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MATERIAL HARM TO OUR SYSTEM OF JUSTICE

THE CONSEQUENCES OF AN EIGHT-MEMBER SUPREME COURT

CONSTITUTIONAL ACCOUNTABILITY CENTER

PEOPLE FOR THE AMERICAN WAY FOUNDATION

Introduction

This Supreme Court Term marks the first Term in decades in which the Court will be without a full complement of nine Justices for almost half the Term. The eight Justices now on the Court have said little about the effects of the prolonged vacancy on the Court following the death of Justice Scalia in February, other than stating that their work will go forward and "[f]or the most part" would not change.[1] In fact, the Court decides most of its cases with three or fewer dissenting votes, and work on such cases can proceed without disruption. In the years since World War II, however, an increasing number of important legal controversies have closely divided the Supreme Court and have been resolved by 5-4 rulings. When, as is currently the case, only eight Justices sit on the Court, it is possible for the Court to deadlock. Such 4-4 ties leave the lower court decision in place, but set *no* national precedent. Already since Justice Scalia's death, as discussed below, two important legal controversies have resulted in 4-4 votes, and in one of those cases, the result is that different legal rules apply to different people and businesses in states literally right next to each other. The absence of a full complement of nine Justices, as explained below, also has other harmful consequences.

In fact, previous statements by current and former Justices and by chief judges of federal appellate courts appointed by Republican and Democratic presidents, as well as by more than 40 current and former law school deans, have made clear the serious harm to the Supreme Court and the administration of justice caused by an understaffed Court. For example, letters this March from former chief judges of the D.C. and Third Circuit Courts of Appeals and from 43 law school deans have explained that:[2]

- The Supreme Court and our "system of law" are "materially hampered" by having only eight Justices on the Court;
- Only if the current Court vacancy is filled "can the Supreme Court continue its vital work of declaring and harmonizing national law in our rapidly changing economy and areas of social concern";

[1] *See* Josh Gerstein, *Breyer on 8-member Supreme Court: 'We'll do our work'*, Politico (Feb. 25, 2016, 4:08 PM), http://www.politico.com/blogs/under-the-radar/2016/02/stephen-breyer-supreme-court-vacancy-219794.

[2] The quotes below are from a March 10, 2016 letter from retired Chief Judge Patricia Wald (D.C. Circuit) and retired Chief Judge John J. Gibbons (Third Circuit) to the Senate Majority and Minority Leaders and the Chair and Ranking Member of the Senate Judiciary Committee, and from a March 14, 2016 letter to the same Senate leaders from 43 current and former law school deans. *See* Zoe Tillman, *Former Federal Appeals Court Chief Judges Urge Senate to Act on Supreme Court Nominee*, Nat'l L.J. (Mar. 14, 2016), http://www.nationallawjournal.com/id=1202752107603/Former-Federal-Appeals-Chief-Judges-Urge-Senate-to-Act-on-Supreme-Court-Nominee?slreturn=20160417112143 (citing Letter from Hon. Patricia M. Wald, Retired D.C. Cir. Chief Judge, & Hon. John J. Gibbons, Retired 3d Cir. Chief Judge, to Mitch McConnell, Senate Majority Leader, et al. (Mar. 10, 2016), http://pdfserver.amlaw.com/nlj/Wald-Gibbons-Letter-Signed.pdf); s*ee also* Letter from Nicholas W. Allard, President, Brooklyn Law School, et al., to Mitch McConnell, Senate Majority Leader, et al. (Mar. 14, 2016), www.dpcc.senate.gov/files/documents/SCOTUSLetters/LawDeansLetter.pdf.

- The absence of nine Justices prevents the Court from being the "final arbiter" of federal law, producing the possibility that the same law will have "different meanings in different parts of the country";
- Having a full complement of nine Justices on the Court "is not only necessary to resolve conflicts among circuits but, just as important, it is essential to the Court's primary function of declaring what the law is in a rapidly moving society where crises frequently arise that must be decided at the highest judicial level"; and
- A continued vacancy on the Court harms its ability to function and jeopardizes "respect for the rule of law."

