Supreme Court Preview

Organized by the **State and Local Legal Center**

Hosted by the **National Association of Counties**

Featuring **Tom Fisher**, **Matt Zinn**, and **Brianne Gorod**

About the Webinar

- Speakers' bios and a handout
- Questions
- Recording
- Technical difficulties
- The views expressed in this webinar do not necessarily reflect the views any of the sponsoring organizations
- Survey

National Association of Counties

- Mission
- Vision

About the SLLC

- National Governors Association
- National Conference of State Legislatures
- Council for State Governments
- National League of Cities
- National Association of Counties
- International City/County Management Association
- U.S. Conference of Mayors
- International Municipal Lawyers Association
- Government Finance Officers Association

About the SLLC

- Since 1983 the SLLC has filed over 350 briefs
- Last term the SLLC filed 13 briefs before the Supreme Court
- The SLLC is a resource for Big Seven members on the Supreme Court—this webinar is an example!

About the Speakers

- **Tom Fisher, Indiana Solicitor General**
- **Matt Zinn, Shute, Mihaly & Weinberger**
- **Brianne Gorod, Constitution Accountability Center**

Virginia Uranium, Inc. v. Warren, No. 16-1275

(Amicus brief by Indiana and Washington, joined by 8 other states)

- Preemption Case: Whether AEA preempts state regulation of uranium mining if that regulation is motivated by concerns for radiological safety.
- At issue: Virginia moratorium on uranium mining, which affects largest deposit of uranium in USA.
- CA4 held no preemption, in conflict with CA2, CA9, CA10.
- Key questions: Import of savings clause and presumption against preemption; vitality of Court precedent; limits of searching for State purpose.
- Set for Argument November 5, 2018

Franchise Tax Board v. Hyatt, No. 17-1299

(Amicus brief by Indiana, joined by 43 other states)

- Sovereign Immunity: Whether to overturn *Nevada v. Hall*
- Issue: Whether Hyatt, former CA resident who moved to NV, can sue FTB in NV court for torts related to its audit contesting the timing of his move.
- Third trip to the Court; case is two decades old.
- Last time 2016: 4-4 split on this issue after Scalia passed away.
- Key issue: Will Court realign with remainder of sovereign immunity doctrine? 9th Justice?
- Argument date not yet set.

Tyson Timbs and a 2012 Land Rover LR2 v. Indiana, No. 17-1091

- Civil asset forfeiture case.
- Issue: Whether the Excessive Fines Clause is incorporated against the States via the Fourteenth Amendment.
- Timbs's Rover forfeited after arrest for using it to deal heroin.
- Indiana Supreme Court held no EFC incorporation (State never argued).
- Key issues: Whether history of EFC and forfeiture support incorporation.
- Argument date not yet set.

Knick v. Township of Scott, Pennsylvania

Weyerhaeuser Co. v. U.S. Fish and Wildlife Service

Merck, Sharp & Dohme Corp. v. Albrecht

SUPREME COURT PREVIEW: OT18

Brianne Gorod
Chief Counsel
Constitutional Accountability Center

GAMBLE V. UNITED STATES

Oral Argument: TBD

GAMBLE V. UNITED STATES

Question Presented:

Should the Supreme Court overrule the dual-sovereignty exception to the Double Jeopardy Clause?

GAMBLE V. UNITED STATES

Fifth Amendment:

"No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb."

GAMBLE V. UNITED STATES

Dual-Sovereignty Exception:

Successive prosecutions are allowed if they are undertaken by separate sovereigns, for example, the federal and state governments.

GAMBLE V. UNITED STATES

- 2008: Gamble was convicted of second-degree robbery
- 2015: Gamble was prosecuted by Alabama for marijuana possession and for being a felon in possession of a firearm
- Gamble received a one-year sentence on the state charge
- While the state prosecution was ongoing, the federal government charged Gamble with the same offense under federal law
- Gamble moved to dismiss his federal indictment on the ground that it violated the Double Jeopardy Clause

GAMBLE V. UNITED STATES

District Court:

"[U]nless and until the Supreme Court overturns" the separate sovereigns doctrine, "Gamble's Double Jeopardy claim must likewise fail."

