

Litigators of the Week: The Boutique Founders Who Nixed the Federal Vaccine Mandate for Large Employers

Less than a year after Steve Lehotsky, the former chief litigation counsel at the U.S. Chamber's Litigation Center, and Scott Keller, the former head of the Supreme Court practice at Baker Botts, came together to form their boutique Lehotsky Keller, they scored a monumental win for a coalition of 26 business associations.

By Ross Todd
January 21, 2022

This week's Am Law Litigation Daily Litigators of the Week are **Steve Lehotsky** and **Scott Keller** of **Lehotsky Keller**. Lehotsky, the former chief litigation counsel at the U.S. Chamber's Litigation Center, and Keller, the former head of the Supreme Court practice at **Baker Botts**, came together last February to form their boutique, which specializes in litigating challenges to federal, state, and local laws and regulations.

Last week they scored an early signature win for the firm representing a coalition of 26 business associations at the U.S. Supreme Court. Last week's ruling from the high court blocked the Occupational Safety and Health Administration's mandate for employees of companies with at least 100 employees to be vaccinated or tested weekly for COVID-19.

Litigation Daily: Who were your clients and what was at stake?

Scott Keller: Our clients were 26 business trade associations representing a broad range of retail, wholesale, warehousing, transportation, travel, logistics, and commercial interests across the nation. At stake was the legality of a regulation covering hundreds of thousands of businesses and 84 million Americans—two-thirds of the private sector workforce.

How did you come to represent this coalition of businesses? Steve, I gather as chief litigation counsel of the U.S. Chamber of Commerce you have some experience bringing together diverse coalitions of



Courtesy photos

Steven P. Lehotsky(L) and Scott A. Keller(R) of Lehotsky Keller.

business interests to challenge actions by government agencies.

Steve Lehotsky: I do. I learned so much about coalition building when I was there—**Tom Donohue**, **Lily Claffee** and so many others there have been great mentors and friends. The core model of our firm is combining my prior experience at the Chamber with Scott's prior experience as the Texas Solicitor General and chairing the Supreme Court practice at a major international law firm. With those prior contacts as well as the model of our firm and the strategy we put forward, we were able to bring together this extensive and diverse coalition.

Who all was on your team and how did you divide the work?

Keller: Our phenomenal team has been instrumental from day one of this case. **Katie Yarger**, our partner

in Denver and a top litigator, and **Mike Schon**, our partner in D.C. with deep environmental, health and safety litigation experience, were key contributors to our strategy and briefing. **Josh Morrow**, who joined us on November 1 as counsel in Austin shortly before this case began, jumped right in and was invaluable with research and drafting. And **Shane O'Connor**, who just graduated from the University of Texas Law School (my alma matter) and will be leaving us in August to start two (or more) clerkships, did everything we could ask from a young attorney.

How did you manage to build out a team that was capable of running this type of case in less than a year's time?

Lehotsky: We intentionally designed a firm that would give our lawyers the freedom to practice law at the highest levels in an exceptionally positive, supportive, and collegial work environment even when we're putting in long days like we did for this case. And we've been able to find people who shared our vision and understood what it would take to get there. Our goal is to build one of the nation's top boutique law firms, and hopefully this case shows that we're well on our way to doing just that.

Walk me through the calculus you made in terms of deciding where to file your initial litigation given the unique procedural nature of this challenge?

Keller: For everything we do, our question is always, "What's in the best interests of our clients?" Steve and I have a lot of experience litigating regulatory challenges in the Fifth Circuit. It's very familiar territory for us. But because of the lottery provision in 28 U.S.C. 2112, we knew the case could wind up in any of the regional circuits.

You pressed a statutory argument focused on the text of the Occupational Safety and Health Act and highlighted the Supreme Court "expects Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance." Beyond the vaccine or test and mask context, what kind of impact do you think the ruling in this case could have on future agency action?

Lehotsky: I worked in the Office of Legal Counsel, and I believe deeply in a strong Executive Branch. But there have been so many attempts to circumvent

Congress by presidents of both parties over the last quarter-century, and we've seen time and again that the courts will not countenance that. Legislating is hard, and presidents are always called by the siren song of unilateral action. This case is a cautionary tale for executive agencies that push the envelope because it's easier than going to Congress.

Scott, given the outcome, is there anything that stands out to you about the oral argument before the Justices?

Keller: The Supreme Court had not held an oral argument on a stay application in decades, and this oral argument lasted over two hours, which is much longer than a typical Supreme Court argument. During that extended oral argument, the justices carefully evaluated all facets of the case through difficult questions of both sides, including these big structural questions about the administrative state and the role of Congress.

The emergency application for a stay that you filed at the Supreme Court calls the COVID-19 vaccines "undeniable marvels of modern medicine." How much responsibility should your clients bear to persuade employees who haven't yet been vaccinated to do so?

Lehotsky: Our clients and their members are the businesses with essential workers that keep our country moving and have been instrumental in vaccine distribution. Many of our clients' members businesses require some of their employees to be vaccinated. Many others offer financial incentives and other rewards for employees to get vaccinated. But the government dragooning employers into becoming public health agencies wasn't, as the Supreme Court decision shows, a lawful way to achieve the government's goal.

What will you remember most about this matter?

Keller: On the legal side, this was a fast-paced, high-stakes case that went all the way to the Supreme Court in a historic oral argument and our firm obtained a signature victory for our clients across the national economy. This was about as memorable as it gets for a Supreme Court litigator. On the personal side, my wife and our 18-month-old son dropped me off for the argument that morning because of the snowstorm—and waving goodbye to them as I walked into the Court is a great memory that I get to take with me.