In addition, current and former Supreme Court Justices nominated by Republican presidents, including the late Justice Scalia himself, have made clear the harm caused by even a short-term lack of a full complement of nine Justices on the Court. Retired Justices John Paul Stevens and Sandra Day O'Connor have recently and publicly decried the continuing vacancy on the Court and the failure of the Senate to act on that vacancy, with Justice Stevens specifically stating that "there are certain cases you just can't decide" with only eight Justices.[3] The late Chief Justice William Rehnquist, when asked to disqualify himself from a single case that would have left the Court with eight Justices, stated that having eight Justices in just that one case should be avoided because of the "undesirable" risk that the "principle of law" presented would remain unsettled.[4] In 2011, Chief Justice John Roberts similarly stressed the importance to the Court of having "nine members who always sit together," and maintained that even a single unnecessary recusal of one Justice in one case would harm the Court by forcing it to "sit without its full membership" in that case.[5]

And in 2004, Justice Scalia himself emphasized the importance of avoiding recusal and having the full complement of nine Justices in every case possible. In rejecting a motion that he recuse himself in the controversial "duck hunt" case involving Vice President Cheney, Justice Scalia stated that "[e]ven one unnecessary recusal impairs the functioning of the Court." Forcing the Court to proceed "with eight Justices," he proclaimed, raises "the possibility that, by reason of a tie vote, it will find itself unable to resolve the significant legal issue presented by the case."[6]

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[3] *See* Christian Farias, *Retired Justice John Paul Stevens Tells Senate to Get Moving on that Supreme Court Nominee*, Huffington Post (May 5, 2016, 5:17 PM), http://www.huffingtonpost.com/entry/john-paul-stevens-supreme-court-nominee_us_572b8118e4b0bc9cb045f4f3.

[4] *See* Steven Lubet & Charles G. Geyh, *What Would Nino Do with Garland's Nomination*, Law.com (May 8, 2016), http://www.law.com/sites/articles/2016/05/08/what-would-nino-do-with-garlands-nomination/.

[5] *Id.*

[6] *Cheney v. U.S. Dist. Court*, 541 U.S. 913, 915-16 (2004) (Scalia, J., mem.) (quoting Chief Justice William H. Rehnquist et al., *Statement of Recusal Policy* (1993)). Justice Scalia explained that his statement about the harm from even one unnecessary recusal quoted a 1993 statement of recusal policy by all the Court's Justices. Although recusal in individual cases will sometimes be necessary, and nothing herein should be construed as approving any specific refusal to recuse, the Justices' statements underscore the

If Justices Scalia, Rehnquist, and Roberts believe that such harmful consequences flow from having a Supreme Court with only eight Justices in just one single case, how much more is the functioning of the Court harmed by having only eight Justices for three months so far and, if Senate Republicans are in fact able to carry out their effort to block consideration of a Court nominee until after the next President takes office, for eight or nine months more? This analysis reviews the harmful effects of the continuing vacancy on the Court, both in the current Term and the upcoming Term as well as in historical context.

I. Effects on Decisions in the October 2015 Term

As of the release of this report, the Supreme Court has issued decisions in approximately half of the 69 cases in which it has heard oral argument this Term, with 27 of those decisions having been issued since Justice Scalia passed away in February. In examining how the vacancy on the Court created by Justice Scalia's death has affected the functioning of the Court this Term, discussed below are first the cases in which the Court split 4-4 on the merits and then those in which the Court issued opinions that may have been affected by the vacancy.

A. 4-4 Decisions

In the roughly three months since Justice Scalia passed away, the Court has already split evenly in two cases: *Hawkins v. Community Bank of Raymore*[7] and *Friedrichs v. California Teachers Association*.[8] When the Court splits evenly in a case, as will inevitably happen on a Court with an even number of Justices, the lower court judgment is automatically affirmed, but the Court issues no opinion. Thus, there is no binding nationwide precedent, and the Court provides no guidance to the lower courts about the question or questions presented in the case. Both *Hawkins* and *Friedrichs* underscore that, however many 4-4 cases the Court ultimately decides before Justice Scalia's successor is confirmed, there are significant consequences whenever the Court is unable to reach a decision in a case.

In *Hawkins*, the Court was considering whether an applicant for a bank loan may be required to have his spouse guarantee the loan. Although federal regulation has prohibited banks from requiring such spousal guarantees for decades, lower federal courts have disagreed

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significant consequences of the Court's being without a full complement of Justices for an extended period of time.

[7] 136 S. Ct. 1072 (2016) (per curiam).