GAMBLE V. UNITED STATES

Puerto Rico v. Sanchez Valle, 136 S. Ct. 1863 (2016):

JUSTICE GINSBURG, with whom JUSTICE THOMAS joins, concurring.

I join in full the Court's opinion, which cogently applies long prevailing doctrine. I write only to flag a larger question that bears fresh examination in an appropriate case. The double jeopardy proscription is intended to shield individuals from the harassment of multiple prosecutions for the same misconduct. *Green* v. *United States*, 355 U. S. 184, 187 (1957). Current "separate sovereigns" doctrine hardly serves that objective. States and Nation are "kindred systems," yet "parts of ONE WHOLE." The

GAMBLE V. UNITED STATES

Gamble's Arguments:

- Text of the Double Jeopardy Clause
- English common law
- Purpose of the Double Jeopardy Clause
- Exception undermines the role of the jury
- Doctrinal changes
- Practical changes

GAMBLE V. UNITED STATES

Government's Arguments

- Long-standing precedent
- Federal and state governments are distinct sovereigns
- Misplaced reliance on common law
- Doctrine reaffirmed after incorporation

NIEVES V. BARTLETT

Oral Argument: TBD

NIEVES V. BARTLETT

Question Presented:

Does probable cause defeat a First Amendment retaliatory-arrest claim under 42 U.S.C. § 1983?

NIEVES V. BARTLETT

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

NIEVES V. BARTLETT

Mt. Healthy City Bd. of Ed. v. Doyle, 429 U.S. 274 (1977)

- There can be a civil claim for retaliatory termination if alleged constitutional violation was a but-for cause of the employment termination.

Hartman v. Moore, 547 U.S. 250 (2006)

- A plaintiff alleging a retaliatory prosecution must show the absence of probable cause for the underlying criminal charge.

NIEVES V. BARTLETT

Lozman v. City of Riviera Beach, Florida, 568 U.S. 115 (2013)

- Does the court apply *Hartman v. Moore* or *Mt. Healthy City Bd. of Ed. v. Doyle?*
- "Lozman's claim is far afield from the typical retaliatory arrest claim, and the difficulties that might arise if *Mt. Healthy* is applied to the mine run of arrests made by police officers are not present here."

NIEVES V. BARTLETT

Lozman v. City of Riviera Beach, Florida, 568 U.S. 115 (2013)

- Thomas dissent: “I would have answered the question presented and held that plaintiffs must plead and prove a lack of probable cause as an element of a First Amendment retaliatory-arrest claim.”

NIEVES V. BARTLETT

- Russell Bartlett attended a sporting event called *Arctic Man*
- Alaska State Trooper Luis Nieves came to investigate underage drinking
- Bartlett declined to speak with Nieves
- Nieves later arrested Bartlett
- *Nieves:* Now you're going to jail.
- *Bartlett:* For what?
- *Nieves:* Bet you wish you would have talked to me now.

NIEVES V. BARTLETT

- Alaska charged Bartlett with disorderly conduct and resisting arrest
- Bartlett sued, alleging retaliatory arrest under 42 U.S.C. § 1983

NIEVES V. BARTLETT

District Court Ruling

Existence of probable cause to arrest Bartlett for harassment barred his First Amendment retaliatory arrest claim

NIEVES V. BARTLETT

Ninth Circuit Ruling

- A plaintiff may prevail on a retaliatory arrest claim "even if the officers had probable cause to arrest."
- "The [Supreme] Court emphasized that the rule that it announced in [*Hartman*], which held that a plaintiff cannot make a retaliatory *prosecution* claim if the charges were supported by probable cause, does not necessarily extend to retaliatory arrests."
- Noting the allegation that Nieves said "bet you wish you would have talked to me now," the Ninth Circuit concluded that Bartlett had potentially established a claim of retaliatory arrest in violation of the 1A.

