

LOOKOUT! – FLSA AND SCOTUS EMPLOYMENT CASES

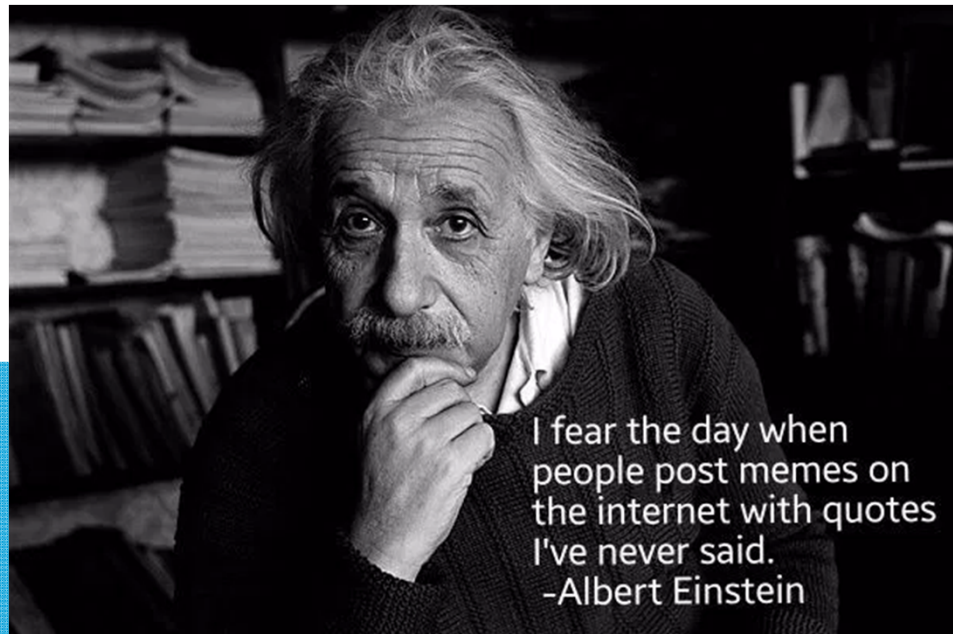
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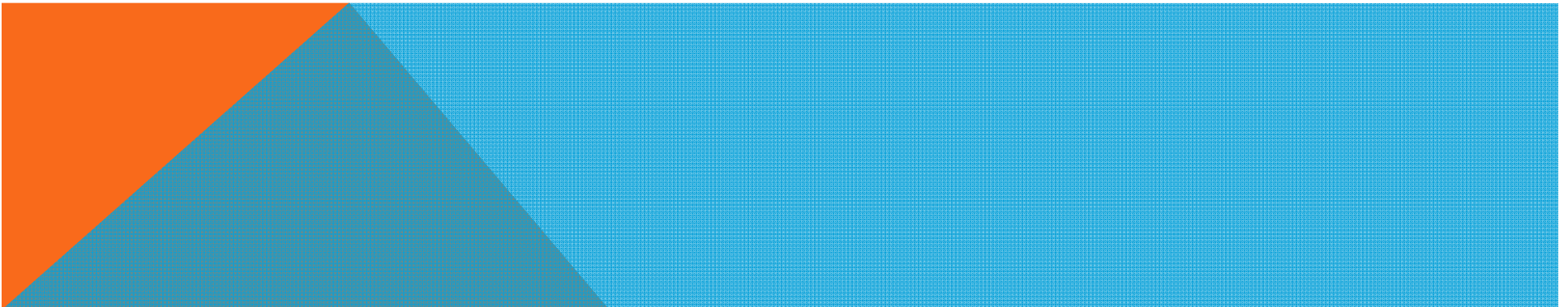


FAIR LABOR STANDARDS ACT
CHANGES AND NEW
ADMINISTRATIVE
INTERPRETATION



BRIEF FLSA OVERVIEW

- FLSA generally applicable to all employers
- Covers minimum wage, overtime pay and youth employment
- When it comes to overtime, job titles do not determine exempt status
- In FLSA litigation, burden of proving exempt status falls on the employer
- Exempt Status Class Actions:
 - Financial services industry
 - IT/computer
 - Pharmaceutical sales



TIMELINE FOR CHANGE

August 2004 - Last updates to Executive, Administrative and Professional (EAP) Exemptions