[8] 136 S. Ct. 1083 (2016) (per curiam). In addition, on April 23, 2016, in *Franchise Tax Board of California v. Hyatt*, 136 S. Ct. 1277 (2016), the Court split evenly on the question whether *Nevada v. Hall*, 440 U.S. 410 (1979) (holding that a state may be sued in the courts of another state without its consent), should be overruled, leaving that legal issue unresolved. The Court was nonetheless able to resolve the case, 6-2, on the other question presented, which was whether Nevada may deny other states sued in its courts the same immunities that it enjoys in its own courts. *See Hyatt*, 136 S. Ct. at 1279.

about whether that regulation is a valid interpretation of the federal statute that it applies. Although the issue in *Hawkins* may appear drier than the issues considered in some of the Court's more high profile cases, it is an important question for anyone who is married and seeking a bank loan. According to the petition for Supreme Court review filed in the case, small business owners must often "obtain spousal guaranties as a condition for a commercial loan,"[9] and the consequences of this mandate can be significant for the spouse: "By requiring the spouse to guaranty credit to a borrowing entity in which that spouse has no interest or position, the lender requires the spousal guarantor to incur (often extensive) liability solely based on marital status. . . . These liabilities impair the spouse's creditworthiness, often making it impossible to independently qualify for future credit."[10]

Moreover, Supreme Court resolution of the question was particularly important because lower federal courts had reached conflicting views on that question. According to the U.S. Court of Appeals for the Eighth Circuit, federal law does not protect "a guarantor . . . from marital-status discrimination,"[11] but, as the Eighth Circuit noted in its decision, "[t]he Sixth Circuit recently reached the contrary conclusion."[12] Indeed, in the petition for review in the case, this acknowledged disagreement between two federal courts of appeals was the first argument for why the Supreme Court should hear the case.[13]

On March 22, 2016, the Supreme Court issued a per curiam order in *Hawkins* providing that the "judgment [was] affirmed by an equally divided Court."[14] Because the Court split 4-4 in this case, the judgment of the Eighth Circuit was automatically affirmed, but the Court was not able to establish binding nationwide precedent. Thus, the Court's decision also left in place the Sixth Circuit decision that had reached a contrary conclusion. As a result, federal law on this issue will apply one way to individuals who live in Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota (the states within the jurisdiction of the Eighth Circuit), and it will apply differently to individuals who live in Michigan, Ohio, Kentucky, and Tennessee (the states within the Sixth Circuit). Moreover, how the law will apply remains uncertain in every other part of the country, where the federal appellate courts have not yet considered the issue in *Hawkins*.

Significantly, the Supreme Court's inability to decide this case and resolve this lower court conflict illustrates that an eight-member Court will often be unable to fulfill one of its most important responsibilities, namely, resolving lower court conflicts and providing one uniform rule of law for the country.[15] Indeed, Supreme Court Rule 10, which discusses

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[9] Petition for a Writ of Certiorari at 18, *Hawkins*, 136 S. Ct. 1072 (No. 14-520).
[10] *Id.* at 18-19.
[11] *Hawkins v. Cmty. Bank of Raymore*, 761 F.3d 937, 942 (8th. Cir. 2014).
[12] *Id.* at 941 (citing *RL BB Acquisition, LLC v. Bridgemill Commons Dev. Grp., LLC*, 754 F.3d 380 (6th Cir. 2014)).
[13] Petition for a Writ of Certiorari, *supra* note 9, at 5.
[14] *Hawkins*, 136 S. Ct. 1072.
[15] In fact, the petitioners in *Hawkins* have filed a petition for rehearing, asking the Court to rehear the case because, in part, the Court's affirmance "by an equally divided Court" does "nothing to solve the

"[c]onsiderations [g]overning [r]eview on [c]ertiorari," identifies as the first consideration whether "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter."[16]

The Justices themselves have repeatedly made clear that providing a uniform rule of law is one of the most important functions—if not the most important function—performed by the Supreme Court. For example, at his Supreme Court confirmation hearing, then-Judge John Roberts explained that "[t]he job of the Supreme Court is to ensure the uniformity and consistency of Federal law, in particular, interpretations of the Constitution. So the clearest case that the Court should hear . . . is when two different courts of appeals are interpreting a law differently. Obviously, the law should mean the same thing in every part of the country, and if two different courts take a different view of the law, that's the kind of case the Court ought to be taking."[17] Similarly, in explaining to the Senate Judiciary Committee how he and his colleagues decide whether to hear a case, the late Justice Scalia explained that they ask, "Is there a circuit conflict? Is this a significant issue on which the lower courts are divided?"[18] Justice Ruth Bader Ginsburg has also stated that "[t]he major job of the [C]ourt is to keep the law of the United States more or less uniform."[19] Thus, because of the vacancy, the Court in *Hawkins* was unable to fulfill what numerous Justices and many others have recognized is its most important responsibility: ensuring a uniform rule of law for the country.

