



# IT'S NOW THE JOHN ROBERTS COURT

*Erwin Chemerinsky*

**I**N THE MOST IMPORTANT CASE in his seven years as Chief Justice, John Roberts wrote the majority opinion upholding the key provision of the Patient Protection and Affordable Care Act over the dissent of four conservative justices who would have invalidated the entire statute.<sup>1</sup> Prior to this decision, only once in seven years had Chief Justice Roberts been in the majority in a 5-4 decision joined by the four liberal members of the Court.<sup>2</sup> In fact, rarely had Chief Justice Roberts been other than with the conservative justices when there was an ideological division on the Court. But three times in the last week of October Term 2011, Roberts sided with the liberals, twice in casting the deciding vote.<sup>3</sup>

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<sup>1</sup> National Federation of Independent Business v. Sebelius, 132 S.Ct. \_\_\_\_ (2012).

<sup>2</sup> Jones v. Flowers, 547 U.S. 220 (2006) (procedural due process was violated by the failure to provide adequate notice before a tax sale of property).

<sup>3</sup> In Arizona v. United States, 132 S.Ct. \_\_\_\_ (2012), also discussed below, Chief Justice Roberts joined the majority opinion of Justice Kennedy, which also was joined by Justices Ginsburg, Breyer, and Sotomayor. Had Chief Justice Roberts joined the dissenters – Justices Scalia, Thomas, and Alito – it would have been a 4-4 split and the Ninth Circuit’s decision would have been affirmed by an evenly divided Court. In United States v. Alvarez, 132 S.Ct. \_\_\_\_ (2012), discussed below, Chief Justice Roberts joined the opinion of Justice Kennedy, which was also joined by Justices Ginsburg and Sotomayor; Justices Breyer and Kagan concurred

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This, of course, does not make John Roberts a liberal. No matter how much his vote to uphold the Affordable Care Act disappointed conservatives, his overall voting record for seven years is consistently solidly conservative. But it does say that no longer can Chief Justice Roberts be taken for granted as another conservative vote along with Justices Scalia, Thomas, and Alito. For seven years, in virtually every ideologically divided case, it was Justice Kennedy who played the role as swing justice. Now Roberts has played that role and in the most important and dramatic of circumstances.

None of this, of course, is to deprecate the continued crucial role of Justice Kennedy on the current Court. Once more, he was more often in the majority than any other justice, 93% of the time, and more often in the majority in 5-4 and 5-3 decisions than any other justice (12 of 16).

But perhaps because of there being two possible swing justices this year as compared to other recent terms, the conservative position prevailed less often this year than in the prior six years of the Roberts Court. There were key liberal victories, such as the decisions about the health care law, Arizona's SB 1070, limits on life sentences without parole for juvenile murderers, and free speech. But there also were crucial conservative victories in limiting contributions to public employee unions, allowing strip searches of inmates without reasonable suspicion, and many civil rights cases where the Court made it harder to sue government officials.

It is worth noting that the Court decided only 65 cases after briefing and oral arguments, the fewest in decades. In each of the prior two terms, the Court had decided 75 cases after briefing and oral arguments and as recently as the 1980s the Court was averaging over 160 cases a term.

In this essay I review the decisions and implications in several key areas: the Affordable Care Act, Arizona's immigration law, criminal procedure, the First Amendment, and civil rights litigation.

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PATIENT PROTECTION AND  
AFFORDABLE CARE ACT

The Supreme Court's decision to uphold the individual mandate and most of the Affordable Care Act is now familiar to all. But what are its likely implications?

There were three parts to the Court's holding in *National Federation of Independent Business v. Sebelius*.<sup>4</sup> First, by a 5-4 margin, the Court upheld the individual mandate, the centerpiece of the Act. There are 50 million Americans without health insurance and the Affordable Care Act seeks to remedy that. A crucial mechanism is to require that almost all individuals have health insurance and those that don't must pay a penalty to the Internal Revenue Service. Insurance companies are required to provide coverage to all and no longer can deny policies based on preexisting conditions, or charge higher premiums based on health conditions, or impose yearly or lifetime caps on payments.

Chief Justice Roberts, joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan, said that the individual mandate is a tax and within the scope of Congress's taxing power. He explained that the mandate is calculated like a tax; for example, in 2014, it is one percent of income or \$95 for those who do not purchase insurance. It is collected by the Internal Revenue Service and the funds go to the federal treasury; it will generate about \$4 billion in 2014. The Court said that it was irrelevant that the Obama administration never called it a tax; the labels used by the government are not determinative.

