NATIONAL WOMEN'S LAW CENTER
EXPANDING THE POSSIBILITIES

JUDGES & THE COURTS

FACT SHEET

Supreme Court Review: 2012-2013 Term

July 2013

The 2012-2013 Supreme Court Term witnessed a number of blockbuster cases affecting women's rights, from affirmative action to workplace protections to voting rights to marriage equality. The results in those cases were decidedly mixed, with some historic victories, but also, unfortunately, heartbreaking setbacks. The National Women's Law Center participated in most of these cases.

Marriage Equality: A Historic Victory

On June 26, 2013, the last day of the Term, the Supreme Court handed down a pair of decisions that promote equality of individuals regardless of gender or sexual orientation: ***United States v. Windsor*** and ***Hollingsworth v. Perry***.

In *Windsor*, the Court addressed the question of whether Section 3 of the federal Defense of Marriage Act (DOMA) violates the Constitution's guarantee of equal protection of the law and basic due process. That section provides that federal law only recognizes marriages between one man and one woman. DOMA had a pervasive, and pernicious, effect on same-sex married couples: for example, it prevented families from receiving Social Security benefits upon the loss of a same-sex spouse or parent, denied health insurance to same-sex spouses of federal employees and increased the cost of health insurance provided to same-sex spouses by other employers by counting this health insurance as taxable income, and denied same-sex spouses the right offered by the Family and Medical Leave Act to take job-protected leave to care for a spouse with a serious medical condition. The constitutional challenge was brought by Edith Windsor, whose marriage was validly performed in Canada and recognized by the state of New York but not by the federal IRS, which held her liable for hundreds of thousands of dollars in federal estate taxes when her spouse died and left her estate to Windsor. The Obama Administration declined to defend DOMA's constitutionality, but a group of lawmakers from the House of Representatives intervened to defend the law. In a historic 5-4 decision, with Justice Kennedy writing for the majority, the Court held that Section 3 of DOMA should be struck down as a "deprivation of an essential part of liberty" under the Fifth Amendment, because it degrades and discriminates against a class of intimate relationships New York and other states have "deemed . . . worthy of dignity in the community equal with all other marriages."

In *Hollingsworth*, the Court addressed the question of whether California's Proposition 8, which amended California's constitution to bar marriage by same-sex couples, violated the Equal Protection Clause of the Constitution. With Chief Justice Roberts writing for a five-justice majority also composed of Justices Scalia, Ginsburg, Breyer, and Kagan, the Court held that Proposition 8 proponents had no standing to appeal the trial court's conclusion that law was unconstitutional. The Court thus vacated a Ninth Circuit's ruling (which had affirmed the California district court's ruling that Proposition 8 was unconstitutional), leaving in place the district court's decision - meaning that marriage between same-sex couples is once again legal in California. This brings the number of marriage equality states (including the District of Columbia) to thirteen.

These decisions will have a tremendous impact on the lives of same-sex married couples and their families around the country, removing both the limitations on

rights afforded to married couples under federal law and the stigma of second-class citizenship. Women, who make up the majority of same-sex couples who have married or acquired some other type of formal legal status, will particularly benefit, given that women are more likely than men to be poor, and thus female same-sex couples are at particular risk of financial instability, and that female same-sex couples are especially likely to be raising children. This makes the web of protections and benefits provided by legal recognition of their marriage particularly important to female same-sex couples. Moreover, as the Center explained in its amicus briefs in both cases, equal treatment of married couples regardless of the sex of the spouses will help break down pernicious gender stereotypes about men's and women's separate roles in marriage.

Affirmative Action: Importance of Diversity Reaffirmed

In 2003 *Grutter v. Bollinger* upheld the use of race-conscious affirmative action at the University of Michigan Law School by a 5-4 majority, in a decision written by Justice O'Connor. Specifically, Grutter held that consideration of race as one of many individualized factors in public university admissions could properly forward the state's compelling educational interest in fostering diversity.