In *Friedrichs v. California Teachers Association*, the Court was considering whether it violates the First Amendment for public sector unions to charge non-members who enjoy the benefits of the union's collective bargaining for the fair share of the costs of that collective bargaining. Nearly forty years ago, the Supreme Court held that these fair share fees are constitutional,[20] but two recent Supreme Court decisions called that earlier decision into question.[21] Relying on that earlier precedent, the Ninth Circuit Court of Appeals upheld the constitutionality of fair share fees,[22] and the Supreme Court granted *certiorari* in *Friedrichs* to consider whether that nearly forty-year-old precedent should be overruled.

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disarray among the federal circuits or state supreme courts." Petition for Rehearing at 7, *Hawkins*, 136 S. Ct. 1072 (No. 14-520); *see id.* at 5-10.

[16] *Rules of the Supreme Court of the United States*, U.S. Sup. Ct. 5 (July 1, 2013), http://www.supremecourt.gov/ctrules/2013RulesoftheCourt.pdf.

[17] *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 336 (2005), *available at* http://www.gpo.gov/fdsys/pkg/GPO-CHRG-ROBERTS/content-detail.html.

[18] *Constitutional Role of Judges*, C-SPAN 49:47 (Oct. 5, 2011), http://www.c-span.org/video/?301909-1/constitutional-role-judges.

[19] Sunnivie Brydum, *WATCH: Ruth Bader Ginsburg Sees 'No Crying Need' for SCOTUS to Take Up Marriage*, Advocate (Oct. 20, 2014, 2:51 PM), http://www.advocate.com/politics/marriage-equality/2014/10/20/watch-ruth-bader-ginsburg-sees-no-crying-need-scotus-take-marr.

[20] *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

[21] *Harris v. Quinn*, 134 S. Ct. 2618 (2014); *Knox v. SEIU, Local 1000*, 132 S. Ct. 2277 (2012).

[22] *Friedrichs v. Cal. Teachers Ass'n*, No. 13-57095, 2014 WL 10076847 (9th Cir. Nov. 18, 2014).

On March 29, 2016, the Court issued a per curiam order in *Friedrichs* providing that the "judgment [was] affirmed by an equally divided Court."[23] Because the Court split 4-4, the judgment of the Ninth Circuit was automatically affirmed. Although there was no circuit split in this case, the Court's failure to issue an opinion leaves the issue unresolved from the perspective of those who oppose fair share fees. Indeed, the petitioner in *Friedrichs* has filed a petition for rehearing with the Court, asking the Court to rehear the case "after it obtains a full complement of Justices capable of reaching resolution by a five-Justice majority."[24] The petitioner in *Friedrichs* argues that "[t]he Questions Presented in this case are too important to leave unsettled with an affirmance by an equally divided Court, and they are guaranteed to recur in the absence of a definitive ruling from this Court."[25] She further argues that "[t]o leave the Questions Presented unresolved would needlessly prolong the prevailing uncertainty on issues that recur constantly and that affect millions of public employees in the more than 20 states that allow agency fees."[26] Indeed, the rehearing petition notes that "there are multiple cases pending in the lower courts that implicate the Questions Presented."[27] Thus, because of the vacancy, the Court was unable to resolve an important question of federal law, and it is clear that there will be ongoing litigation on the issue until the vacancy is filled and the Court is capable of issuing a majority decision on the issue.

In short, each of the two cases in which the Supreme Court has already split 4-4 since Justice Scalia's passing highlights the significant consequences that can result from 4-4 decisions. Of course, even when the Court does not divide 4-4, the vacancy may nonetheless affect the Court's decisions, as the next section discusses.

B. Other Effects of the Vacancy on Merits Decisions This Term

In the aftermath of Justice Scalia's death, a number of news stories examined all of the major cases being considered by the Court this Term through the lens of the vacancy, and discussed the possible consequences of a 4-4 decision in those cases. Since then, the Court has heard oral argument in all of those cases, most significantly, *Whole Women's Health v. Hellerstedt*, *United States v. Texas*, and *Zubik v. Burwell*. These three cases raise critically important issues concerning restrictions on abortion rights, immigration, and the intersection between the right to contraceptive coverage and religious liberty claims. Although *Whole Women's Health* and *Texas* have not yet been decided—and it is premature to conclude that either of them will result in a 4-4 decision—the Court's decisions in *Zubik*, and in a lower profile case, *Spokeo, Inc. v. Robins*, illustrate other ways in which the Supreme Court vacancy may be affecting the way the Court functions.

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[23] *Friedrichs*, 136 S. Ct. 1083.
[24] Petition for Rehearing at 1, *Friedrichs*, 136 S. Ct. 1083 (No. 14-915).
[25] *Id.* at 1; *see id.* at 2 (rehearing "ensures that cases important enough for this Court to grant certiorari do not remain unresolved simply because an unexpected vacancy prevents a majority decision").
[26] *Id.* at 3-4.
[27] *Id.* at 4.

