



# Why Courts Matter

## Reproductive Rights

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As advocates, our battles are not limited to the legislative process. They also exist in the courts. For years, conservatives have put a strong emphasis on who dons the robes on the federal bench, understanding that a lifetime appointment can have just as important an impact as legislation, if not more so. But progressives have not made the courts as much of a priority.

While conservatives have been stacking the deck against women, appointing judges who will choose ideology over the law, we progressives have focused largely on legislative efforts, which are now in danger of being overturned by the same increasingly conservative judiciary. It is integral to the overall success of a progressive agenda that the president appoint and the Senate confirm men and women who will respect the law and protect women's fundamental reproductive rights. And it is our responsibility as advocates to hold our elected officials to that standard.

Below is a discussion of the federal judiciary's role in several significant battles over women's health and rights being waged right now in jurisdictions with openings on the federal bench.

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### Family planning cases

Title X provides federal funds to states to administer family planning services. But some states have targeted Planned Parenthood and any other providers that offer abortion services, even though they provide those abortion services with nongovernment funds. By excluding these providers, states cut off their low-income citizens from vital health services, including contraception, cancer screenings, and treatment for sexually transmitted infections. Two cases with opposite outcomes are instructive in the role the federal courts have in determining whether these restrictions can stand.

#### North Carolina

In 2011 the North Carolina State Legislature passed a law targeting Planned Parenthood. The law prohibited the North Carolina Department of Health and Human Services from allocating any of its funds, including Title X funds, to Planned Parenthood and its affiliates.

- Judge James A. Beaty, Jr., appointed by President Bill Clinton to the Middle District of North Carolina, struck down the law.<sup>1</sup> As a result, Planned Parenthood in North Carolina continues to receive public funds for family planning services.<sup>2</sup>
- North Carolina currently has one vacancy at the District Court level.<sup>3</sup>

## Texas

A similar story had a different ending in Texas, where the federal circuit court is overwhelmingly dominated by conservatives. In 2011 the Texas Legislature reauthorized the Texas Women’s Health Program, prohibiting “organizations that contract or affiliate with entities that perform or promote elective abortions” from receiving Title X funding. Because some local Planned Parenthood affiliates offer abortion care and because all have a relationship with the national Planned Parenthood, Texas Gov. Rick Perry and other Republican legislators have said they would rather forgo the \$35 million in Title X federal funding than permit Planned Parenthood to receive any money. Planned Parenthood has been the Women’s Health Program’s largest provider in Texas, serving about 40 percent of patients.<sup>4</sup>

- Judge Lee Yeakel, of the Western District of Texas, suspended enforcement of the law, allowing Planned Parenthood to receive funding.<sup>5</sup> But the Fifth Circuit reversed that ruling and allowed the restrictions to remain in place.<sup>6</sup>
- Since the law went into effect, more than 60 family planning clinics have been forced to close.<sup>7</sup>
- There are two vacancies on the Fifth Circuit and four District Court vacancies in Texas<sup>8</sup> that could be filled with judges who will follow the law instead of ideology. Texans for a Fair Judiciary, in partnership with Legal Progress, is working to promote and support progressive judicial nominees.

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## Biased counseling cases

Twenty years ago the Supreme Court established that states could restrict abortion, as long as those constraints did not pose an “undue burden” upon women.<sup>9</sup> As a result, state legislatures have consistently made it harder to obtain an abortion by requiring measures such as waiting periods that involve multiple clinic visits, counseling that includes deceptive information, and ultrasounds without regard to medical necessity.<sup>10</sup> Because “undue burden” is at best a nebulous standard, it matters who is on the bench defining the practical parameters of an undue burden.

## South Dakota

For the past seven years, South Dakota has tried to enforce a law that, among other things, requires physicians to provide false and misleading information<sup>11</sup> about the risks of suicide and suicidal ideation to women considering abortion.

- Judge Karen Schreier, a Clinton appointee, initially struck down the law.<sup>12</sup>
- The full Eighth Circuit Court of Appeals, packed with conservatives (only 2 of the 11 members of the court were appointed by a Democratic president),<sup>13</sup> found the law to be constitutional. The court bent to ideology instead of following precedent, which states that only “truthful and non-misleading”<sup>14</sup> information can be required as part of informed consent. The data on suicide and suicidal ideation reflects the exact opposite of what the court permitted South Dakota to use to justify its law.
- In early 2013, there will be a vacancy on the Eighth Circuit.<sup>15</sup>

## Texas

By requiring women to endure unwanted invasive ultrasounds regardless of medical need prior to receiving an abortion, the Texas legislature has ignored women’s constitutional rights.

- The Fifth Circuit Court of Appeals, through a three-judge panel (all Reagan appointees), upheld the law,<sup>16</sup> forcing physicians to perform invasive procedures without regard for medical need or the patient’s consent.
- There are currently two vacancies on the Fifth Circuit Court of Appeals.<sup>17</sup>

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## Contraceptive coverage cases

The Affordable Care Act guarantees that employers cover women’s preventive services, including contraceptives, with no cost sharing by employees. While houses of worship are exempted from the rule and religiously affiliated nonprofits are allowed to seek an accommodation and have the insurance company provide the coverage directly to employees, a number of objectors have nevertheless challenged the regulation, claiming that the required coverage infringes on their religious liberty.<sup>18</sup>

## Colorado

Hercules Industries is a for-profit, secular corporation in Colorado that manufactures and distributes heating, ventilation, and air conditioning products and equipment. One day before filing a lawsuit in the District Court of Colorado challenging the contraception requirement, the owners added two provisions to the articles of incorporation: (1) that the primary purpose of the corporation was to follow “appropriate religious, ethical or moral standards,” and (2) that its board of directors was allowed to prioritize “religious, ethical or moral standards” at the expense of profitability.

