TAKE BACK THE COURT

The Supreme Court's Dismantling of Women's Rights Will Far Exceed the Demise of Roe v. Wade

February 2020

Executive Summary

- It is well understood that the Supreme Court may invalidate Roe v. Wade, the Supreme Court ruling that guarantees the constitutional right to an abortion.
- Perhaps less well understood is that the Court has already done considerable damage to statutory and constitutional protections ensuring that women can lead lives free from restrictions on their bodies, career choices, and family lives.
- And, the Court is poised to do much more damage to women's rights, far beyond striking down Roe v. Wade.
- In this report, we address eight areas of law and policy that impact women's ability to lead lives free from restrictions on their bodies, careers, and family lives: (1) reproductive justice; (2) health care access; (3) child care; (4) paid family leave; (5) sexual harassment; (6) workplace discrimination; (7) pregnancy discrimination; and (8) sexual assault prevention.
- We show that in three important areas of law and policy—reproductive justice, health care access, and sexual harassment— the Supreme Court has already done considerable damage to women's rights.
- We show that in all eight areas of law and policy that impact women's ability to lead lives free from restrictions on their bodies, careers, and family lives, the Court is poised to do considerably more damage.
- The Supreme Court's dismantling of women's rights, in short, will far exceed the demise of Roe v. Wade.
- While many presidential candidates emphasize protecting women's rights, the threat that the Court poses to women is so extreme that structural reform of the judiciary may be the only option for ensuring that women can lead lives free from restrictions on their bodies, careers, and family lives.

Summary:

Women's rights are in danger.[1] The Supreme Court threatens to dismantle the statutory and constitutional protections that activists have spent decades building in the name of ensuring that women can lead lives free from restrictions on their bodies, their career choices, and their family lives. What's more, the current Court puts future policies that would further gender equality in danger. And it goes without saying that women will be affected by every decision of this Court—including those that are outside concerns faced uniquely by women which are the subject of this issue brief.

Commentators have focused on the possibility that the Court might overturn—or at least severely curtail—-a woman's constitutional right to an abortion under Roe v. Wade.[2] Legislatures in red states have become increasingly emboldened to pass unconstitutional laws restricting women's reproductive freedom in the hopes that the Court will take the opportunity to reconsider Roe. The threat the Court poses to women's right to an abortion—and an abortion without burdensome restrictions that in effect eviscerate that right—cannot be overstated. But women's rights are not limited to reproductive rights; they encompass a full spectrum of areas that ensure equality across the board. Pay equity, family leave, health care, gender discrimination, sexual assault, child care—these are just a sample of rights that vindicate the interests of women. The current Court puts them all at risk.

In this report, we address eight areas of law and policy that impact women's ability to lead lives free from restrictions on their bodies, careers, and family lives: (1) reproductive justice; (2) health care access; (3) child care; (4) paid family leave; (5) sexual harassment; (6) workplace discrimination; (7) pregnancy discrimination; and (8) sexual assault prevention. We show that in three important areas of law and policy—reproductive justice, health care access, and sexual harassment— the Supreme Court has already done considerable damage to women's rights. And, we show that in all eight areas of law and policy mentioned above, the Court is poised to do considerably more damage. The Supreme Court's dismantling of women's rights, in short, will far exceed the possible demise of Roe v. Wade.

THE SUPREME COURT THREATENS WOMEN

	DAMAGE ALREADY DONE	FUTURE DAMAGE POSSIBLE
Reproductive justice	X	X
Health care	X	X
Child care		X
Paid family leave		X
Sexual harassment	X	X
Workplace discrimination		X
Pregnancy discrimination		X
Sexual assault prevention		X

Background:

Historical Background

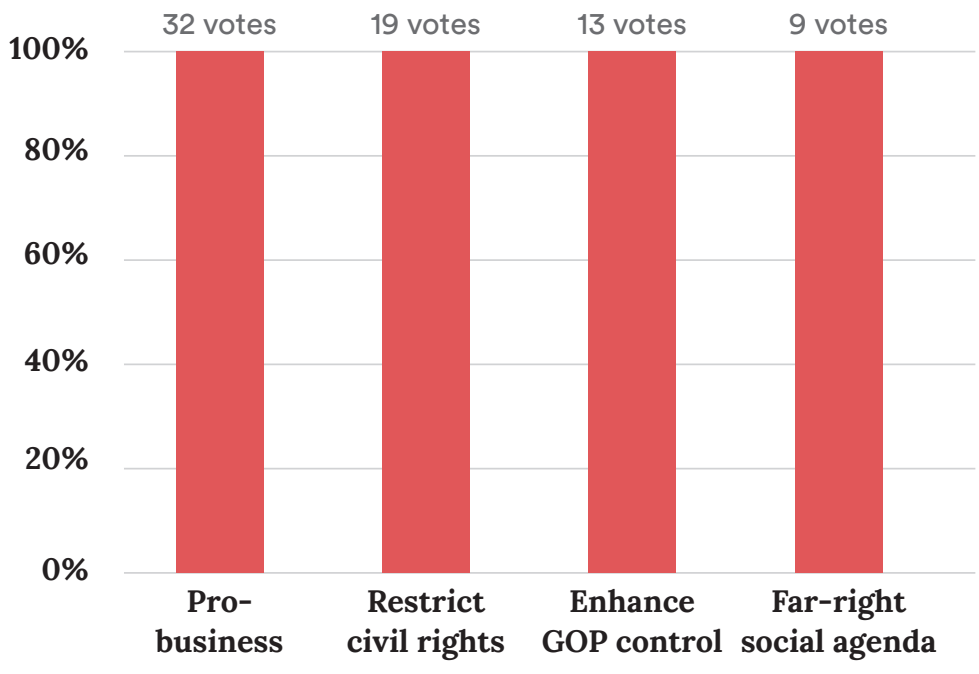
As the women's rights movement gained steam in the second half of the twentieth century, the Supreme Court proved a reliable ally. Though initially it rejected attempts to create a constitutional test for sex discrimination, it eventually ruled sex discrimination unconstitutional under the Equal Protection Clause.[3] Other landmark cases expanded women's rights, such as Griswold v. Connecticut[4] (establishing that the right to privacy in the Constitution guarantees the right to use contraceptives), Roe v. Wade[5] (recognizing women's constitutional right to an abortion), and Virginia v. United States[6] (holding that a state-funded, male-only military academy violates the Constitution).

