NOW Foundation Board Report

To: NOW Foundation Board Members

From: Gilda Yazzie, Vice President, and Jan Erickson, Director of Programs

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LITIGATION

Important Gerrymandering Challenge Could Reshape Political Landscape

The first Monday in October is the official opening of the **U.S**. **Supreme Court** term. The Court will hear several critically important cases, the first of which concerns a challenge that involves election districts that have been subjected to what is described as 'extreme gerrymandering.' Court observers have described the importance of the case as potentially invalidating gerrymandered maps in nearly half of the states. What this may mean for feminist and progressive activists, hopefully, is a reduced presence of right-wing lawmakers in state legislatures and Congress.

Wisconsin is the state in question in ***Gill v. Whitford*** which some say has the worst right-wing gerrymander of any state, with Republicans controlling nearly two-thirds of state Assembly seats after a secretive closed-door redistricting process in 2011. **Texas, Pennsylvania**, and **North Carolina** are several other states that could see new district lines if the Supreme Court decides that Wisconsin's redistricting plan is an "impermissible partisan gerrymander." Additional states that have been identified as either in part or as a whole gerrymandered include **Maryland, West Virginia, Kentucky, Louisiana, Utah, Arkansas**, and **Ohio.**

A 2016 analysis of about 4,700 state legislative seats found four times as many states where districts were skewed Republican than Democratic. That is why **Republicans** are now in full control (Governor, both houses of the legislature) **in 26 states** and **only 6 are in full control by Democrats**. And that is why Republicans hold the White House, **240 U.S. House seats** against the **Democrats' 194** and **52 Republican U.S. Senate** seats. Further, that is why we are seeing an endless succession of harmful cuts to federal and state budgets, slashing critical human needs programs; pushing tax policy proposals that benefit the rich, not to forget, a continuing succession of attacks on the Affordable Care Act and on women's access to reproductive healthcare.

Gill v. Whitford

Docket No. 16-1161

Argued: Oct. 2, 2017

To Be Decided: June, 2018

Issues: (1) Whether the district court violated *Vieth v. Jubelirer* when it held that it had the authority to entertain a statewide challenge to Wisconsin's redistricting plan, instead of requiring a district-by-district analysis; (2) whether the district court violated *Vieth* when it held that Wisconsin's redistricting plan was an impermissible partisan gerrymander, even though it was undisputed that the plan complies with traditional redistricting principles; (3) whether the district court violated *Vieth* by adopting a watered-down version of the partisan-gerrymandering test employed by the plurality in *Davis v. Bandemer*; (4) whether the defendants are entitled, at a minimum, to present additional evidence showing that they would have prevailed under the district court's test, which the court announced only after the record had closed; and (5) whether partisan-gerrymandering claims are justiciable

On Tuesday, the Supreme Court heard oral arguments in the highly-anticipated case concerning a challenge to the practice of extreme gerrymandering. **William Whitford** is a retired law professor from the University of Wisconsin at Madison is the lead plaintiff in this challenge to **Wisconsin's 2011 legislative map**. Agreeing with the plaintiffs, a federal district court invalidated the map as partisan gerrymander and the case before the Supreme Court is on appeal. That district court found that the redistricting plan violated the Constitution in that it purposely drew district lines to favor one party and to put another at a disadvantage.

Political Gerrymandering at Issue - The type of gerrymandering at issue is a political party's use of the redistricting process to net and entrench an unbreakable legislative majority that it couldn't command without extreme manipulations of the electoral map. Wisconsin Republicans won majorities in the fall elections of 2010; they then secretly plotted gerryrmandered state legislative districts and rammed their plan through the legislature. Republican Gov. Scott Walker signed it into law and then launched his union- busting and right-wing legislative agenda, with lots of support from a very Republican legislature.