- Judge John Kane temporarily suspended enforcement of the law on the basis that Hercules will likely be successful in enjoining the law permanently.<sup>19</sup> A final decision in the plaintiff’s favor could set a sweeping precedent allowing private employers to claim protection under the Religious Freedom Restoration Act, enabling them to use religion as a basis for discriminating against female employees.

- In August Senate Republicans filibustered the confirmation vote of Judge Robert Bacharach, nominated by President Barack Obama, to the United States Court of Appeals for the Tenth Circuit, with little attention from the public.<sup>20</sup>

There are currently two vacancies on the Tenth Circuit Court of Appeals, and in early 2013, there will be a District Court vacancy in Colorado.<sup>21</sup>

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## Conclusion

As progressives, we cannot afford to ignore the courts. When it comes to issues of women's rights and health, the federal judiciary will continue to play an instrumental role, and we must actively engage in shaping its composition.

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## Endnotes

- 1 Planned Parenthood of Cent. N.C. v. Cansler, \_\_\_ F. Supp. 2d \_\_\_, 2012 WL 2513510, no. 1:11CV531 (M.D.N.C. June 28, 2012) (striking down law for violating the First Amendment, Due Process and Equal Protection Clauses of the Fourteenth Amendment, Bill of Attainder Clause of the Fifth Amendment, and the Supremacy Clause).
- 2 Planned Parenthood affiliates in North Carolina now receive Title X funds directly from the federal government. Laura Bassett, "Planned Parenthoods Rescued by Obama Administration With Large Title X Grants," *The Huffington Post*, July 26, 2012, available at [http://www.huffingtonpost.com/2012/07/26/planned-parenthoods-obama-title-x-grants\\_n\\_1706303.html](http://www.huffingtonpost.com/2012/07/26/planned-parenthoods-obama-title-x-grants_n_1706303.html).
- 3 "Current Judicial Vacancies," available at <http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/CurrentJudicialVacancies.aspx> (last accessed October 2012).
- 4 "Court Rules Texas Can Defund Planned Parenthood," *Ms. Magazine*, August 22, 2012, available at <http://www.ms magazine.com/news/uswirestory.asp?id=13823>.
- 5 Planned Parenthood Ass'n of Hidalgo Cnty. v. Suehs, 828 F. Supp. 2d 872 (W.D. Tex. 2012).
- 6 Planned Parenthood Ass'n of Hidalgo County v. Suehs, \_\_\_ F.3d \_\_\_, 2012 WL 3573642, No. 12-50377 (5th Cir. Aug. 21, 2012).
- 7 Carolyn Jones, "One Year Later, Cuts to Women's Health Have Hurt More Than Just Planned Parenthood," *The Texas Observer*, August 15, 2012, available at <http://www.texasobserver.org/cover-story/one-year-later-cuts-to-women's-health-have-hurt-more-than-just-planned-parenthood>.
- 8 "Current Judicial Vacancies."
- 9 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 876 (1992).
- 10 Guttmacher Institute, "State Policies in Brief: Counseling and Waiting Periods for Abortion," October 1, 2012, available at [http://www.guttmacher.org/statecenter/spibs/spib\\_MWPA.pdf](http://www.guttmacher.org/statecenter/spibs/spib_MWPA.pdf).
- 11 Maya Manian, "Perverting Informed Consent: The South Dakota Court Decision," *RH Reality Check*, August 1, 2012, available at <http://www.rhrealitycheck.org/article/2012/08/01/perverting-informed-consent-south-dakota>.
- 12 "Biographical Directory of Federal Judges," available at <http://www.uscourts.gov/JudgesAndJudgeships/BiographicalDirectoryOfJudges.aspx>.
- 13 "Eighth Circuit Court of Appeals Judges," available at <http://www.ca8.uscourts.gov/newcoa/judge.htm> (last accessed October 2012).
- 14 *Casey*, 505 U.S. at 881.
- 15 "Future Judicial Vacancies," available at <http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/FutureJudicialVacancies.aspx> (last accessed October 2012).
- 16 *Texas Medical Providers Performing Abortion Services v. Lakey*, 667 F.3d 570 (5th Cir. 2012).
- 17 "Current Judicial Vacancies."
- 18 The Becket Fund for Religious Liberty, "HHS Mandate Information Central," available at <http://www.becketfund.org/hhsinformationcentral/> (last accessed October 2012).
- 19 *Order, Newland v. Sebelius*, No. 12-cv-01123-JLK (D. Colo. July 27, 2012).
- 20 Seung Min Kim, "GOP senators block Obama judicial nominee Robert Bacharach," *Politico: On Congress*, July 30, 2012, available at <http://www.politico.com/blogs/on-congress/2012/07/gop-senators-block-obama-judicial-nominee-robert-bacharach-130556.html>.
- 21 "Future Judicial Vacancies," available at <http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/FutureJudicialVacancies.aspx> (last accessed October 2012).