Fisher v. University of Texas at Austin, the first case to reach the Supreme Court challenging the use of affirmative action in higher education since *Grutter*, was decided on June 24, 2013, with Justice Kennedy writing for a 7-1 majority (Justice Ginsburg dissented and Justice Kagan recused herself). The Court preserved the ability of colleges and universities to consider racial and ethnic diversity as one factor among many in a carefully crafted admissions policy, reaffirming the vital educational role that diversity in the classroom and on campus can play. The Court held, however, that Fifth Circuit failed to apply the correct legal standard when evaluating the constitutionality of the University of Texas at Austin's admissions criteria, which consider race as one of multiple factors. It then remanded the case back to the Fifth Circuit, directing the lower court to use "strict scrutiny" to determine whether or not the University's program was permissible (as required by *Grutter*): specifically, it required the University to show that "available, workable race-neutral alternatives" will not suffice to achieve the diversity it seeks and emphasized that reviewing courts must independently and closely review this evidence.

The promotion of racial and gender diversity in vocational and higher education to ensure that talented students from all backgrounds have an opportunity to succeed—for example, diversity policies reduce barriers to women's entrance into historically male-dominated fields such as engineering and computer science. Women, and especially women of color, are more likely to succeed in schools that promote diversity, and diverse classrooms enhance the educational experience for students of all backgrounds. The Center submitted an amicus brief on behalf of twenty-four women's and legal organizations in support of the University of Texas, explaining that an educational experience in a diverse community of learners can dispel both race and gender stereotypes, which are often intertwined, and that this diversity is essential to preparing students to succeed as leaders in communities and businesses.

Title VII Protections: Dramatically Undermined

Two cases this term dramatically undermined the scope of Title VII protections, *Vance v. Ball State University* and *University of Texas Southwestern Medical Center v. Nassar*. The Center joined briefs in both cases.

Vance v. Ball State dealt with the rule (established by two 1998 decisions: *Faragher v. City of Boca Raton* and *Burlington Industries, Inc. v. Ellerth*) that, under Title VII, employers may be held legally responsible for harassment by an employee's "supervisor." Vance raised the question of who counts as a "supervisor." On June 24, 2013, in a 5-4 decision, the Court held that only individuals who have the power to hire and fire employees or take other tangible employment actions constitute "supervisors" for this purpose. The majority's definition thus exclude immediate or day-to-day supervisors who do not have this authority, even though that supervisor can control the worker's hours, work assignments, or shifts—which could significantly impact the work environment and empower the employer to harass. As such, *Vance* substantially limits Title VII's protections for women and minorities who face harassment on the job, which remains a problem of enormous scope. As the dissent, authored by Justice Ginsberg, explained, this definition ignores the realities of the workplace and is contrary to the U.S. Equal Employment Opportunity Commission (EEOC)'s longstanding interpretation of Title VII's protections. She urged Congress to take swift corrective action in response to the majority's decision.

The issue in ***University of Texas Southwestern Medical Center v. Nassar*** was the burden of proof for proving retaliation under Title VII. In an opinion written by Justice Kennedy, the Court held, 5-4, that plaintiffs must satisfy a different, and more difficult, standard for proving retaliation for complaining about discrimination than for proving the discrimination itself. This important decision makes it more difficult for women and minorities to guard against unlawful retaliation at work. Justice Ginsburg also dissented in *Nassar*, taking the majority to task for ignoring guidance by the EEOC and its prior precedent to drive a "wedge" between the mutually reinforcing remedies against discrimination and complaining about discrimination. Here, too, Justice Ginsburg called upon Congress to act to remedy the Court's decision.

Potential Obstacles for Employees Coming Together to Challenge Employer Abuses in Equal Pay and Other Cases

Collective actions, the form of class action allowing plaintiffs to sue on behalf of other unnamed, but similarly situated workers under the Fair Labor Standards Act, are important tools for women workers seeking to enforce their rights. In a FLSA collective action, after one worker brings suit, other similarly situated workers have the right to opt in and join the class. When workers are able to litigate as a group, whether through collective actions or other forms of class actions, they do not face the same risk of retaliation from their employer, are less burdened by the costs of litigation, and are better able to obtain legal representation. Successful class or collective actions can also result in employer-wide solutions to employer-wide problems. This Term, two cases may pose new significant obstacles to class and collective actions brought by workers.