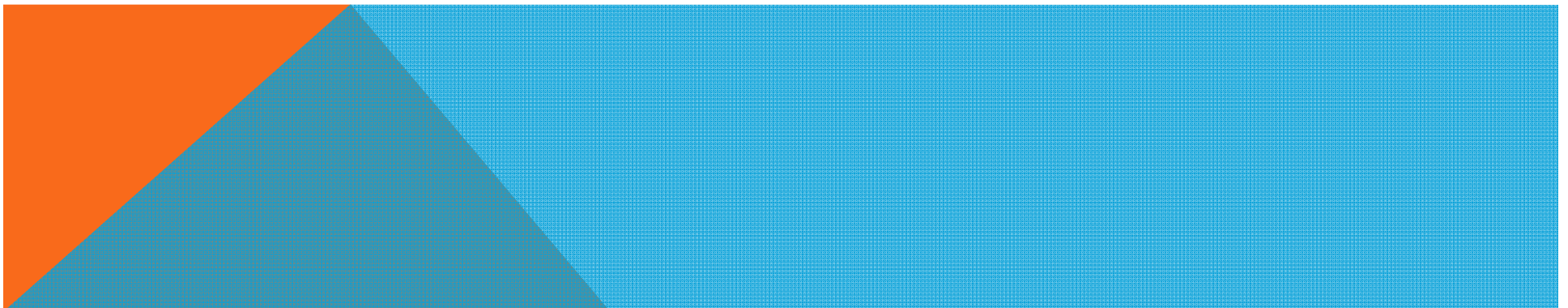
March 2014 - Presidential Memorandum issued

- Simplify and modernize the exemptions, while making sure the overtime regulations are fully enforced

July 2015 – Notice of Proposed Rulemaking

September 2015 – Public Comment Period Closed

2016 – Regulations?



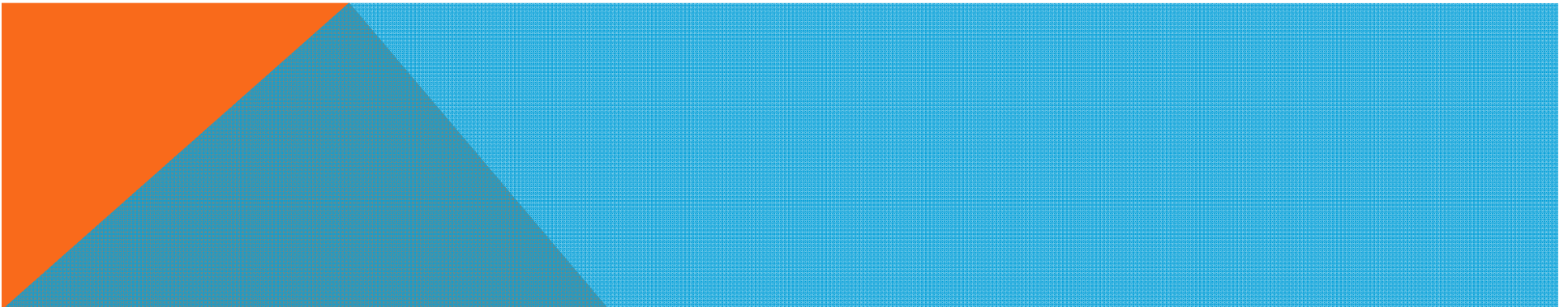
OVERTIME EXEMPTION GUIDELINES

To be exempt from the overtime requirements of the FLSA, generally must meet three requirements:

- Must be paid on a salary basis
- Your weekly salary must meet minimum amount – currently \$455
- You must meet requirements of specific exemption
 - Generally called the “duties test”

Currently minimum salary test does not apply to teachers, lawyers or doctors

Can also be exempt if you’re a “Highly Compensated Employee” with a minimum annual salary, and customarily perform one of the duties in the Executive, Administrative or Professional exemptions