Cracking and Packing Methods - As a further example of political gerrymander: in 2012, Republicans won slightly less than half the statewide vote, but which garnered 60 seats of the Wisconsin Assembly's 99 seats; Democrats won just over half the statewide vote but got only 39 seats.The 2014 elections showed a similar outcome. The

gerrymander methods by which this is accomplished are known as**: 'cracking'** – dividing up supporters of one party into multiple districts so that they don't constitute a majority; and **'packing'** – gathering large numbers of a party's supporters in relatively few districts where they win by big margins.

SCOTUSblog's Amy Howe reported on the oral arguments with this observation: "Cautious optimism for challengers in Wisconsin redistricting case?" Howe noted that the justices did not pursue a challenge to the standing of the plaintiffs, but went instead to the merits.They questioned whether the Court could come up with a manageable test to determine whether politics plays a too influential role in redistricting. The Court has generally avoided hearing any cases on redistricting, rejecting a Pennsylvania case 13 years go. **Chief Justice John Roberts** made clear his view that the Supreme Court should stay out – because the public will think that the Court is siding with one political party. If the Court proceeded, he later commented that the determinations about gerrymandering would be based on social science "gobbledygook."

The swing-voter, **Justice Anthony Kennedy**, who had supported the rejection of the Pennsylvania case, but his comments on Tuesday suggested that he would support going forward with a review. There are two key questions to be considered: Should the courts get involved in reviewing partisan- gerrymandering at all; and, if so what standard should they use to review such claims?

Justice Stephen Breyer suggested a five-part test that looked at, among other things, whether one party controls the legislature and the redistricting process; whether the redistricting maps create "partisan asymmetry" – that is, they do not treat the different political parties equally; and whether that asymmetry is "persistent" and extreme. **Justice Elena Kagan** agreed with Breyer noting that new technology can help legislators draw maps easily and the same technology can be used to evaluate the maps in a scientific manner**. Wisconsin Solicitor General Misha Tseytlin** disagreed, asserting that any "standards" the Court might use to evaluate extreme gerrymandering claims would rely heavily on statistics and battles between each side's experts.

Paul Smith, lawyer for the plaintiffs, said that in a 2004 case the court provided a blueprint for future partisan gerrymandering challenges and that was the use of manageable standards. In the present case, he said, "the district court used three different social-science standards and concluded that the 2010 Wisconsin map was, for the purposes of partisan gerrymandering, one of the worst maps ever." Smith directed his closing remarks at the key member on the Court, Justice Kennedy.

More information on *Gill v. Whitford* and gerrymandering:

https://www.washingtonpost.com/news/the-fix/wp/2015/03/04/the-remarkable-republican-takeover-of-state-legislatures-in-1-chart/?utm_term=.8dfb96e42a83

http://now.org/resource/issue-advisory-restoring-democracy-court-ruling-approves-independent-commissions-to-counter-gerrymandering/

https://www.brennancenter.org/analysis/current-citizen-efforts-reform-redistricting

https://www.brennancenter.org/blog/bringing-whitford-focus

Victory in Racial Gerrymandering Case

Cooper, Governor of North Carolina, et. al. v. Harris, et. al.

Docket No. 15–1262.

Argued: December 5, 2016

Decided: May 22, 2017

The *Slate* headline said it all: "Clarence Thomas Joins Liberals, Shocks World."

The ultra-conservative African-American justice sided with the four liberals on the Court to find that **North Carolina congressional District 1 and District 12**, drawn into bizarre shapes, had packed African American voters into a few districts in order to dilute their political power. On May 22, the Supreme Court issued a landmark decision finding the two congressional districts were racially gerrymandered in violation of the Constitution.

Republican–dominated state legislatures are now notorious for brazen racial gerrymanders, locking black voters out of GOP districts and herding them into safe Democratic ones instead, the *Slate* article explains. The result is an extreme imbalance in dozens of state legislatures -- especially in Southern states -- which gives the Republicans huge majorities.