In *Zubik,* the Court considered whether the accommodation provided by the government to religious non-profits that object to the Affordable Care Act's contraceptive mandate violates the Religious Freedom Restoration Act. Following oral argument in the case, the Court issued an order requesting supplemental briefing. In that order, the Court directed the parties "to file supplemental briefs that address whether and how contraceptive coverage may be obtained by petitioners' employees through petitioners' insurance companies, but in a way that does not require any involvement of petitioners beyond their own decision to provide health insurance without contraceptive coverage to their employees."[28] The Court offered up one hypothetical possibility and asked the parties to address it, and also invited them to "address other proposals along similar lines."[29]

The order was highly unusual and, as was widely reported at the time, seemed to reflect the Court's effort to determine whether there was a compromise position on which the parties could agree. It was also particularly odd, given that, as the government pointed out in its supplemental brief, the accommodation at issue had been developed following "consult[ation] with religious organizations, insurers, and other stakeholders" and "three rounds of notice-and-comment rulemaking" that "generated hundreds of thousands of public comments."[30]

On May 16, 2016, the Court issued a per curiam order in *Zubik* in which it stated that "[i]n light of the positions asserted by the parties in their supplemental briefs, the Court vacates the judgments below and remands to the [lower courts]" so that the "parties on remand [can] be afforded an opportunity to arrive at an approach going forward that accommodates petitioners' religious exercise while at the same time ensuring that women covered by petitioners' health plans 'receive full and equal health coverage, including contraceptive coverage.'"[31] According to the Court, "the foregoing approach [is] more suitable than addressing the significantly clarified views of the parties in the first instance."[32] The Court made clear that it "expresses no view on the merits of the cases," though it also noted that "[n]othing in this opinion . . . is to affect the ability of the Government to ensure that women covered by petitioners' health plans 'obtain, without cost, the full range of FDA approved contraceptives.'"[33]

The same day that the Court effectively punted in *Zubik*, it also issued a non-decision decision in *Spokeo, Inc. v. Robins*, in which the Court was asked to decide whether Congress

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[28] Order on Supplemental Briefs, *Zubik v. Burwell*, No. 14-1418 (U.S. Mar. 29, 2016).
[29] *Id.*
[30] Supplemental Brief for the Respondents at 1, *Zubik*, No. 14-1418 (U.S. Apr. 12, 2016).
[31] *Zubik v. Burwell*, No. 14-1418, 2016 WL 2842449, at *2 (U.S. May 16, 2016) (per curiam) (quoting Supplemental Brief for the Respondents*, supra* note 29, at 1).
[32] *Id.*
[33] *Id.* at *2, *3 (quoting *Wheaton Coll. v. Burwell*, 134 S. Ct. 2806, 2807 (2014)); *see id.* at *3-4 (Sotomayor, J., concurring) (noting that "[r]equiring standalone contraceptive-only coverage would leave in limbo all of the women now guaranteed seamless preventative-care coverage under the Affordable Care Act" and "the Courts of Appeals remain free to reach the same conclusion or a different one on each of the questions presented by these cases").

may give individuals the right to sue for damages in federal court when a federal law has been violated. Although *Spokeo* was not as high profile a case as *Zubik*, the question *Spokeo* presented was nonetheless incredibly important because it affects the ability of individuals to hold companies accountable when they violate federal law. In a 6-2 decision, the Court did not resolve the question whether the plaintiff in the case had standing to sue, but instead concluded that the court below had engaged in "incomplete" standing analysis and sent the case back to that court to reconsider the issue. The Supreme Court made clear that it "t[ook] no position as to whether [the lower court's] ultimate conclusion . . . was correct."[34]

These two opinions highlight three different respects in which the vacancy on the Court may be affecting how the Court operates. First, they illustrate the extent to which the Court may be forced to operate in ways that are not only unusual, but also at odds with how the Court traditionally resolves cases. Given that it is the responsibility of Congress and federal agencies, not the Court, to make the sorts of policy determinations inherent in crafting an accommodation like the one at issue in *Zubik*, it is arguably problematic that the Court first invited the parties to re-litigate those policy questions in a forum (*i.e*., supplemental briefs to the Court) that did not permit other affected parties to weigh in and address competing alternatives, and then directed the lower courts to reconsider the legal issue by "afford[ing] [the parties] an opportunity" to resolve the issue through some new accommodation. Given the uncertainty about what will happen in the courts of appeals on remand, the Supreme Court's non-decision decision has produced legal uncertainty and made it quite possible that the Court will again be asked to resolve the questions presented in *Zubik* in the future. Second, the two opinions also highlight that this eight-member Court might be reaching different conclusions than would a nine-member Court that could more easily reach a majority on the legal questions the Court has been asked to address.[35] Indeed, although the supplemental briefing request made that possibility more transparent in *Zubik*, it could well be that other majority decisions may have been affected, in ways large or small, by the vacancy. Third, as just noted, the two opinions underscore that even when the Court does not split 4-4, it may nonetheless be unable to resolve the important questions presented in the cases coming before it, leaving significant legal uncertainty on important issues.