Around the same time, state and national legislatures began stepping in to also protect women's rights. Congress passed the Equal Pay Act of 1963; the Civil Rights Act of 1964, which included Title VII's prohibition on sex discrimination in employment matters; and the Pregnancy Discrimination Act of 1978, to name a few. And when legislatures moved to restrict women's rights, the Court served as an ally in the fight against anti-women policies.[7]

All that might be about to change. Legislatures are increasingly attacking women's rights, and the Court can no longer be trusted to correct them. The Court has emboldened legislatures to pass draconian policies in the hopes that it will hear cases challenging those policies and issue decisions that restrict women's rights. In May 2019, for example, Georgia passed a law that would prohibit abortions once a fetal heartbeat could be detected—around the six-week mark for a pregnancy.[8] The law was designed to provoke litigation that could bring the case before the Supreme Court. The Georgia law is not an isolated incident. Other states have passed similarly restrictive laws targeting abortion.[9] The Department of Education has proposed new Title IX regulations that heighten the protections of the accused—to the detriment of the victims, who are frequently women. Sham pregnancy clinics can draw women in yet refuse to properly inform women about their right to an abortion.[10] And a whole host of policies and decisions that favor corporations over workers threaten economic justice and the ability of women to achieve equality and equity in the workplace.[11]

The prediction that the Court is poised to dismantle women's rights is not based on mere speculation but rather on hard evidence. Since 2005, there have been 73 split-decision rulings in which GOP donors have had a clear interest, and the Roberts Court voted in the direction favored by the donors 73 times, for a record of 73-0.[12] Thirty-two of those cases protected corporations, 19 restricted civil rights, 13 facilitated GOP control of the political process, and 9 advanced a far-right social

PERCENT OF SPLIT-DECISION VOTES BENEFITING GOP DONORS (2005-2018)



agenda. While only a small minority of these 73 cases primarily involved women's rights, major GOP donors have a clear interest in the outcomes of cases in two of the issue areas we address in this paper: health care access and workplace discrimination.[13] Both issues can be categorized in terms of the policy areas in which the Roberts court has a 73-0 record ruling in the direction favored by GOP donors (health care access involves protecting corporations, while reproductive justice is a far-right social issue). The Roberts Court's 73-0 record in such cases lends credence to our expectation that the Court is poised to do considerably more damage to women's rights moving forward.

The current Court poses a grave danger to women's rights. Even if the executive and Senate should change hands, the Court could stonewall efforts to maintain and expand on protections for women.

Justices' Backgrounds on Women's Rights

President Trump's two appointees to the Supreme Court, Justices Gorsuch and Kavanaugh, have problematic records on women's rights. Though their extremist positions have yet to fully bear out (e.g., whether either would vote to overturn Roe v. Wade), their past decisions offer a disconcerting picture of what could happen next.

JUSTICE KAVANAUGH AND WOMEN'S RIGHTS

Multiple women have credibly accused Kavanaugh of sexual assault, and his conduct at his confirmation hearing arguably revealed his lack of the composure, character, and impartiality required to serve as a judge, let alone a Justice on the United States Supreme Court. Setting aside the question as to whether, by his very presence on the bench, Justice Kavanaugh is an affront to women's rights, his jurisprudence on women's rights issues parallels his personal misconduct. While sitting on the U.S. Court of Appeals for the District of Columbia, for example, he voted to block a detained unaccompanied immigrant minor from obtaining an abortion for eleven additional days despite the fact that the minor had already obtained approval to obtain the abortion through Texas's judicial bypass system. Justice Kavanaugh declined to acknowledge that the minor had the right to an abortion, instead stating that the government "assumed" she had that right. He added that as a lower court judge he was bound to follow Supreme Court precedent.[14]

He has voiced his support for religious exemptions from the Affordable Care Act's contraceptive provisions and argued in favor of broader protections for employers who seek to use those exemptions.[15] Justice Kavanaugh has praised Justice Rehnquist for opposing what he viewed as the Court's wrongful expansion of "unenumerated rights."[16] The unenumerated right conservatives most often refer to when using this type of language is the right to an abortion under Roe v. Wade, a case in which Justice Rehnquist dissented. Justice Kavanaugh's extensive record of pro-business decisions threatens to undermine workplace protections for women, especially minority women, and his jurisprudence does not offer much hope for the future of the constitutional right to an abortion.

JUSTICE GORSUCH AND WOMEN'S RIGHTS

Justice Gorsuch has an equally concerning record on women's rights. In his confirmation hearing, he refused to say whether he thought Roe v. Wade was rightly decided.[17] While on the Tenth Circuit, Gorsuch wrote in the Hobby Lobby case—a case that ultimately reached the Supreme Court—that certain employers' religious beliefs should outweigh an employee's right to obtain some forms of birth control under the Affordable Care Act.[18] Gorsuch has also argued that the evidence offered in a woman's pregnancy discrimination lawsuit was insufficient, encouraged the Tenth Circuit to rehear a case in which it had ruled in favor of Planned Parenthood, and critiqued the use of the Due Process Clause to provide substantive freedoms—freedoms which include the right to privacy and the right to an abortion.[19]

Justice Gorsuch's concurring opinion in Hobby Lobby is particularly illuminating with regard to his views towards women.[20] In concurring with the majority that part of the Affordable Care Act's contraceptive mandate violated Hobby Lobby's religious freedom rights under the Religious Freedom Restoration Act ("RFRA"), he wrote,

> *All of us face the problem of complicity. All of us must answer for ourselves whether and to what degree we are willing to be involved in the wrongdoing of others. For some, religion provides an essential source of guidance both about what*

> *constitutes wrongful conduct and the degree to which those who assist others in committing wrongful conduct themselves bear moral culpability.*[21]

That "wrongdoing" then-Judge Gorsuch refers to is, outrageously, providing insurance coverage that includes certain contraceptive care to Hobby Lobby's female employees.[22] He implies that women seeking legal contraceptives engage in "wrongful conduct," and that Hobby Lobby's facilitating that care—not directly, but through insurance coverage—implicates its "moral culpability."[23] Putting aside the question of whether a corporation's religious beliefs ought to be protected, and whether a business entity should be able to invoke its moral culpability, Gorsuch's nod toward women's "wrongdoing" sheds light on his views towards women's rights. And now emboldened by his conservative colleagues, these views are a grave threat to women's rights as cases come before the Court.

