JUDGES & THE COURTS

SUPREME COURT REVIEW: 2015-2016 TERM

During its 2015-2016 Term, the Supreme Court heard a number of blockbuster cases affecting women's rights, making critical rulings on abortion, affirmative action, immigration, and anti-discrimination protections, among other key issues. The Court's Term was marked by the loss of Justice Antonin Scalia in February. Although President Obama nominated Merrick Garland, Chief Judge of the U.S. Court of Appeals for the District of Columbia Circuit, to the Supreme Court in March, Republican leaders in the U.S. Senate have thus far refused to move forward on his nomination. As a result, the shorthanded Court was unable to resolve a number of cases, rendering decisions that leave, in some cases, a patchwork of laws across the country. Thus, although several of the Court's decisions represent tremendous victories for women and girls, those victories are tempered by other decisions in which the impact of a Court operating at less than full strength was apparent.

Landmark Decision Reaffirms Women's Constitutional Rights

Whole Woman's Health v. Hellerstedt. In a 5-3 decision, the Supreme Court struck down two provisions of HB2, a Texas law passed in 2013 in order to shut down clinics and make it difficult —if not impossible—to access abortion in the state.

The law imposed several restrictions on abortion, including requiring providers to obtain medically unnecessary hospital admitting privileges and requiring abortion clinics to meet the licensure requirements of ambulatory surgical centers. While Texas claimed the provisions protected women's health, expert testimony before the trial court made clear that they would do no such thing, but instead severely limit access to abortion services by imposing arbitrary and burdensome requirements on abortion clinics and providers. If upheld, these provisions would have left at most ten clinics to serve the 5.4 million women of reproductive age living in the state, forcing many Texas women to travel hundreds of miles to access a clinic. Additional travel drives up the indirect costs of obtaining an abortion, including child care, time off work, gas or other transportation expenses, and hotel costs, making abortion services cost-prohibitive for many women. The National Women's Law Center's amicus brief , submitted on behalf of 48 organizations, focused on the negative impact of these provisions of HB 2 on women's economic security and equal participation in social and economic life.

In an opinion authored by Justice Breyer, the Supreme Court struck down both provisions, holding that the admitting privileges and ambulatory surgical center requirements imposed an undue burden on the constitutional right to decide whether to have an abortion. Specifically, the Court rejected the state's argument that courts must defer to the Texas legislature's assertion that the laws were necessary to protect women's health. Instead, the Court ruled, courts must determine whether laws restricting abortion actually serve any benefit. Looking at HB 2, the Court found the challenged provisions "vastly increase[d] the obstacles confronting women seeking abortions in Texas without providing any benefit to women's health."

In a concurring opinion, Justice Ginsburg emphasized that HB 2 would have the effect of reducing the number of clinics and doctors allowed to provide abortion services in Texas. She asserted that the law's purported health benefits were only a pretext for the state's true intent of blocking women's access to abortion, declaring that "it is beyond rational belief that HB 2 could genuinely protect the health of women, and certain that the law would simply make it more difficult for them to obtain abortions."

In striking down the challenged provisions of HB 2, the Court reaffirmed more than four decades of precedent and clarified that states cannot use false pretenses to pass laws aimed at making it difficult—if not impossible—to access abortion. The Court's decision is an important step towards ensuring that a

woman can access abortion and make the decisions about what is best for her health, family, and future.

Court Sends Challenge to Women's Birth Control Access Back to Lower Courts

In ***Zubik v. Burwell***, the Court vacated the decisions of nine lower courts and remanded for further consideration, without ruling on the merits or resolving whether women can access insurance coverage for birth control no matter where they work. This action means that the litigation is ongoing.

As part of the Affordable Care Act's (ACA) effort to ensure health insurance meets women's health needs and improve women's health outcomes, the law requires insurance coverage of certain women's preventive health services, including birth control, without any cost-sharing (such as co-payments or deductibles). The birth control benefit, which became effective in 2012, requires coverage of all Food and Drug Administration (FDA)-approved methods of birth control, sterilization, and related education and counseling without cost-sharing.