Finally, although much of the national discussion about the Court focuses on the biggest cases the Court is hearing, it is worth remembering that the other cases the Court has yet to decide this Term all involve important and consequential issues. Indeed, the Court considers thousands of petitions for *certiorari* each year, and it selects approximately 70-80 that it concludes are significant or consequential enough to merit its review. The cases still

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[34] *Spokeo, Inc. v. Robins*, No. 13-1339, 2016 WL 2842447, at *8 (U.S. May 16, 2016).

[35] There is historical precedent for the proposition that Justices will sometimes change their votes to avoid 4-4 splits. *See, e.g.*, *Inman v. Balt. & Ohio R.R. Co.*, 361 U.S. 138, 142 (1959) (Frankfurter, J., concurring) (explaining that rather than voting to dismiss the case, he would join the Court's opinion, because to do otherwise would result in a 4-4 split, casting the case into "the limbo of unexplained adjudications, and the lower courts, as well as the profession, would be deprived of knowing the circumstances of this litigation and the basis of our disposition of it").

outstanding this Term involve race discrimination in jury selection, federal employment law, judicial conflicts of interest, and a host of other important issues. While there is no way to know whether any of these will produce a 4-4 split, some could. Moreover, even if they do not come out 4-4, they could otherwise be affected by the vacancy on the Court. Indeed, given that some of these cases may be affected in ways that will not be obvious from the final opinion, we may never know the true impact of the Supreme Court vacancy on the October 2015 Term.

II. Importance of Nine Justices with the Number of 5-4 Decisions at Historic Highs

While Supreme Court cases decided by only one vote were rare throughout most of our nation's history, they have become much more common since the beginning of World War II, especially during the eras of the Rehnquist and Roberts Courts. Indeed, until 1941, no Chief Justice had presided over a Court in which more than 5% of opinions were decided by one vote. The three Chief Justices to preside over Courts with the highest percentage of such sharply divided opinions have been the three most recent ones: Warren Burger (appointed by Richard Nixon), William Rehnquist (appointed by Ronald Reagan), and John Roberts (appointed by George W. Bush), each higher than the one before.[36]

By the end of the last full Term (2014-2015), 22% of the rulings over the first ten years of the Roberts Court were 5-4 splits.[37] That statistic, and the cases giving rise to it—cases like *Citizens United v. FEC*,[38] *Boumediene v. Bush*,[39] *Shelby County v. Holder*,[40] *Windsor v. United States*,[41] *Ledbetter v. Goodyear Tire and Rubber*,[42] *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project*,[43] *AT&T Mobility v. Concepcion*,[44] and *Gonzales v. Carhart*[45]—make clear that America's highest court is sharply divided, more so than ever before in U.S. history. In order for the Court to effectively address and provide uniformity on the country's most important and difficult legal questions, it must be fully staffed.

[36] David P. Kuhn, *The Incredible Polarization and Politicization of the Supreme Court*, Atlantic (June 29, 2012), http://www.theatlantic.com/politics/archive/2012/06/the-incredible-polarization-and-politicization-of-the-supreme-court/259155/.
[37] Kedar Bhatia, *Final Stat Pack for October Term 2014*, SCOTUSblog 22 (Jun. 30, 2015, 11:23 AM), http://sblog.s3.amazonaws.com/wp-content/uploads/2015/07/SB_Stat_Pack_OT14.pdf.
[38] 558 U.S. 310 (2010).
[39] 553 U.S. 723 (2008).
[40] 133 S. Ct. 2612 (2013).
[41] 133 S. Ct. 2675 (2013).
[42] 550 U.S. 618 (2007).
[43] 135 S. Ct. 2507 (2015).
[44] 563 U.S. 333 (2011).
[45] 550 U.S. 124 (2007).