This does not change the law in any way in terms of the scope of Congress's taxing and spending power or how it is determined if something is a tax. At most, it is a reminder that if Congress wants to discourage behavior, it has the power to tax it.

Second, five justices – Chief Justice Roberts and the four dissenters (Justices Scalia, Kennedy, Thomas, and Alito) – said that the individual mandate was not a constitutional exercise of Congress's

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<sup>4</sup> 132 S.Ct. \_\_\_\_ (2012).

commerce clause power. They said that Congress under the commerce clause may regulate economic activity that taken cumulatively has a substantial effect on interstate commerce. They saw the individual mandate as regulating *inactivity*, regulating those not engaged in commerce, and thus exceeding the scope of Congress's power.

I think that this is fundamentally misguided because all are engaged in economic activity with regard to health care; as Justice Ginsburg pointed out, over 99% of people will receive medical care in their lifetimes and 60% of the uninsured do so each year. Everyone is engaged in economic activity in that they are either purchasing insurance or self-insuring; Congress is regulating the latter economic behavior.

The five justices have created a new distinction limiting Congress's commerce power: it can regulate activity, not inactivity. How much will this matter? Perhaps little in that Congress rarely is going to compel economic transactions. On the other hand, any distinctions like "activity/inactivity" or "direct/indirect"<sup>5</sup> are an open invitation to litigation where a great deal turns on labels and characterizations.

Consider an example: Title II of the 1964 Civil Rights Act, which was adopted under Congress's commerce clause power, prohibits hotels and restaurants from discriminating on the basis of race.<sup>6</sup> Does that law regulate the "inactivity" of hotels and restaurants that refused to serve African-Americans, or was it regulating "activity"? I am not suggesting that the Court will strike down Title II, but it does illustrate how much can turn on a label.

Finally, the Court in a 7-2 ruling held that it exceeded the scope of Congress's spending power and violated the Tenth Amendment for the Act to deny all Medicaid funding to states that do not comply with the new conditions for Medicaid. The Act requires that states cover within their Medicaid programs those within 133% of the

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<sup>5</sup> See *A.L.A. Schechter Poultry v. United States*, 295 U.S. 495 (1936) (drawing a distinction between direct and indirect effects on commerce).

<sup>6</sup> This was upheld in *Katzenbach v. McClung*, 379 U.S. 294 (1964).

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federal poverty level. The federal government pays 100% of these costs until 2019 and 90% thereafter. Any state that failed to comply would lose all of its Medicaid funds.

The Court said that it was unduly coercive to tie existing Medicaid funds to a failure to comply with a new requirement. The Court saw two Medicaid programs, the old one and the new requirements, and said that it was impermissible to tie existing funds to the failure to comply with new requirements. But why see this as two programs rather than one? Moreover, why see this as Congress' coercing – or to use Chief Justice Roberts' word, “dragooning” – the states? Admittedly, given the huge amount of money involved, any state would face a hard choice to turn it down. But there is a basic difference between being forced to do something and facing a very difficult choice.

It is this part of the opinion that is likely to have the broadest implications. This is the first time that the Court ever has found conditions on federal funds to be so coercive as to be unconstitutional. Countless federal statutes provide funds to state and local governments on the condition that they comply with requirements. There likely will be challenges to many of these laws on the ground that the requirements are too coercive.

For example, the federal Solomon Amendment provides that if any law school refuses to allow the military to recruit on campus, its university will lose all federal funds. Similarly, federal law provides that if a university program discriminates based on race, the entire university and not just that program will lose its federal funding. Many federal environmental laws operate through conditions on state and local governments receiving money. The Court gave little guidance as to how to decide when conditions are too coercive and that will lead to a great deal of litigation.

## IMMIGRATION

Arizona's SB 1070 declares its purpose to be decreasing the presence in the state of undocumented immigrants through aggressive law enforcement and attrition. In 2010, federal district court judge Susan Bolton issued a preliminary injunction against

four key provisions of SB 1070.<sup>7</sup> In *Arizona v. United States*, the Supreme Court in a 5-3 ruling affirmed almost all of Judge Bolton's preliminary injunction.<sup>8</sup> Justice Kennedy wrote for the majority and was joined by Roberts, Ginsburg, Breyer, and Sotomayor. Justice Kagan was recused.