On April 16, 2013, in ***Genesis Healthcare Corp v. Symczyk***, the Supreme Court, in an opinion authored by Justice Thomas, held, 5-4, that courts lack jurisdiction to hear collective action cases if the named plaintiff's (or plaintiffs') own claims are "moot." Plaintiff Laura Symczyk, a nursing home worker, alleged that her employer was committing wage theft by failing to pay her and other employees if they worked during their lunch period. Her employer offered to settle Symczyk's wage claims before other had the opportunity to join the collective action, and then argued that because it had made this offer, Symczyk no longer had a personal stake in the case and that the case must be dismissed, even though the named plaintiff's complaint sought damages for a group and not solely for herself. The Supreme Court held that if the original plaintiff's claim becomes moot before other employees have had an opportunity to join the case, then the case must end, but did not decide whether an employer's settlement offer to the original plaintiff can moot a case. The decision means that if the named plaintiff no longer has a "personal stake" in the case and no other individuals have yet joined the case, no relief is available to the group and the case must end. The Court, however, did not decide the important issue of whether a settlement offer moots an individual plaintiff's case. Justice Kagan wrote a powerful dissent arguing that you should "[f]eel free to relegate the majority's decision to the furthest reaches of your mind" because in fact such settlement offers should not be understood to moot a plaintiff's case, and thus "[t]he situation is addresses should never again arise."

Collective suits lie at the core of enforcement of the FLSA, as well as the Equal Pay Act (EPA), which relies on the same enforcement mechanisms. This enforcement mechanism is particularly important for low-wage workers like Laura Symczyk, as the Center showed in its brief in the case. As Justice Kagan argued in dissent, going forward lower courts should recognize that a mere offer to settle does not moot a plaintiff's case, particularly in situations such as Symczyk's, where the plaintiff rejected the employer's offer and therefore received no relief. If courts allow employers to duck their obligations under the FLSA and the EPA by strategically picking off a lead plaintiff through a settlement offer, it would have the effect of making wage and hour violations and pay discrimination much more difficult to challenge collectively. Unfortunately, the majority's decision leaves the door open to undermine enforcement of these fundamental protections, harming women workers.

American Express v. Italian Colors Restaurant may also have troubling implications for employees who join together to challenge employer abuses. The case presented the question of whether a clause in a contract between American Express and merchants that required the merchants to arbitrate any claims against American Express individually and waived their rights to bring federal statutory claims as a class was enforceable, even when the cost of arbitrating an individual claim was greater than any potential individual recovery. On June 20, 2013, the Supreme Court decided, in a 5-3 decision written by Justice Scalia, that it was, concluding that plaintiffs were not guaranteed an affordable way to enforce their rights. In her dissenting opinion, Justice Kagan argued that the majority's

decision is "choking off a plaintiff's ability to enforce congressionally created rights" in violation of the Court's own "effective-vindication rule," under which arbitration clauses cannot be enforced when doing so would make it impossible for claimants to vindicate federal statutory rights. Justice Kagan described the majority's take on having rendered these rights in effect, unenforceable, because the cost of proceeding would exceed any remedy, as: "Too darn bad."

While this case arose in a commercial context, it will no doubt also be used to argue the arbitration clauses with class-action waivers should also be enforced against workers in employment contracts, even if this means that no individual plaintiff will be able to afford to enforce her rights.

