NATIONAL WOMEN'S LAW CENTER
EXPANDING THE POSSIBILITIES

THE SUPREME COURT: WOMEN'S RIGHTS REMAIN AT RISK

For three decades, the Supreme Court's interpretations of Constitutional principles and federal statutes have played a vital role in protecting the rights of women to privacy, to equal protection of the laws, to basic health and safety, and to freedom from discrimination in the workplace and in school. But during the October 2006 term, the first full term after Chief Justice Roberts and Justice Alito were confirmed, the newly constituted Court handed down decisions that reversed decades of precedent and that dramatically cut back women's hard won legal rights to privacy, to freedom from discrimination in the workplace and to an integrated education. Although the Court did not dismantle some important anti-discrimination protections for employees during the October 2007 term – the term that ended in June 2008 – the new decisions neither negate the damage done in the prior term nor provide any assurance that women's rights are secure for the future. Indeed, the Court has already accepted three cases for the next term, starting this coming October, in which key legal rights for women are at stake.

Much is at Stake for Women

- *The Constitutional right to privacy, including the right to abortion, is not secure*. Last term, in *Gonzales v. Carhart*, the Court for the first time upheld an abortion restriction with no exception to protect women's health.[1] Five justices, including Chief Justice Roberts and Justice Alito, overturned 30 years of constitutional law protecting women's health and put in jeopardy the fundamental freedom of individuals to make important life decisions. Justice Scalia has repeatedly stated that *Roe v. Wade* should be overturned.[2] Justice Thomas has gone so far as to say that there is no constitutional right to privacy at all.[3] Both Chief Justice Roberts and Justice Alito explicitly refused to state any support for *Roe v. Wade* in the *Carhart* decision. No privacy cases were before the Court in the term that just ended. Thus, even a severely weakened *Roe*, without strong protections for women's health, is hanging by a thread.

- *Statutory protections against sex discrimination in the workplace have been seriously weakened*. Last year, in *Ledbetter v. Goodyear Tire and Rubber Co.*,[4] the Supreme Court reversed the long-standing interpretation of Title VII of the Civil Rights Act of 1964, the law that bars discrimination in employment, that allowed victims of pay discrimination to challenge the discrimination as it continues over time. Lilly Ledbetter, one of the few women supervisors in a Goodyear tire plant, did not know until close to her retirement that she had been paid less than her male co-workers for close to 20 years. The Court, in a 5-4 decision written by Justice Alito, held that even though she proved she was discriminated against, she had no remedy because she did not file her complaint with the EEOC within 180 days after receiving her first discriminatory paycheck. This decision

[1] 127 S. Ct. 1610 (2007).
[2] *See id*. at 1639-40 (2007) (Thomas, J., dissenting, joined by Justice Scalia).
[3] Lawrence v. Texas, 539 U.S. 558, 605-06 (2003) (Thomas, J., dissenting).
[4] 127 S. Ct. 2162 (2007).

makes it virtually impossible for women and others subjected to pay discrimination to effectively protect their rights. It ignores the realities of the workplace, in which employees typically do not know how much their coworkers are paid, creates perverse incentives for employers to hide discrimination until they are no longer subject to liability, and allows employers to continue to pay employee less with impunity. This decision also overturns decades of precedent that applied in virtually every court in the country.[5]

- In the term that just ended, the Court did not continue on the path it embarked on in *Ledbetter*. It followed its precedents, and held in *CBOCS v. Humphries* and *Gomez-Perez v. Potter* that two federal laws provide a cause of action for those who are subject to retaliation for complaining about discrimination.[6] Some have suggested that the public outcry that followed the *Ledbetter* decision might have contributed to these results, but the fact that there were even two dissents in one case and three in the other in these straight-forward cases raises concerns. In addition, the Court ruled in favor of employees in cases involving the presentation of evidence,[7] what constitutes a "charge" that is filed with the EEOC,[8] and whether the employer or the employee has the burden of proof in certain cases,[9] again with some dissents. It ruled against employees in two other cases, one that makes it more difficult to prove age discrimination in a pension plan,[10] and one that invalidated a state law involving union organizing.[11] As a result, the decisions that support employees neither wipe out this Court's dramatic narrowing of anti-discrimination protections in *Ledbetter* nor suggest that the Court's future decisions will maintain current core protections against discrimination. Next term, in *AT&T v. Hulteen*, the Court may very well apply *Ledbetter* to limit the extent to which women who were discriminated against when they took pregnancy leave may seek redress.[12] The Court will also hear *Crawford v. Metropolitan Gov't of Nashville and Davidson Cty*., a case that could create a damaging gap in the scope of Title VII's protection against retaliation.[13]

