NATIONAL WOMEN'S LAW CENTER
EXPANDING THE POSSIBILITIES

JUDGES & THE COURTS

FACT SHEET

Supreme Court Preview 2013-2014 Term

October 2013

During the 2013-2014 Term, the Supreme Court will review several cases that concern legal rights of importance to women—including access to abortion, equal opportunity in education, protection against housing discrimination, and the ability to use the Equal Protection Clause to challenge discrimination in public employment. In addition, the Court will review an important case involving the President's ability to fill vacancies on a body that protects workers. Finally, the Court may decide whether for-profit businesses can refuse to provide employee insurance coverage for contraceptives based on asserted religious objections. The decisions in these cases may have a significant impact on women's rights in all of these important arenas.

Reproductive Rights

The Court has agreed to hear two reproductive rights cases: one dealing with protestor-free zones surrounding abortion clinics, and another with a state law restricting doctors' ability to use their best clinical judgment when women choose to end a pregnancy with medication abortions.

McCullen v. Coakley involves a constitutional challenge to a Massachusetts law passed in response to harassment and intimidation at reproductive health clinics. The law makes it a crime for all speakers—regardless of their viewpoint—to "enter or remain on a public way or sidewalk" within 35 feet of an entrance, exit, or driveway of "a reproductive health care facility." The plaintiffs challenging the law argue that it singles out abortion protesters and leaves them no way to communicate their views, in violation of the First Amendment. The First Circuit upheld the law, relying in part on *Hill v. Colorado*, a 2000 decision by the Supreme Court sustaining a Colorado law that also aimed to protect patients visiting health care facilities from unwanted contact with protestors. The *McCullen* case will decide whether women in Massachusetts will continue to access health care from trusted providers free from harassment and intimidation. It will also signal whether the Court, differently constituted since 2000, will revisit or overrule its own prior decision.

In the second case, ***Cline v. Oklahoma Coalition for Reproductive Justice***, the Court will decide the constitutionality of an Oklahoma law that interferes with women's ability to get medicine consistent with current medical practice and the standard of care. In 2011, Oklahoma passed a law that has the effect of prohibiting women's access to medication to end a pregnancy, and could also be read to prohibit the use of medicine to end a life-threatening ectopic pregnancy. Because the law is unclear, the U.S. Supreme Court has agreed to hear the case pending answers from the Oklahoma Supreme Court about which drugs are covered by the statute.

Oklahoma claims that the law does not ban use of all these medicines, but rather requires doctors to follow the original FDA protocol for medication abortion. As happens routinely, however, in the years following FDA approval, the standard of care for medication abortion has evolved beyond the original FDA protocol. Today, it is widely accepted, standard medical practice for drugs to be used in different protocols than those upon which the FDA has based its approval. Requiring adherence to the original FDA label for medication abortion goes against years of

research and doctors' practical experience. It would force doctors to either practice outdated medicine, which violates medical ethics and subjects women to unnecessary risks, or to cease providing medication abortion altogether.

Women have been safely and legally using medication abortion for over a decade. If the Court does ultimately hear *Cline*, the case may determine whether a woman must follow an inferior, outdated, and less effective protocol or lose access altogether to a safe, private, and less invasive method of ending early pregnancy. It may also determine whether the "undue burden" standard announced more than 20 years ago in *Planned Parenthood v. Casey,* which prevents states from imposing an "undue burden" on women seeking abortions, still provides meaningful protection for women's most intimate decisions.

Equal Educational Opportunity

Last Term, in *Fisher v. University of Texas*, the Court preserved the ability of public colleges and universities to consider racial and ethnic diversity as one factor among many in admissions decisions. This Term, the Court will review a challenge under the Equal Protection Clause to a state constitutional amendment that bars consideration of race or gender in admissions to public universities.

Schuette v. Coalition to Defend Affirmative Action is an appeal from the Sixth Circuit's decision striking down an amendment to Michigan's Constitution, passed by ballot initiative in 2006, which prohibits race- and gender-based affirmative action in public university admissions. The Sixth Circuit found that the ballot initiative violated the federal Equal Protection Clause under what is known as the "political restructuring doctrine," because of the inequalities that the state amendment introduced into the political process for racial minorities. The Sixth Circuit explained: "A student seeking to have her family's alumni connections" considered as part of her college application could "lobby the admissions committee," "petition the leadership of the university," "seek to influence the school's governing board," or "initiate a statewide campaign to alter the state's constitution." On the other hand, it continued, "a black student seeking the adoption of a constitutionally permissible race-conscious admissions policy" had one and only one option: amending the Michigan Constitution, a "lengthy, expensive, and arduous process." The amendment banning affirmative action created a "structural burden" for minorities that other potential students did not share, the Sixth Circuit concluded, and thus violated the Equal Protection Clause.

The Center joined an amicus brief in the case, arguing that heightened judicial scrutiny is appropriate when laws distort governmental processes so as to place unique burdens on minority groups seeking to enter into the political process—and particularly appropriate for examining laws targeting racial minorities passed by ballot initiative, given the potential for prejudice to infect such campaigns. The brief also set out the need for universities to retain the ability to implement their academic missions, including pursuit of the educational value that diversity provides. As the brief explained, promotion of racial and gender diversity in higher education is necessary to ensure that talented students from all backgrounds have an opportunity to succeed—for example, by reducing barriers to women's entrance into historically male-dominated fields such as engineering and computer science—and diverse classrooms enhance the educational experience for students of all backgrounds.