In implementing the ACA's birth control benefit, the Obama Administration created an accommodation for certain non-profit organizations with religious objections to birth control. The accommodation allows objecting entities to exclude birth control coverage from their employer- or school-based health insurance by notifying either the insurance provider or the federal government of its objections. At the same time, the insurance company or a third party administrator (TPA) separately provides the contraceptive coverage directly to the women, without the participation of the objecting entity.

Some objecting entities challenged the accommodation, claiming that the accommodation itself violates the Religious Freedom Restoration Act (RFRA). RFRA prevents the federal government from imposing a substantial burden on the exercise of a person's religious beliefs unless doing so furthers a compelling government interest through the least restrictive means for advancing that interest. Eight of the nine federal courts of appeals that heard these cases found that the accommodation is consistent with RFRA.

After oral arguments, the Court requested supplemental briefing by the parties as to whether birth control coverage could be provided to women through the objecting entities' insurance companies without any notice from the objecting entities. In its *per curiam* opinion, the Supreme Court declined to rule on the merits of the case, instead stating that the parties both confirmed in their supplemental briefing that this resolution was possible. The Court remanded the cases to the lower courts to determine how to proceed in a manner that "accommodates petitioners' religious exercise while at the same time ensuring that women covered by petitioners' health plans receive full and equal health coverage, including contraceptive coverage."

In July, the government requested that the lower courts withhold further action in the cases while it solicited feedback on potential resolutions from all affected individuals and organizations, both those that are and are not parties to the litigation, through a Request for Information (RFI) in the Federal Register. Comments on the RFI are due Sept. 20, 2016. At the same time, the government indicated that where it has the necessary information obtained through the litigation, it will begin to notify insurance issuers and/or TPAs of their obligation to pay for birth control for women enrolled in the objecting entities' plans. Ultimately, the litigation remains ongoing.

Shorthanded Court Fails to Reach Decision on Presidential Immigration Policy, Impacting Millions of Families

In ***United States v. Texas***, the Court was divided, 4-4. This result, without an opinion, had the effect of allowing a Texas district court's nationwide injunction to stand, blocking two executive immigration initiatives that would affect millions of immigrants across the country.

In November 2014, President Obama announced several executive immigration initiatives, among them Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) and expanded Deferred Action for Childhood Arrivals (DACA). DAPA would have allowed certain children who came to the U.S. as children and undocumented parents of U.S. citizen or lawful permanent resident children to apply for "deferred action" to receive temporary permission to remain in the U.S. These two executive orders would have allowed millions of immigrants to apply for protection from deportation and for a work permit.

Texas and a number of other states challenged DAPA and expanded DACA in federal district court. In February 2015, a district court in Texas issued a nationwide order blocking the implementation of DAPA and expanded DACA. The Obama Administration appealed this ruling to the U.S. Court of Appeals for the Fifth Circuit. On November 9, 2015, a divided panel of the Fifth Circuit affirmed the district court's order. The Obama Administration then appealed to the Supreme Court.

Because the Court was unable to reach a majority decision, the nationwide injunction put in place by the lower court will continue in effect as the lower court challenge moves forward. However, the Obama Administration has asked the

Court to rehear the case once a ninth Justice is confirmed.

Victory Validates Importance of Diversity Policies by Colleges and Universities

In ***Fisher v. University of Texas at Austin***, in a 4-3 decision authored by Justice Kennedy, the Court upheld the University of Texas's race-conscious admissions program as lawful under the Equal Protection Clause.

In 2013, the Supreme Court first heard Abigail Fisher's challenge to the University of Texas at Austin's undergraduate admissions policy. Under this policy, the University automatically accepted Texas high school seniors who graduated in the top ten percent of their high school classes. This phase of the process constituted about 80 percent of admitted students. The remaining 20 percent of those accepted were selected using a holistic analysis of the applicant, which included consideration of race, among many other factors. In its 2013 decision in *Fisher I*, the Court held that the U.S. Court of Appeals for the Fifth Circuit failed to apply the correct legal standard in evaluating the constitutionality of the admissions policy and sent the case back to the lower court. Upon further review, the Fifth Circuit once again upheld the University's admissions program as narrowly tailored to advance the University's compelling interest in diversity.