Justice Elena Kagan authored the majority opinion and provided the basis for what could be many future lawsuits, Kagan wrote:

> "So, for example, if legislators use race as their predominant districting criterion with the end goal of advancing their partisan interests – perhaps thinking that a proposed district is more "sellable" as a race based VRA (Voting Rights Act) compliance measure than as a political gerrymander and will accomplish the same result – their action still triggers strict scrutiny. In other words, the sorting of

> voters on the grounds of their race remains suspect even if race is meant to function as a proxy for other (including political) characteristics."

With this decision it will now be possible to successfully challenge other Congressional – and even state legislative – districts where racial minorities have been packed.

For more of the convoluted history of these two North Carolina districts where Democrats once practiced racial gerrymandering on the theory that this would satisfy the **Voting Rights Act**, see:

http://www.slate.com/articles/news_and_politics/jurisprudence/2017/05/in_cooper_v_harris_the_supreme_court_strikes_a_blow_against_racial_redistricting.html

Janus v. American Federation of State, County, and Municipal Employees

Docket No. 16-1466

Argued: TBD

Issue: Whether *Abood v. Detroit Board of Education* should be overruled and public sector "agency shop" arrangements be invalidated under the First Amendment.

This is a third case of critical importance and one which could exact wide-spread and lasting damage to public sector unions including teachers unions, workers' rights and the progressive movement. In June, the anti-union **National Right to Work Legal Defense Foundation** asked the Court to hear ***Janus v. American Federation of State, County, and Municipal Employees*** which seeks to prohibit unions from requiring dues or fees from all employees – not just union members. On Sept. 28 the Court granted certeriori and the case will soon be argued. With uber-conservative **Associate Justice Neil Gorsuch** now on the Court, fears about an adverse ruling in the case are well-founded, see https://www.thenation.com/article/springtime-for-union-busting/ .

A decision is expected to be announced next June. For background, our friends at the **American Federation of Teachers (AFT)** shared the following information:

> As early as this week, the Supreme Court is poised to grant certiorari and take up a case called *Janus v. AFSCME* this term, which would make the entire public sector "right-to-work" in one fell swoop. Janus is the culmination of decades of attacks on working people by corporate CEOs, the wealthiest 1% and the politicians that do their bidding to rig the economy in their favor. The forces behind this case are the same forces that have pushed for limiting voting rights, attacked immigrants, and undermined civil rights protections. Their goal with Janus is no secret: they

want to use the Supreme Court to take away the freedom of working people to join together in strong unions, because unions give workers a powerful voice in speaking up for themselves, their families and their communities.

Unions have played a critical role in building and protecting the middle class in America. They provide hard working people economic stability for their families and give them the tools to build a good life, home and education for themselves and their children. A recent article in The Guardian (https://www.theguardian.com/us-news/2017/aug/30/rightwing-alliance-unions-defund-defang) highlights how this case is part of a blatant multi-million-dollar campaign to "defund and defang" and weaken unions because they know that strong unions are the best vehicle working people have to level the economic playing field for all Americans.

The Guardian article describes the expansive right-wing advocacy landscape behind Janus, an alliance of 66 state-based conservative think tanks, headed by the **State Policy Network (SPN)**, with a combined annual budget of $80 million. A 10-page fund-raising letter, signed by SPN's president and CEO **Tracie Sharp**, details a campaign as a "once-in-a-lifetime change to reverse the failed policies of the American left…We are primed, right now, to deliver the mortal blow to permanently break its stranglehold on our society."

The letter goes on to say, "The long term objective is to "deal a blow to the left's ability to control government at the state and national levels. I'm talking about *permanently depriving* the left from access to millions of dollars in dues extracted from unwilling union members every election cycle."

Mark Janus, an Illinois state employee with two others who object to paying fees to the union, which represents 35,000 workers, brought the lawsuit backed by this huge right-wing network. Conservatives have been salivating at the prospect of killing all unions by attacking the dues or fees that public sector union members and fellow employees are required to pay. If the Court rules for the plaintiffs, it would overturn a 40 year old ruling in ***Abood v. Detroit Board of Education*** when the Court said that it was reasonable to require all employees, not just union members, to support the cost of bargaining because all of them benefitted. By law, unions are required to represent all employees, including by handling their grievances. Some labor lawyers believe that if employees do not have to pay dues, a substantial proportion will not.

