



JUDGES & THE COURTS

SUPREME COURT PREVIEW: 2016-2017 TERM

The Supreme Court will begin its 2016-2017 Term as it finished the last one: short one Justice.

The nomination of Judge Merrick Garland, Chief Judge of the U.S. Court of Appeals for the District of Columbia Circuit, to be an Associate Justice of the Supreme Court, has been pending for over 200 days.

Republican leaders in the Senate have refused to schedule a Senate Judiciary Committee hearing on the nomination of Judge Garland, and Senate Majority Leader McConnell continues to insist that the Senate will not take action on the nomination this year. This is unprecedented—no nominee to the Supreme Court has waited longer for Senate consideration.

A number of decisions by the short-handed Court last Term demonstrate that the absence of a full complement of Justices impacted the administration of justice. During the second half of the 2015-2016 Term, the Court was unable to render substantive decisions in several critical cases. In some instances, this meant that women across the country continue to face a patchwork of laws, depending on their state of residence. As the Court begins its 2016-2017 Term, the potential for equally divided decisions remains, and it has been surmised that the Court has limited the number and kind of cases that it has taken for review as a result.

Nevertheless, several of the cases the Court has agreed to hear this Term have critical implications for women's legal rights and protections.

Lynch v. Morales-Santana

In 2011, in *Flores-Villar v. United States*, an equally divided Supreme Court affirmed the Ninth Circuit's ruling that a law establishing different physical-presence requirements for

awarding citizenship to the children of unmarried fathers than to the children of unmarried mothers did not violate the Equal Protection Clause. (Only eight Justices participated because Justice Kagan recused herself, based on her participation in the litigation below while she served as Solicitor General.) This Term, in *Lynch v. Morales-Santana*, the Court will review a Second Circuit decision that reached the opposite conclusion.

Luis Morales-Santana was born outside the United States, to unmarried parents. His father was a U.S. citizen, and his mother was not. Morales-Santana was legitimated when his parents married, and was admitted to the U.S. as a lawful permanent resident. He was later ordered to be deported, after being convicted of a number of felonies. He appealed on the grounds that he was a U.S. citizen, by virtue of his father's citizenship. His appeal was denied based on statutory requirements that a child born abroad out of wedlock could only be granted citizenship if the citizen father had been physically present in the U.S. for at least ten years - five of which needed to be after the father had turned 14 - and Morales-Santana's father had not met the latter requirement. In contrast, under the law, an unmarried mother only needed to have been physically present in the U.S. for one continuous year before the child's birth to confer citizenship to her child born abroad. Morales-Santana challenged this provision of the law as violating the Equal Protection Clause's prohibition against laws that discriminate on the basis of sex. The Second Circuit Court of Appeals agreed, and ruled that Morales-Santana was a citizen as of birth. The United States appealed, in part because the Second Circuit's decision conflicted with the Ninth Circuit's earlier decision in *Flores-Villar*.

In its *amicus* brief in *Flores-Villar*, the Center noted that sex-based residency requirement of this statute embodies the inaccurate, outdated, and harmful stereotype that unmarried fathers don't have meaningful relationships with their children. The Center joined [an amicus brief authored by the American Civil Liberties Union](#) making similar arguments in the instant case. The Court's review of *Morales-Santana* provides



another opportunity to declare such stereotype-based sex distinctions to be unconstitutional. The question will be whether, with only eight Justices currently sitting, the Court will be able to reach a decision on the merits this time.

Trinity Lutheran Church of Columbia v. Pauley

In this case, the Court will decide whether the exclusion of churches from a secular grant program violates the Free Exercise and Equal Protection Clauses of the Constitution. The program at issue, Missouri's Scrap Tire Program, competitively awards grants to non-profit organizations for the purchase of recycled tires to resurface playgrounds. The Missouri Department of Natural Resources administers the program, which is funded through a fee collected on the purchase of all new tires.

Trinity Lutheran Church, which runs a preschool that "teaches a Christian world view...including the Gospel," on its property, applied for the Scrap Tire Program in order to resurface the preschool's playground. Although its application ranked fifth out of 54 reviewed, the state declined to award the church a grant on the grounds that doing so would violate the provision of Missouri's state constitution that states, "no money shall be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion." Trinity Lutheran challenged this decision in federal court. While both the district and appellate courts agreed with the state, the Supreme Court decided to hear Trinity Lutheran's challenge.