Justice Kennedy began by accepting the argument of the United States that immigration is solely in the control of the federal government. Anything done with regard to immigration has foreign policy implications and states cannot have their own foreign policy. The Court quoted its 1942 ruling in *Hines v. Davidowitz*, that states cannot "contradict or complement" federal immigration efforts.<sup>9</sup>

The Court affirmed three parts of Judge Bolton's preliminary injunction, finding unconstitutional as preempted by federal law the provisions of SB 1070 that require non-citizens to carry papers at all times showing that they are lawfully in the country, that prohibit those not lawfully in the country from seeking or receiving employment in Arizona, and that allow police to arrest individuals without warrants when there is probable cause that they are deportable.

The Court reversed the preliminary injunction as to the provision which allows police to question individuals about their immigration status if they are stopped for other reasons and if there is reasonable suspicion that they are not lawfully in the United States. Even this provision was substantially narrowed as the Court held that police cannot extend the duration of a stop to check immigration status and also that state and local police cannot arrest individuals who they determine to be illegally in the country. Moreover, the Court left open the possibility of an "as applied" challenge to this provision of SB 1070 if it could be shown that it was being applied in a racially discriminatory fashion.

The decision is a clear message to state governments that laws like SB 1070 are unconstitutional because they intrude on the feder-

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<sup>7</sup> *United States v. Arizona*, 703 F.Supp.2d 980 (D.Ariz. 2010).

<sup>8</sup> 132 S.Ct. \_\_\_\_ (2012).

<sup>9</sup> 312 U.S. 41 (1942).

al government's exclusive power to control immigration. The one part of the preliminary injunction reversed by the Supreme Court has potentially very troubling implications. Realistically, it seems inevitable that police will decide who to question about immigration status based on surname and skin color. But that challenge, which was expressly left open by Justice Kennedy's opinion, will need to wait until another case.

### CRIMINAL PROCEDURE

From a practical perspective, the decisions that will most affect the practice of law and what judges do on a daily basis are *Missouri v. Frye*<sup>10</sup> and *Lafler v. Cooper*.<sup>11</sup> In two 5-4 decisions, with Justice Kennedy writing for Justices Ginsburg, Breyer, Sotomayor, and Kagan, the Court held that the right to effective assistance of counsel applies at the plea bargaining stage. Justice Kennedy explained that plea bargaining is a critical stage of criminal proceedings: 97% of all convictions in federal court and 94% of all convictions in state court are gained via guilty pleas.

The Court said that the two-part test for ineffective assistance of counsel articulated in *Strickland v. Washington* is to be applied.<sup>12</sup> First, a defendant must demonstrate that counsel's performance was so deficient as to negate representation. Second, the defendant must show prejudice. The Court said that this requires that the defendant show that he or she likely would have accepted the plea bargain, that the prosecutor likely would not have withdrawn it, and that the judge likely would have allowed the plea agreement.

The decisions likely will change how plea bargaining is done in many jurisdictions, causing it to be more formal and put in writing. Also, it already is leading to a large number of individuals arguing that their pleas were the product of ineffective assistance of counsel. The difficult inquiry for the courts will be how to assess prejudice. For example, how are they to assess whether the judge would have allowed the plea?

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<sup>10</sup> 132 S.Ct. 1399 (2012).

<sup>11</sup> 132 S.Ct. 1376 (2012).

<sup>12</sup> 466 U.S. 688 (1984).

It is important to note that *Lafler v. Cooper* was before the Court on a writ of habeas corpus. Under 28 U.S.C. § 2254(d), a federal court may grant a writ of habeas corpus only if the state court decision is “contrary to” or an “unreasonable application” of clearly established law as announced by the Supreme Court. The fact that the Supreme Court found this standard to be met means that it did not regard its decision as creating new law. Thus, it seems clear that these decisions will apply retroactively and open the door to a large number of claims by people who pled guilty, but believe that there was ineffective assistance of counsel.