Burwell v. Hobby Lobby Stores, Inc.[46] provides a good example of how an unfilled vacancy could produce enormous and harmful consequences. In that case, a for-profit corporation cited the federal Religious Freedom Restoration Act (RFRA) to challenge the Affordable Care Act's contraception coverage provision. While the case is generally known as "*Hobby Lobby*," the Supreme Court was in fact reviewing two conflicting appellate court rulings. In *Hobby Lobby Stores*, the Tenth Circuit had ruled in favor of the corporate challenger,[47] while in *Conestoga Wood Specialties Corp. v. Burwell*, the Third Circuit, considering the same legal arguments, had rejected the corporation's challenge.[48]

Different circuits had come to different conclusions on the same issue, one of critical importance to women employees and their employers. Had the Supreme Court been deadlocked in these cases, two major federal laws (RFRA and the Affordable Care Act) would have been interpreted in extremely different ways in different parts of the country, defeating the purpose of having federal legislation to address national problems in the first place. As noted above, "circuit splits" on important legal matters are a major reason the Supreme Court agrees to review a case.[49]

Had the *Hobby Lobby* Court split 4-4, the conflicting rulings of the lower courts would have been upheld, without any national precedent or guidance to other courts. And if the Supreme Court had been so hobbled for two consecutive Terms, it would have taken even longer to resolve the issue, creating uncertainty for businesses and individuals alike.

The consequences could have been more dire—and more politically destructive—had there only been eight Justices when the constitutionality of the ACA's individual mandate was before the Supreme Court. In a case with major ramifications for the limits of congressional authority, Americans' access to healthcare, and intense political debate over the law's constitutionality, the nine-member Court upheld the individual mandate in *NFIB v. Sebelius* by a 5-4 vote.[50] But an evenly-divided Court would have been disastrous. Circuit courts had reached different conclusions on the question whether the individual mandate was constitutional,[51] and without guidance from the Supreme Court, the law would have been struck down as unconstitutional in some parts of the country and upheld in others. Again, a major function of the Supreme Court is to prevent the Constitution from applying in different ways in different parts of the country. The question of whether the ACA's individual mandate was constitutional required a timely resolution that applied uniformly throughout the United States.

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[46] 134 S. Ct. 2751 (2014).
[47] *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013).
[48] *Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 724 F.3d 377 (3d Cir. 2013).
[49] *See supra* p. 4-5.
[50] 132 S. Ct. 2566 (2012).
[51] *Seven-Sky v. Holder*, 661 F.3d 1 (D.C. Cir. 2011) (upholding the law); *Thomas More Law Ctr. v. Obama*, 651 F.3d 529 (6th Cir. 2011) (upholding the law); *Florida ex. rel. Attorney Gen. v. U.S. Dep't of Health & Human Servs.*, 648 F.3d 1235 (11th Cir. 2011) (striking the law down).

Cases involving the ACA are hardly the only recent ones in which the Court has resolved a circuit split by a 5-4 vote. For example, in *District of Columbia v. Heller*, the Court held, 5-4, that the Second Amendment protects an individual's right to bear arms unrelated to militia service.[52] And in *Obergefell v. Hodges*, the Court held, 5-4, that state laws limiting marriage to opposite-sex couples are unconstitutional.[53] Without Supreme Court resolution of issues such as these, the constitutional rights of individuals and the constitutional authority of states would vary across different regions of the country, defeating one of the key purposes of having a national Constitution.

III. Other Problems Posed by an Eight-Justice Court

The Supreme Court does more than issue final opinions in cases. It is also the court of last resort for parties seeking or opposing an immediate stay of the enforcement of a lower court order or an injunction temporarily blocking a law from being enforced. For instance, when a federal district court in Utah struck down that state's marriage discrimination law in 2013, both that court and the Tenth Circuit denied requests that the decision be stayed pending appeal.[54] But the Supreme Court granted a stay.[55]

Stay requests are particularly important in the weeks leading up to national elections; the decision whether to allow a jurisdiction's challenged voting laws to go into effect will have an enormous impact on Americans who want to vote and on the state and local governments that run elections. Shortly before the 2014 midterm elections, the Supreme Court issued orders granting or denying stays affecting whether voting laws being challenged in court would go into effect in Wisconsin (voter ID),[56] Texas (voter ID),[57] Ohio (early voting),[58] and North Carolina (same-day registration and out-of-precinct voting).[59] In fact, the Court was divided 5-4 on the Ohio stay order.