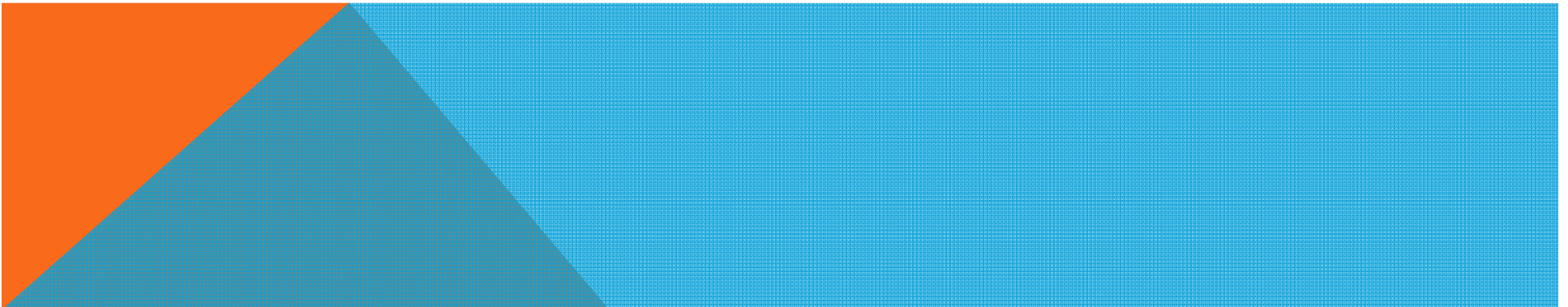
PROPOSED REGULATORY CHANGES

Increase Minimum Salary

- Last set in 2004, currently is \$455 per week or \$23,660 per year
- Projected change to \$970 per week or **\$50,440** per year
- Move from 20th percentile to 40th percentile of the Bureau of Labor Statistics average wage
 - Of all exempt status employees in the nation (including lawyers, doctors, teachers)

Automatic Updates

- Automatic annual updates to the minimum salary based on CPI or other methodology each year
- Predictability – avoids long gaps in adjustments to the salary test



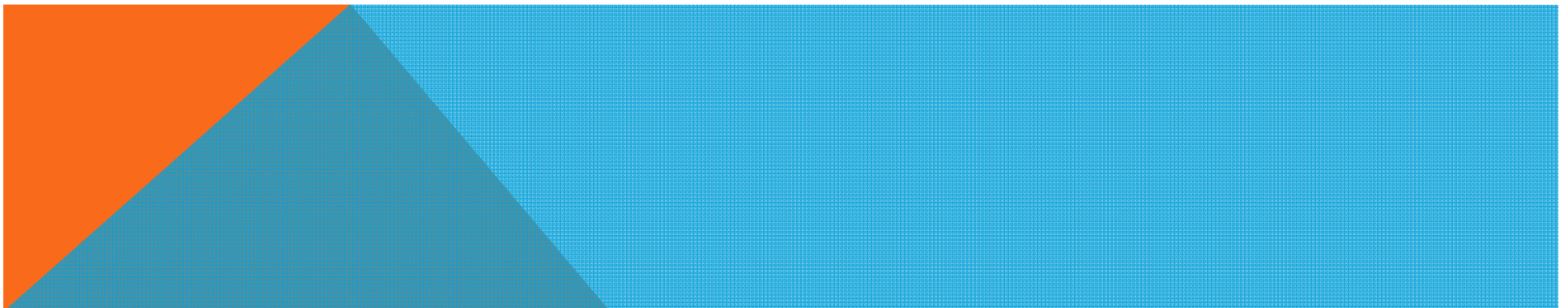
PROPOSED REGULATORY CHANGES (CONT'D)

Highly Compensated Employees (“HCEs”)

- Increase the salary level from \$100,000 annually to 90th percentile (in 2013, this was \$122,148)

Sought Comment on Amounts Included in Salary Calculation

- Employer stakeholders requested Department include non-discretionary bonuses, incentive payments and commissions in calculation of salary
- Not clear if the Department will propose regulatory language on this issue