JUSTICE ROBERTS AND WOMEN'S RIGHTS[24]

Chief Justice John Roberts has been a staunch opponent of women's reproductive rights throughout his career, and in a gradual effort to dismantle the constitutional right to abortion, he has consistently voted to undermine Roe v. Wade.[25]

Roberts has led an ongoing effort to dismantle the constitutional right to abortion since he became Chief Justice in 2005. During that time, the Court ruled in six cases involving reproductive rights, and Roberts voted in opposition each time (100%). His staunch resistance to reproductive rights is evident in positions he took in some of these six cases. In Whole Woman's Health v. Hellerstedt,[26] for example, he joined a dissent that would have effectively shut down all abortion clinics in Texas had it been the majority. Even Justice Alito, the dissent's author, acknowledged the impact of the law, struck down by the Court's narrow 5-4 majority, requiring doctors to maintain admitting privileges at hospitals in impractical locations. He wrote, "[t]here can be no doubt that H. B. 2 caused some clinics to cease operation."[27]

Roberts was in the majority in Gonzales v. Carhart,[28] a ruling that limited access to certain forms of medically necessary abortion on the basis of morality. As Justice Ginsburg explained in her dissent, the decision "tolerates, indeed applauds, federal intervention to ban nationwide a procedure found necessary and proper in certain cases by the American College of Obstetricians and Gynecologists (ACOG) . . . And, for the first time since Roe, the Court blesses a prohibition with no exception safeguarding a woman's health . . . . Ultimately, the Court admits that 'moral concerns' are at work, concerns that could yield prohibitions on any abortion."[29]

Justice Robert's history on the Court is decidedly anti-women. As he leads his conservative colleagues into a new era, his influence both on and off the bench is almost certain to further restrict women's rights.

Reproductive Justice:

Reproductive justice is the human right to bodily autonomy, the right to not have children, the right to have children, and the right to parent children in safe and sustainable communities.[30] The current Supreme Court was designed to overturn Roe and restrict women's access to safe and legal abortions, and it poses risks to reproductive justice across multiple areas of the law, including but not limited to access to abortion.

When Donald Trump ran for president, he pledged to appoint justices to the Supreme Court who would overturn Roe v. Wade. In the final 2016 presidential debate, he said that a decision overturning Roe would happen automatically once his justices reached the Court. While this remark revealed a misunderstanding of the way in which cases reach the Supreme Court, the appointments of Justices Gorsuch and Kavanaugh have already impacted the legal landscape for reproductive rights. Several states passed outright abortion bans citing the replacement of Justice Kennedy with Justice Kavanaugh as a core reason for doing so. In the first six months of 2019, states enacted 58 abortion restrictions, including 26 laws that would ban all, most, or some abortions.[31]

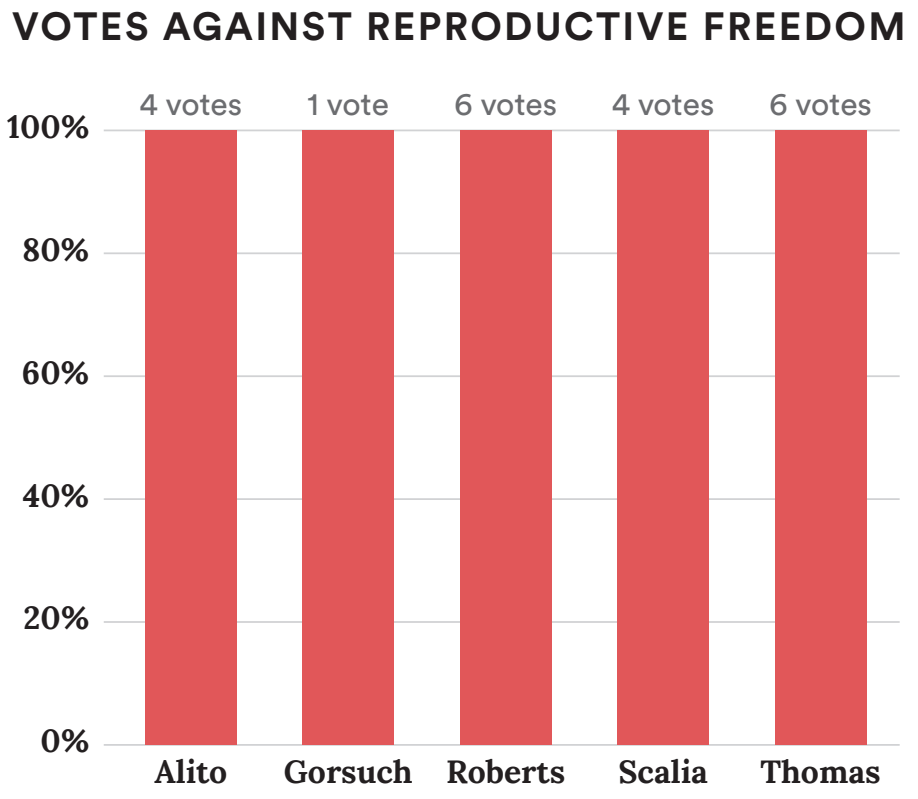
Justice Kavanaugh voted to block a detained unaccompanied immigrant minor from obtaining an abortion for eleven additional days despite the fact that

the minor had already obtained approval to obtain the abortion through Texas's judicial bypass system. Justice Kavanaugh declined to acknowledge that the minor had the right to an abortion, instead stating that the government "assumed" she had that right. He added that as a lower court judge he was bound to follow Supreme Court precedent. The flip side of that statement is that as a Supreme Court justice, Justice Kavanaugh will no longer feel bound to follow Supreme Court precedent that ensures the right to an abortion.[32]

The Court agreed to hear a case this term, June Medical Services v. Gee, that it likely would not have but for this change in the Supreme Court's membership.[33] The case, which concerns Louisiana's admitting privileges law, is nearly identical to the case concerning Texas's admitting privileges law, Whole Women's Health v. Hellerstedt, that the Court decided in 2016. In Whole Women's Health, the Court, in a 5-4 decision in which Justice Kennedy was the deciding vote in the majority, struck down Texas's admitted privileges law and robustly applied Casey's undue burden standard, signaling that the Court remained committed to protecting the right to choose and telling states that TRAP laws (targeted restrictions on abortion providers) would be heavily scrutinized.