Trinity Lutheran argues that excluding churches from the Scrap Tire Program violates both the Free Exercise and Equal Protection Clauses of the Constitution by prohibiting churches from fully engaging in religious exercise. In addition, Trinity Lutheran argues that the law treats churches differently from other applicants to the program and thus must pass strict scrutiny, the highest level of review, requiring the state to show that the program furthers a compelling government interest and uses the least restrictive means to do so.

This case arises amidst an intense debate, in the wake of the Court's decision around religious exemptions to the Affordable Care Act in *Burwell v. Hobby Lobby Stores* as well as its ruling last Term in *Zubik v. Burwell*. The Court's ruling in this case could have serious implications for preventing tax dollars from flowing to groups that discriminate on the basis of sex, sexual orientation, or religion.

Bank of America v. Miami* and *Wells Fargo & Co. v. Miami

The issue in these two consolidated cases is whether city governments may sue mortgage lenders and housing

operators to enforce the antidiscrimination protections of the Fair Housing Act.

The city of Miami alleged that the banks targeted African American and Latino customers for predatory mortgages. The city asserted that these riskier loans created a foreseeable result: foreclosures and lowered property values, which in turn resulted in lost tax revenues, increased need for public services, and other economic damages for the city. The lower court hearing the underlying cases dismissed them on the grounds that the city could not bring such actions under the FHA, the question now before the Court, but the Eleventh Circuit reversed.

Women of color were disproportionately targeted in predatory mortgage schemes during the housing crisis. Although the specific allegations in this case involve race discrimination, the Fair Housing Act also prohibits discrimination by mortgage lenders on the basis of sex (as well as on the basis of color, religion, national origin, familial status, or disability). Accordingly, the ability of municipalities (or other government entities) to bring claims under the FHA could impact the protections that the statute provides to women.

National Labor Relations Board v. SW General

In 2014, in *National Labor Relations Board v. Noel Canning*, the Court considered the validity of the President's appointment of National Labor Relations Board members, under the Recess Appointments Clause of the Constitution, while the Senate was in recess during a Congressional session, and found such appointments to be invalid. This Term, in *National Labor Relations Board v. SW General*, the Court considers the question of whether, under statute, the President may name certain officials who would otherwise require Senate confirmation in an acting capacity.

SW General challenged an NLRB unfair labor practice complaint on the grounds that the individual serving as Acting General Counsel of the NLRB was not properly appointed under statute. When an office requiring Presidential appointment and Senate confirmation is vacant, the Federal Vacancies Reform Act allows the first assistant to the vacant office to be named as the "acting" officer. The statute provides for three alternative ways that the President can temporarily fill the vacancy: by designating someone who holds another Senate-confirmed appointment, a high-ranking long-term employee within the agency, or a person who has been nominated for reappointment to the office, but whose term has expired. The statute further provides that a person may not serve as an acting officer under this section if the person "has not served in the position of first assistant to the office" for at least 90 days. SW General persuaded the D.C. Circuit that the 90-day requirement applied to the alternative



methods of temporarily filling a vacant office, rather than just the automatic mechanism set forth for first assistants – contrary to the interpretation of three Presidents in the twenty years since the FVRA was enacted. The Ninth Circuit reached a similar conclusion in a recent case as well.

The NLRB petitioned for certiorari, and the Supreme Court took the case.

The NLRB’s decisions are in many instances critical to vindicating the rights of low-wage working women. Although the challenged decisions and actions taken by the recess-appointed Board members were resolved following the Court’s 2014 decision in *Noel Canning*, that process strained the resources of the NLRB and detracted from its adjudication of new cases. If the Court were to invalidate the NLRB’s Acting General Counsel to carry out that position, its decision likewise could call into question orders and decisions issued during that official’s tenure. Such a decision, perhaps even more importantly, could impact other Presidential appointments of officials in an “acting” capacity, and the ability of future Presidents to manage Executive Branch appointments in the face of a recalcitrant Senate.

Looking Ahead

In addition to the cases that have already been granted for the upcoming Term, there are other cases working their way through the federal appellate courts that could reach the Supreme Court this Term. For example, following the Court’s actions last Term, cases involving a challenge to the birth control benefit under the Affordable Care Act are proceeding. In addition, the Court stayed a Fourth Circuit decision regarding the rights of transgender students pending consideration of a petition for review. Other cases, including challenges to state abortion restrictions in the wake of the Court’s decision in *Whole Women’s Health v. Texas* last Term, may come before the Court this Term as well.

Women will be watching, both the Court’s deliberations and decisions in these and other cases critical to women, and the Senate’s treatment of the individual who has been named to fill the vacant seat on the Court.

