



THE COURT AFFECTS EACH OF US

THE SUPREME COURT TERM IN REVIEW

Erwin Chemerinsky

ABOVE ALL, OCTOBER TERM 2012 powerfully shows that Supreme Court decisions affect each of us, often in the most important and intimate aspects of our lives. On Wednesday, June 26, the Supreme Court dismissed on jurisdictional grounds the case involving California's Proposition 8 and two days later same sex couples began marrying in California.¹ The decisions of this term will affect who gets into college, when the government can take our DNA, what federal benefits married same-sex couples can receive, what voting systems are used and thus who gets elected, and whether injured individuals can successfully sue businesses.

Once more, it was the Anthony Kennedy Court. Justice Kennedy was in the majority more than any other justice: 91% of the time.² But it is the 5-4 decisions where Kennedy's influence is best seen. Out of 73 cases decided after briefing and oral argument, 23 were 5-4. Kennedy was in the majority in 20 of the 23. Antonin Scalia was second most often in the majority in 5-4 cases, but in only 13 of them.

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¹ Perry v. Hollingsworth, 133 S.Ct. 2652 (2013).

² All of the statistics are from the "Statpack" on www.scotusblog.com.

It therefore is possible to get the clearest overall sense of the ideology of the term by focusing on the 16 cases that were ideologically divided 5-4 along familiar lines, with John Roberts, Scalia, Clarence Thomas, and Samuel Alito on one side and Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan on the other. Kennedy was with the conservatives in ten and with the liberals in six of these cases.

So what were some of the more important cases of the term and what will they mean?³

I. AFFIRMATIVE ACTION

No decision was more eagerly anticipated than *Fisher v. University of Texas* on the constitutionality of affirmative action by colleges and universities.⁴ The case was argued on Wednesday, October 10, but not decided until Monday, June 24. At first reading, the decision seemed to do very little. Supporters of affirmative action breathed a huge sigh of relief that the Court did not change the law, at most clarified it, and remanded the case for further consideration.

In June 2003, in *Grutter v. Bollinger*,⁵ the Supreme Court held 5-4 that colleges and universities have a compelling interest in having a

³ Of course, a 5,000-word essay can cover only some of the cases of the term. Other important cases not discussed here included: *Alleyne v. United States*, 133 S.Ct. 2151 (2013) (the Sixth Amendment right to trial by jury requires a jury to determine facts that increase a mandatory minimum sentence); *Association for Molecular Pathology v. Myriad Genetics*, 133 S.Ct. 2107 (2013) (naturally occurring DNA segment is a product of nature and not patent-eligible merely because it has been isolated, but complementary DNA (cDNA) is patent-eligible because it is not naturally occurring); *Clapper v. Amnesty International*, 133 S.Ct. 1138 (2013) (challenge to possible electronic surveillance of those in the United States under the Foreign Intelligence Surveillance Act dismissed for lack of standing because plaintiffs could not show that their conversations were intercepted or likely to be intercepted); *Koontz v. St. Johns River Water Management District*, 133 S.Ct. 2586 (2013) (the government's demand for property from a land-use permit applicant must satisfy the *Nollan/Dolan* requirements even when it denies the permit).

⁴ 133 S.Ct. 2411 (2013).

⁵ 539 U.S. 306 (2003).

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diverse student body and that they may use race as one factor among many in their admissions decisions. In 2004, the Regents of the University of Texas realized that they had a less diverse student body than existed in 1996. A new admissions plan was adopted.

Under it, about 75 percent of the entering class was taken from the top ten percent of high schools across the state. Texas is sufficiently racially segregated that this will produce some racial diversity. The other 25 percent of the class was taken by calculating an admissions score for each student. The score was the sum of two numbers: an academic achievement index, which was the applicant's grades and test scores, and a personal achievement index, which was arrived at by grading two essays and looking at six factors, one of which was diversity.

