The Phyllis Schlafly Report

VOL. 45, NO. 10 | P.O. BOX 618, ALTON, ILLINOIS 62002 | MAY 2012

Winning Where It Counts: in the Courts

To paraphrase Charles Dickens, it has been both the best of times and the worst of times for our judiciary, depending on the issue and the court. Like it or not, most major decisions in our nation are now made by judges rather than legislators. At the end of June, the U.S. Supreme Court will decide whether ObamaCare is or is not a valid law, and this ruling will likely influence the presidential election months later. In 2000, the U.S. Supreme Court intervened to stop Democrats from using the Florida judiciary to take the election away from George W. Bush.

The thousands of lower courts are as important, if not more so, than the U.S. Supreme Court because more than 99% of cases never reach the High Court. Every week enormously important decisions are made by lower courts, without most of the public even aware of them. These decisions set precedents that affect not only the parties in the case, but all future Americans who encounter similar issues.

Every significant issue is now being defined and decided by the courts. Abortion, same-sex marriage, and pornography were unleashed on our society by the courts; censorship of prayer and Christianity in schools were the handiwork of the courts; and even the scourge of addiction by young people to violent video games is due to the courts. No issue today is untouched by rulings in the court system.

Eagle Forum Education & Legal Defense Fund has participated with an *amicus* brief in more than 75 pivotal cases since 1999, helping to win many upset victories. An *amicus* brief is a "friend of the court" brief that enhances the arguments of one side, urging the court to reach a particular result. Supreme Court Justices often cite *amicus* briefs, and liberals usually file numerous *amicus* briefs in important cases. But liberals are not so keen on conservatives doing the same thing; in several cases the other side filed a motion asking the court **not** to read our brief. Of course, that only heightened the judges' interest in what we say — judges then needed to read our brief to decide whether or not it should be read!

Here is a summary of what we have achieved, and what unfinished work remains to be done. In many cases we were the only conservative group to participate. Unfortunately, other groups on our side are often not willing to stand up to the feminists or participate in other essential, but difficult, legal battles. Complaining about judicial supremacy is essential; it is also necessary to submit briefs to courts explaining how wrong the other side is.

Here are the highlights of our more than 75 *amicus* briefs:

Commerce Clause

The key precedent for overturning ObamaCare is a 2000 case in which we, nearly alone among conservatives, stood up to the feminists and the Violence Against Women Act (VAWA). Entitled *United States v. Morrison* (2000) — a case litigated by the Center for Individual Rights — our *amicus* brief was successful in arguing that the Supreme Court should strike down part of VAWA as beyond the Commerce Clause authority of Congress. This ruling is a cornerstone for the case against ObamaCare.

In the VAWA case, more than 50 groups filed briefs for the feminists, but that did not deter us from arguing that aspects of domestic violence are beyond the scope of congressional power and the federal judiciary. Because that precedent stands tall today, the argument that ObamaCare goes beyond congressional power in compelling everyone to buy costly health insurance is easier to make.

Redistricting

Texas won't be losing five Republican seats in Congress, in part because of our *amicus* brief filed with the U.S. Supreme Court over the Christmas holidays last year. Time was short and our schedules were busy with Christmas activities, but we knew how important this redistricting issue was for 2012 and beyond.

Liberals had cleverly proposed "minority coalition" redistricting based on combining *different* ethnic groups to create many new Democrat-majority districts. The U.S. Supreme Court rendered a stunning, unanimous decision against the concept of "minority coalition" redistricting. Our

race-blind Constitution does not support the fiction that different minority voting blocs can be cobbled together in order to expand the number of Democrat-majority districts. This victory enabled Texas to implement its conservative redistricting plan, resulting in a likely gain of Republican districts, and our *amicus* brief helped shut the door on this type of redistricting mischief for the future. *Perry v. Perez* (2012).

Illegal Aliens

Our *amicus* briefs have racked up a nearly perfect record of success in numerous illegal-alien cases. As with several other issues, we file briefs in difficult cases that some conservative groups avoid. Most of these illegal-alien cases attracted numerous *amicus* briefs filed by the other side, making it lonely to stand up for law and order.

