Supreme Court Preview

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

Hosted by the **National Association of Counties**

Featuring **John Elwood**, **Vinson & Elkins**, **Kelsi Brown Corkran**, **Orrick Herrington & Sutcliffe**, and **Kimberly Atkins**, **Boston Herald**

About the Webinar

- Type your questions in anytime in the box in the middle right hand side of your screen
- A recording of the webinar will be available on the SLLC's website following the webinar
- The views expressed in this webinar do not necessarily reflect the views of the SLLC member groups

About the SLLC

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

About the SLLC

- Since 1983 the SLLC has filed over 300 briefs
- The SLLC filed 3 briefs before the Supreme Court this term
- The SLLC is a resource for Big Seven members on the Supreme Court—this webinar is an example

About the Speakers

- John Elwood, Vinson & Elkins
- Kelsi Brown Corkran, Orrick Herrington & Sutcliffe
- Kimberly Atkins, Boston Herald

Friedrichs v. Cal. Teachers Ass'n— Intro

- *Abood v. Detroit Bd. of Education* (1977): Public-sector unions can bill nonmembers for expenses related to collective bargaining
  - Keep nonmembers from free-riding on union's efforts
  - BUT: may not require nonmembers to fund union's political/ideological efforts
- Fast Forward: *Knox v. SEIU* (2012), involving temporary dues increase to fund political operations
  - "compelled speech" "significant impingement on First Amendment rights"; Court's past tolerance "an anomaly"

Friedrichs v. Cal. Teachers Ass'n—Intro

- *Harris v. Quinn* (2014), refused to extend *Abood* to personal rehabilitation assistants
  - Avoiding "free ridership" "generally insufficient to overcome First Amendment objections"
  - *Abood* "questionable on several grounds"; an "anomaly."

Friedrichs v. Cal. Teachers Ass'n

- Challenges California's "agency shop" law requiring public-school teachers either to be union members (& thus pay dues) or contribute equivalent fee
- QP1: Whether *Abood* should be overruled and public-sector "agency shop" rules invalidated
- QP2: Whether it violates First Amendment to require opt-out to political speech rather than opt-in

Friedrichs: Prospects

- Very free-speech Court; questioned *Abood* twice
  - But why not overrule it in *Harris*?
- Because the case was decided on the pleadings, respondents argue the record is inadequate and that arguments against opt-out are premised on facts not presented on record.
- Government also raised the argument that requiring participation is permitted under the line of cases applying balancing test for employee speech in disciplinary matters, *Pickering v. Board of Education* (1968). (Addressed and rejected in *Harris*.)
- *Stare decisis*, which has had an impact in *Halliburton v. Erica P. John Fund* and the *Basic v. Levinson* test.
- Remains to be seen whether arguments gain traction.

Friedrichs: Implications

- If the Court invalidates *Abood*, it could have enormous implications: *Citizens United* for labor law.
  - Public sector unions represent one of the last bastions of strong unionism in the U.S.
  - Because people could get benefits without paying fee, could prompt thousands of members to leave unions, and cost unions millions of dollars in dues and fees, causing public-sector unions to "potentially wither into insignificance."
  - The case thus has the potential to be a watershed case in labor law.
    - 25 amicus briefs filed so far on *top side alone*.

Luis v. United States: Background

- *United States v. Monsanto* and *Caplin & Drysdale v. United States* (1989): Constitution permits freezing *tainted* assets needed to retain counsel
  - "A defendant has no [constitutional] right to spend another person's money for service rendered by an attorney, even if those funds are the only way that the defendant will be able to retain the attorney of his choice."
  - Left open question whether must have hearing to establish probable cause
  - *Kaley v. United States*: Court held 6-3 that defendant cannot challenge grand jury's determination of probable cause to believe defendant committed crime charged

Luis v. United States

- Question Presented: Whether pretrial injunction prohibiting defendant from spending untainted assets to retain counsel of choice violates Fifth and Sixth Amendments.
- Previous cases emphasized taint of assets used to retain counsel; whether is constitutional difference that these assets are legitimate
  - Relevant statute allows government to seek to freeze "property of equivalent value" to tainted assets
- More disruptive to defendants than *Monsanto/Caplin & Drysdale* if upheld

