THE SUPREME COURT IN 2016

In the coming months, the Supreme Court will decide a number of cases with critical implications for women's health, educational opportunity, and economic security. Decisions in all of these cases are expected by the end of June 2016.

Whole Woman's Health v. Hellerstedt. In this case, the Court will have to answer the question of how far states can go in their attempts to make it difficult—or even impossible—for women to exercise their constitutional right to decide whether to have an abortion.

In 1992, the Supreme Court decided *Planned Parenthood v. Casey*, holding that the government may not impose an undue burden on a woman's right to decide whether to have an abortion. Under this standard, restrictions that have the purpose or effect of "plac[ing] substantial obstacles in the path of a woman seeking an abortion" are unconstitutional.[1] Since Casey, states have been trying to push the limits of the undue burden standard and make an end run around the Constitution by passing laws designed to shut down clinics and make it impossible for women to get the essential reproductive health care they need.

In 2013, the Texas legislature passed one such law, HB 2. Among other restrictions on abortion, the law imposes arbitrary and burdensome requirements on abortion clinics and providers under false pretenses of promoting women's health. Before the law was passed, more than forty clinics located throughout Texas served the 5.4 million women of reproductive age living in the state. If the challenged provisions of the law are upheld, at most only ten clinics will remain, forcing many Texas women to travel hundreds of miles to access a clinic.

Following a challenge brought on behalf of healthcare providers in the state, a federal district court permanently blocked two of the most harmful restrictions in HB 2. The U.S. Court of Appeals for the Fifth Circuit overturned that ruling, ignoring substantial evidence that the law's purported health benefits were nothing more than a pretext to close clinics and block women's access to abortion. The U.S. Supreme Court stepped in on an emergency basis to stay the Fifth Circuit's decision and ensure many of the state's clinics could remain open while the lawsuit continues.

Clinic closures as a result of HB 2 impose heavy burdens on women seeking to exercise their constitutional right to obtain an abortion, including traveling drastically long distances to reach a clinic. Additional travel drives up the indirect costs of getting an abortion, such as child care, time off work, gas or other transportation expenses, and hotel costs. The need to save additional money means that women will be forced to obtain abortions later in pregnancy, which increases the risks and the cost of abortion. Some women will never be able to save enough money for the procedure and associated costs and some, like low-wage workers with inflexible schedules and little ability to absorb extra costs, will be put in an untenable position in which the price of obtaining an abortion is a financial crisis. If this law were to go fully into effect, many women in Texas would be unable to exercise their constitutional right to abortion.

In *Whole Woman's Health*, the Court has the opportunity to re-affirm more than four decades of precedent and make clear that laws that impose such heavy burdens on women's access to abortion are unconstitutional.

The National Women's Law Center submitted an *amicus* brief on behalf of 48 organizations in support of the health care providers challenging the law. The brief highlights the negative impacts that HB 2 has on women's economic security and equal participation in social and economic life. These effects deprive women of equal dignity promised by the Constitution, unduly burdening women's reproductive decision-making. Oral argument is scheduled for March 2, 2016.

Zubik v. Burwell. The challenge at issue in this case was brought by non-profit organizations that want to make it difficult, if not impossible, for their female employees to access essential birth control coverage.

As part of the Affordable Care Act's (ACA) effort to make important preventive services more available, birth control must be covered by insurance plans without any additional costs to individuals, like co-payments or deductibles. The benefit went into effect in August 2012, and 55 million women are now eligible for this important benefit.[2] The benefit has already had an immediate impact on women's out-of-pocket spending – in 2013, women saved more than $1 billion on the birth control pill alone.[3] The benefit allows a woman to choose the most appropriate method without cost posing an obstacle, so that she is able to get the method that she and her health care provider agree is right for her, and it also means that some women will be able to use birth control for the first time.

In implementing the birth control benefit, the Obama Administration decided to accommodate certain non-profit organizations with religious objections to birth control. The "accommodation" allows an objecting entity to opt out of including birth control in its employer- or school-based insurance plan. The objecting employer only has to fill out paperwork to notify either its insurance plan or the federal government of its objections. If it does so, its health insurance plan does not have to include birth control. The insurance company separately provides the benefit directly to the women without the participation of the objecting employer.