In June Medical Services, the Fifth Circuit Court of Appeals declined to follow Whole Women's Health and upheld Louisiana's admitting privileges law, ignoring on-point Supreme Court precedent. A Supreme Court committed to its abortion rights jurisprudence would have summarily reversed the Fifth Circuit decision and admonished it for disregarding a binding decision from the Supreme Court. But the Court agreed to hear the case, and without Justice Kennedy's vote, it is likely the Court will overturn Whole Women's Health or at the very least uphold Louisiana's restrictive law overturning the contrary three-year-old precedent sub silentio, or without explicitly stating so. Its agreement to hear the case signals to lower courts that they may freely ignore Supreme Court precedent on abortion rights.

The Supreme Court did grant the application for a stay, which has meant that Louisiana's law is not being enforced while the appeal is pending. Justice Roberts sided with the four Justices appointed by Democrats to grant the stay in February 2019. Justices Gorsuch and Kavanaugh, along with Justices Thomas and Alito, would not have granted the stay. Justice Kavanaugh wrote a dissent which seemed to credit Louisiana's speculation that physicians could obtain the admitting privileges



at issue and would have allowed the law to go into effect.[34] Justice Kavanaugh ignored the Supreme Court's holding in Whole Woman's Health that the admitting privileges law was unconstitutional because it did not further an interest in women's health when he faulted Louisiana doctors for not trying hard enough to obtain these unconstitutional admitting privileges.[35] This seems to suggest that with Justice Roberts's dissent in Whole Woman's Health and four justices already having stated they would have allowed the law to go into effect, the future for abortion access at the Court is not promising.

Even more concerning, Louisiana is using this case as a vehicle not only to pave the way for the Supreme Court's blessing of TRAP laws but to also undo the four-decades-long practice of third-party standing for providers in abortion rights cases. In almost every abortion rights case, clinics and doctors challenge restrictive laws on behalf of their patients. If the Court were to limit third-party standing for doctors in these cases, something Justice Thomas stated was his goal in his dissent in Whole Women's Health, more restrictions would go unchallenged, making it easier for states to limit and even ban abortion.[36]

As more states pass abortion restrictions in response to the change in composition of the Court, more cases arise in the lower courts that could potentially reach the Supreme Court. In many cases, this is apparently what proponents of the restrictions have in mind. Other related cases that could soon make their way to the Supreme Court include cases challenging the Trump administration's Domestic Gag Rule. The new rule imposes strict limits on Title X funding. Title X is the nation's family planning program for low-income women and families. The rule restricts organizations receiving Title X funding from referring patients to abortion providers and has already resulted in Planned Parenthood's exit from the program, which has been a long-time conservative goal. A Ninth Circuit en banc panel that consisted of a majority of Republican-appointed judges was responsible for the rule's going into effect by lifting a nationwide preliminary injunction.[37]

These cases are making their way through the federal courts, and it is likely that the current Supreme Court would uphold the rule based on its 1991 decision in Rust v. Sullivan, which upheld a similar but less restrictive rule.[38]

A future Democratic administration attempting to protect the right to an abortion in restrictive states would likely be limited by the current makeup of the Court. Former 2020 candidate Senator Kamala Harris has proposed a preclearance regime for state abortion restrictions similar to the preclearance regime previously in place under Section Five of the Voting Rights Act. Harris's proposal would require states and localities that have a history of violating Roe v. Wade to receive the Department of Justice's approval before enacting new abortion restrictions.[39] However, it was the Supreme Court that dismantled that preclearance regime in 2013 in Shelby County v. Holder.[40] It is likely that, based on the current Court's federalism jurisprudence, it would strike down Harris's proposed preclearance system as unconstitutional.

In addition, progressive states that have sought to ensure the protection of the right to an abortion have been stymied by the Supreme Court. In 2018, in NIFLA v. Becerra, the Supreme Court struck down California's law requiring pregnancy-related clinics (including anti-abortion crisis pregnancy centers) to disseminate information that California provides public funding for abortion and for unlicensed clinics to disseminate a notice that they are unlicensed.[41] The Court struck down the notice requirements as a content-based limitation on Free Speech in violation of the First Amendment, despite the existence of many state laws requiring abortion providers to recite certain information prior to performing an abortion. The Thomas majority opinion distinguishes the laws at issue from those anti-abortion informed consent laws acceptable to the Court.[42] This is just one example of the way in which the majority's reading of the First Amendment allows the Court to advance public policy objectives and administer purportedly neutral law in non-neutral ways.

Health Care Access:

The Court's likely openness to a broad set of religious refusals from generally applicable laws jeopardizes reproductive rights.[43] In recent years, consolidation in the health care industry has included mergers of Catholic and secular hospitals as well as instances of Catholic hospitals purchasing non-Catholic hospitals and physician practices. Since Catholic hospitals abide by Catholic health directives that do not allow for sterilization in most instances and that do not permit abortions, more women are encountering providers that are unwilling to perform the services they need.[44] In addition, the Trump administration has expanded conscience protections for health care workers such that even in secular settings, individual providers can choose not to provide medically-necessary care. Even if a future administration were to reverse these rules, it is likely that the Supreme Court would recognize expanded conscience protections for providers based on its expanded conception of religious freedom under the First Amendment.