An adverse decision will affect public sector **union members in 22 states**, including California, were fees are authorized in state law. The other 28 states have "right to work" laws that prohibit a requirement that workers join or support a union. Not surprisingly, workers tend to be paid less in "right to work" states. Not only would **AFSCME** be decimated, so would the **National Education Association**, **American**

Federation of Teachers and **the Service Employees International Union** (which represents public service workers, hospital staff, nurses, nursing home staff, building services and security guards).

Needless to say, these union members form an important part of the **Democratic Party** and it would be a huge bonus for the right-wing to exact major damage to the party. One other important gain for the right-wing agenda is that with weakened teachers' unions, it may be a lot easier to rapidly expand their plan to privatize the public education system through taxpayer-funded vouchers, and for-profit charter and online schools.

As noted in the first case we write about, a website that is useful in explaining the importance of various Supreme Court cases, **SCOTUSblog** is a great source, and here are several important articles:

http://www.scotusblog.com/case-files/cases/janus-v-american-federation-state-county-municipal-employees-council-31/

A plain English discussion by Amy Howe is at,
http://www.scotusblog.com/2017/06/will-third-time-charm-challenge-public-sector-union-fees/

Is Custom Cake-Making Covered under the First Amendment?

Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission

Docket No. 16-111

Argued: TBD

Issue: Whether applying Colorado's public accommodations law to compel the petitioner to create expression that violates his sincerely held religious beliefs about marriage violates the free speech or free exercise clauses of the First Amendment.

The custom-cake business owned by **Jack Phillips** of the Denver area, who describes himself as a "cake artist," argues that Colorado's public accommodations law violates the First Amendment by requiring Phillips to create custom wedding cakes for same-sex weddings, in violation of his religious beliefs. Phillips, a Christian who closes his business on Sundays, refuses to design custom cakes that conflict with his religious beliefs, like cakes that have alcohol, cakes that have a Halloween theme or celebrate divorce.

The same-sex couple, **Charlie Craig and David Mullins**, who went to the **Masterpiece Cakeshop** for their wedding cake in 2012 were refused service.They then filed a claim

of discrimination based on their sexual orientation with the **Colorado Civil Rights Division**. The agency ruled in the couple's favor and the **Colorado Civil Rights Commission** later agreed. So did the **Supreme Court of Colorado**.

Phillips argues that his artistic expression through his custom cake-making falls under the First Amendment's protection of free speech. Additionally, because of the burden that the Colorado law places on his religious beliefs, Phillips asserts that the law should be subjected to the toughest constitutional test, or "strict scrutiny."

NOW Foundation has expressed an interest in joining an *amicus* brief in the Masterpiece Cakeshop, Ltd. V. Colorado Civil Rights Commission; preparation of the brief is underway and we expect to see it by mid-October. Hopefully, it will result in a landmark ruling that reaffirms the primacy of anti-discrimination law over speculative claims of religious freedom and free speech violations. But with this conservative-majority Supreme Court, that is the optimistic scenario. Dozens of briefs have been filed by conservative, religiously-affiliated groups on behalf of Phillips.

Areas to be covered in the *amicus* brief are summarized as follows:

In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, the Supreme Court will decide whether a business owner in Colorado may legally refuse to provide a wedding cake to a same-sex couple simply because the couple is gay. In this case, the business owner brings First Amendment claims based on speech and religion to say that he should not be required to provide a gay couple with any type of wedding cake. Colorado found that the First Amendment did not empower the owner to violate Colorado's state law prohibition on sexual orientation discrimination and the matter is now pending with the U.S. Supreme Court.

The National Women's Law Center will submit an amicus brief arguing that to allow a business to disregard non-discrimination protections in the name of religion and free speech will certainly have a negative impact on the civil rights of women to be free from sex discrimination. The brief will describe the critical role of antidiscrimination laws to the opportunity for equal participation in all facets of society for women. The brief will highlight cases in which courts have recognized that anti-discrimination protections are fundamental and that free speech rights do not trump the government's ability to protect women. Finally, the brief will describe how accepting the business owner's justifications for this discrimination would weaken antidiscrimination protections for all marginalized groups including women.