Some non-profit employers and schools have gone to court claiming that the accommodation itself violates the federal Religious Freedom Restoration Act (RFRA). RFRA prevents the government from imposing a substantial burden on the exercise of a person's religious beliefs unless it furthers a compelling government interest and uses the least restrictive means for advancing that interest.

In 2014, the Supreme Court decided *Burwell v. Hobby Lobby Stores, Inc.,* in which it considered a RFRA challenge to the birth control benefit by for-profit employers, which did not have access to the accommodation. In a 5-4 decision, the Supreme Court held that certain closely-held employers could claim an exemption under RFRA from the requirement to include birth control in their health insurance plans. In reaching this conclusion, the Court accepted the compelling government interest in ensuring women receive birth control without additional costs and specifically pointed to the very accommodation already provided to the non-profits as demonstrating that a less restrictive means was available for employees to receive birth control coverage.

Since the *Hobby Lobby* decision, eight federal courts of appeals have considered challenges to the accommodation brought by non-profit employers and schools. Seven of these circuit courts have found that the accommodation is consistent with RFRA, rejecting the objecting employers' claims. Only one circuit court of appeals has found otherwise. The Supreme Court agreed to hear seven cases brought by non-profit organizations against the accommodation, consolidating them into one case as *Zubik v. Burwell.*

The birth control benefit advances women's health, closes gender gaps in health care, and promotes women's equality. Following the Court's decision in *Hobby Lobby*, the federal government extended the accommodation to closely-held for-profits with religious objections like Hobby Lobby. Accordingly, a ruling in *Zubik* could not only affect the employees who work at objecting non-profits, but also the employees that work for for-profit companies that are now part of the accommodation post- *Hobby Lobby*. Women deserve and need real access to birth control, regardless of who their employer may be.

Oral argument has not yet been scheduled in this case.

Fisher v. University of Texas at Austin. The Court is once again considering the constitutionality of public university admissions policies that take race into account. Two terms ago, the Supreme Court first heard *Fisher,* which challenged the University of Texas at Austin's consideration of race to promote diversity in admissions. The University's admissions plan 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 admittees was determined by engaging in a holistic analysis, one which included race as one of many factors, of students who did not qualify for admissions under the "top ten percent" plan. The challengers argued that the consideration of race as part of this holistic review violated the Equal Protection Clause.

The National Women's Law Center filed an *amicus* brief in *Fisher I*. In the brief, NWLC argued that racial diversity in higher education is important to women, and especially women of color, because it breaks down stereotypes that feed and perpetuate inequality, including intertwined race and gender stereotypes. Accordingly, state universities must have the freedom to consider race, along with all the other aspects of a student's background and identity that go into its admissions decisions, in order to assemble classes that prepare students to succeed in a diverse world and that advance the state's interests in nurturing future leaders of business and government.

In its decision in 2013, the Supreme 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, because of the importance of student diversity in allowing a university to achieve its educational mission. The Court held, however, that the Fifth Circuit had failed to apply the correct legal standard when evaluating the constitutionality of UT Austin's admissions criteria. So it sent the case back to the lower courts, instructing them to consider whether UT had shown that diversity could not be achieved by using other, race-neutral alternatives.

Upon subsequent review, the Fifth Circuit once again upheld the University's admissions program. Citing state educational data, the Fifth Circuit found that there are "stark" gaps in "the quality of education available" between racially-integrated high schools and non-integrated high schools which justified the inclusion of race in the holistic analysis. The Supreme Court then decided to review the Fifth Circuit's most recent decision.

It should be noted that *Fisher II* may lack the jurisdictional requirement of a real "case or controversy" because the plaintiff's case is moot—UT has made a strong showing that she would not have been accepted even if the admissions process had not considered race at all. In addition, Justice Elena Kagan will likely recuse herself from hearing the case, as she did originally (because she had worked on the case as Solicitor General).