Abigail Fisher applied for the University of Texas in 2008 and was rejected. She enrolled at Louisiana State University, from which she graduated in 2012. After being rejected, she brought a lawsuit against the University of Texas challenging its use of race as denying equal protection. The federal district court and the Fifth Circuit ruled in favor of the University of Texas, saying that it had followed *Grutter* and had permissibly used race as one factor among many in its admissions decisions.

The Supreme Court granted review. I strongly believe that the Court did not have jurisdiction to hear the case. Fisher expressly acknowledged to the Court that she no longer has claims for injunctive or declaratory relief. She graduated from college and is not going again. She is the only plaintiff in the lawsuit and her only remaining claim is for \$100, her application fee. The defendants in the lawsuit are the University of Texas and its regents, sued in their official capacity. But the law is clear that the Eleventh Amendment bars suits for money damages against a state or its officials in their official capacity.⁶ Moreover, to have standing a plaintiff must show that his or her injury is caused by the unconstitutional policy.⁷ Fisher's loss of \$100 was not caused by the affirmative action plan.

⁶ See Erwin Chemerinsky, *Federal Jurisdiction* (6th ed. 2012) 438.

⁷ See, e.g., *Allen v. Wright*, 468 U.S. 737 (1984).

Inexplicably, the Court ignored these jurisdictional issues (they were raised in a footnote in the University of Texas's brief).⁸ In a 7-1 decision, the Court reversed the Fifth Circuit's decision and remanded the case for reconsideration. Justice Kennedy wrote for the Court. Only Justice Ginsburg dissented. Justice Kagan was recused.

Kennedy wrote that the Court was not reconsidering *Grutter* and its holding that colleges and universities have a compelling interest in having a diverse student body. The Court said, though, that *Grutter* established that any use of race in admissions must meet strict scrutiny and thus must be shown to be necessary to achieve a compelling interest. The Court said that it is not enough to have a compelling interest in achieving diversity; a college or university also must show that the use of race is *necessary* to achieve it.

Kennedy wrote that there must be a "careful judicial inquiry into whether a university could achieve sufficient diversity without using racial classifications."⁹ In crucial language, he said: "The reviewing Court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity. If a nonracial approach . . . could promote the substantial interest about as well and at tolerable administrative expense, then the university may not consider race." But the Court also said that this "does not require exhaustion of every *conceivable* race neutral alternative."¹⁰

In one sense, this did not change the law concerning affirmative action. The Court reaffirmed *Grutter*: colleges and universities have a compelling interest in having a diverse student body, but must meet strict scrutiny in using race as a factor in admissions decisions.

In another sense, though, *Fisher* adopts a tougher, less sympathetic tone when it comes to affirmative action programs. For example, in *Grutter*, the Court spoke of the need to defer to the judgment of colleges and universities. In *Fisher*, the Court said that such deference was appropriate only as to the importance of diversity; there is no deference to given as to whether race is necessary to achieve it.

⁸ Brief for Respondents, *Fisher v. University of Texas, Austin*, at 16-17 (fn. 6).

⁹ 133 S.Ct. at 2420.

¹⁰ *Id.*

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Kennedy declared: “The University must prove that the means chosen by the University to attain diversity are narrowly tailored to that goal. On this point, the University receives no deference.”¹¹

Fisher leaves open many crucial questions, which will need to be litigated on remand (unless the lower court dismisses, as it should, for lack of jurisdiction) and in challenges to other affirmative action plans. Colleges and universities use race to gain diversity precisely because other alternatives don’t achieve racial diversity.

But what kind of evidence is required to show that race neutral alternatives are insufficient to achieve diversity? Must each institution compile its own evidence and how much evidence is required?

In fact, it even is unclear as to what qualifies as a “race neutral” alternative. For example, is a top ten percent plan – a state university taking the top ten percent of graduates from around the state – race neutral? Ginsburg makes the point in her dissent that top ten percent plans are adopted with the intent of creating racial diversity and have that effect.¹² A government action taken with the intent and impact of using race is treated as a racial classification under equal protection. In fact, any proxy for race that is done with the purpose and effect of using race is a racial classification.