Additionally, SCOTUSblog's Amy Howe provides a deep background on the case and related law at,
http://www.scotusblog.com/2017/09/wedding-cakes-v-religious-beliefs-plain-english/

And, Mary L. Bonauto, Civil Rights Project Director at LGBTQ Legal Advocates and Defenders,
http://www.scotusblog.com/2017/09/symposium-commercial-products-speech-cake-just-cake/

Maria Esterlina Perez Vigil v. Jefferson Beauregard Sessions Sessions III, U.S. Attorney General

Docket No. 17-6035, U.S. Court of Appeals, Fifth Circuit

Argued: TBD

NOW Foundation joined an *amicus curiae* brief prepared for the following case. Just to note:The brief was prepared by the National Immigrant Women's Advocacy Project (NIWAP, Inc.) of American University Washington College of Law, with Leslye E. Orloff, director. Orloff is a former staff attorney with NOW Legal Defense and Education Fund's (now Legal Momentum) pioneering Battered Immigrant Women's Project.

A case involving **Maria Esterlina Perez de Vigil**, a victim of domestic violence, seeks to overturn the Immigration Judge and the Board of Immigration`s ruling that denied her request for asylum because she was able to move out the residence that she shared with the abuser. NIWAP, Inc. and Winston & Strawn LLP prepared an *amicus curiae* brief in support to Maria Esterlina Perez de Vigil to the **U.S. Fifth Circuit Court of Appeals**. Ms. Perez de Vigil is being represented by the Human Rights Initiative of North Texas.

In the underlying claim, the petitioner is seeking gender-based asylum as a victim of domestic violence perpetrated by her spouse. This specific appeal seeks to vacate the decision of the **Board of Immigration Appeals (BIA)** affirming the immigration judge in a case in which the immigration court ruled that by moving out of an abusive home, the victim can unilaterally end the abuse in the relationship and is therefore ineligible for gender-based asylum as a victim of domestic violence. The *Amicus* brief discusses the dynamics of abusive relationships, pointing out that the abuser's control of the victim often continues long after the victim moves out, particularly when children are involved.

The Immigration Judge accepted de Vigil's testimony as credible. However, he found that "Salvadoran women in domestic relationships who are unable to leave the relationship" lacked immutability and questioned if the group itself were cognizable. The BIA held that a female victim of domestic violence may establish her membership in a "particular social group" by showing that for religious, societal, cultural, legal, or other reasons, she was "unable to leave the relationship" with her abuser. A single BIA judge upheld the immigration judge's finding that Ms. Perez was not a member of that group, simply because she moved out.

The brief was:

- Filed on behalf of a victim whose marriage was plagued by beatings, rape, being coerced at gunpoint, suffering one occasion when her husband pulled the trigger but the gun was not loaded. When the victim moved out of the home she shared with the abuser she received death threats including witnessing the husbands' armed men at her work she fled El Salvador for the U.S. seeking asylum.
- Provides social science research finding discussing lethality and separation violence and will explain that physical separation from an abuser rarely means that an abused woman has successfully left the relationship or marriage and stopped the cycle of violence. Indeed, the very essence of an abusive relationship is that the abuser is in control and the victim does not have the power to end the relationship on her own.
- Shows that whether or not the separated parties have any continuing legal arrangement, and their relationship (and the attendant abuse) will necessarily continue if they have children in common.

The ruling in this case can affect future decisions if it were repeated by this Court, it could adversely impact the lives of many women who have suffered persecution because they found themselves trapped in violent, abusive and controlling marriages and relationships with the father of their children. By signing on to this brief, you are helping Maria Esterlina Perez de Vigil and also helping to ensure that immigrant victims of domestic violence receive gender- based asylum and the full protections available to them under the law.