Voting Rights: A Victory Followed by a Crushing Defeat

Two voting rights decisions were handed down this term, one a victory for voters, including women, another a crushing defeat. In ***Arizona v. Inter Tribal Council of Arizona, Inc.***, in a 7-2 decision, the Court held the National Voter Registration Act, a 1993 federal law that requires states to use a uniform federal form to register voters for federal elections, preempted an Arizona law mandating voters submit proof of citizenship prior to registration. Unfortunately, this victory was eclipsed by the Court's second voting rights decision, in ***Shelby County v. Holder***. *Shelby County* addressed the question of the constitutionality of Congress' overwhelming, bipartisan reauthorization of the Voting Rights Act in 2006, and particularly the sections of the Voting Rights Act requiring certain jurisdictions with a history of discriminatory election practices to get preclearance from the federal government before making any change in voting laws or procedures. On June 25, 2013, in a 5-4 decision, the majority invalidated the formula used in the VRA to determine which jurisdictions are subject to preclearance requirements. The majority decision, written by Justice Roberts, noted that voter turnout and registration rates in covered jurisdictions now approach "parity" between minority voters and white voters, and asserted that blatant racial discrimination in violation of federal law was now "rare." Justice Ginsburg, joined by Justices Breyer, Sotomayor, and Kagan, dissented, arguing, "Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet." The dissent argued that Congress had accumulated a significant record illustrating continuing and pervasive discrimination in covered districts justifying its enforcement of the Fourteenth and Fifteenth Amendments by means of the preclearance rules and rebuked the majority for lacking proper deference to the legislative branch.

In the wake of *Shelby County*, a number of state legislators have already declared their intent to push forward with restrictive voting laws. As the result of the decision, the Justice Department's authority to challenge state laws that, for example, require voters to produce particular forms of identification or require states to remove certain categories of individuals from voter registration rolls in covered districts, has been significantly undermined. These new, exclusionary barriers will have a concrete, detrimental impact on voters and are likely to particularly harm people of color, but also the poor, the elderly, students, and those who have changed their names—groups in which women are disproportionately represented.

Looking Ahead

While advocates and legal experts analyze the implications of this Term's decisions, a number of cases raising issues important to women have already been accepted for review next Term. On the heels of its decision in ***Fisher***, the Court has already granted certiorari in ***Schuette v. Coalition to Defend Affirmative Action***, an appeal of the Sixth Circuit's *en banc* decision striking down an amendment to Michigan's Constitution prohibiting race-based and gender-based affirmative action in public institutions of higher education under the Equal Protection Clause. The Court has also decided to review ***McCullen v. Coakley***, which will evaluate a constitutional challenge to a Massachusetts law that makes it a crime for speakers other than "employees or agents . . . acting within the scope of their employment" to "enter or remain on a public way or sidewalk" within thirty-five feet of an entrance, exit, or driveway of "a reproductive health care facility." Next Term, the Court will also hear ***National Labor Relations Board v. Noel Canning***, in which it will review the scope of the President's recess-appointment powers, in a case arising out of the recess appointments of National Labor Relations Board members; because of its implications for the NLRB, the case is of particularly important for all workers who rely on NLRB to adjudicate claims pertaining to worker protections and collective bargaining rights. Finally, the Court may hear one or more challenges to the Affordable Care Act's requirement that employers provide insurance coverage without cost-sharing for contraceptives.

To read the *amicus* briefs that the Center wrote or joined in the 2012-2013 term, follow the below links:

- ***United States v. Windsor***

http://www.nwlc.org/sites/default/files/pdfs/nwlc_windsor_amicus_brief.pdf

- ***Hollingsworth v. Perry***

http://www.nwlc.org/sites/default/files/pdfs/nwlc_hollingsworth_amicus_brief.pdf

- ***Fisher v. University of Texas at Austin***

http://www.nwlc.org/sites/default/files/pdfs/nwlc_fisher_final_brief_08.13.12.pdf

- ***Vance v. Ball State***

http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/11-556_petitioneram-cunpwf.authcheckdam.pdf

- ***University of Texas Southwestern Medical Center v. Nassar***

http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v2/12-484_resp_amcu_nela-etal.pdf

- ***Genesis Healthcare Corp v. Symczyk***

http://www.nwlc.org/sites/default/files/pdfs/symczyk.pdf