The National Women's Law Center, joined by Gay & Lesbian Advocates & Defenders, and Lambda Legal Defense and Education Fund, and 30 other organizations focused on combating discrimination on the basis of sex, sexual orientation, and gender identity, filed an *amicus* brief in support of respondents. The brief described the benefits of diversity in higher educational settings, and argued that racial diversity helps break down damaging stereotypes that restrict opportunities for women and LGBT individuals of color. Oral argument in this case took place December 9, 2015.

Friedrichs v. California Teachers Association. *Friedrichs* presents the issue of whether the Constitution permits public employee unions to collect fair share fees from non-union workers who share in the benefits won through union representation. This issue is critical to the health of public sector unions.

In a case decided in 1977—*Abood v. Detroit Board of Education*—the Court held 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 require 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. These fees do not fund political work undertaken by the union, but instead cover costs that the union incurs in the process of bargaining on the employees' behalf.

In 2014, the Court heard *Harris v. Quinn,* which involved an Illinois state law that authorized home care workers paid by the Medicaid program to decide, by majority vote, whether to join a union. Illinois provided that, if a majority of workers voted to unionize, nonmembers would not be required to join the union or pay to support political activities, but could be required to pay fair share fees. Justice Alito's majority opinion held that home health workers, as individuals who were paid with state Medicaid funds, were not "full-fledged" public employees. Accordingly, the 5-4 Court held, the union violated the First Amendment when it required non-union members to pay fair share fees. Even though Justice Alito criticized *Abood* in the majority opinion, however, the Court did not overrule the 37-year old precedent.

But in *Friedrichs*, the question squarely before the Court is whether to overturn *Abood.* The Court has been asked to consider whether the collection of fair share fees from non-union public employees violates free speech rights. If the Court finds that it does, the ramifications for public unions would be significant: specifically, without fair share fees, public employee unions would be financially crippled.

Union membership is critical to achieving better pay and benefits for workers—especially women. In 2014, the Bureau of Labor Statistics found that union members had median usual weekly earnings of $970, compared to $763 for workers not represented by a union. And for women, the effects are especially great: female union members who work full time typically make $904 per week, which is $217 more than female non-union workers. Moreover, while there is a 10.9 percent wage gap between female and male union workers, the wage gap between female and male non-union workers face is even larger (18.2 percent). Further, union representation has had a particularly beneficial impact on women of color. Among full-time workers, African American women union workers typically make 34 percent more (or $202 more per week) than African American non-union workers, and there is a differential of 46 percent for Latina union workers, who make $237 more per week than Latina non-union workers.

The National Women's Law Center, along with the Leadership Conference on Civil and Human Rights, the Human Rights Campaign, and 70 other organizations, filed an *amicus* brief

in support of respondents. The brief argued that strong public sector unions have yielded critical economic opportunities for all workers, and for women, people of color, and LGBT workers in particular. Oral argument in *Friedrichs* took place January 11, 2016.

Green v. Brennan (formerly listed as *Green v. Donahoe*). This case asks the Court to decide whether, under Title VII, the time limit for bringing a constructive discharge claim begins to run when an employee resigns or at the time of an employer's last discriminatory act prior to the resignation. The Court's decision in this case could raise new obstacles for individuals who faced intolerable discrimination in the workplace that forced them to quit their jobs.

A constructive discharge occurs when an individual's work environment has become so intolerable that the worker has no real choice other than to quit. Leaving her job is a reasonable response to extreme and unrelenting hostility or harassment in the workplace.

Marvin Green, a postmaster 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, he alleged, his situation at work only got worse. According to his complaint, Mr. Green's supervisors threatened him with criminal prosecution for a baseless charge, and suspended him without pay and without prior notice. He eventually resigned in February 2010, effective the first day of March 2010, and filed his constructive discharge suit forty-one days later. Federal employees like Mr. Green must file discrimination or retaliation complaints within 45 days of experiencing the challenged discrimination or retaliation.

The question before the Court is whether the 45-day limit should be counted from the date of Mr. Green's resignation, or that of the last action by the Postal Service that precipitated his resignation. If the time for filing a claim is considered to have begun when he resigned, then Mr. Green's claim is timely and his case can move forward. But if the Court decides that the clock for filing a constructive discharge claim began at the time of the employer's last discriminatory act, Mr. Green's case will be time-barred.

