

The Texas Lawbook

Free Speech, Due Process and Trial by Jury

First Up Before SCOTUS in New Year: Scott Keller

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Former Texas Solicitor General Scott Keller will be the first lawyer arguing before the U.S. Supreme Court in 2022, urging on January 7 that the justices stay the Biden Administration's vaccine mandate for companies with 100 or more employees.

Keller is partner and co-founder of Lehotsky Keller, the litigation boutique that launched in February last year. It has bases in Austin, Washington and Denver. Co-founder Steve Lehotsky formerly was chief litigation counsel of the U.S. Chamber of Commerce from 2013 to 2021, which may explain why the firm was picked to take on the high-profile case on behalf of 26 business associations, ranging from the National Federation of Independent Business to the Ohio Grocers Association. Because of the case's urgency, the Supreme Court fast-tracked the process by scheduling it for January 7, a rare Friday argument.

"Unless this Court immediately stays the [OSHA emergency temporary standard's] effective date, on January 10, America's businesses will immediately begin incurring billions in nonrecoverable compliance costs, and they will lose employees amid a preexisting labor shortage," Lehotsky wrote as counsel of record in the business brief, adding that "OSHA's sweeping regulatory dictate will convert hundreds of thousands of businesses into de facto public health agencies for two-thirds of America's private employees. It should be stayed."

Keller, who formerly headed the Baker Botts Supreme Court practice, clerked at the Supreme Court along with Lehotsky in 2009. Keller clerked with Justice Anthony Kennedy, while Lehotsky clerked for Justice Antonin Scalia during that term. Keller has argued 11 cases before the high court as Texas's solicitor general from 2015 to 2018. The upcoming argument will be Keller's first since leaving the SG's office. Lehotsky will be at his side at the court as "second chair."

Arguing against Keller will be Biden-appointed U.S. Solicitor General Elizabeth Prelogar. Both Keller and Lehotsky, along

with other Supreme Court advocates, signed a joint letter to Congress in September supporting Prelogar's nomination. In her brief before the court, Prelogar asserted that blocking the OSHA mandate "would cost many workers' lives and result in thousands of worker hospitalizations – all the more so as the pandemic's most recent surge drives case counts to new highs."

Keller's 2022 debut is a fitting indication that a slew of Texas-related cases are before the high court when arguments will take place and hand down decisions during the winter and spring. Among them:

Federal Election Commission v. Cruz: Set for argument January 19, the case was brought by Senator Ted Cruz in a challenge to a federal law that restricts when candidates can repay personal loans they make to their campaigns. He claims that the statute violates the First Amendment's free-speech clause. Counsel of record for Cruz is Charles Cooper of Cooper & Kirk in Washington.

Ysleta del Sur Pueblo v. Texas: An important tribal-gaming case will be argued February 22. At issue is the meaning of a federal law that bars any gaming activities on tribal lands if the activities are "prohibited by the laws of the State of Texas." Counsel of record for the Texas tribes is Brant Martin of Wick Phillips Gould & Martin in Fort Worth. Sidley Austin veteran Supreme Court advocate Carter Phillips in Washington is also on the brief.

Torres v. Texas Department of Public Safety: The Court granted review of this important sovereign-immunity case, but no argument date has been set. At issue is whether a state may be sued in state court for violating a federal law that gave military members a cause of action in disputes over discrimination on the basis of military service. Invoking sovereign immunity, Texas asserted that it was immune from that kind of lawsuit. Arnold & Porter senior associate Andrew Tutt, based in Washington, is counsel of record for Torres. Also on the brief is Stephen Chapman of the Chapman Law Firm

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in Corpus Christi. Judd Stone II, the current Texas solicitor general, is likely to represent the Texas department.

Houston Community College System v. Wilson: Argued in November, this First Amendment case has not yet been handed down by the Supreme Court. The question is whether the First Amendment restricts the authority of an elected body to issue a censure resolution in response to a member's speech. Richard Morris of Rogers, Morris & Grover in Houston argued for the community college. Representing Wilson was Michael Kimberly of McDermott Will & Emery in Washington.

Ramirez v. Collier: The court heard arguments in November in a plea by a Texas death row inmate to have his pastor be with him and pray aloud while he is being executed. The policy of Texas is to allow the pastor to be present, but forbids the laying on of hands and audible prayer. Seth Kretzer of the Law Offices of Seth Kretzer in Houston argued on behalf of inmate John Ramirez. Texas SG Judd Stone II represented the Texas Department of Criminal Justice.

City of Austin, Texas v. Reagan National Advertising of Texas Inc.: In another First Amendment case, the court heard arguments in November asking whether Austin's city code that distinguishes between on-premise signs and off-premise signs is a facially unconstitutional content-based regulation. Michael Dreeben, co-chair of O'Melveny & Myers's white-collar defense and corporate investigations practice, represented Austin, and Kannon Shanmugam of Paul, Weiss, Rifkind, Wharton & Garrison, argued on behalf of the advertising company.

Whole Woman's Health v. Jackson: In the controversial dispute over the Texas anti-abortion law SB8, the Supreme Court in December allowed it to go forward, but also narrowly let abortion providers to challenge it against certain state medical officials. The Fifth Circuit U.S. Court of Appeals will hear arguments Friday on whether the case should be certified to the Texas Supreme Court to decide if those medical officials have power to enforce the state law. The abortion providers have asked the U.S. Supreme Court to order the appeals court to the federal district court.