

JUDGES & THE COURTS

FACT SHEET

Supreme Court Review: 2011-2012 Term

(July 2012)

The 2011-2012 Supreme Court Term presented both a significant victory and significant setbacks for women's rights. The Term concluded in blockbuster fashion with the announcement of the Court's 5-4 decision in National Federation of Independent Business, et al v. Sebelius, upholding the constitutionality of the Affordable Care Act (ACA) on June 28.

Women's rights advocates, among many others across the country, celebrated that the law's critical protections for women's health and economic security were upheld. But while it ruled that the law was constitutional, the Court limited the penalty that the federal government may impose on states that refuse to participate in the expansion of the Medicaid program set out in the ACA. Further, Chief Justice Roberts' opinion, when read in conjunction with a stinging joint dissent by Justices Scalia, Kennedy, Thomas, and Alito, may raise questions as to the Court's future Commerce Clause and Spending Power jurisprudence and invite new constitutional challenges to important social programs.

Other decisions this Term involving issues of great importance to women and addressing important interactions between the Constitution and federal statutes reinforce the concern, arising from recent decisions like *Wal-Mart v. Dukes*, *Citizens United v. Federal Election Commission*, and *Ledbetter v. Goodyear Tire & Rubber Co.*, that women suffer greatly from the Court's disinclination to protect the rights of individuals looking to the law for justice. This Term, the Court ruled 5-4 that state employees do not have full redress for violations of the Family and Medical Leave Act (FMLA), finding that some provisions of the FMLA were not designed to address sex discrimination. The Court also broadened the category of employees who may not bring employment discrimination claims against their religious employers because these claims

could burden employers' constitutional rights. Next Term, in cases addressing race-conscious admissions, protections against sexual harassment on the job, and (potentially) marriage equality, the Court is poised to issue further rulings addressing the scope of individuals' rights that will be of great importance to women and the legal protections that they enjoy.

The Health Care Law Upheld

In 2010, Congress passed the landmark Patient Protection and Affordable Care Act, known as the "Affordable Care Act" or "ACA." The ACA is crafted to achieve near-universal comprehensive health insurance coverage, slow the growth of health care costs and insurance premiums, and end an array of insurance practices that have prevented individuals from obtaining health insurance and health care. One of the ACA's primary goals is to improve women's health and address the discrimination women have faced in the health insurance market—disadvantages and discrimination that often lead women to bear significant costs or go without health care altogether.

Upon passage of the ACA, multiple lawsuits were brought challenging the constitutionality of the individual responsibility provision, which requires individuals (unless exempt) to obtain health insurance or pay a penalty, with subsidies available for millions of low- and moderate-income people.

The challengers argued that Congress's power to regulate interstate commerce did not allow it to require people to obtain health insurance. A lawsuit was also brought by several states challenging the ACA's requirement that states expand Medicaid eligibility as a condition of future receipt of Medicaid funding as an unconstitutionally coercive exercise of Congress's spending power under the Constitution. The states argued that Medicaid funding is so important to state budgets that states have no choice but to accede to the expansion of Medicaid under the ACA.

The Supreme Court heard oral argument on these questions during three days in March 2012. On June 28, the last day of the Term, the Court issued its decision in ***National Federation of Independent Business, et al v. Sebelius***. Justices Ginsburg, Breyer, Sotomayor and Kagan joined the portion of Chief Justice Roberts' opinion holding that the individual responsibility provision represented a valid exercise of Congress's constitutional authority to tax. The Court also upheld the expansion of the Medicaid program as constitutional, but ruled that the federal government could not penalize states' failure to expand Medicaid coverage by withholding states' existing Medicaid funding. Justices Ginsburg, Breyer, Sotomayor and Kagan would also have upheld the constitutionality of the individual responsibility provision under the Commerce Clause, and Justices Ginsburg and Sotomayor found no constitutional violation in making states' entire Medicaid grant contingent on states implementing the ACA's Medicaid expansion. On the other hand, Justices Scalia, Kennedy, Thomas, and Alito—just a single vote short of a majority—would have found both the individual responsibility provision and the Medicaid expansion unconstitutional and struck down the entire ACA, from the prohibition on denying insurance because of preexisting medical conditions, to the ban on sex discrimination in federally funded health programs, to requiring insurance coverage of contraceptives, to the protections for nursing mothers on the job, and much more, as a result.

Although leaving in place the individual responsibility provision was a clear victory for women and all Americans, the practical implications of parts of the decision, and particularly the legal reasoning of Chief Justice Roberts, raises questions and concerns in several ways. As a result of the majority decision, some states may refuse to implement the Medicaid expansion, leaving the most vulnerable uninsured individuals

without health coverage and without options for obtaining coverage. In addition, legal challenges are now expected to test whether a majority of the Court will apply the unprecedented Medicaid ruling limiting Congress's authority to place conditions on federal grants to states in order to undermine other vital social programs and legal protections. Further, while Chief Justice Roberts' opinion upheld the individual responsibility provision under Congress's taxing power, a nonbinding section of his opinion set forth a narrowed interpretation of Congress's Commerce Clause authority that departs significantly from the Court's prior precedents. It remains to be seen whether his reinterpretation of the Commerce Clause, together with that contained in the joint dissent by Justices Scalia, Thomas, Kennedy, and Alito, will have a significant impact in future cases.