As important as this case is to Mr. Green, its significance reaches far beyond him. The majority of constructive discharge claims are brought in sex discrimination cases, frequently in cases challenging hostile environment sexual harassment, and thus the outcome of this case is particularly important for women workers.

The National Women's Law Center coauthored a brief with the NAACP Legal Defense and Education Fund arguing that the employee's date of resignation is the appropriate moment for starting the clock for the time limitation on filing lawsuits. After all, 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. To begin counting against the time for filing a suit at "the last discriminatory act" would therefore prevent many employees from seeking justice for discrimination faced in the workplace.

Oral argument in this case took place November 30, 2015.

Tyson Foods, Inc. v. Bouaphakeo. This case raises the question of whether liability and damages may be calculated using statistical averages in class actions or collective actions; and whether a class may be certified or maintained for a class action or collective action when some members did not suffer any injury and do not have a legal right to damages.

The substantive lawsuit in *Tyson Foods* involves wage theft. Wage theft is defined as when an employer, in violation of minimum wage or overtime laws, refuses to pay a worker her full earnings for the time that she worked.

The plaintiffs in *Tyson Foods* had to put on special safety equipment when working in particular areas of their Iowa meat processing plant. Tyson claimed that it would take workers about four minutes to put on or take off that gear, but in reality, the time to complete this task far exceeded four minutes. Tyson only paid its workers for the four minutes. Tyson's workers banded together to sue the company as a class and collective action 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.

Tyson did not keep records of the actual time workers had spent putting on and taking off the safety gear. So in order to calculate how much time the workers had spent (and thus how much in wages they were owed), at trial, the class presented statistical evidence. They calculated the average amount of time the task took for employees, based on 744 observations of employees putting on and taking off the safety gear. Using this average, awards were calculated for individual class members, using the individual's time sheets and pay data. In this way, backpay was calculated separately for each individual in the class based on his or her individual schedule and hourly rate. Where class members had already received full compensation, they received no award. The jury awarded a total of $5.8 million dollars to the class members, and the Court of Appeals affirmed the award.

The Supreme Court, however, agreed to hear Tyson's challenge. Tyson argues that differences in the time it took particular individuals to put on and take off the gear—and the use of statistics to determine award amounts—make both a class action and collective action inappropriate, and that the individual workers should each have brought their own case.

Statistics have long been used in class action suits to determine the scope of wrongdoing or the amount of damages owed to workers or consumers. If the Court were to rule that statistical evidence could not be used to calculate individual losses in a class action, it would be much more difficult for individuals to come together to challenge corporate wrongdoing. Tyson's argument ignores how difficult it would be for each individual worker in Tyson's meat processing plant to find an attorney to take on his or her huge corporate employer, in order to recover back wages that—while critically important to the worker—amount at most to a few thousand dollars in each individual case.

This is hardly an amount to tempt attorneys to spend the time and resources to litigate individual workers' cases. A class or collective action levels the playing field by allowing a large group of workers wronged in the same way to sue a corporation, with its tremendous advantage in finances and resources, together. Accordingly, the decision in this case will likely have a significant impact on individuals' ability to vindicate their rights against powerful corporations.

Oral argument in this case took place on November 10th.

The Supreme Court's decisions in these, and many other cases, will have a tremendous impact on women's legal rights for decades to come. In light of recent criticism that some of the male Justices have a "blind spot" when it comes to understanding the impact of their decisions on women, particularly close attention must be paid to these cases in the coming months.

1 *Planned Parenthood of Southeast Pa. v. Casey,* 505 U.S. 833, 878 (1992).

2 Dept. of Health and Human Servs., Office of the Assistant Sec'y for Planning and Evaluation, The Affordable Care Act is Improving Access to Preventive Services for Millions of Americans (May 2015) https://aspe.hhs.gov/sites/default/files/pdf/139221/The%20Affordable%20Care%20Act%20is%20Improving%20Access%20to%20Preventive%20Services%20for%20Millions%20of%20Americans.pdf.

3 Nora V. Becker & Daniel Polsky, Women Saw Large Decrease In Out-Of-Pocket Spending For Contraceptives After ACA Mandate Removed Cost Sharing, 34 HEALTH AFF. 1204, 1209 (2015).