Nor does the Court offer any guidance about what “diversity” means. In *Gutter*, the Court recognized that there must be a “critical mass” of minority students to attract them to attend and to provide the benefits of diversity. One of the key issues raised in the briefs and oral arguments in *Fisher* was how to determine what is sufficient for a “critical mass.” The Court did not address that issue.

II. CRIMINAL PROCEDURE

A. Fourth Amendment

This was a big year for the Fourth Amendment in the Supreme Court, with five decisions.¹³ Two – *Florida v. Jardines*¹⁴ and *Mary-*

¹¹ *Id.*

¹² *Id.* at 2433 (Ginsburg, J., dissenting).

¹³ The other Fourth Amendment cases were: *Florida v. Harris*, 133 S.Ct. 1050

*land v. King*¹⁵ – are especially important for what they say about the Court’s approach to the Fourth Amendment. In the former, the Court ruled that it is a search under the Fourth Amendment for a police officer to take a drug-sniffing dog onto the front porch of a home without the consent of the homeowner. Justice Scalia, writing for the majority in a 5-4 decision, held that taking the dog onto the property was a trespass and that was sufficient for it to be a search.

In *Maryland v. King*, the Court held, 5-4 with Justice Kennedy writing for the majority, that it did not violate the Fourth Amendment for the police to routinely take DNA from those arrested for serious crimes, if the DNA is taken for the purpose of helping to solve other crimes for which the individual is not a suspect. The Court, stressing that the police action was reasonable because the benefits to law enforcement outweighed the invasion of privacy, likened this to taking fingerprints from those arrested.

Beyond limiting dog sniffs at homes and approving taking DNA from arrestees, these cases show the failure of the Court to deal with a crucial underlying issue: when should the police be able to gather information about an individual, whether it is about what is going on in the home or from the person’s DNA, without a warrant and probable cause? Informational privacy is the key question in a society where it is increasingly easy for police to gather information about people and their activities. Neither case focused on this.¹⁶

(2013) (use of a police dog to establish probable cause does not required detailed evidence establishing its reliability); *Missouri v. McNeely*, 133 S.Ct. 1552 (2013) (there are not inherently exigent circumstances justifying warrantless taking of blood without consent in all driving-under-the-influence cases); *United States v. Bailey*, 133 S.Ct. 1031 (2013) (police cannot detain an individual who is not at home incident to a search of the home).

¹⁴ 133 S.Ct. 1409 (2013).

¹⁵ 133 S.Ct. 1958 (2013).

¹⁶ In a concurring opinion in *Jardines*, Justice Kagan, joined by Justices Ginsburg and Sotomayor, urged a privacy based approach, rather than one focusing on property and trespass. 133 S.Ct. at 1418 (Kagan, J., concurring).

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B. Fifth Amendment

A person cannot invoke the right to remain silent by being silent and not responding to police questions. That seemingly oxymoronic statement was the holding in *Salinas v. Texas*.¹⁷ The result is that unless a person explicitly invokes the right to remain silent in the face of police questioning before an arrest, prosecutors can use that silence as evidence of guilt at trial. The bottom line is that criminal defense lawyers should advise their clients to be explicit that they are invoking their right to remain silent whenever they wish to refuse to answer police questions.

Genovevo Salinas was questioned by the police in connection with a double murder. He was not under arrest and voluntarily answered questions from the police. He had turned over his shotgun and for most of the hour-long interview with the police officers responded to their questions, but when asked whether his shotgun “would match the shells recovered at the scene of the murder,” Salinas declined to answer.

When Salinas was prosecuted for the murders, the prosecutor used evidence of his silence in response to the police questions as evidence of his guilt. He was convicted and sentenced to 20 years in prison.

The Supreme Court, in a 5-4 decision, without a majority opinion, held that there had not been a violation of Salinas’s privilege against self-incrimination. Justice Alito wrote the plurality opinion, which was joined by Chief Justice Roberts and Justice Kennedy. The plurality said that the privilege against self-incrimination must be expressly invoked and Salinas never did that.