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[5] For more information, visit the National Women's Law Center's Fair Pay Campaign at http://www.nwlc.org/fairpay/.

[6] CBOCS v. Humphries, 128 S. Ct. 1951 (2008) (finding a cause of action for retaliation under 42 U.S.C. § 1981); Gomez-Perez v. Potter, 128 S. Ct. 1931 (2008) (finding a cause of action for retaliation for federal employees under the Age Discrimination in Employment Act (ADEA)).

[7] Sprint v. Mendelsohn, 128 S. Ct. 1140 (2008) (rejecting the employer's effort to have the Court adopt a rule limiting the admission of evidence about discriminatory actions taken against employees other than the plaintiffs).

[8] Federal Express v. Holowecki, 128 S. Ct. 1147 (2008) (EEOC document called an "Intake Questionnaire" constitutes a charge that meets the statutory requirement for a timely filing).

[9] Meacham v. Knolls, 2008 WL 2445207 (U.S. 2008) (finding that the employer has the burden of proof in cases under the ADEA to show that an action was reasonably taken for reasons other than age).

[10] Kentucky Retirement Systems v. EEOC, 2008 WL 2445078 (U.S. 2008) (retirement system's use of age to calculate certain benefits does not violate the ADEA because it was not "actually motivated" by age).

[11] Chamber of Commerce v. Brown, 2008 WL 2445420 (U.S. 2008) (California law that prohibited employers from using state funds to "assist, promote or deter union organizing" held to be preempted by the National Labor Relations Act).

[12] 498 F.3d 1001 (9th Cir. 2007), *cert. granted*, 76 U.S.L.W. 3226 (U.S. June 23, 2008) (No. 07-543) (whether the pension benefits of women who were absent because of pregnancy before the effective date of the Pregnancy Discrimination Act 0f 1978 should be lower because of that absence).

[13] 211 Fed. Appx. 373 (6th Cir. 2006), *cert. granted*, 75 U.S.L.W. 3663 (U.S. Jan. 18, 2008) (No. 06-1595) (whether employees who cooperate in an employer's internal sexual harassment investigation are protected against retaliation under Title VII).

- *Protections against sex discrimination in schools are at risk of being narrowed.* Title IX of the Education Amendments of 1972 prohibits all forms of sex discrimination (including sexual harassment and unequal athletic opportunity) by educational institutions that receive federal funds. In 2005, in *Jackson v. Birmingham Bd. of Ed.*, the Court ruled 5-4 that Title IX provides protection against retaliation for those who complain about discrimination.[14] Fortunately, that decision survived the threat that was posed by the retaliation cases that were recently decided,[15] but other threats to the protection of girls in school remain. For example, *Fitzgerald v. Barnstable School Committee*, a case the Court will hear next term that raises the issue of whether Title IX provides the sole remedy for discrimination in education, has the potential to cut back on constitutional claims to remedy sex discrimination.[16]

- *Several Justices do not accept the current equal protection standard requiring "heightened scrutiny" of government-based sex discrimination*. The Equal Protection Clause of the Fourteenth Amendment to the Constitution has been interpreted by the Supreme Court to prohibit most laws and government policies that discriminate on the basis of sex. Official distinctions based on sex are subject to "heightened scrutiny." But Justices Scalia and Thomas take issue with this principle. Justice Scalia even dissented from the Court's ruling that the exclusion of women from the state-run Virginia Military Institute, based on gender stereotypes about how women learn, was an Equal Protection violation (Justice Thomas did not participate in that case).[17] If their view prevails in future cases, it would make it easier to uphold sex-based classifications in the law even where they are based on harmful gender stereotypes. While Chief Justice Roberts and Justice Alito did not express opposition to heightened protection in their confirmation hearings, they have yet to rule on any constitutional cases involving the equal protection clause and sex discrimination.