This term, in *Fisher II*, the Supreme Court reviewed the Fifth Circuit's application of the strict scrutiny standard to the University's admissions policies. The University argued that its policy was an essential tool in recruiting a diverse incoming class. As underscored in an amicus brief filed by the National Women's Law Center on behalf of over 30 organizations, promoting diversity in higher education settings helps break down racial stereotypes as well as stereotypes on the basis of sex, sexual orientation, and gender identity.

The Court held that the University's race conscious admissions policy withstood strict scrutiny because the University provided a "reasoned, principled explanation for its decision… [and was] written after a year-long study revealed that its race-neutral policies and programs did not meet its goals." In the majority opinion, Justice Kennedy noted that "the University articulated concrete and precise goals—*e.g.*, ending stereotypes, promoting 'cross-racial understanding,' preparing students for 'an increasingly diverse workforce and society,' and cultivating leaders with 'legitimacy in the eyes of the citizenry'—that mirror the compelling interest this Court has approved in prior cases."

The Court's decision recognized the value of diversity in higher education and the need to create equal opportunities for all students. Race-conscious admissions policies, like the University of Texas at Austin's, help to break down stereotypes that continue to disadvantage people of color, specifically including women and LGBT persons of color; prepare students to succeed in a diverse world; and advance the state's interests in nurturing future leaders of business and government.

A Divided Court Fends Off a Challenge to Public Sector Unions

The judgment of the Ninth Circuit Court of Appeals was affirmed by an equally divided 4-4 Court in ***Friedrichs v. California Teachers Association***, with the effect that public employees who enjoy the increased wages, benefits and other protections a union negotiates can still be required to contribute their fair share to the cost of securing those benefits and protections, as the Court held nearly 40 years ago. In the absence of such provisions, many individuals would decline to pay union dues while still seeking to take advantage of union services, thus weakening the ability of public sector unions to represent everyone in the workplace.

In 1977, the Court held in *Abood v. Detroit Board of Education* that public teachers unions could require "fair share fees" from everyone the union represents. Because a union is charged with representing all employees, even those who opt not to join the union, the Court held that unions could requires the non-members to pay a fee to the union to contribute to the costs to the union in securing the benefits of representation, i.e. a "fair share" fee.

In *Friedrichs*, the petitioners attempted to place new obstacles in the way of public employees coming together in unions by arguing that this fee arrangement violated the First Amendment; the Ninth Circuit disagreed, holding that the fee was permitted by *Abood* and did not violate the free speech rights of employees who chose not to join the union. The Supreme Court's split decision allows the Ninth Circuit decision to stand and will protect the ability of public sector unions to engage in effective representation of behalf of employees, thus yielding improved economic opportunities for all workers. Union representation has been especially beneficial for women, people of color, and LGBT employees, as noted in an amicus brief filed by the National Women's Law Center in collaboration with over 70 other organizations. For example, women represented by public sector unions are paid 24 percent more, experience a smaller gender wage gap, and are more likely to participate in employer-based health insurance than their unrepresented counterparts.

Decision Protects Victims of Employment Discrimination Facing Constructive Discharge

In a 7-1 opinion authored by Justice Sotomayor, the Court

ruled in ***Green v. Brennan*** (formerly listed as *Green v. Donahoe*) that when an employee alleges that he or she faced discrimination that would have compelled a reasonable person to resign—i.e., "constructive discharge"—that the time limit to initiate a claim challenging that discrimination begins to run only after the employee actually resigns.