Justice Thomas concurred in the judgment, joined by Justice Scalia, and would have gone much further: he would have overruled the long-standing Supreme Court decision which held that prosecutors cannot use a defendant’s silence as evidence of guilt. In *Griffin v. California*,¹⁸ the Court held that the Fifth Amendment privilege

¹⁷ 133 S.Ct. 2174 (2013).

¹⁸ 380 U.S. 609 (1965).

against self-incrimination prohibits a prosecutor or judge from negatively commenting on a defendant's failure to testify.

Justice Breyer wrote the dissenting opinion, joined by Justices Ginsburg, Sotomayor, and Kagan. He stressed that the Court long has held that “no ritualistic formula is necessary in order to invoke the privilege,”¹⁹ and that in the context of the questioning of Salinas, his silence was likely intended to avoid answering questions that might incriminate him. Although not under arrest, he was questioned at the police station and was told that he was a suspect in the murders. Breyer said that the issue in any case should be “whether one can fairly infer that the individual being questioned is invoking the Amendment’s protection.”²⁰

The case is troubling because it is so divorced from reality. Most people don’t know that they have the right to remain silent when questioned by police during an investigation. And certainly most are unlikely to know that even if they have such a right, they must explicitly say, “I wish to invoke my right to remain silent.” Although the plurality does not specify any magic words that must be uttered, it seems fairly close to that because the suspect must unambiguously and expressly invoke the right to remain silent.

There is a profound irony to the plurality’s approach: exercising the right to remain silent by being silent is not sufficient to invoke that right. A defendant must speak in order to claim that right and likely must do so with exactly the type of “ritualistic formula” that the Court has previously rejected. Constitutional protections should not be just for those who have legal training and know what they need to say to the police to invoke their rights.

III. VOTING RIGHTS

The Voting Rights Act of 1965 is one of the most important federal laws adopted in my lifetime. Section 2 prohibits state and local governments from having election practices or systems that discriminate against minority voters. Lawsuits can be brought to

¹⁹ *Quinn v. United States*, 349 U.S. 155 (1955).

²⁰ 133 S.Ct. at 2189 (Breyer, J., dissenting).

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enforce it. But Congress believed that this was not sufficient to stop discrimination in voting. Congress knew that litigation is expensive and time consuming. Congress also knew that some states – especially Southern states – had the practice of continually changing their voting systems to disenfranchise minority voters.

Section 5 of the Voting Rights Act provides that jurisdictions with a history of race discrimination in voting may change their election systems only if they get “preclearance” from the Attorney General or a three-judge federal district court. Section 4(b) of the Act defines those jurisdictions which must get preclearance: nine states and many local governments with a history of race discrimination in voting.

Each time the law was about to expire, Congress extended it. Most recently, the law was set to expire in 2007 and Congress held 12 hearings over an 11-month period and produced a record of 15,000 pages. The Senate voted 98-0 to extend the law for another 25 years and there were only 33 no votes in the House of Representatives. President George W. Bush signed the extension into law.

In *Shelby County, Alabama v. Holder*, the Court, 5-4, held Section 4(b) unconstitutional and thereby also effectively nullified Section 5 because it applies only to jurisdictions covered under Section 4(b).²¹ It is the first time since the 19th century that the Court has declared unconstitutional a federal civil rights statute. Chief Justice Roberts wrote for the Court and stressed that the formula in Section 4(b) rests on data from the 1960s and the 1970s. He said that it was an intrusion on state and local sovereignty to require that they “beseech” the Attorney General to approve their election systems. Roberts said that it violated a principle of equal state sovereignty to treat the states differently with regard to the requirement for preclearance.

Roberts’s opinion was puzzling because the constitutional basis for the decision was not clear. What part of the Constitution did Section 4(b) violate? What level of scrutiny was the Court using? What is the constitutional basis for the principle of equal sovereign-

²¹ 133 S.Ct. 2612 (2013).

ty? None of these questions was addressed by the Court.