While these concerns are real, the immediate practical result of the Court's decision, worthy of great celebration, is that more women will get preventive services like mammograms, Pap smears, and birth control without a co-pay; that health insurance companies will no longer be able to deny care because of a pre-existing condition or charge women more than men for the same coverage; that young adults up to 26 years of age will be able to remain on their parents' insurance policies; and that many people will have access to affordable insurance coverage long out of reach.

Family and Medical Leave Act Narrowed

The Family and Medical Leave Act (FMLA) requires large employers to give employees unpaid, job-protected leave if they need time off because of the birth or adoption of a child, or to care for a child, spouse, or parent with a serious health condition (the "family care provisions"), or if they themselves cannot perform their jobs because of a serious health condition, including pregnancy (the "self-care provision"). Employers who violate the FMLA can be liable for damages to an employee, but the Supreme Court has ruled that Congress only has authority to subject state governments to liability for damages when it is acting to enforce the guarantees of the Fourteenth Amendment. In 2003, in *Nevada Department of Human Resources v. Hibbs*, former Chief Justice Rehnquist wrote a majority opinion holding that monetary damages could be awarded to a state employee under the FMLA's family care provisions. In that case, the Court

found that Congress had the power to require states to pay damages for violations of the family care provision based on evidence that Congress intended to address gender discrimination, by removing “the pervasive sex-role stereotype that caring for family members is women’s work,” in enacting the FMLA. As a result, the Court found that the Fourteenth Amendment, which gives Congress the authority to enforce the protection against sex discrimination provided by the Equal Protection Clause, empowered Congress to impose liability for damages on state governments when they unlawfully deny family care.

In January, the Court heard arguments in ***Coleman v. Maryland Court of Appeals***, which presented the question of whether state employers can be liable for damages when they unlawfully fail to provide employees leave based on their own medical conditions under the self-care provision. In March, the Court ruled in a 5-4 decision authored by Justice Kennedy that state employees who are denied their FMLA right to take time off due to their own serious medical conditions no longer have a meaningful remedy. Contrary to the real-life experiences of those at the National Women’s Law Center who worked to secure the passage of the FMLA, the majority opinion concluded that the self-care provision was not designed to address sex discrimination and that Congress therefore had no authority to subject state governments to damages under the self-care provision.

Justice Ginsburg wrote a powerful dissent, joined by Justices Breyer, Sotomayor, and Kagan, setting out why that the FMLA was designed to enforce the Fourteenth Amendment’s protections against sex discrimination and promote women’s equal employment opportunities by correcting a long pattern of employment discrimination against pregnant women and new mothers. The opinion set forth the ways in which the self-care provision was crafted to address women’s need for leave for childbirth and pregnancy-associated health problems, while ensuring that the law did not create a disincentive for employers to hire women by creating a leave entitlement that only women could exercise. She also criticized the Court for not repudiating previous precedent holding that discrimination on the basis of pregnancy does not constitute discrimination on the basis of sex under the Constitution. Unfortunately, the majority’s decision in *Coleman* will

make it harder for state employees who develop other serious medical conditions, including pregnancy complications, to enforce their rights to take the leave to which they are legally entitled.

Exemptions from Antidiscrimination Laws for Employees of Religious Institutions Broadened

The lower courts have established a “ministerial exception” that prevents the application of the civil rights laws to certain employees of religious institutions, based on concerns that otherwise rights of religious freedom might be compromised. In ***Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC***, a teacher in a religious school took medical leave after developing a disability. The school refused to take her back during the school term when her doctor told her she could return to work. She was fired after she complained that the school’s refusal violated the Americans with Disabilities Act (ADA). The EEOC filed a retaliation case on her behalf, in response to which the school argued that the ADA was not applicable to the teacher because of the ministerial exception.

In January 2012, in a unanimous decision, the Court ruled that a ministerial exception applied to employment discrimination laws because claims based on those laws implicate a church’s selection of its own ministers and thus address internal church decisions affecting the faith and mission of the church itself. The Court held that this exception applied to bar the teacher’s lawsuit, because in this particular case the teacher, whose title was “minister” and whose work as a teacher included religious duties constituted a minister for the purposes of the exception, despite the fact that a significant portion of her work consisted of non-religious activities. However, the Court declined to adopt a bright-line rule defining under what circumstances employees will be considered ministers more generally, or whether the ministerial exception applies to laws other than workplace antidiscrimination protections. As a result, the questions of who qualifies as a minister and when neutral legal rules will be understood as improperly addressing internal church decisions will continue to be litigated in the lower federal courts.