In addition, the current Court poses risks to contraception access, risks with potentially more serious consequences than those resulting from the Supreme Court's 2014 decision in Burwell v. Hobby Lobby.[45] The effect of that decision was the expansion of the contraceptive mandate's accommodations process for religious non-profits to closely-held for-profit corporations with religious objections. But the Supreme Court did not hold the accommodations process itself unconstitutional, thus ensuring that female employees of employers with religious objections would still have access to contraception, without cost-sharing, that they are entitled to under the Affordable Care Act. Religious non-profits with religious exemptions have continued to challenge that underlying accommodations process as an unconstitutional burden on their free exercise of religion and as a violation of the Religious Freedom Restoration Act (RFRA). While on the D.C. Circuit Court of Appeals, Justice Kavanaugh dissented in one such case. He opposed the court's decision not to reconsider en banc a panel decision that upheld the accommodations process. Justice Kavanaugh would have held that the requirement that religious non-profits simply fill out a form informing HHS of their opposition to contraception coverage was a burden on free exercise in violation of RFRA.[46] Judge Reed O'Connor in the Northern District of Texas has enjoined the Obama administration's accommodations process on similar grounds,[47] while the Third Circuit Court of Appeals has enjoined the Trump administration's revised regulations that expand the availability of both religious and moral exemptions from the contraceptive mandate.[48] In response to the Third Circuit's decision, Little Sisters of the Poor (a religious non-profit) and the United States have filed cert petitions asking the Supreme Court to overturn the Third Circuit's decision and hold that the Obama Administration's accommodation, which sought to balance the needs of religious employers with those of female employees, was unconstitutional.[49]

The Court's openness to religious exemptions that prevent women from receiving medically necessary care demonstrates how the Court could poke holes in any generally applicable health care legislation passed by a future President and Congress, especially if future laws continue to rely on private employers and providers. Additionally, federal courts have limited the application of Section 1557, the non-discrimination provision of the Affordable Care Act. The Obama administration issued a rule interpreting discrimination on the basis of sex in health care to include discrimination on the basis of termination of pregnancy or gender identity. Judge Reed O'Connor enjoined that rule in Franciscan Alliance.[50] Judge O'Connor also struck down the entire Affordable Care Act (ACA) in Texas v. United States.[51] Both Democratic states and the Democratic House of Representatives as intervenors appealed the decision to the Fifth Circuit Court of Appeals, which could issue an opinion striking down the entire Act. The case likely would then reach the Supreme Court. While Justice Roberts has twice upheld the Act in NFIB v. Sebelius[52] and King v. Burwell,[53] there is no guarantee he will do so again. And if the entire ACA were to be dismantled, its protections for women would disappear, including but not limited to the guarantee of access to contraception without cost-sharing, maternity care as an essential health benefit, free yearly well-women's exams, and the ban on charging women more for health insurance than men (gender-based rating), a practice that was common before the ACA.

The inequities that women face in the U.S. health care system are worse for women of color, and the current Court threatens potential policy solutions that would

reduce the current disparities. African American women are three to four times more likely to die in childbirth than non-Hispanic white women. Medicaid expansion has helped many women gain access to health care which is critical for healthy lives, births, and families. People of color are disproportionately represented in the coverage gap that resulted from the Supreme Court's decision to allow states to opt out of the ACA's Medicaid expansion in NFIB.[54] States that have expanded Medicaid have seen their racial disparities in rates of insurance coverage decline by more than states that have refused to expand.[55]

Justice Kavanaugh has criticized an important canon of statutory construction: constitutional avoidance.[56] Under constitutional avoidance, when a statute is ambiguous, courts should adopt a permissible reading of the ambiguity that avoids a potential constitutional problem. Justice Roberts in NFIB v. Sebelius upheld the Affordable Care Act's individual mandate through constitutional avoidance. He found a reading of the individual mandate as a tax to be a permissible meaning of the statute and therefore upheld the mandate under Congress's taxing power after rejecting the mandate as a permissible exercise of Congress's power under the Commerce Clause. If Justice Kavanaugh's view that constitutional avoidance should be invoked less frequently gains traction, the Court could strike down more statutes or statutory provisions as unconstitutional, jeopardizing future legislation that protects or expands women's access to health care. Constitutional avoidance encourages judicial restraint and acts as a check on the ability of judges to strike down legislation passed by Congress, and Justice Kavanaugh may want to diminish the influence of that check, a check that saved the Affordable Care Act.

Child Care

While access to quality and affordable health care, including reproductive care, is critical for gender equality and particularly for women to succeed economically, so are other important policies. Two stand out: child care and family leave, both of which are provided in other industrialized nations. Child care and family leave have been on the progressive policy agenda for decades and have been frequently discussed by Democratic presidential candidates on the campaign trail. Even if Congress were able to pass legislation to provide these benefits, the Supreme Court could employ a number of tools to dismantle the laws.

A popular proposal for expanding access to child care is to give states and localities federal funding for daycare and public preschool programs such as Head Start. When Congress seeks to incentivize states and localities to pursue a particular policy, since the Supreme Court has held that the federal government cannot "commandeer" state and local officials to carry out federal policy,[57] it often legislates through its spending power under the Constitution. In NFIB v. Sebelius, the Supreme Court put limits on Congress's ability to achieve progressive policy goals using this tool. For the first time, the Supreme Court held that the stick Congress used to achieve its goal of getting the states to expand Medicaid—the threat of withdrawing all of a state's federal Medicaid funding if it refused to expand coverage—was unconstitutionally coercive. Thus, the Supreme Court allowed states to opt out of the Medicaid expansion without losing other federal funds. This has had significant consequences for low-income people in the fourteen states that decline to expand coverage. The Supreme Court could apply this same reasoning to future funding for child care programs. By eliminating Congress's ability to wield such a "stick," these social programs will not be universal and will leave millions of people, who are disproportionately people of color, without access to the benefits Congress intended.

The Supreme Court could also strike down the funding mechanisms needed to pass programs such as universal child care. Democratic presidential candidate Elizabeth Warren proposes to pay for her universal child care plan (along with other policies that will help women) with a wealth tax.[58] The Court could strike down the wealth tax by arguing that it is a direct tax that violates the requirement in Article I Section 9 of the Constitution that direct taxes be levied in such a way that an equal amount of tax is levied per capita in each state. The Court likely would rule that a wealth tax is not an income tax and thus does not fall within Congress's power to levy income taxes that do not conform to that requirement under the Sixteenth Amendment.