In theory, Congress can enact a new version of Section 4(b) based on contemporary data. In reality, it is hard to imagine Congress being able to ever agree on a new formula to require that some of jurisdictions and not others get preclearance. Moreover, it would seem that any formula which treats some states differently from others would violate the Court's principle of equal state sovereignty. The effect likely will be a significant increase in litigation under Section 2 and also many election systems going into place that otherwise would have been rejected because of their impact on minority voters.

IV. MARRIAGE EQUALITY

In two decisions on Wednesday, June 26, the Supreme Court significantly expanded the right to marriage equality for gays and lesbians. In *United States v. Windsor*,²² the Court invalidated Section 3 of the Defense of Marriage Act (DOMA), which provided that for purposes of federal law, marriage had to be between a man and a woman. The result is that same-sex couples who are lawfully married in the 13 states which now allow this will receive benefits that are accorded to married couples under more than 1,000 federal laws.

In *Hollingsworth v. Perry*,²³ the Court dismissed the litigation concerning California's Proposition 8, which had amended the State's constitution to provide that marriage must be between a man and a woman.

Although the Court's decisions were limited to those laws, the implications are enormous. Simply put, the Court took a major step towards a right to marriage equality for gays and lesbians in the United States.

In *Windsor*, the Supreme Court, in a 5-4 decision, declared Section 3 of DOMA unconstitutional. Justice Kennedy wrote for the Court and his opinion was joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan. Kennedy began by addressing the issue of ju-

²² 133 S.Ct. 2675 (2013).

²³ 133 S.Ct. 2652 (2013).

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risdiction. Since the Obama administration agreed with the U.S. Court of Appeals for the Second Circuit that Section 3 of DOMA is unconstitutional, could it seek Supreme Court review? The Court found that there was jurisdiction because there was a continuing dispute between the United States and Edith Windsor over whether she was owed a refund of the \$363,053 in estate taxes she had paid on her inheritance from her deceased partner. The Court concluded: “Windsor’s ongoing claim for funds that the United States refuses to pay thus establishes a controversy sufficient for Article III jurisdiction.”²⁴ The Court found that the “sharp adversarial presentation of the issues” by the Bipartisan Legal Advisory Group (BLAG) of the House of Representatives “satisfies the prudential concerns that otherwise might counsel against hearing an appeal from a decision with which the principal parties agree.”²⁵

The Court then reached the merits and found that Section 3 of DOMA denies equal protection to gays and lesbians. The Court began by noting that marriage has traditionally been defined by the states. The Court said that “DOMA seeks to injure the very class New York seeks to protect. By doing so it violates basic due process and equal protection principles applicable to the Federal Government.”²⁶ The Court explained that DOMA is unconstitutional because it was based on an impermissible desire to disadvantage gays and lesbians. Kennedy quoted the House Report on DOMA, which said the Act was based on “both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality.”²⁷

The Supreme Court earlier held that the government cannot base a law on disapproval of homosexuality.²⁸ Such animus is not a legitimate government purpose sufficient to justify a discriminatory statute.

²⁴ 133 S.Ct. at 2686.

²⁵ *Id.* at 2688.

²⁶ *Id.* at 2693.

²⁷ *Id.* at 2693.

²⁸ *Romer v. Evans*, 517 U.S. 620 (1996).

Chief Justice Roberts and Justices Scalia and Alito each wrote a dissenting opinion. The dissents argued that the Court should have dismissed the case on jurisdictional grounds and strongly disagreed with the Court's invalidation of Section 3 of DOMA. Each urged deference to Congress's judgment to prohibit same sex marriage. The irony is that none of these justices felt any need to defer to Congress when striking down a key provision of the Voting Rights Act in *Shelby County*.