Fair Housing

In ***Mount Holly v. Mt. Holly Gardens Citizens in Action***, the Court will decide an issue critical to combating segregation in housing and to ensuring all individuals—no matter their race, ethnicity, sex, disability, or status as parents—have an equal opportunity to seek a home and fair treatment in any neighborhood. In this case, a New Jersey township declared an entire community "blighted." Residents were offered between $30,000 to $50,000 for their homes, which were to be replaced with $200,000 buildings that they could not afford to buy. While the lawsuit challenging these actions was pending, the township demolished the vast majority of these homes. The plaintiffs sued under the Fair Housing Act, arguing that the township's behavior had a "disparate impact" on racial minorities—that it disproportionately harmed African-American and Hispanic families and did not have a necessary and manifest relationship to a legitimate, nondiscriminatory interest.

The Supreme Court in this case will determine whether the Fair Housing Act allows plaintiffs to prove discrimination by showing that a challenged action has an unjustified "disparate impact" on a protected class, even in the absence of a showing of discriminatory intent by defendants. All eleven Courts of Appeals in the country that have considered the question have concluded that the Fair Housing Act prohibits disparate impact discrimination, just as Title VII prohibits disparate impact discrimination in employment. Additionally, the Department of Housing and Urban Planning issued regulations interpreting the Fair Housing Act to prohibit disparate impact discrimination, and this interpretation by the agency charged with enforcing the Act should be entitled to substantial deference.

The ability to challenge disparate impact housing discrimination is especially important to women in low-wage jobs and women of color, who are disproportionately affected by predatory lending practices when seeking mortgages. The disparate impact standard is also important for challenging housing discrimination against victims of domestic violence or sexual assault, who are often forced to vacate their homes when landlords impose "zero tolerance" policies for crimes committed in the home, or when jurisdictions penalize households to which police are dispatched on multiple occasions: such actions, which have the effect of doubly victimizing those who experience violence, will often have a disparate impact on women.

Age Discrimination

In ***Madigan v. Levin***, the Court will decide whether state and local government employees may bring age discrimination claims directly under the Equal Protection Clause and or must rely on the procedures set out in the Age Discrimination in Employment Act ("ADEA"). In *Madigan*, a 55-year-old Illinois senior assistant attorney general was terminated and replaced by a woman in her thirties. He sued and alleged unconstitutional age discrimination. The Seventh Circuit concluded that the plaintiff was allowed to bring this constitutional challenge, even though he had not exhausted administrative remedies as required in order to bring suit under the ADEA. If the Court decides that the ADEA forecloses a constitutional claim for public employees, they will be required to proceed exclusively through a cumbersome and often backlogged administrative process in order to bring a claim of age discrimination.

The Court's decision will impact state and local government employees with age discrimination claims, and depending on its reach, might also have implications for other discrimination claims against state and local governments. Federal Courts of Appeals are split as to whether Title VII, which protects against sex discrimination in employment, forecloses state and local government employees from pursuing an equal protection claim challenging employment discrimination. (While the Supreme Court has not weighed in explicitly, in the past it has proceeded under the assumption that Title VII cases are not foreclosed.) In 2009, the Supreme Court unanimously held that a student can bring a claim alleging sex discrimination by a public school in violation of the Equal Protection Clause, rather than proceeding exclusively through Title IX.

Labor

In ***National Labor Relations Board v. Noel Canning***, the D.C. Circuit Court of Appeals held that the National Labor Relations Board (NLRB) could not issue valid decisions because three of its then-members were appointed by President Obama during a congressional recess, after Senate Republicans prevented confirmation votes that would have allowed the NLRB to function. The D.C. Circuit held that the President could not validly appoint these individuals under the Constitutional provision authorizing recess appointments, because they were appointed in a recess during a Congressional session, rather than the recess that occurs between one Congress and the next, and because the vacancies that the President appointed these members to fill did not arise during the recess.

The ramifications of the D.C. Circuit's decision are significant, potentially calling into question every order issued by the NLRB between when the appointments were made on January 4, 2012, and August 2013, when new members of the NLRB were confirmed by the Senate. In many instances, NLRB decisions are critical

to vindicating the rights of low-wage working women. What is more, similar reasoning could threaten past and future decisions of other federal agencies and prevent a President from staffing vacancies if the Senate failed to confirm any nominees, further disrupting the process of Executive Branch appointments.

Looking Ahead

This Term, the Court is likely to hear one or more of the percolating challenges to the Affordable Care Act's ("ACA") guarantee that women receive insurance coverage without cost-sharing for all FDA-approved methods of contraceptives. These challenges, brought by private, for-profit businesses, raise claims under the Religious Freedom Restoration Act, which prevents the federal government from "substantially burden[ing] a person's exercise of religion" unless the government's action advances a compelling government interest and is the least restrictive means of achieving it. At issue in these cases is whether the boss of a for-profit company should be allowed to trump women's health and women's access to the health care they need by refusing to comply with the birth control benefit. The Center has submitted "friend of the Court" briefs in many of these contraceptive coverage cases in the Courts of Appeals, arguing that the ACA's contraceptive coverage requirement does not substantially burden religion and that it furthers the compelling state interests of safeguarding public health and promoting gender equality.