Supreme Court poised to turn right in 2013 term

by Richard Wolf in the October 30, 2013 issue

After two blockbuster terms in which it saved President Obama's health-care law and advanced the cause of same-sex marriage, the Supreme Court appears poised to tack to the right in its upcoming term on a range of social issues, from abortion and contraception to race and prayer.

The justices, whose term began on October 9, could rule against racial minorities in two cases and abortion rights in one or two others. They also could uphold prayers at government meetings, ease restrictions on wealthy political donors, strike down federal environmental regulations and take a first bite out of the Affordable Care Act.

The court also may be ready to restrict the power of the federal government and stand up for states and municipalities in several cases, furthering their defense of federalism.

"They don't defer to the other branches. They don't seem to care about precedents," said Stephen Wermiel, a constitutional law professor at American University Washington College of Law. The justices, he says, are "more than willing to step up to the plate."

That was evident in June, when the court on successive days struck down the most important sections of the Voting Rights Act of 1965, over the objections of President Obama and congressional Democrats, and the Defense of Marriage Act of 1996, over the objections of Republicans.

"You could not have less deference to a legislative institution," said David Salmons, an appellate lawyer who has argued 14 cases before the high court. "This is a court that's very comfortable in exercising its power."

Conservative interest groups, perhaps seeing their best chance in years to advance their causes, have argued aggressively in their briefs to the court not only for

favorable rulings but for overturning some of the court's time-honored precedents: a 37-year-old campaign finance decision, a 31-year-old ruling on racial integration, even a 93-year-old opinion allowing the federal government to supersede state laws when implementing international treaties.

"They think they have the wind at their back," says Pamela Harris, a former Justice Department lawyer now teaching at Georgetown University Law Center.

Most of the high-profile cases on the docket fall into one of two categories: lower courts sided either with liberal activists or with federal agencies. They include:

• A challenge to the Federal Election Commission's limit on how much donors can contribute over two years to candidates, parties and political action committees. It comes from a Republican businessman, Shaun McCutcheon, who wants to exceed the current $123,200 cap.

• A defense by Michigan's Republican attorney general of the state's 2006 constitutional amendment banning affirmative action policies at state universities. If the justices reverse the lower court's decision, it could bolster such bans in other states, including California.

• The Greece, New York, town board's defense of its policy allowing local clergy to deliver prayers at town board meetings. The lower court sided with two women who argued that the predominance of Christian clergy and prayers is coercive.

• A challenge by abortion opponents to a Massachusetts law setting up 35-foot buffer zones around reproductive health clinics that perform abortions. The lower court dismissed what it labeled arguments "old and new, some of which are couched in a creative recalibration of First Amendment principles."

• A defense by Oklahoma Republican officials of a state law that has the effect of blocking most medical abortions. The law bans off-label uses of drugs that end pregnancies, including RU-486, even though doctors routinely prescribe the drugs that way.

The court also is likely to choose from among dozens of challenges to the new health-care law's requirement that employers include contraceptive services in preventive health insurance plans. In that case, lower courts have ruled both ways, and the government is among those seeking the high court's review—but

conservatives have the most to gain.

“The court will get another shot at the Affordable Care Act,” says Paul Clement, a former solicitor general under George W. Bush and the nation’s premier Supreme Court litigant. Clement represented states challenging the law in the historic 2012 case.

The medical abortion case probably won’t be the last effort to push the justices into further limits on abortion rights. More cases are in the pipeline, including state laws banning abortions after 20 weeks, mandating ultrasound tests and imposing new restrictions on abortion clinics.

Even the landmark cases most recently decided on same-sex marriage, voting rights and affirmative action could get encores at the high court in the near future. The lawyers who defeated California’s Proposition 8 ban on gay marriage joined a Virginia case that seeks to legalize the practice there.

Such cases, says Tom Goldstein, publisher of Scotusblog.com and a frequent Supreme Court litigant, are “making their way to the Supreme Court like a rocket ship, or a series of rocket ships.” —*USA Today*

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