Paid Family Leave

Paid family leave could also be on the Supreme Court's chopping block. The Court would likely prove hostile to laws that place additional regulatory requirements on businesses, including requirements to provide paid family leave to employees. Conservatives sometimes view these sorts of requirements as an economic burden rather than as an engine of economic justice. If paid family leave policy delegates the power to make decisions to administrative agencies, as most progressive legislation must do in order to be effectual and comprehensive while receiving House and Senate approval, the Court could fall back on its skepticism of federal power to prevent implementation. Some justices, for example, are known skeptics of Chevron deference. Justice Gorsuch, in his dissent in Gundy v. United States, joined by Chief Justice Roberts and Justice Thomas, demonstrated a desire to revive the non-delegation doctrine, which would compromise the modern administrative state's power to help people through policymaking.[59] Justice Kavanaugh took no part in the opinion, and Justice Alito only concurred, providing a fifth vote for the majority, because there were not yet five votes to overturn a law as violating the non-delegation doctrine, which the Court had not done since the early 1930s before it ceased blocking New Deal legislation. It is likely with the confirmation of Justice Kavanaugh that there are now five votes on the Court to revive the non-delegation doctrine in order to handcuff the administrative state.

Sexual Harassment

The current Court has been friendly to the interests of big business and the wealthy. The Court has closed the courthouse door to workers and consumers by enabling corporations to force workers and consumers to settle disputes through mandatory arbitration rather than through litigation.[60] In the employment context, many contracts require arbitration for resolving workplace disputes, including sexual harassment, and include class action waivers as well. Additionally, arbitration clauses can include confidentiality requirements that effectively prevent female workers who are sexually harassed on the job from identifying other female plaintiffs who have had similar experiences of harassment. Forcing women to sue one by one makes it more difficult and expensive to pursue harassment claims, and settlements often prevent victims of harassment from sharing their experiences with the public and with co-workers. Thus, the Court's approval of mandatory arbitration allows corporations to shield sexual harassers. For example, Harvey Weinstein notoriously used non-disclosure agreements to silence women, while Fox News invoked arbitration clauses in employment contracts to require confidentiality.[61] The current Court, with its favorable view toward arbitration, could also use the preemptive power of the Federal Arbitration Act to strike down state laws that attempt to prohibit mandatory arbitration of sexual harassment claims.[62]

Workplace Discrimination

The Equal Protection Clause of the Fourteenth Amendment is the primary constitutional vehicle that bars certain types of sex discrimination. Though its protections for sex discrimination are limited,[63] it serves as an important roadblock preventing the government from making irrational classifications on the basis of sex. The current Court appears to be poised to eliminate, or at least seriously weaken, that barrier. The Equal Protection Clause, part of Section 1 of the Fourteenth Amendment, provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." The Court initially read the Equal Protection Clause to prohibit government-sponsored discrimination on the basis of race, alienage, and national origin.[64]

The Supreme Court finally considered whether to extend the guarantees of the Equal Protection Clause to sex discrimination in 1971 in Reed v. Reed.[65] Reed involved the death of Richard Lynn Reed, a minor, whose divorced parents fought over who would serve as the administrator of his estate.[66] Idaho state law provided that when determining which individual would administer an estate, "males must be preferred to females."[67] Writing for a unanimous Court, Chief Justice Burger held the Idaho state law unconstitutional because it served no rational state purpose.[68] But the Court went no further than that, dodging the opportunity to more fully elaborate on the meaning of sex discrimination.

That opportunity presented itself again two years later in Frontiero v. Richardson.[69] In that case, a married servicewomen challenged a federal restriction that barred her from claiming her husband as a "dependent" for the purpose of receiving increased benefits, including medical and dental care for the husband.[70] Under the challenged statute, servicemen could claim their wives as dependents automatically; but servicewomen had to prove that their husbands depended on them for more than one-half of their support.[71]

For the first time, a plurality of the Court announced a standard of intermediate scrutiny[72] for claims based on sex discrimination. "[C]lassifications based upon sex . . . are inherently suspect and must therefore be subjected to close scrutiny."[73] Because sex "is an immutable characteristic determined solely by accident of birth," and because "the sex characteristic frequently bears no relation to ability to perform or contribute to society," a plurality of the Court wrote that "statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members."[74]

A majority of the Court finally adopted the intermediate scrutiny standard first discussed in Frontiero in 1976 in Craig v. Boren.[75] Boren considered the constitutionality of an Oklahoma statute that prohibited the sale of beer with a 3.2% alcohol content to males under the age of twenty-one and females under the age of eighteen.[76] Relying on the principles in Reed, the Court struck down the statute and adopted an intermediate scrutiny standard for classifications based on sex. "To withstand constitutional challenge . . . classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives."[77] That standard continues to govern sex discrimination cases under the Equal Protection Clause to this day.

The Supreme Court has decided relatively few sex discrimination cases based on the Equal Protection Clause in the past few decades. The most important of those cases was United States v. Virginia,[78] in which the Court determined that the Virginia Military Institute (VMI), in which only male students could enroll, violated the Equal Protection Clause.[79] In so ruling, Justice Ginsburg, writing for the majority, expanded on the intermediate scrutiny standard set out in Craig v. Boren. Classifications based on sex, she wrote for the Court, must be "exceedingly persuasive,"[80] "not hypothesized or invented post hoc in response to litigation,"[81] and "must not rely on overbroad generalizations about different talents, capacities, or preferences of males and females."[82] VMI attempted to justify the exclusion of women on two grounds: (1) that single-sex education contributed to diversity in education[83] and (2) that inclusive policy would require "drastic" changes that would "destroy" the school's educational program.[84] The Court rejected those reasons, finding neither sufficiently persuasive to justify discriminating against women.[85] As well, the Court rejected Virginia's plan to create a new, women-only military academy to remedy the

constitutional violation. Because the new academy would fail to provide the same level of military training, faculty quality, and powerful alumni network as VMI, it could not serve as a constitutionally valid substitute.[86]

Justice Scalia's dissent in the case offers a window into the ways a conservative Court could rule on cases such as United States v. Virginia. He would have upheld the all-male character of VMI because he believed it reflected long-standing traditions and societal values not previously thought to be an affront to the Constitution.[87] "[T]he tradition of having government-funded military schools for men is as well rooted in the traditions of this country as the tradition of sending only men into military combat,"[88] he wrote. Justice Scalia suggested that he would replace the more protective intermediate scrutiny standard for classifications based on sex with a permissive, government-friendly rational basis test.[89] With scant Equal Protection cases based on sex discrimination before the Court, it is difficult to predict how the current Court would rule on these types of cases. But odds are high that at least some of the current justices agree with Justice Scalia's anti-women jurisprudence.