NIEVES V. BARTLETT

Nieves' Arguments

- *Hartman* supports probable cause element for retaliatory arrest
- Common law of torts supports a probable cause element for retaliatory arrest
- *Ad hoc* arrests by individual officers are "not a potent tool for suppressing core First Amendment speech, and improper arrests can be deterred and corrected in other ways."

NIEVES V. BARTLETT

Bartlett's Arguments

- *Hartman*'s rationale for a probable cause element in retaliatory *prosecution* cases does not apply in retaliatory *arrest* cases
- Section 1983, unlike common law torts, is designed to protect fundamental constitutional rights
- Troubling implications of allowing officials to escape liability for retaliatory arrest

MOUNT LEMMON FIRE DISTRICT V. GUIDO

Oral Argument: Oct. 1, 2018

MOUNT LEMMON FIRE DISTRICT V. GUIDO

Question Presented

Whether, under the Age Discrimination in Employment Act, the same 20-employee minimum that applies to private employers also applies to political subdivisions of a state, as the U.S. Courts of Appeals for the 6th, 7th, 8th and 10th Circuits have held, or whether the ADEA applies instead to all state political subdivisions of any size, as the U.S. Court of Appeals for the 9th Circuit held in this case.

MOUNT LEMMON FIRE DISTRICT V. GUIDO

29 U.S.C. § 630(b)

The term “employer” means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year . . . . The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

MOUNT LEMMON FIRE DISTRICT V. GUIDO

- 2000: Guido and Rankin were hired by Mount Lemmon Fire District, a political subdivision of Arizona
- 2009: Guido and Rankin were fired (they were the two oldest full-time employees)
- Guido and Rankin filed charges of age discrimination with the EEOC
- The EEOC issued favorable rulings

MOUNT LEMMON FIRE DISTRICT V. GUIDO

District Court Ruling

- District court granted the Fire District's motion for summary judgment
- The district was not an "employer" within the meaning of the ADEA

MOUNT LEMMON FIRE DISTRICT V. GUIDO

Ninth Circuit Ruling

- Section 630(b)'s plain meaning creates three distinct categories of "employers"
- Ordinary meaning of "also" supports the notion that there are three distinct categories
- Notes EEOC argument that Congress knew how to use language that would apply the employee minimum to political subdivisions
- Rejects arguments from legislative history made by the Fire District

MOUNT LEMMON FIRE DISTRICT V. GUIDO

Fire District's Arguments

- Plain text argument: the statute defines "employer" to include only those political subdivisions with 20 employees and the following sentence merely clarifies its scope
- The Ninth Circuit's decision treats public and private employers of comparable sizes differently and treats different civil rights statutes differently

Is it the most elegant statute Congress ever drafted? It won't win any awards. But in fairness to Congress, it was not drafting this way from scratch. In 1974, it amended a preexisting definition to encompass certain governmental entities, essentially as follows:

> The term "employer" means a person engaged in an industry affecting commerce who has twenty-five or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year.... The term also means any agent of such a person, but such term does not include the United States, a corporation wholly owned by the Government of the United States, or a State or political subdivision thereof.

MOUNT LEMMON FIRE DISTRICT V. GUIDO

Guido and Rankin's Arguments

- Plain text: the "statute's coverage of private employers carries a numerosity requirement, but the transitional phrase 'also means' creates a distinct, freestanding category of public employers"
- Legislative history: Legislators described the changes to the ADEA as a "logical extension" of changes they were making to the FLSA
- The ADEA is drawn from the FLSA, which covers political subdivisions regardless of size
- Section 630(b) does not threaten to impair the operations of small political subdivisions

Questions

Thanks for attending!