Hollingsworth v. Perry involved a California initiative which banned same-sex marriages. In May 2008, the California Supreme Court interpreted the California Constitution to create a right of marriage equality for gays and lesbians. To overturn this decision, in November 2008, California voters passed Proposition 8, which amended the California Constitution to say that marriage had to be between a man and a woman.

Two same-sex couples seeking marriage licenses brought a lawsuit in the United States District Court for the Northern District of California challenging the constitutionality of Proposition 8. In the summer of 2010, federal district court Judge Vaughn Walker declared Proposition 8 unconstitutional because it violated the fundamental right to marry and denied equal protection to gays and lesbians. The defendants in the lawsuit, including the Governor, the Attorney General, and the Registrar of Records, decided not to appeal Walker's ruling. Supporters of Proposition 8 intervened to appeal.

After briefing and oral argument, the U.S. Court of Appeals for the Ninth Circuit certified to the California Supreme Court the question of whether under California law the supporters of an initiative have standing to appeal when state officials refuse to do so. The California Supreme Court said that the supporters of an initiative could represent the interests of the state to ensure that an initiative is defended in court.²⁹ The Ninth Circuit, in February 2012, then found that the supporters of the initiative had standing to appeal and declared Proposition 8 unconstitutional.

²⁹ *Perry v. Brown*, 52 Cal.4th 1116, 134 Cal.Rptr.3d 499, 265 P.3d 1002 (2011).

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The Supreme Court, in a 5-4 decision, reversed and vacated the Ninth Circuit's decision. Chief Justice Roberts wrote for the Court that the supporters of an initiative lack standing to appeal to defend it when government officials refuse to do so. His opinion was joined by Justices Scalia, Ginsburg, Breyer, and Kagan. The Court explained that standing to bring a suit or appeal requires that there be an injury. Those who support an initiative suffer only an ideological injury if it is enjoined and an ideological injury is never sufficient for standing. The result is that the federal district court decision invalidating Proposition 8 stands.

In practical effect, these decisions are very important. Gay and lesbian couples who are married will get federal benefits previously reserved for heterosexual couples. Gay and lesbian couples are now marrying in California, making it the thirteenth and largest state to permit this.

The Supreme Court was explicit that it was declaring only Section 3 of DOMA unconstitutional and not ruling on any other law denying marriage equality. But the Court's reasoning will have significant implications for laws denying marriage equality for gays and lesbians. For example, Section 2 of DOMA, which says that no state must recognize a same-sex marriage from another state, is almost surely unconstitutional after the Court's decision in *Windsor*. Kennedy said that DOMA is unconstitutional because it was based on impermissible hostility to gays and lesbians. This would seem to make all of it unconstitutional, including Section 2.

The next major wave of litigation will be challenges to state laws that prohibit same-sex marriage. In his vehement dissent, Scalia said that there is no way to distinguish these statutes from Section 3 of DOMA and it is just a matter of waiting for the other shoe to drop.

After *Windsor's* conclusion that no legitimate government purpose is served by denying gays and lesbians the right to marry, it is difficult to see how the Court will uphold any law prohibiting same-sex marriage. Those who oppose same-sex marriage will argue that the language about federalism in Kennedy's opinion supports the ability of states to decide, including to ban same-sex marriage. But the holding in *Windsor* was that Section 3 of DOMA unconstitution-

ally denied equal protection to gays and lesbians. Its reasoning, that the failure to recognize same-sex marriages is based on animus and serves no legitimate purpose, will be the basis for challenging state laws throughout the country. It seems only a matter of a short time before this gets back to the Supreme Court and it appears that there are five votes – Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan – to strike down such laws.

V. BUSINESS LITIGATION

In a number of important decisions, the Supreme Court ruled in favor of businesses and made it more difficult for those injured to sue. In *Mutual Pharmaceuticals Co. v. Bartlett*,³⁰ the Court ruled, 5-4, that makers of generic drugs could not be sued for design defects. Two years ago, in *PLIVA, Inc. v. Mensing*,³¹ the Court ruled that makers of generic drugs cannot be sued on a failure to warn theory. In these two cases, the Court said that under federal law, generic drugs can be sold if they are identical to brand-name drugs and if they have the warning label approved for the brand-name drugs. The Court said this precludes a generic drug company from changing the chemical compound or the warning label, so no lawsuits can be brought for failure to do so.