- *The ability of Congress to protect the health and safety of the American people is also on the line*. In a series of 5-4 cases, the Court took an unduly narrow view of the constitutional authority of Congress to pass legislation addressing violence against women,[18] permitting state employees to sue for damages for disability[19] or age discrimination,[20] or keeping schools free from the dangers of firearms.[21] The Court did uphold the right of state employees to sue for damages for violations of some provisions of the Family and Medical Leave Act[22] and, by 5-4, upheld the right of a disabled person

[14] 544 U.S. 167 (2005).
[15] CBOCS v. Humphries, 128 S. Ct. 1951 (2008); Gomez-Perez v. Potter, 128 S. Ct. 1931 (2008), discussed above.
[16] 504 F.3d 165 (1st Cir. 2007), *cert. granted*, 76 U.S.L.W. 3641 (U.S. June 9, 2008) (No. 07-1125).
[17] United States v. Virginia, 518 U.S. 515, 566-603 (1996) (Scalia, J, dissenting); *see also* J.E.B. v. Alabama, 511 U.S. 127 (1994) (Scalia, J., dissenting, joined by Justice Thomas and Chief Justice Rehnquist) (arguing that state's use of peremptory strikes on the basis of gender in jury selection did not violate the Equal Protection Clause of the Constitution).
[18] United States v. Morrison, 529 U.S. 598 (2000).
[19] Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356 (2001).
[20] Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000).
[21] United States v. Lopez, 514 U.S. 549 (1995).
[22] Nevada v. Hibbs, 538 U.S. 721 (2003).

to sue a state for damages for denying access to the courthouse.[23] Justices Scalia and Thomas dissented in both those cases and take the most restrictive view of Congress's power. Justice Thomas, in fact, has urged the Court to jettison its past precedents in this area and return to an approach that could even mean invalidating New Deal legislation such as minimum wage laws and restrictions on child labor.[24] If these views prevail, they could be devastating not only to women's rights, but to public health and safety more broadly. Again, neither Chief Justice Roberts nor Justice Alito have yet ruled on cases raising these key issues.

- *Affirmative action is at risk.* Just as it is critically important to have strong constitutional standards in place that will invalidate sex-based discrimination by the government, it is essential to have constitutional standards that will permit the use of affirmative action when necessary to dismantle discrimination or promote diversity in our nation's educational institutions and workplaces. In 2003, the Court upheld the affirmative action program of the University of Michigan Law School by a 5-4 vote. Justice O'Connor cast the deciding vote and wrote the majority opinion.[25] But last year, in *Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1*, the Court in a 5-4 decision struck down efforts by two school districts to maintain racial integration in individual schools.[26] The majority set back in key ways this country's efforts to provide integrated public education to our nation's children, and amply demonstrated that there continues to be a substantial threat to programs aimed at removing barriers that women of all races and ethnicities still face.

Women's legal rights hang in the balance before this changed Supreme Court. And, with other changes on the Court an ever-present possibility, women's ability to depend upon their long-standing legal rights is even more uncertain.

[23] Tennessee v. Lane, 541 U.S. 509 (2004).

[24] *See* United States v. Morrison, 529 U.S. 598, 627 (2000) (Thomas, J., concurring) ("[T]he very notion of a 'substantial effects' test under the Commerce Clause is inconsistent with the original understanding of Congress' powers and with this Court's early Commerce Clause cases."); United States v. Lopez, 514 U.S. 549, 596 (1995) ("I am aware of no cases prior to the New Deal that characterized the power flowing from the Commerce Clause as sweepingly as does our substantial effects test. My review of the case law indicates that the substantial effects test is but an innovation of the 20th century.").

[25] Grutter v. Bollinger, 539 U.S. 306 (2003).

[26] 127 S. Ct. 2738 (2007).