Montgomery v. Louisiana

- Montgomery in prison since 1963 for shooting deputy sheriff
- *Miller v. Alabama* (2012) held by 5-4 margin that Eighth Amendment forbids a sentencing scheme that *mandates* life in prison without possibility of parole for juvenile homicide offenders.
  - Lesser culpability of juvenile offenders b/c of lack of maturity
- *Teague v. Lane*. New constitutional rules of criminal procedure do not apply to cases on collateral review unless (1) limits the conduct that is criminal or the punishment for certain offenders ("substantive" rule) (2) watershed procedures that goes to fundamental fairness and accuracy.
- Is *Miller* a "substantive" rule? A "watershed" rule?
- Court added another question: Does it have jurisdiction to review?
  - Louisiana courts not required to follow *Teague*; but is its state law "interwoven" with federal law?

Montgomery v. Louisiana

- Montgomery has unusual *amicus*: The United States
  - Michael Dreeben, Deputy Solicitor General
- Decision for Montgomery could affect 200 inmates in Louisiana, 2000 nationwide.
  - Whether resentenced to subject to determine whether should be subject to parole
- *Amici* argued Court should order briefing on whether sentencing juveniles to life without parole is *always* unconstitutional
  - Court also appears to be considering cases in pipeline that raise question
  - That issue, if applied retroactively, could have still-broader implications

EnerNOC, Inc. v. Electric Power Supply Ass'n

Does federal energy-savings rule obstruct state governance of energy markets?

- Federal Energy Regulation Commission (FERC) regulates energy sales.
  - **Wholesale energy markets**: multistate; energy generators sell to retailers.
  - **Retail energy markets**: local; retailers (public and private utilities) sell to businesses and households.
  - FERC has authority over wholesale markets only. Not retail markets.
- Problem: retail prices not sensitive to high demand at peak hours.
- Solution: **"Demand response"** allows energy end users to sell usage reductions back into wholesale market.

EnerNOC, Inc. v. Electric Power Supply Ass'n

- FERC issues rule to boost demand response.
  - Sets rate wholesale market operators must pay for demand response bids.
- Does rule trample on **state authority over retail markets**?
- **State and municipal utilities' position**:
  - Some disfavor rule – own demand response programs at retail level are disrupted by federal overlay.
  - Some states favor federal rule – helps reduce energy cost and usage.

Franchise Tax Board of California v. Hyatt

What immunity is a state entitled to in another state's court?

- Hyatt sues California Tax Board in Nevada.
- States can be sued in other states' courts (*Nevada v. Hall*).
  - States cannot be sued in own state courts or federal courts.
- States consent to be sued in own courts for certain torts (tort claims acts).
- California's tort claims act: Hyatt's suit not allowed. Agency is immune.
- Nevada's tort claims act: Hyatt's suit can proceed. Agency is not immune.

Franchise Tax Board of California v. Hyatt

- *Hyatt I*: Nevada courts can apply own sovereign immunity law. Tax Board not entitled to *more* immunity than Nevada agency would get.
- *Hyatt II*:
  - (1) Can Nevada give Tax Board *less* immunity than Nevada agency would get?
    - Is Tax Board entitled to benefit of Nevada statutory damages cap, if more damages are necessary to fully compensate Nevada citizen?
  - (2) Should *Nevada v. Hall* be overruled, so states cannot be sued in other states?

Gobeille v. Liberty Mutual Life Ins. Co.

Are state healthcare reporting laws preempted?

- ERISA: Federal regulation of employee retirement plans.
  - Requires plan administrators to report financial and management data.
- State laws that have "connection with" ERISA plans are preempted.
- Vermont law requires healthcare administrators to report claims, enrollment data.
- Is Vermont's law preempted?
  - Burden on plan administrators.
  - Presumption against preemption for areas of traditional state concern.