According to the Food and Drug Administration, almost 80 % of all prescriptions are filled with generic drugs. If there is a generic equivalent to the brand name drug, over 90% of prescriptions are filled with the generic drug. Those injured by generic drugs, even severely, likely are without a remedy.

In two employment discrimination cases, both 5-4, the Court made it much more difficult for employees who bring such claims. In *Vance v. Ball State University*,³² the Court made it harder for employees suing for workplace harassment. In recent years the Court has held that an employer can be held liable for harassment by a fellow employee only if the employer is proven to be negligent in con-

³⁰ 133 S.Ct. 2466 (2013).

³¹ 131 S.Ct. 2567 (2011).

³² 133 S.Ct. 2434 (2013).

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trolling the workplace.³³ If the harasser is a supervisor and the supervisor's harassment culminates in a tangible employment action, the employer is strictly liable. But if no tangible employment action is taken, the employer may escape liability by establishing, as an affirmative defense, that (1) the employer exercised reasonable care to prevent and correct any harassing behavior and (2) the plaintiff unreasonably failed to take advantage of the preventive or corrective opportunities that the employer provided.

In *Vance*, the Court adopted a narrow definition of who is a supervisor, limiting it to those employees who have been empowered by their employer to take an adverse employment action, such as the power to "hire, fire, demote, promote, transfer, or discipline" the employee bringing the harassment claim. This will mean that in many more cases an employee can recover for harassment only by proving negligence by the employer.

In *University of Texas Southwestern Medical Center v. Nassar*,³⁴ the Court made it more difficult for employees to successfully sue for claims that they were retaliated against for complaining of discrimination. Generally, a plaintiff in an employment discrimination suit need only show that the prohibited grounds, such as race or gender, were a motivating factor for the adverse employment action. The Court has prescribed a method of analysis for such "mixed motive" claims.³⁵

But in *Nassar*, the Court ruled that the retaliation provision of Title VII of the Civil Rights Act of 1964, and similarly worded provisions in other federal statutes, requires a plaintiff to prove that an employer would not have taken the adverse employment action *but for* the desire to retaliate. This requirement of "but-for causation" likely will mean that many more of such claims will be resolved in favor of employers at the summary judgment stage.

Finally, in *American Express v. Italian Colors Restaurant*,³⁶ a small

³³ *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. Boca Raton*, 524 U.S. 775 (1998).

³⁴ 133 S.Ct. 2517 (2013).

³⁵ *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

³⁶ 133 S.Ct. 2304 (2013).

business sought to bring a class action against American Express for alleged antitrust violations. American Express moved to prevent this litigation by invoking a clause in its agreement with Italian Colors requiring individual, and not class-wide, arbitration. The Court said that an arbitration clause in a contract must be enforced even if it means that the antitrust suit realistically would not go forward.

Italian Colors said that the suit simply could not go forward except as a class action. Successfully suing for an antitrust violation costs hundreds of thousands if not millions of dollars. Recovery for a claim under the antitrust law, though, is limited to \$39,000. The Court, 5-4, in an opinion by Justice Scalia, said that the Federal Arbitration Act required that the arbitration clause be strictly enforced, even if it meant that the antitrust claims otherwise would not be brought. As in *ATT Mobility LLC v. Concepcion* two years ago,³⁷ the Court's conservative majority required enforcement of an arbitration clause even though it would likely completely immunize the defendant from liability for illegal conduct.

CONCLUSION

October Term 2012 was filled with blockbuster cases and next term promises to be more of the same. The Court already has cases on the docket concerning abortion rights, affirmative action, campaign finance, separation of church and state, separation of powers, and freedom of speech. It is an amazing time in the United States Supreme Court.



³⁷ 131 S.Ct. 1740 (2011).