The Equal Protection Clause proved an imperfect tool for remedying all sex discrimination, so Congress stepped in to statutorily shore up women's rights. A common refrain of conservative judges is that it is the legislature's job—and not the court's—to protect certain rights.[90] If the public truly wanted a class of people protected from discrimination, say for instance, pregnant women, then it would express itself at the ballot box to elect representatives who would pass such laws. Courts should bend to the will of the people, the argument goes, not create judicial protections for groups of people. Even when legislatures do expand rights by passing laws, however, courts can undermine statutory protections just as they can undermine—or refuse to create—constitutional ones. The following section discusses various statutory protections for women's rights—protections that the current Court jeopardizes.

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment "because of such individual's race, color, religion, **sex**, or national origin."[91] The Court is considering this term whether discrimination "because of . . . sex" also prohibits discrimination based on sexual orientation. Zarda v. Altitude Express, Inc.,[92] the case before the Court, involves a skydiving instructor who claims he was fired from his job because of his sexual orientation. The Second Circuit Court of Appeals ruled that Title VII's prohibition of discrimination "because of . . . sex" extended to discrimination based on sexual orientation, overturning past precedent that had ruled the opposite.[93]

The Second Circuit based its reasoning on three arguments. First, that "sex is necessarily a factor in sexual orientation."[94] The court explained, "Because one cannot fully define a person's sexual orientation without identifying his or her sex, sexual orientation is a function of sex. Indeed sexual orientation is doubly delineated by sex because it is a function of both a person's sex and the sex of those to whom he or she is attracted."[95] Second, the court wrote that discrimination on the basis of sexual orientation was premised on sex stereotypes about whom a man or woman should be sexually attracted to, and therefore fell within the parameters of sex discrimination.[96] Finally, the court determined that sexual orientation discrimination was a type of associational discrimination that categorized individuals based on "romantic association between particular sexes," which again depended on an employee's sex.[97]

The Second Circuit's landmark decision made waves, and further intensified a growing circuit split over the question of whether Title VII should be construed to extend to discrimination in employment because of sexual orientation.[98] The Eleventh Circuit reached the opposite decision in Bostock v. Clayton County Board of Commissioners,[99] but the Seventh Circuit laid out similar reasoning to that in Zarda in its 2017 decision Hively v. Ivy Tech Community College.[100] The Supreme Court decided to grant certiorari to resolve the circuit split and heard arguments on the question on October 8.

The questions Justices asked at the oral argument demonstrate the potential hostility that the current Court could show to progressive interpretations of statutory protections. In a companion case to Zarda, for example, Justice Gorsuch suggested that judges should consider "the massive social upheaval that would be entailed" were the Court to expand the current interpretation of sex discrimination in Title VII.[101] He invoked "judicial modesty," implying that the Court should leave questions of equal rights up to the legislatures, even if that means denying those rights when state legislatures delay expanding legislation.

Though the Second and Seventh Circuits' reasoning is based on discrimination "because of . . . sex," therefore

protecting people of all genders, it still holds implications for women's rights. Lesbians as well as bisexuals and transwomen will gain or lose legal protections in their workplaces depending how the Supreme Court rules. The last major case focused on sexual orientation in the context of same-sex marriage, Obergefell v. Hodges,[102] held that same-sex couples had a constitutional right to marriage under the Due Process Clause, and was decided on a 5-4 vote—with Justice Kennedy serving as the fifth vote with the liberals on the Court. Chief Justice Roberts, now widely considered the Court's new swing vote after Justice Kennedy's retirement, wrote a dissenting opinion in Obergefell. However, the Court's balance shifted after Justice Kavanaugh replaced Justice Kennedy. If the vote makeup in Obergefell (four liberals with Justice Kennedy in the majority, and the four conservatives, all of whom remain on the bench, in the dissent), is any indication as to how the current Court will react to cases such as Zarda, the future looks grim for expanding statutory rights for LGBT workers.

Expanding Title VII protections for LGBT workers is a relatively recent phenomenon. But women have been relying on Title VII for standard bread-and-butter employment discrimination claims for decades. The current Court might put even those standard claims at risk. In employment discrimination claims, for example, Justice Kavanaugh consistently rules in favor of employers over workers.[103] This is especially concerning for Black women, who, on average, earn thirty-seven percent less than other workers.[104] Black women often work in low-wage positions, are more likely than other women to face sexual harassment at work, and are more likely than other groups of women to belong to a union.[105] The women who need protections under Title VII are vulnerable to the Court's majority.

Pregnancy Discrimination

As mentioned above, though the Equal Protection Clause bars some sorts of sex discrimination, the Court has not read it to cover all types. The most glaring omission might be the Court's decision in Geduldig v. Aiello[106] that pregnancy discrimination is not sex discrimination for purposes of the Equal Protection Clause because classifications based on pregnancy involve discriminating between pregnant and non-pregnant women.[107] In other words, when a state discriminates against pregnant women, it is only those pregnant women, and not women as a class, against whom the state discriminates.

In response to Geduldig, Congress passed the Pregnancy Discrimination Act of 1978, which amended the understanding of "sex discrimination" in Title VII to include discrimination on the basis of pregnancy.[108] It is unclear, however, how the current Court would react to pregnancy discrimination cases brought under Title VII. In Young v. United Parcel Service, Inc.,[109] Justices Alito and Roberts joined with the liberal block in ruling that UPS's failure to accommodate a pregnant woman's restriction on lifting heavy objects was a potential viable claim under the Pregnancy Discrimination Act.[110] Though little evidence exists as to how Justice Kavanaugh would rule on a pregnancy discrimination case, his pro-business leanings are concerning.[111] A pro-business Supreme Court could rule against workers like Peggy Young, who require pregnancy-based accommodations in order to keep performing their jobs.

Sexual Assault Prevention

With Justices Kavanaugh and Thomas on the bench, the Supreme Court is an affront to survivors of sexual assault even before deciding a case. Beyond the very real optics—and consequences—of having two Justices credibly accused of sexual assault on the highest Court, the current Court could create legal obstacles to advocates wishing to strengthen protections for sexual assault survivors.

