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# The Supreme Court Vacancy: Why This Seat Matters for Reproductive Rights and Health

The current Supreme Court vacancy comes at a time of increasing attacks on our fundamental rights—including the right to abortion—and on laws that guarantee health care. Justice Breyer was a strong champion of the right to abortion and access to health care. His replacement must be someone who will carry on that legacy—people's ability to make decisions about their bodies, lives, and futures depends on it.

## Justice Breyer was a champion of abortion rights and access to health care

Justice Breyer was a forceful protector of health care and reproductive rights, including the right to abortion.

During his 26 years on the bench, Justice Breyer wrote for the majority every time the Supreme Court struck down an abortion restriction. In *Stenberg v. Carhart* (2000), he wrote the decision striking down a state law banning an abortion method with no exception for a pregnant person's health.<sup>1</sup> In 2016 and 2020 in *Whole Woman's Health v. Hellerstedt*<sup>2</sup> and *June Medical Services v. Russo*,<sup>3</sup> respectively, Justice Breyer wrote the decisions for the Court striking down state restrictions designed to shutter abortion clinics. His decisions for the Court laid out clearly how these kinds of abortion restrictions had no actual benefit but imposed considerable harm on people seeking abortion care.

In addition to his strong majority opinions protecting the right to abortion and people's ability to access it, Justice Breyer joined forceful dissents in cases where a conservative Supreme Court majority allowed politicians, employers, and others to take away people's access to reproductive health care. This included *Gonzales v. Carhart* (2007),<sup>4</sup> when the Supreme Court allowed a federal ban on an abortion procedure with no health exception, and *Whole Woman's Health v. Jackson* (2021),<sup>5</sup> allowing Texas's unconstitutional ban on abortion at six weeks of pregnancy to remain in effect. Justice Breyer also joined in dissent in *Burwell v. Hobby Lobby Stores Inc.* (2014)<sup>6</sup> when the Court allowed for-profit employers to refuse to provide insurance coverage of birth control as required by the Affordable Care Act.

Justice Breyer was instrumental in safeguarding the Affordable Care Act (ACA), which has been critically important to helping women obtain health care and health insurance and ending longstanding discriminatory practices.<sup>7</sup> Justice Breyer authored the majority opinion in *California v. Texas* (2021),<sup>8</sup> which upheld the validity of the ACA. And although he joined the majority in part in striking down the Medicaid expansion piece of the ACA in *National Federation of Independent Business v. Sebelius* (2012),<sup>9</sup> subsequent reporting has explained that he did so in order to save the Affordable Care Act more broadly.<sup>10</sup>

## A new justice must be committed to safeguarding fundamental reproductive rights and access to health care

Over the next few decades, a new justice is likely to consider a range of cases about people's ability to access health care and their fundamental rights to make decisions about their own bodies, medical treatment, health, and futures.

Courts are currently considering cases about a range of issues related to people's ability to access health care. These include cases about non-discrimination in health,<sup>11</sup> cases about whether providers can use religion to dictate patient care,<sup>12</sup> and cases about whether states can prohibit health care providers from helping individuals access gender-affirming care.<sup>13</sup> These cases—and others like them—could work their way up to the Supreme Court.

Additionally, litigation surrounding abortion rights and access will continue, whether or not the right to abortion survives the challenge currently being considered by the Supreme Court.<sup>14</sup> And if the current Court further erodes or overturns the right to abortion, there are likely to be challenges to other rights that share the same constitutional foundation as *Roe v. Wade*. This includes the right to contraception, the right to procreate, and the right to personal control of medical treatment.<sup>15</sup>

There is no doubt Justice Breyer's replacement will face an uphill battle for the majority on a Court that has been stacked with nominees hostile to reproductive rights and people's ability to access the health care they need. The nominee must be strong and firm in their commitment to upholding those rights in the face of great opposition.

But they will also play a key role in shaping the Court of tomorrow, and ensuring that the Constitution continues to protect individual liberty and equality, and the right of

all people to make decisions about their bodies, futures, and lives, including the right to use contraception, have an abortion, and access the health care they need.

### FOOTNOTES

1 530 U.S. 914, 920 (2000).

2 579 U.S. 582 (2016).

3 140 S. Ct. 2103 (2020).

4 550 U.S. 124 (2007).

5 142 S. Ct. 522 (2021).

6 573 U.S. 682, 739 (2014).