Marvin Green, an employee for the Postal Service, filed a formal charge with the Post Office's Equal Employment Opportunity Office when he suspected that he was passed over for a promotion because of his race. Once he filed his complaint, Mr. Green's supervisors threatened him with criminal prosecution for a baseless charge and suspended him without pay or prior notice, and he eventually resigned. Mr. Green filed his constructive discharge suit 41 days after the date his resignation became effective, arguing that his employer was motivated by race and sought to retaliate against him for his pervious complaint. This was within the 45-day limitations period for initiating a complaint. However, the Postal Service asserted the 45-day window for filing the complaint began on the date the employer had last acted in a discriminatory or retaliatory manner, not the date the resignation became effective, in which case Mr. Green's claim would not be considered timely and he would not be allowed to proceed. As noted in an amicus brief coauthored by the National Women's Law Center and the NAACP Legal Defense and Education Fund, one problem with the Postal Service's interpretation is that an employee is not in a position to know what constitutes the "last allegedly discriminatory act giving rise to the resignation" until the employee actually resigns. Moreover, sometimes an employer's discrimination will take the form of a failure to act, as when an employer does not address ongoing sexual or racial harassment by coworkers, further complicating application of a rule that required the time limit for filing a constructive discharge claim to run from the employer's last discriminatory act.

In its decision, the Supreme Court held that "[f]or a constructive discharge, the claim does not exist until the employee resigns." Explaining that a constructive discharge requires a plaintiff to prove both that "he was discriminated against by his employer to the point where a reasonable person in his position would have felt compelled to resign," and that "he actually resigned," the Court held that a plaintiff does not have a "complete and present" cause of action until after he actually resigns. Accordingly, the Court ruled, because the limitations period ordinarily cannot begin to run until a plaintiff has a "complete and present cause of action," the limitations period for filing a constructive discharge claim does not begin until the date an employee actually resigns.

The Court's ruling is an especially important victory for women, as the majority of constructive discharge claims are brought in sex discrimination cases, frequently in cases challenging hostile environment sexual harassment.

Protecting the Right of Employees to Come Together to Challenge Employers in Court

In a 6-2 opinion authored by Justice Kennedy, the Court ruled in ***Tyson Foods, Inc. v. Bouaphakeo*** that a class was properly certified to bring a lawsuit against Tyson Foods for wage theft, despite differences in the extent of injury and damages claims among members of the class.

The plaintiffs in *Tyson Foods* had to put on special safety equipment, which Tyson claimed would take workers about four minutes. The company only paid its workers for those four minutes, although in practice, it took the workers much longer to put on and take off the equipment. Tyson's workers successfully banded together to sue the company as a class for the unpaid time. And they won—which meant the workers were entitled to be paid for the additional time they had spent putting on and taking off their gear over and above four minutes.

Because Tyson did not keep records of the actual time workers spent putting on and taking off the safety gear, the plaintiffs presented statistical evidence at trial to calculate how much time the workers had spent, and thus how much in wages they were owed. Using this data, in addition to employees' individual time sheets and salary information, the lower court calculated back pay separately for each individual in the class. Tyson challenged the court's calculations, arguing that the individual workers should each have brought their own case because the differences in the time it took particularly individuals to put on and take off the gear—and the use of statistics to determine award amounts—made the class action inappropriate.

The Supreme Court held that despite individual differences among members' injuries and damages, the certification of the class for the purpose of bringing this lawsuit was permissible. Justice Kennedy, writing for the majority, noted that "[i]n many cases, a representative sample is the only practicable means to collect and present relevant data establishing a defendant's liability."

The Court's decision strengthened the ability of individuals to come together to challenge corporate wrongdoing, rather than separately incurring the time and expense of filing individual claims. Making it easier to bring class action suits also makes it easier for workers to secure representation, as attorneys are more likely to challenge large corporate entities when they can leverage their time and resources to represent a group.

Looking Ahead

Advocates and legal experts will be monitoring the ongoing litigation in *United States v. Texas* and the cases consolidated in *Zubik v. Burwell*, as well as pending cases involving the interpretation of the Religious Freedom Restoration Act in the wake of the Court's 2015 decision in *Hobby Lobby v. Burwell*, the rights of transgender students in schools, and U.S. citizenship laws that treat children born abroad differently if their father is a U.S. citizen than if their mother is a U.S. citizen. In addition, it is possible that additional challenges to state abortion restrictions could be brought, and come before the Supreme Court, in the wake of *Whole Woman's Health*.