Heffernan v. City of Paterson

- Does the First Amendment bar the government from demoting a public employee based on the supervisor's perception that the employee engaged in political activity, but that perception was mistaken?
- Third Circuit held that because the employee did not actually engage in any protected activity, he cannot assert a viable First Amendment claim.
- Courts of Appeals are divided.

Fisher v. University of Texas at Austin

Affirmative action case takes second trip to the court

- The background: From *Bakke* to *Schuette*
  - *Regents of the University of California v. Bakke* (1978): Strict scrutiny test requires race-based considerations to be "precisely tailored" to meeting compelling interest.
  - *Grutter v. Bollinger* (2003): Allowed consideration of race in law school admissions if part of an "individualized inquiry into the possible diversity contributions of all applicants."
  - *Fisher v. University of Texas at Austin* (Fisher I) (2013): Case sent back to lower court, with strong warning that the strict scrutiny standard established by *Bakke* and *Grutter* is an exacting one.
  - *Schuette v. Coalition to Defend Affirmative Action* (2014): Voter-enacted affirmative action ban for Michigan's public universities upheld.

Fisher v. University of Texas at Austin

- The return of Fisher (Fisher II)
  - Policy based on that upheld in *Grutter*
  - Top 10 rule
  - Question Presented: Whether the Fifth Circuit's re-endorsement of the University of Texas at Austin's use of racial preferences in undergraduate admissions decisions can be sustained under this Court's decisions interpreting the Equal Protection Clause of the Fourteenth Amendment.
  - Plain language: How strict is strict scrutiny for affirmative action plans. NOT a question of overturning *Grutter*.

Fisher v. University of Texas at Austin

- The future: The case that does seek to overturn *Grutter*
  - Lawsuit against Harvard seeks to be test case for overturning *Grutter*, but could be impacted by Fisher II, depending on how the justices rule.

Evenwel v. Abbott

Drawing the lines: One person, one vote

- The background: Reynolds to Shelby County
  - *Reynolds v. Sims* (1964): Equal protection requires districts of about equal size according to population.
  - *Burns v. Richardson* (1966): "[N]o constitutionally founded reason to interfere" with choice of population state uses to draw districts.
  - *Shelby County v. Holder* (2013): Invalidates Section 4 of the Voting Rights Act, which sets up the formula for determining pre-clearance requirements.

Evenwel v. Abbott

- What does "population" mean?
  - Texas draws its districts in proportion according to total population.
  - Plaintiffs challenge the districts, arguing that the population considered should be that of eligible voters, not total population. Other claims assert actual voters or past voting percentages be the measure.
  - Question presented: Whether "one-person, one-vote" principle under the Equal Protection Clause allows States to use total population, and does not require States to use voter population, when apportioning state legislative districts.

Evenwel v. Abbott

- Impact
  - Challengers' interpretation would leave out non-citizens, those with felony convictions and others from district population determinations.
  - Could shift power for urban areas to more suburban and rural areas.
  - Seen as politically motivated.

Harris v. Arizona Independent Commission

Drawing the lines: Measuring partisanship

- The background:
  - *Shelby County*
  - *Arizona State Legislature v. Arizona Independent Redistricting Commission* (2015): Upheld Arizona's use of an independent commission to adopt congressional districts

Harris v. Arizona Independent Commission

- An independent commission created districts that the challengers claim pack white voters into districts, creating larger Republican-leaning districts in an efforts to give minority, largely Democratic voters more power.
- Challenged the districts, arguing that partisan representation not a valid reason to create uneven districts.
- Questions presented:
  - (1) Whether the desire to gain partisan advantage for one political party justifies intentionally creating over-populated legislative districts that results in tens of thousands of individual voters being denied Equal Protection because their individual votes are devalued, violating the one-person, one-vote principle;
  - (2) whether the desire to obtain favorable preclearance review by the Justice Department permits the creation of legislative districts that deviate from the one-person, one-vote principle, and, even if creating unequal districts to obtain preclearance approval was once justified, whether this is still a legitimate justification after *Shelby County*.