In *Miller v. Alabama*,<sup>13</sup> the Court held that a mandatory sentence of life imprisonment without parole for a homicide committed by a juvenile is cruel and unusual punishment. Justice Kagan wrote for the majority and was joined by Justices Kennedy, Ginsburg, Breyer, and Sotomayor. The Court did not create an absolute bar to such a punishment, but said that there must be an individual determination that justifies such a sentence, which the Court indicated should be rare. This is different from *Roper v. Simmons*,<sup>14</sup> which held that there never can be the death penalty for a crime committed by a juvenile, or *Graham v. Florida*,<sup>15</sup> which held that there never can be a sentence of life without parole for a non-homicide crime committed by a juvenile.

This likely will have the practical consequence of requiring a penalty phase when a prosecutor wants a sentence of life without parole for a homicide committed by a juvenile. The jury will need to find the aggravating factors that warrant such a penalty. There is likely to be immediate litigation over whether this applies retroactively. In saying that a punishment is unconstitutional, *Miller v. Alabama* would seem to apply retroactively. On the other hand, if it is seen as imposing a new procedural requirement – a penalty phase hearing before a juvenile can be sentenced to life without parole for homicide crimes – this would not be retroactive.

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<sup>13</sup> 132 S.Ct. \_\_\_\_ (2012).

<sup>14</sup> 543 U.S. 551 (2005).

<sup>15</sup> 130 S.Ct. 2011 (2010).



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There were two Fourth Amendment decisions. I long have thought that the Supreme Court's Fourth Amendment decisions can be explained by a simple predictive principle: if the justices can imagine it happening to them, then it violates the Fourth Amendment. That certainly explains both of this year's Fourth Amendment rulings.

In *United States v. Jones*,<sup>16</sup> the Court held that it violated the Fourth Amendment for the police to place a GPS device on a person's car and track his movements for 28 days without a valid warrant. Although the result was unanimous, the justices differed in their reasoning. Justice Scalia, in an opinion joined by Roberts, Kennedy, Thomas, and Sotomayor, pointed to a 1765 English decision, *Entick v. Carrington*, which would have treated the placing of the GPS device as a trespass, thus making it a search for modern Fourth Amendment purposes. Justice Alito wrote an opinion concurring in the judgment joined by the other justices in which he argued that it makes no sense to decide what is a search in 2012 by looking to 18th-century English decisions. He said that the focus should be on whether there is an invasion of the reasonable expectation of privacy.

But neither of these approaches is likely to be very useful when courts confront, as they inevitably will, the question of when the use of satellites and drones to gather information violates the Fourth Amendment. Surely 18th-century English law will not be helpful with this. Nor, though, will Justice Alito's approach be helpful. We have no reasonable expectation of privacy when we are on public streets; the police could have had an undercover agent follow Jones every minute he was outside and never needed a warrant. What is needed, as Justice Sotomayor pointed out in her concurring opinion, is a new approach for deciding when people have the Fourth Amendment right to keep information from the government unless it has a valid warrant.

In *Florence v. Board of Chosen Freeholders*,<sup>17</sup> the Court ruled, 5-4,

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<sup>16</sup> 132 S.Ct. 945 (2012).

<sup>17</sup> 132 S.Ct. 1510 (2012).

that jails may subject inmates to strip searches without any need for reasonable suspicion. Justice Kennedy, in an opinion joined by Roberts, Scalia, Thomas, and Alito, said that the interest of jails in ensuring security and preventing drugs and weapons from being smuggled in was sufficient to permit strip searches without any need for reasonable suspicion. It is a case which reflects the tremendous deference of the conservative majority to claims by jails and prisons of the need to restrict the rights of inmates.

## FIRST AMENDMENT

In *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*,<sup>18</sup> the Court held that it violates both the free exercise and the establishment clauses of the First Amendment to hold a religious institution liable for choices it makes as to who will be its ministers. The case involved a teacher at a parochial elementary school who took a leave of absence because of a serious illness. The Equal Employment Opportunity Commission sued on her behalf when the school filled her position when she was ill and then fired her when the school thought she might be contemplating an action under the Americans with Disabilities Act.

Chief Justice Roberts, writing for a unanimous Court, said that the teacher was deemed a “minister” by the school, having taken the requisite courses at a religious college and been approved by the board of the school for this designation. The Court said that it would be unconstitutional to hold the school liable under employment discrimination law for the choices it makes as to who will be its ministers.

What, then, if a religious institution designates all of its employees to be ministers? It would seemingly then be exempt from all employment discrimination laws. In fact, this is the first time the Supreme Court ever has found a First Amendment exemption for religious institutions from the application of civil rights statutes. It undoubtedly will open the door to many more such challenges in the future.

