NOW Foundation Board Report

TO: NOW Foundation Board Members
FROM: Bonnie Grabenhofer, Vice President, and Jan Erickson, Director of Programs
DATE: June 23, 2016

NOW Foundation Workshops Set the Tone

Founders will Recall Early Days of NOW - The 2016 National NOW Conference will feature several important workshops moderated by NOW's founders and pioneering members. These workshops will facilitate the sharing of institutional knowledge from more seasoned members to younger feminists, and reflect on the history of NOW and its future as we embark upon a new digitalized age. Recruiting NOW Leaders – Attracting Younger and Older Feminists pairs experienced feminists with younger NOW members, allowing for a dialogue that will strengthen NOW's impact in the current age. In The Founding of NOW: She Was There, co-founder Muriel Fox will provide a first-hand account of NOW's beginnings and the visions of the leaders who created the organization, joined by Mary Jean Collins, Eleanor Pam, and Barbara Love, who will discuss issues and organizing in the early days of NOW.

Preserving Our History - In part two of the workshop, the panelists will further discuss the history of NOW in the hopes of encouraging chapter and state leaders to preserve the history of their organizations, especially for their application to women's history and women's studies programs. In Where Did We Go From NOW and What Did We Take With Us? former NOW leaders will share the skills and lessons they learned as activists, and the memorable experiences that shaped their feminist work. Lastly, in Documenting Our History and Digitizing NOW Chapter Archives, the crucial work of community members in the second wave feminist movement will be honored. The workshop will also allow for collaboration with a university or historical library to preserve the history of NOW, and detail steps to catalogue materials for the internet in order to allow broader access to the materials.

PAC Workshops Highlight Important Campaigns - The conference will also feature workshops led by NOW's Political Action Committee, dedicated to bringing into office politicians whose platforms align with the organization's values. In Looking at the 2016 Feminist Political Landscape, NOW PAC members and advisors will discuss opportunities and obstacles for feminists running for federal office in 2016, and will share how NOW intends to elect Hillary Clinton as the first female president and regain the majority in the Senate. Engaging a New Generation of Political Leaders will feature an intergenerational discussion regarding the importance of young feminists' participation and involvement in the political process, as well as how to engage and support the future generation of feminist political leaders.

Come One, Come All! - A PAC reception, which includes a poster session and a silent auction, will take place on Saturday from 4:40-6:30 p.m. The poster session will allow for the opportunity to view posters highlighting work carried out by NOW activists on the Ms. President NOW

campaign, while in the silent auction bids can be made on highly valuable feminist suffrage and ERA memorabilia.

Latifa Lyles Moderates Federal Panel - In Know Your Rights: Recent Federal Initiatives to Achieve Equal Pay, a panel of senior officials from the U.S. Department of Labor and the Equal Employment Opportunity Commission (EEOC) will discuss new equal pay initiatives at their various agencies, including the Women's Bureau and the Office of Federal Contract Compliance Programs (OFCCP). The workshop will provide valuable tools and resources for understanding and seeking remedies to gender-based wage gaps. The workshop will be moderated by Latifa Lyles, director of the Women's Bureau, who oversaw the 2014 White House Summit on Working Families and served as a previous NOW Membership Vice President. Also, we are very fortunate in having a commissioner from the EEOC, Charlotte Burrows, who will speak on the commission's date collection efforts and new worker compensation initiatives. Additional speakers include Christopher Seely, Branch Chief for Regulatory, Legislative and Policy Development in the Office of Federal Contract Compliance Programs and Laura Fortman, Deputy Administrator for the Wage and Hour Division

Don't Miss Hearing Your Board Candidates - Candidate forums will take place on Friday from 5:15-6 p.m., with the Pacific Electoral District in Concord, the Western Electoral District in Lexington, and the Heartland Electoral District in Bunker Hill. Forums will also take place on Friday from 6:15-7 p.m., with the Southern Electoral District in Concord, the Eastern Electoral District in Lexington, and the Northern Electoral District in Bunker Hill. The Issue Hearing will take place on Friday from 5:15-7 p.m.

And For Goodness Sake, Don't Forget to VOTE - Board elections will take place on Saturday from 4:15-6:15 p.m., with the Pacific and Southern Electoral Districts in Concord, the Western and Eastern Electoral Districts in Lexington, and the Heartland and Northern Electoral Districts in Bunker Hill.