7 See, e.g., NAT'L WOMEN'S LAW CENTER, NEW DATA ESTIMATES 61.4 MILLION WOMEN HAVE COVERAGE OF BIRTH CONTROL WITHOUT OUT-OF-POCKET COSTS (2019), <https://nwlc.org/wp-content/uploads/2019/12/preventativeservices2019.pdf> (detailing that nearly 61.4 million women have insurance coverage of birth control without out-of-pocket costs due to the ACA); BRIGETTE COURTOT & JULIA KAYE, NAT'L WOMEN'S LAW CTR, STILL NOWHERE TO TURN: INSURANCE COMPANIES TREAT WOMEN LIKE A PRE-EXISTING CONDITION (2009), <https://nwlc.org/wp-content/uploads/2015/08/stillnowheretoturn.pdf>.

8 141 S. Ct. 2104 (2021).

9 567 U.S. 519 (2012).

10 Ian Millhiser, Retiring Justice Stephen Breyer's nearly 28 years on the Supreme Court, explained, VOX (Jan. 27, 2022), <https://www.vox.com/22262764/stephen-breyer-supreme-court-justice-abortion-biden>.

11 See, e.g., *Boston All. of Gay, Lesbian, Bisexual and Transgender Youth v. United States*, No. 20-11297, 2021 WL 3667760 (D. Mass. Aug. 18, 2021) (granting in part and denying in part motion to dismiss challenge to Trump Administration's 2020 Rule limiting the definition of discrimination in healthcare); see also *Whitman-Walker Clinic, Inc. v. U.S. Dep't of Health & Human Servs.*, 485 F. Supp. 3d 1 (D.D.C. 2020) (preliminarily enjoining portions of the 2020 Rule); *Washington v. U.S. Dep't of Health & Human Servs.*, 482 F. Supp. 3d 1104 (W.D. Wash. 2020) (denying motion to preliminarily enjoin the 2020 Rule); *Walker v. Azar*, 480 F. Supp. 3d 417 (E.D.N.Y. 2020) (preliminarily enjoining portions of the 2020 Rule); *Order Granting Unopposed Motion to Stay Proceedings*, *New York v. U.S. Dep't of Health & Human Servs.*, No. 1:20-cv-05583 (S.D.N.Y. Feb. 18, 2021) (stayed without decision); *Order Granting Unopposed Motion to Stay Proceedings*, *Chinatown Serv. Ctr. v. U.S. Dep't of Health & Human Servs.*, No. 21-cv-00331 (D.D.C. May 27, 2021) (stayed without decision).

12 See, e.g., *New York v. U.S. Dep't of Health & Human Servs.*, 414 F. Supp. 3d 475 (S.D.N.Y. 2019) (vacating Trump Administration rule that gave virtually any individual or entity involved in patient care the right to refuse to provide care based on personal beliefs), appeal stayed pending rulemaking, Nos. 19-4254, 20-31, 20-32, & 20-41 (2d Cir.); see also *Washington v. Azar*, 426 F. Supp. 3d 704 (W.D. Wash. 2019) (vacating Trump Administration rule), appeal stayed pending rulemaking, No. 20-35044 (9th Cir.); *Religious Sisters of Mercy v. Azar*, 513 F. Supp. 3d 1113 (D.N.D. 2021) (enjoining federal agencies from requiring objecting Catholic entities to perform or provide insurance coverage for gender-affirming healthcare), appeal pending, No. 21-1890 (8th Cir.).

13 See, e.g., *Brandt v. Rutledge*, No. 4:21-cv-00450, 2021 WL 3292057 (E.D. Ark. Aug. 2, 2021) (preliminarily enjoining Arkansas law prohibiting healthcare providers from providing or referring any individual under the age of 18 for "gender transition procedures"), appeal pending, No. 21-285 (8th Cir.).

14 NAT'L WOMEN'S LAW CENTER, DOBBS V. JACKSON WOMEN'S HEALTH ORGANIZATION: WHAT'S AT STAKE FOR ABORTION RIGHTS AND ACCESS (2022), [https://nwlc.org/wp-content/uploads/2022/02/NWLC\\_FactSheet\\_Dobbs-v.-Jackson-Womens-Health-Organization-Whats-at-Stake-FINAL-2.2.22.pdf](https://nwlc.org/wp-content/uploads/2022/02/NWLC_FactSheet_Dobbs-v.-Jackson-Womens-Health-Organization-Whats-at-Stake-FINAL-2.2.22.pdf).

15 NAT'L WOMEN'S LAW CENTER, EVEN MORE THAN ABORTION: THE CONSTITUTIONAL IMPORTANCE OF ROE V. WADE (2022), [https://nwlc.org/wp-content/uploads/2022/01/NWLC\\_FactSheet\\_Even-More-Than-Roe-FINAL-1.20.22-v2.pdf](https://nwlc.org/wp-content/uploads/2022/01/NWLC_FactSheet_Even-More-Than-Roe-FINAL-1.20.22-v2.pdf).