" is a "term of art encompassing acts that one might not characterize as 'violent' in a nondomestic context." 134 S. Ct. 1411. The Supreme Court, the federal government, many states, and other nations all have recognized that "domestic violence" involves a pattern of conduct intended to coerce and control the victim. An abuser's pattern of conduct encompasses a broad range of behaviors—some violent, some harassing, some coercive—all of which the abuser intentionally combines to create a complete system of abuse and control. It is therefore incorrect to classify one act of an individual who "recklessly" abuses a domestic partner as unintentional or somehow being less culpable of "domestic violence." Simply put, "[m]en do not beat their wives by accident." *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1136 (9th Cir. 2006) (Wardlaw, J.,

dissenting). Domestic violence is a crime that is the sum of many large and small acts of abuse and coercion.

Moreover, domestic violence "often escalates in severity over time . . . and the presence of a firearm increases the likelihood that it will escalate to homicide." *Castleman*, 134 S. Ct. at 1408 (citation omitted). In fact, evidence shows that where a firearm is present, a woman is *six times* more likely to be killed. Jacquelyn C. Campbell et al., *Assessing Risk Factors For Intimate Partner Homicide*, DOJ, Nat. Institute of Justice J., No. 250, p. 16 (Nov. 2003). Even if a firearm present in the home of a domestic abuser is never fired, the very presence of the weapon is a tool used to terrorize the victim and perpetuate the abuser's power and control. In other words, the firearm remains a potent instrument of domestic violence and control.

The National Domestic Violence Hotline, the Battered Women's Justice Project, and the Wisconsin Coalition Against Domestic Violence have received thousands of communications outlining first-hand accounts of such abuse. [Transcripts of some of those communications—redacted to preserve the safety and confidentiality of the survivors—are included in the brief.] The emotional and psychological toll of such abuse is devastating, and underscores the need to keep firearms out of the hands of individuals who have a demonstrated proclivity for domestic abuse—whether "reckless" or otherwise. http://www.scotusblog.com/wp-content/uploads/2016/01/1410154bsacNationalDomesticViolenceHotline.pdf

United States v. Texas

The American Federation of Teachers is partnering with the National Immigration Law Center, First Focus, and the National Education Association to file an *amicus*, friend-of-the-court brief in support of DACA+ and DAPA in the *United States v Texas* Supreme Court Case. As you all know the lawsuit was brought by Texas and 25 other states in an attempt to halt the President's executive actions on immigration, including the expansion of the Deferred Action for Childhood Arrivals (DACA) initiative and the new Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) initiative

The Supreme Court brief makes two general points:

#1. The expanded DACA and new DAPA programs will benefit individuals, families, and communities by allowing individuals to pursue expanded educational and professional opportunities;

#2. The expanded DACA and new DAPA programs will ameliorate the harms caused by family separation while improving educational, socioeconomic, and physical and mental health outcomes for children.

A Summary of the Argument:

The Court of Appeals upheld a nationwide preliminary injunction preventing implementation of the DAPA and Expanded DACA programs. These programs would have provided security from removal for millions of parents of U.S. citizens and the LPR children (under the DAPA program), as well as individuals who came to the United States as children (under the DACA program) enjoining these programs, the courts below failed to assess the harm to the public interest that these programs were designed to mitigate – and that the injunction therefore perpetuates.

Most importantly, the courts failed to consider the harms to U.S. citizen and LPR children that would result from the injunction of the DAPA program. When implemented, DAPA would have removed the threat of deportation for millions of parents of U.S. citizen and LPR children. Due to the nationwide injunction, these parents will continue to face the threat of removal, and their children will face the prospect of either being separated from their parents, or being forced to leave their U.S. homeland for a country that is not their own.

As detailed below, children whose parents face removal from the United States are more likely to suffer a host of harms, particularly to their educational opportunities, economic stability, and psychosocial well-being. The DAPA and expanded DACA programs directly address these serious harms to U.S. citizen and LPR children by alleviating the risk of removal for a limited period of time. The government's decision to adopt these programs, therefore, was in the best interests of millions of U.S. citizen and LPR children and should have been considered by the courts. The courts also failed to adequately account for the benefits of work authorization for the eligible population and the enhanced educational opportunities that expanded DACA would facilitate.

In short, lifting the injunction would benefit millions of U.S. citizen and LPR children by providing them with the family stability and security that is essential in supporting their healthy development, educational attainment, emotional well-being, and economic stability.

The legal question(s) that the Supreme Court are:

Issue: (1) Whether a state that voluntarily provides a subsidy to all aliens with deferred action has Article III standing and a justiciable cause of action under the Administrative Procedure Act (APA) to challenge the Secretary of Homeland Security's guidance seeking to establish a process for considering deferred action for certain aliens because it will lead to more aliens having deferred action; (2) whether the guidance is arbitrary and capricious or otherwise not in accordance with law; (3) whether the guidance was subject to the APA's notice-and-comment procedures; and (4) whether the guidance violates the Take Care Clause of the Constitution, Article II, section 3.