We have tirelessly defended the laws against illegal aliens passed in Pennsylvania, Alabama, Texas, Georgia and Arizona, including a victory before the U.S. Supreme Court last year and a case that we expect to win by the end of June this year in the Supreme Court. We even won an illegal alien case before the Ninth Circuit, despite its reputation as the most liberal court in the nation!

Our victories have included *Chamber of Commerce v. Whiting*, which we won both in the Ninth Circuit and in the Supreme Court, to uphold the Arizona Legal Arizona Workers Act in requiring E-Verify; and also *Gray v. City of Valley Park, Missouri* (8th Cir. 2009), where we successfully defended the immigration ordinances of the City of Valley Park, Missouri. In this case, the ACLU urged the Eighth Circuit **not** to allow us to file our brief. Of course, that probably made the Court even more interested. The ACLU lost its attempt to keep our brief away from the Court, and then we won the case, too.

Gay Adoption

We have filed several briefs in defense of traditional marriage and DOMA laws, from the Left Coast to the Northeast. We also helped attain the most significant legal victory so far for traditional marriage in a federal appellate court, in *Adar v. Smith* (5th Cir. 2011) (*en banc*). In that case an original panel of the Fifth Circuit ordered Louisiana to change the birth certificate of a child after he had been adopted by two men married in another state.

This precedent, considered pivotal to the homosexual agenda, would have required a state that rejects same-sex marriage to accommodate demands for changes in birth certificates by same-sex couples married elsewhere. If this precedent were allowed to stand, then it would open the door to liberal states imposing their support of same-sex marriage on the larger number of conservative states that adhere to traditional values.

We recognized the significance of this matter and filed an *amicus* brief urging the entire Fifth Circuit to go *en banc*, which is a rehearing by all the active judges on the appellate court. Though rarely done, the Fifth Circuit agreed with our request and replaced the pro-gay panel decision with a splendid conservative one.

The U.S. Supreme Court then rejected a petition to overrule the Fifth Circuit decision, thereby leaving in place a terrific precedent that a state need not change its laws in order to accommodate same-sex marriages from other states.

Pro-Life

We continue to be a leader in filing *amicus* briefs in the most important abortion cases. Sadly, many pro-life groups fail to recognize the importance of filing *amicus* briefs, while the pro-abortion lobby is always ready to litigate every issue with numerous briefs.

The court system brought our nation the scourge of *Roe v. Wade*, and tireless litigation is needed to undo that damage. We filed *amicus* briefs in support of the defunding of Planned Parenthood in Indiana and Kansas.

In the Kansas case, Planned Parenthood tried to prevent the Court from accepting our brief. The Court rejected Planned Parenthood's request and fully accepted our legal papers, and we await a decision by the Tenth Circuit. We have also filed *amicus* briefs in other important pro-life cases.

Title IX

We are the only conservative group that repeatedly stands up against the feminists in Title IX lawsuits. A cottage industry has grown up for feminist lawsuits to demand that girls be treated in sports just like boys, even though girls are on average less interested in sports than boys.

Many schools have been besieged by expensive lawsuits demanding damages because of some discrepancy in the numbers of male athletes compared to female ones, even though males have a higher interest in sports than females. Misinterpretation of Title IX imposes a strict "proportionality test," such that courts often require the male:female ratio of athletes on sports teams to equal the male:female ratio of students in the school.

Colleges now approach 60% female in enrollment, but that includes many women who go back to school later in life and thus will not compete in sports. Colleges are required to eliminate men's teams unfairly, merely to satisfy the quotas. Wrestling has been a big casualty of this quota system, even though it costs so little to support.

We frequently file *amicus* briefs in support of schools ambushed by this absurd feminist regulation, which is not authorized by the law. We were successful in defending single-gender classrooms in Louisiana, helping to win an appeal in *Doe v. Vermilion Parish School Board* (2011).