There is currently a circuit split over the due process rights university hearing panels must give students accused of sexual assault, based on varying interpretations of Title IX, which governs sexual assault

and harassment policies in higher education. The Sixth Circuit has ruled that students accused of sexual misconduct or their representatives must be afforded the right to cross-examine accusers during hearings.[112] This holding is in line with proposed Department of Education regulations that would codify the accused's right to cross-examine the accuser.[113] The First Circuit, in contrast, held that an accused student or his or her representative need not be given the chance to question the accuser. Instead, questions to the accuser from a panel of students or administrators could fulfill that due process right.[114]

Allowing students accused of sexual assault to directly question victims is an unproductive exercise unlikely to uncover new facts, not to mention its being extremely traumatic for sexual assault survivors.[115] If the Supreme Court were to grant certiorari to resolve this circuit split, Justice Kavanaugh's and Thomas's personal experiences of being credibly accused of sexual assault could influence their opinions as to whether the accused should have the right to cross-examine victims. The Court may compromise Title IX's protections for sexual assault survivors.

The Court is also set to rule on military sexual assault cases this term. A military appeals court in United States v. Mangahas ruled that rape allegations dating back to before 2006 could not be prosecuted unless survivors had reported the offense and prosecutors had charged the alleged offenders within five years of the incident.[116] The Supreme Court will hear the case this term to determine whether this five-year statute of limitations should apply to sexual assault cases from 1986 to 2006.[117] Though the Justice Department and U.S. Solicitor General have argued for overturning the Mangahas decision, there is no telling what a highly partisan Court with credibly accused sexual harassers on the bench will do.[118]

Conclusion:

Women's rights are in danger, as the Supreme Court threatens to dismantle protections that activists and litigators have spent decades building in the name of ensuring that women can lead lives free from restrictions on their bodies, their career choices, and their family lives. What's more, the current Court puts future policies that would further gender equality in danger.

The threat the Court poses to women's right to an abortion cannot be overstated. But women's rights are not limited to reproductive rights—they encompass a full spectrum of areas that ensure equality across the board. Pay equity, family leave, health care, gender discrimination, sexual assault, child care—these are just a few of the rights that vindicate the interests of women. The current Court puts them all at risk.

In this report, we have addressed eight areas of law and policy that impact women's ability to lead lives free from restrictions on their bodies, careers, and family lives: (1) reproductive justice; (2) health care access; (3) child care; (4) paid family leave; (5) sexual harassment; (6) workplace discrimination; (7) pregnancy discrimination; and (8) sexual assault prevention. We have shown that in three important areas of law and policy—reproductive justice, health care access, and sexual harassment— the Supreme Court has already done considerable damage to women's rights. And, we have shown that in all eight areas of law and policy mentioned above the Court is poised to do considerably more damage.

The Supreme Court's dismantling of women's rights, in short, has the potential to far exceed the demise of Roe v Wade. While many presidential candidates emphasize protecting women's rights, the threat that the current Court poses to women is so extreme that structural reform of the judiciary may be the only option for ensuring that women can lead lives free from restrictions on their bodies, careers, and family lives.

ENDNOTES

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3. See Craig v. Boren, 429 U.S. 190 (1976).
4. 381 U.S. 479 (1965).
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6. 518 U.S. 515 (1996).
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65. 404 U.S. 71 (1971).
66. Id. at 71–72.
67. Id. at 73.
68. Id. at 77 ("To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment; and whatever may be said as to the positive values of avoiding intrafamily controversy, the choice in this context may not lawfully be mandated solely on the basis of sex.")
69. 411 U.S. 677 (1973).
70. Id. at 678–79.
71. Id. at 680.
72. There are in general three tiers of scrutiny under the Equal Protection Clause. Classifications based on race, national origin, or alienage receive strict scrutiny treatment. That is, if the government wishes to discriminate on those bases, it must do so for a compelling interest and by the least restrictive means possible. See Grutter v. Bollinger, 539 U.S. 306, 326 (2003). Classifications based on sex receive intermediate scrutiny treatment, which asks whether the government has a substantial interest in the classification based on sex and whether the classification is "substantially related" to that interest. See Craig v. Boren, 429 U.S. 190, 197 (1976). In this framework, rational basis scrutiny is the lowest level of review, and merely asks whether the government has a rational reason for making the classification. See Williamson v. Lee Optical of Oklahoma Inc., 348 U.S. 483, 487–88 (1955).
73. Id. at 683. Frontiero was decided under the Due Process Clause of the Fifth Amendment, id. at 690–91, since a federal statute was at issue, in comparison to the Idaho state statute in Reed v. Reed, 404 U.S. 71 (1971). The Fifth Amendment's Due Process Clause, which applies to the federal government, has been interpreted to obligate the federal government to follow the mandates of the Fourteenth Amendment's Equal Protection Clause, which has no analogue in the Fifth Amendment and technically only applies to states.
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75. 429 U.S. 190 (1976).
76. Id. at 191–92.
77. Id. at 197.
78. 518 U.S. 515 (1996).
79. Id. at 519.
80. Id. at 531 (internal quotation marks omitted).
81. Id. at 533.
82. Id.
83. Id. at 535.
84. Id. at 540 (internal quotation marks omitted).
85. See id. at 539, 545.
86. Id. at 547–54.
87. Id. at 568–69 (J. Scalia, dissenting).
88. Id. 569 (J. Scalia, dissenting).
89. Id. at 574–75 ("The Court's intimations are particularly out of place because it is perfectly clear that, if the question of the applicable standard of review for sex-based classifications were to be regarded as an appropriate subject for reconsideration, the stronger argument would be not for elevating the standard to strict scrutiny, but for reducing it to rational-basis review.")
90. See, e.g., Obergefell v. Hodges, 135 S. Ct. 2584, 2611 (2015) ("[T] his Court is not a legislature. Whether same-sex marriage is a good idea should be of no concern to us. Under the Constitution, judges have power to say what the law is, not what it should be.").
91. 42 U.S.C. § 2000e-2.
92. 139 S.Ct. 1599.
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95. Id. at 113.
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104. Id.
105. Id.

106. 417 U.S. 484 (1974).

107. Id. at 496-97 ("There is no evidence in the record that the selection of the risks insured by the program worked to discriminate against any definable group or class in terms of the aggregate risk protection derived by that group or class from the program. There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not.") [internal footnotes omitted]).

108. "The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . . ." 42 U.S.C.A. § 2000e.

109. 135 S.Ct. 1338 (2015).

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