NOW Foundation Litigation Summary

The Future of TRAP Laws: *Whole Woman's Health v. Hellerstedt, Currier v. Jackson Women's Health Organization*

Since 2011, hundreds of TRAP (Targeted Regulations of Abortion Providers) laws have been adopted in 44 states – all going beyond what is necessary to ensure patients' safety. These laws, part of a right-wing, anti-choice strategy to severely limit access to abortion, unfortunately, have been very effective.

The Supreme Court case *Whole Woman's Health v. Hellerstedt* heard oral arguments on March 2, 2016. This case addresses the constitutionality of Texas's notorious TRAP law, House Bill 2 (HB2). HB2 requires abortion providers to obtain admitting privileges at local hospitals and meet the standards of ambulatory surgical centers, causing roughly half the state's clinics to close.

This left only 19 abortion providers in the entire state of Texas. The Center for Reproductive Rights, representing Whole Woman's Health, posits that the restrictions do not make abortions any more safe, but merely more difficult to obtain. The case hinges on the 1992 ruling in Planned Parenthood v. Casey, which established that creating "undue burden" to obtain an abortion was unconstitutional; the Center holds that HB2 constitutes an undue burden on Texas women. Due to the reduced nature of the court, the case will likely hinge on Justice Anthony Kennedy's vote, which is uncertain surrounding abortion law. The decision should be passed down in June 2016.

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.

Barriers to Birth Control Access After *Hobby Lobby v. Burwell*

Zubik v. Burwell, a case consolidated with several other religious nonprofits, addresses the newest religious challenge to the ACA's contraceptive mandate. Accommodations were given both to churches and "closely held" for-profit businesses (i.e. Hobby Lobby), so the federal government would supply contraceptives if the organization had a religious objection to covering them under the Religious Freedom Restoration Act.

Zubik v. Burwell is the newest battleground. Religious nonprofits, such as schools or charities, argue 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, 2016, the Supreme Court vacated the case, knocking *Zubik v. Burwell* back down to the lower courts. SCOTUS requested additional information regarding alternatives, but also was careful to note that they were not ruling on the merits of the case in any capacity. The message seems to be that the case will perhaps be heard again when the Supreme Court vacancy is filled.

Affirmative Action: *Fisher v. University of Texas at Austin*, Round Two

The University of Texas responded to the 2003 Grutter v. Bollinger case allowing consideration of race in admissions 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. 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. 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 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.

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 has been argued, but the decision has not been handed down yet. More information on this case can be found on SCOTUSblog (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. 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 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. The case decided that, 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. It also determined that 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. The

ability of individuals to collectively take action against large entities has been upheld in a 6-2 decision.

One Person, One Vote: *Evenwel v Abbott*

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, 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.

The Uncertain Future of Public-Sector Unions

The *Friedrichs v. California Teachers Association* was one of the most controversial labor disputes in recent memory. 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 sees the controversy undecided.

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.

The Supreme Court affirmed the judgment of the lower court in a 4-4 split. 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 soon.

The Right to Damages for Mothers and Children: *Ortiz v. United States*

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?

As of April 2016, the Ortiz case decided to settle rather than let the Supreme Court decide the issue. It is likely that this issue will return to the Supreme Court with another case in the near future.

Recklessness and Domestic Abuse: *Voisine v. United States*

Is "reckless" behavior enough to uphold a domestic violence misdemeanor? Is that enough to remove a person's right to bear arms? While these may seem like obvious questions, the Supreme Court is currently debating them.

Voisine was twice convicted for domestic assault, defined in Maine as "knowingly, intentionally, or recklessly causes bodily injury or offensive physical contact to another person." Voisine was later found to possess a rifle in the course of another investigation, adding a federal charge of possessing a firearm after a domestic violence conviction. Voisine's argument is that "recklessness" is not enough to result in a domestic violence charge, overturning the federal conviction and returning his right to bear arms. Of course, domestic violence is violence regardless of "recklessness," and a ruling in favor of Voisine will be a blow to the rights of women and all survivors of intimate partner abuse.

This case heard oral arguments on February 29, 2016. Interestingly, Justice Clarence Thomas asked a question during oral arguments for the first time in ten years, speaking up in support for gun rights. The decision, which has second-amendment ramifications, should be passed down soon.

Immigration Reform and Constitutionality: *United States v. Texas*

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 U.S. citizens. This law would give certain undocumented immigrants the right to live in the US and 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. Oral arguments were heard on April 18, 2016, but no decision has been passed down yet.