First Amendment

One possible reason that colleges are now 60% women and only 40% men is the vast amount of time many boys waste on violent video games, leaving them unsuitable and uninterested in college academics. It is now common to hear about men who drop out of college because of a video game addiction, and most high school shooting rampages are by troubled students who reportedly spent time playing violent video games.

States have valiantly tried to help parents curb this harmful addiction, but courts interfered by insisting that video games, no matter how violent, are free speech just as is the best of Shakespeare. We filed the only *amicus* brief in support of a petition for *certiorari* in the most prominent video game case to reach the U.S. Supreme Court, and the liberal media were stunned when the High Court agreed with our brief by "granting *cert*." The case then took the Court the longest to decide in its entire Term, detaining it until its last day in late June 2011 before rendering a decision.

We came up one vote short (5-4) in our opposition to the Court's view that the sale of video games to children, no matter how violent the games are or how young the children are, is fully protected free speech. But the decision — which declined to consider how bad violent video games really are — may not withstand the test of time. Simply put, we lost this battle but laid the foundation for winning the war later.

Appealing Decisions

Some of our best work was done in April in Louisiana by calling on state officials to appeal a dreadful trial court ruling to the Fifth Circuit. Judges can decide a case only if it is brought before them, and thus it is essential that state officials appeal bad rulings to the appellate court and then to the Supreme Court. Liberals have become increasingly clever in talking state officials out of appealing a ruling, thereby preventing a more conservative appellate court from correcting a bad decision made by a trial court.

For example, when we filed an *amicus* brief in an affirmative action case pending before the U.S. Supreme Court earlier this year, Walter Mondale and the Obama Department of Justice reportedly persuaded the City of St. Paul to withdraw its petition, thereby depriving us of a chance of a national victory.

Similar game-playing by the other side might have prevented a recent appeal by Louisiana of a trial court decision in favor of abortion. But we were ready and got the word out that Louisiana's Governor Bobby Jindal, who is pro-life, needed to appeal this case. And he did, making it likely the Fifth Circuit will overrule the bad decision.

Ten Commandments

Perhaps the finest victory for the Establishment Clause was helping to preserve the Ten Commandments on the grounds of the Texas Capitol in Austin. The liberals have won so many harmful victories on the expulsion of Christianity from public life. But in *Van Orden v. Perry* (2005), our *amicus* brief helped to win a stunning 5-4 upset. Since then this precedent has been cited more than 1,000 times. One of the Clinton-appointed Justices joined the conservative side, enabling this victory.

With the subsequent replacement of Justice O'Connor by Justice Alito, there is now a potential six-vote favorable majority on Establishment Clause cases. We subsequently filed an *amicus* brief in support of the memorial Cross at Mojave National Preserve, and the Cross won in *Salazar v. Buono* (2010). These good precedents will facilitate future progress on this important issue.

Parental Rights

We have repeatedly defended parental rights, though this work is far from finished. The Third Circuit cited our *amicus* brief in a ruling about nosy questionnaires used in public schools in *C.N. v. Ridgewood Board of Education* (2005). Prior to that we filed an *amicus* brief opposing dilution of the protections in the Family Educational Rights and Privacy Act (FERPA) in *Owasso Independent School District v. Falvo* (2002).

More recently, in *Camreta v. Greene* (2011), we filed an *amicus* brief opposing interrogating children without their parents' consent when there is no warrant. The courts have been slow, however, to recognize the full rights of parents in their children's upbringing and education. We plan to continue to file briefs in this important field.

English Language

We have stood up for the English language, and helped win a precedent that has been useful on many fronts: *Alexander v. Sandoval* (2000). By a margin of 5-4, the Court upheld Alabama's English-only driver's license exams against an intense challenge. That enabled the Court to render a decision in favor of the authority of Arizona to establish its own pro-English requirements for "English language learners" nearly a decade later, in *Horne v. Flores* (2009), in which we also filed a brief.