These are extremely important legal issues as to which time is of the essence. With a full Court, the decision whether to grant or deny a stay will be made by a majority of the Justices. But when the Court has only eight members, ties become possible, meaning that the Supreme Court's failure to take action on urgent stay requests over an extended period of time may not be the product of a majority decision by the Court. As we approach another national

[52] 554 U.S. 570 (2008).
[53] 135 S. Ct. 2584 (2015).
[54] *Kitchen v. Herbert*, 961 F. Supp. 2d 1181 (D. Utah 2013), *stay denied*, No. 2:13-cv-217, 2013 WL 6834634 (D. Utah Dec. 23, 2013), *stay denied*, No. 13-4178 (10th Cir. Dec. 24, 2013), ECF No. 01019177155.
[55] *Herbert v. Kitchen*, 134 S. Ct. 893 (2014).
[56] *Frank v. Walker*, 135 S. Ct. 7 (2014).
[57] *Veasey v. Perry*, 135 S. Ct. 9 (2014).
[58] *Husted v. Ohio State Conference of the NAACP*, 135 S. Ct. 42 (2014).
[59] *North Carolina v. League of Women Voters*, 135 S. Ct. 6 (2014).

election in less than six months, voter ID and other voting-related laws are still in litigation, including in the Fourth Circuit (challenging North Carolina laws) and the Fifth Circuit (challenging Texas's voter ID law). The Supreme Court may very well be called upon to address stay requests in these and other cases that will have an enormous impact on the affected states and potentially the entire nation.

The Justices themselves recently made this clear in denying a request to vacate the Fifth Circuit's stay of a district court order striking down Texas's voter ID law. Specifically mentioning the time constraints associated with the fall elections, the Court stated that it would be open to considering another stay request if the Fifth Circuit has not acted by July 20, 2016.[60]

The potential for the Supreme Court to split when considering stay requests is yet another way that a prolonged vacancy on the Court can bring ongoing harm to the nation.[61]

Finally, although this cannot be known for sure, it is possible that the potential for tie votes has affected the Court's decisions on what cases to hear next Term. First, the total number of cases accepted for review next Term is now slightly lower than the recent average at this point in the year.[62] Second, and perhaps even more important, commentators have suggested that the prospect of a 4-4 split is affecting the types of cases the Court is taking. For example, the PBS NewsHour's analysis of how the Court is functioning without Justice Scalia noted that "[t]here are fewer big cases in the pipeline for next term, almost certainly a product of the [C]ourt's desire to avoid controversial topics until the bench is once again full."[63] A *Washington Post* story made a similar point, noting Court experts' conclusion that the "ideologically divided eight-member court" might be "reluctan[t]" to "take on an issue in which it might not be able to provide a clear answer."[64] And according to *The Los Angeles Times*,

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[60] *Veasey v. Abbott*, No. 15A999, 2016 WL 1707589 (U.S. Apr. 29, 2016).

[61] Another issue on which the Supreme Court often receives very time-sensitive stay requests is the death penalty, as the Court is frequently asked whether to allow executions to go forward. For example, the Court recently split 4-4 on a motion to vacate a stay of execution granted by the Eleventh Circuit Court of Appeals. *See* Mark Berman, *After Federal Appeals Court Stays Alabama Inmate's Lethal Injection, Evenly Split Supreme Court Rejects Request to Step in*, Wash. Post (May 12, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/05/12/federal-appeals-court-delays-alabama-inmates-lethal-injection-hours-before-scheduled-execution/. In that case, the Court's 4-4 split simply allowed the Eleventh Circuit's stay of execution to remain in place; in another case, a 4-4 split could allow an execution to go forward.

[62] *Statistics*, SCOTUSblog, http://www.scotusblog.com/statistics/ (last visited May 18, 2016) (graph showing "[p]ace of grants").

[63] Mark Sherman & Sam Hananel, *How the Supreme Court Is Functioning Following Scalia's Death*, PBS NewsHour (April 30, 2016, 2:07 PM), http://www.pbs.org/newshour/rundown/how-the-supreme-court-is-functioning-following-scalias-death/.

[64] Robert Barnes, *Scalia's Death Affecting Next Term, Too? Pace of Accepted Cases at Supreme Court Slows*, Wash. Post (May 1, 2016), https://www.washingtonpost.com/politics/courts_law/scalias-death-affecting-next-term-too-pace-of-accepted-cases-at-supreme-court-slows/2016/05/01/1d304d1c-0ecb-11e6-bfa1-4efa856caf2a_story.html.

professionals familiar with the Court have noticed that the Justices seem wary of taking on major cases, especially in high-profile matters where a 5-4 ruling might otherwise be expected.[65]

IV. Conclusion

As the above discussion demonstrates, having a short-handed Court for an extended period of time is harmful to the proper functioning of the Court and to the nationwide rule of law.

[65] David G. Savage, *Supreme Court, Wary of Major New Cases, to Rule on Cheerleaders' Outfits and Adult Diapers*, L.A. Times (May 6, 2016, 10:52 AM), http://www.latimes.com/nation/la-na-court-divided-20160505-snap-story.html.