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<sup>18</sup> 132 S.Ct. 694 (2012).

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There were two important speech cases. In *United States v. Alvarez*,<sup>19</sup> the Court declared unconstitutional the federal Stolen Valor Act, which makes it a crime for a person to falsely claim to have received a military honor or declaration. Justice Kennedy wrote for a plurality of four and concluded that the law imposed a content-based restriction on speech and thus had to meet the most exacting scrutiny. He explained that the government failed this test because it did not prove any harm from false claims of military honors and because the government could achieve its goals through less restrictive alternatives. Perhaps most importantly for the future, he rejected the government's argument that false speech is inherently outside the scope of the First Amendment.

Justice Breyer concurred in the judgment, joined by Justice Kagan. He said that he would use intermediate rather than strict scrutiny and that the law failed this test because it was not narrowly tailored. He suggested that a narrower statute, one that prohibits false claims of military honors with the goal of receiving a tangible benefit, likely would be constitutional. Congress may well adopt exactly that type of law.

The other major speech case was *Knox v. SEIU*.<sup>20</sup> In *Abood v. Detroit Board of Education*,<sup>21</sup> the Court held that public employees cannot be forced to join a union, but they must pay for the collective bargaining activities of the union since they benefit from them. They cannot, however, be required to support the political activities of the union. In subsequent cases, the Court made clear that those who do not want to support the political activities can "opt out" of doing so and must be given an accounting as to the percentage of dues that are used for collective bargaining as opposed to political activities.

In *Knox*, Justice Alito, joined by Roberts, Scalia, Kennedy, and Thomas, held that at least as to special assessments for political campaigns, non-members must not be assessed unless they "opt in" and affirmatively choose to give support, as opposed to being as-

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<sup>19</sup> 132 S.Ct. \_\_\_\_ (2012).

<sup>20</sup> 132 S.Ct. \_\_\_\_ (2012).

<sup>21</sup> 431 U.S. 209 (1977).

sessed unless they opt out. As was pointed out by Justices Sotomayor and Breyer, in separate opinions, this is a major change in the law and there is no reason this will be limited to special assessments.

Justice Alito's reasoning will seemingly require non-members always to be subject to an opt-in system and make the long-standing opt-out system unconstitutional. This will significantly decrease the funds for public employee unions to participate in the political process. It is ironic that the same Supreme Court that so strengthened the political power of corporations in *Citizens United v. Federal Election Commission*<sup>22</sup> has significantly decreased the political strength of unions.

## CIVIL RIGHTS

The plaintiffs lost in every civil rights case where they were seeking money damages. For example, in *Minecci v. Pollard*,<sup>23</sup> the Supreme Court held that prison guards at private prisons contracting with the federal government cannot be sued for constitutional violations where state tort law provides a remedy. The Court said that no *Bivens* claim could be brought by a prisoner who suffered physical injuries and claimed an Eighth Amendment violation because state tort law provided some remedy, even though not the same as would be available in a *Bivens* action.<sup>24</sup> Justice Breyer writing for the Court, with only Justice Ginsburg dissenting, stated:

Where, as here, a federal prisoner seeks damages from privately employed personnel working at a privately operated federal prison, where the conduct allegedly amounts to a violation of the Eighth Amendment, and where that conduct is of a kind that typically falls within the scope of traditional state tort law (such as the conduct involving improper medical care at issue here), the prisoner must seek a remedy under state tort law. We cannot imply a *Bivens* remedy in such a case.<sup>25</sup>

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<sup>22</sup> 130 S.Ct. 876 (2010).

<sup>23</sup> 132 S.Ct. 617 (2012).

<sup>24</sup> *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971).

<sup>25</sup> 132 S.Ct. at 626.

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Private prisons operating under contracts with the government are increasingly common and this will make it much more difficult for prisoners in facilities contracting with the federal government to sue. But the Court's reasoning suggests an even greater significance to the case: for the first time, the Court has said that the existence of *state* remedies can preclude a *Bivens* cause of action. In a number of cases, the Court had said that the existence of a federal statutory remedy could preclude *Bivens* actions. But in *Bivens* itself the Court had rejected the argument that a state tort remedy was a reason to deny a federal cause of action for a constitutional violation.