Second Amendment

The vast majority of courts had denied an individual Second Amendment right to bear arms, until some courageous plaintiffs and clever Second Amendment attorneys challenged the suffocating gun control laws in D.C. We helped by filing an *amicus* brief with the U.S. Supreme Court. The margin of victory for the Second Amendment in this case, entitled *D.C. v. Heller* (2008), was only 5-4, but winning by one vote sets the same precedent as winning by 9 votes.

We followed that up by helping achieve another Supreme Court victory on this issue in *McDonald v. City of Chicago* (2010), further solidifying the good precedent. This has cut the wind out of the sails of the gun control lobby, closing off arguments that the Constitution permits government to take away the rights of law-abiding citizens.

Charlton Heston, who famously warned Al Gore in 2000 that he could only take Heston's gun "from my cold, dead hands," passed away two months before the initial Supreme Court victory, but Charlton can rest in peace now that some gun control is recognized to be unconstitutional under these precedents.

Domestic Violence

We are increasingly concerned about the overly harsh penalties meted out based on *un*remarkable domestic disputes. The Violence Against Women Act (VAWA) spends billions of dollars to turn domestic disputes best handled by an apology into federal cases, restraining orders, loss of jobs, and maneuvering in divorce proceedings.

In *United States v. Hayes* (2009), we opposed an overly harsh sentence which was given based on the combination of a misdemeanor conviction for a domestic disturbance and unrelated gun possession, and two Justices agreed with us. In *Crespo v. Crespo*, we filed two briefs (at the New Jersey appellate level and before the NJ Supreme Court), to argue for a higher burden of proof for domestic restraining orders.

This work is unfinished; in 2010 the New Jersey Supreme Court, like most courts, toed the feminist line in favor of easy restraining orders despite how they can cause innocent people to lose their jobs or become unemployable.

Foreign Law

We have repeatedly opposed the incorporation of international law and treaties into our domestic laws and policies. In a case handled by Paul Clement, *Bond v. U.S.* (2011), we successfully argued in our *amicus* brief that an individual, who was absurdly prosecuted under a foreign treaty for a purely domestic issue of trying to harm her husband's paramour, has the right to raise the Tenth Amendment as a defense. This victory set a fabulous precedent that is helpful in many areas ranging from opposing foreign treaties to allowing individuals to assert the Tenth Amendment as a defense against any federal overreaching.

Conclusion

Appellate courts set the legal precedents for our nation based on the legal submissions put before them. No one should be surprised if a court rules for the side that has better-written briefs supported by a larger number of organizations. Many top law firms write briefs for free for liberal causes, indirectly funded by corporate America, and we cannot let their liberal arguments go unrebutted. We cannot expect to win if we do not show up.

Eagle Forum Education & Legal Defense Fund has risen to this task — with the support of our members — and outperformed liberal attorneys at their own game, helping establish dozens of important legal precedents on the greatest social issues of our time. Several struggles have been largely won — such as establishing a constitutional right to bear arms, obtaining precedents against unlimited federal power under the Commerce Clause, and defining limits on redistricting mischief. But in several other areas, such as same-sex marriage, abortion, parental rights, and feminism, much work remains to be done.

We have had the help of a half-dozen attorneys who have decades of experience. Our selection of cases is guided by what they have learned and by the input we receive from our state leaders around the nation. Anyone can alert us to a case of underpublicized significance. The media are becoming savvy in downplaying cases of interest to conservatives, when they sense we can win them.

Although we select only the cases having the most significance, and where our briefs can add arguments not fully developed by others in the proceeding, there are still more cases out there than we can get to. Additional support is essential to enable us to participate in as many important, precedent-setting cases as possible.

The Phyllis Schlafly Report
PO Box 618, Alton, Illinois 62002
ISSN0556-0152

Published monthly by the Eagle Trust Fund, PO Box 618, Alton, Illinois 62002. Periodicals Postage Paid at Alton, Illinois. Postmaster: Address Corrections should be sent to the Phyllis Schlafly Report, PO Box 618, Alton, Illinois 62002. Phone: (618) 462-5415.

Subscription Price: $20 per year. Extra copies available: 50¢ each; 10 copies $4; 30 copies $8; 100 copies $15; 1,000 copies $100.

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