Access to the Courts Narrowly Maintained—for Now

Douglas v. Independent Living Center of Southern California presented the question of whether the Supremacy Clause of the Constitution offers an avenue for beneficiaries and providers of Medicaid services to challenge state actions that are inconsistent with the federal Medicaid law. Recently, many states have responded to state budget crunches by seeking to cut back on their Medicaid programs. The federal Medicaid law does not explicitly provide a private right of action allowing beneficiaries or providers to challenge state policies or laws inconsistent with the federal statute, and while courts have allowed private enforcement of some Medicaid provisions under the Reconstruction-era statute known as Section 1983, many Medicaid provisions are not enforceable under this statute; moreover, courts have shown increasing hostility to such claims in recent years. The plaintiffs in this case argued that the Supremacy Clause of the Constitution, which makes federal law the supreme law of the land, provided an alternative path for beneficiaries and providers to take their claims that California had violated the federal Medicaid law to court.

In February 2012, the Court declined to rule on the constitutional question, but instead held in a 5-4 decision that the plaintiffs might have a right to challenge the state's actions under the federal Administrative Procedures Act (APA), because while the case was pending before the Supreme Court, the federal Medicaid agency had approved several of the challenged state actions and the APA generally permits review of federal agency decisionmaking. The Court remanded the case to the Ninth Circuit Court of Appeals to determine whether the APA provided the more appropriate avenue to determine whether the state's actions were consistent with the Medicaid statute. In dissent, Justices Roberts, Alito, Scalia, and Thomas argued that the courthouse doors should be closed to the plaintiffs.

Looking Ahead to the 2012-2013 Term

In the 2012-2013 Term beginning in October 2012, the Court has already decided that it will hear two cases of particular importance to women, and may also hear one or more marriage equality cases with critical implications for women and for Equal Protection law more broadly.

Race-Conscious Admissions

In 2003, in *Grutter v. Bollinger*, the Court upheld the use of race-conscious admissions to the University of Michigan Law School by a 5-4 vote. Justice O'Connor cast the deciding vote and wrote the majority opinion, which held that consideration of race in public university admissions could properly further the state's compelling educational interest in diversity. In ***Fisher v. University of Texas at Austin***, the Fifth Circuit, *en banc*, ruled that University of Texas admissions policies that take the race of applicants into account in certain circumstances passed constitutional muster under *Grutter*. The Fifth Circuit's decision was appealed to the Supreme Court, which in February 2012 decided to hear the appeal in the 2012-2013 Term. This will be the first time the Supreme Court has considered the constitutionality of race-conscious admissions in higher education since Justices Roberts and Alito joined the Court. The case is important to women, and especially women of color, because racial diversity within schools breaks down stereotypes that feed and perpetuate inequality, including the intertwined race and gender stereotypes that women of color face. Moreover, a decision limiting state universities' ability to use race-conscious admissions could adversely affect, for example, state universities' efforts to increase women's representation in nontraditional educational programs such as engineering.

Employment Discrimination

The Court has also decided to hear the case of ***Vance v. Ball State*** next Term. Under the 1998 cases *Faragher v. City of Boca Raton* and *Burlington Industries, Inc. v. Ellerth*, employers are vicariously liable for harassment by an employee's supervisor in cases brought under Title VII of the Civil Rights Law of 1964, without any need to show that the employer was negligent in

allowing the harassment to occur. *Vance* presents the question whether this vicarious liability rule (1) applies to harassment by anyone whom the employer vests with authority to direct and oversee their victim's daily work, or (2) is limited to those harassers who have the power to "hire, fire, demote, promote, transfer, or discipline" their victim. The case affects when women experiencing sexual harassment on the job will be able to hold their employer accountable in court.

Marriage Equality

In addition to the cases that the Court has already decided to hear next Term, the Court has been asked to review two cases involving the constitutionality of the federal refusal to recognize same-sex marriage and may be asked to review additional cases challenging prohibitions of or refusals to recognize same-sex marriage. The First and Ninth Circuits have recently ruled that Section 3 of the federal Defense of Marriage Act, which provides that federal law only recognizes marriages between one man and one woman, is unconstitutional. At the beginning of July, a petition was filed with the Supreme Court seeking review of both decisions, and the Court will decide whether or not to review them in the fall. In addition, the Court will likely be asked to review the decision by the Ninth

Circuit Court of Appeals striking down Proposition 8, which amended California's constitution to ban same-sex marriage, as violating the Equal Protection Clause of the U.S. Constitution. It is possible that the Court could hear one or more of these cases next Term. These cases are important to women, not only because they implicate federal recognition of legal marriages of LGBT women and the right of LGBT women to marry under California state law, but also because they have the potential to affect the scope of the Equal Protection Clause for LGBT individuals and women more generally.

The decisions of the Court have a profound, and lasting, impact on the women of this nation for generations to come. Women will be watching the decisions that the Court will make during the 2012-2013 term.

To read the *amicus* briefs that the Center wrote or joined in the 2011-2012 Term:

[Amicus Brief: Department of Health and Human Services, et al., v. State of Florida, et al.](#)

[Amicus Brief: Coleman v. Maryland Court of Appeals](#)

[Amicus Brief: Hosanna-Tabor Church v. EEOC](#)