In *Ryburn v. Huff*,<sup>26</sup> the Court held that police officials were protected by qualified immunity when they entered a home without a warrant and without the permission of the occupants. Government officials who are sued for money damages for constitutional violations, whether state and local officers under 42 U.S.C. § 1983 or federal officers in a *Bivens* action, may assert immunity as a defense. A few officers – such as prosecutors performing prosecutorial actions, judges performing judicial actions, and legislators performing legislative actions – have absolute immunity to suits for money damages. All other officers have qualified immunity and may be held liable for their discretionary acts only if they violate clearly established law that a reasonable officer should know.

The courts have long struggled with how to determine what is clearly established law that the reasonable officer should know. In *Hope v. Pelzer*,<sup>27</sup> the Court held that there does not need to be a case on point in order to overcome qualified immunity. *Hope v. Pelzer* involved prison guards who tied a prisoner to a hitching post and left him in the hot sun for seven hours with almost no water and no access to a bathroom. The federal court of appeals ruled that the prison guards had engaged in cruel and unusual punishment in violation of the Eighth Amendment, but held that the guards were protected by qualified immunity because there was no case on point holding that this was unconstitutional. The Supreme Court reversed

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<sup>26</sup> 132 S.Ct. 987 (2012).

<sup>27</sup> 536 U.S. 730 (2002).

and expressly held that a case on point is not necessary so long as officers have “fair warning” that their conduct is unconstitutional. Otherwise, of course, egregious unconstitutional actions would be shielded from liability if they had not been done before and thus had not been specifically disapproved by the courts.

However, in recent cases, without acknowledging it was doing so, the Court has backed away from *Hope v. Pelzer* and found qualified immunity because there was not a specific case on point. For example, in *Ashcroft v. Al-Kidd*,<sup>28</sup> the Court held that the Attorney General was protected by qualified immunity for authorizing a person to be held on a material witness warrant even though there never had been any desire to use the person as a material witness and there was no suspicion that the person had committed any crime.

Similarly, in the recent ruling in *Ryburn v. Huff*, the Court found qualified immunity based on the absence of a case on point.<sup>29</sup> A rumor circulated in a high school that a student there had threatened violence. The police went to the boy’s home to investigate. The boy and his mother came out of the house and answered the police questions. The officer asked permission to enter the home and the mother refused. When the mother entered the home, the police officer followed without permission and against her wishes. The officer said that his experience was that parents usually allow officers in their home when asked for consent. The police found no weapons or other contraband and ultimately concluded that the rumors about the boy were unfounded.

The Ninth Circuit rejected qualified immunity. The Supreme Court, in a *per curiam* opinion, reversed. Once more, the Court stressed the absence of decisions on point and said: “No decision of this Court has found a Fourth Amendment violation on facts even roughly comparable to those present in this case.”<sup>30</sup> The Court said that its precedents had allowed police to enter a home when there was a fear of violence. But those decisions had allowed police to

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<sup>28</sup> 131 S.Ct. 2074 (2011).

<sup>29</sup> 132 S.Ct. 987 (2012).

<sup>30</sup> 132 S.Ct. at 990.

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enter when there was reason to believe that there might be violence in the home; here it was only a rumor and there was no basis for suspicion other than the occupant of the home not wanting the police to enter.

The Court, of course, has not overruled *Hope v. Pelzer*. But it is notable that in neither of these cases was it cited; nor did the Court focus on what should be the central inquiry under *Hope v. Pelzer*: did the officer have fair notice that the conduct violated the Constitution? Requiring that the plaintiff have a case on point to overcome qualified immunity will create an obstacle for civil rights plaintiffs in many cases.

### NEXT YEAR

Already on the docket for next year is the issue of whether colleges and universities may continue to use race as a factor in admissions decisions to benefit minorities (*Fisher v. University of Texas, Austin*).<sup>31</sup> Also, the Court will decide whether companies can be sued in the United States for their foreign human rights violations under the Alien Tort Statute (*Kiobel v. Dutch Petroleum*).<sup>32</sup> And it seems highly likely that the Court will decide whether there is a constitutional right to marriage equality for gays and lesbians. It is an amazing couple of years in the Supreme Court.



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<sup>31</sup> Cert. granted, 132 S.Ct. 1656 (2012).

<sup>32</sup> Set for rehearing and reargument, 132 S.Ct. 1738 (2012).