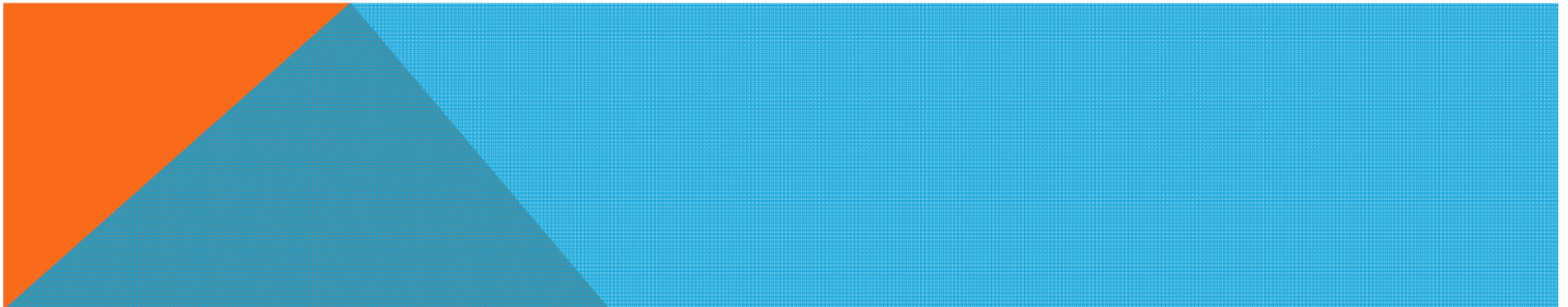
NEW DOL ADMINISTRATIVE INTERPRETATION ON INDEPENDENT CONTRACTORS VS EMPLOYEES

Published by the DOL July 2015

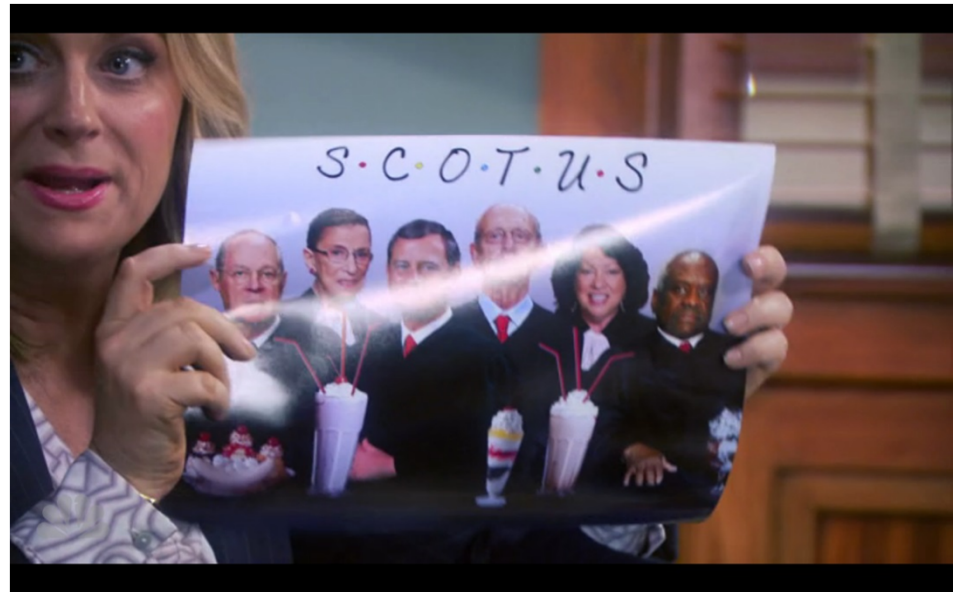
- http://www.dol.gov/whd/workers/Misclassification/AI-2015_1.htm

Formalizes DOL's position, adopted by most courts, that the test of employee/independent contractor status is one of "economic realities," not "control"

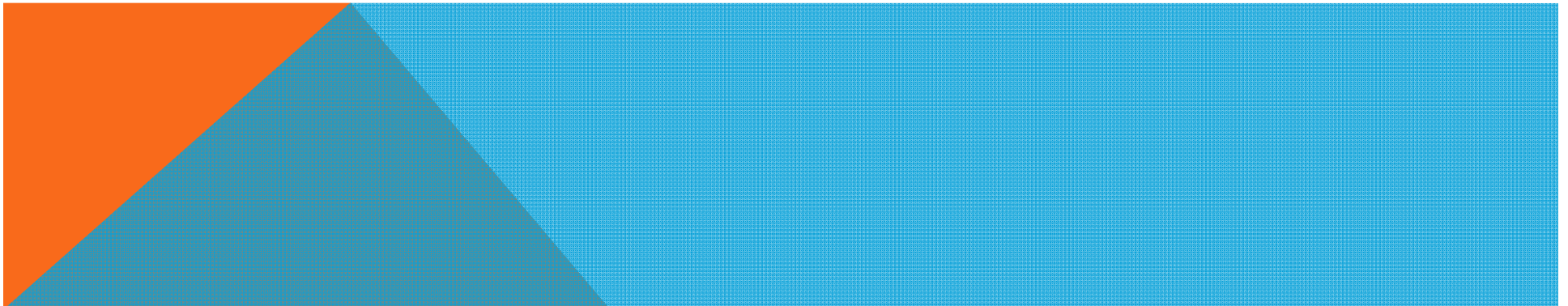
Much more expansive definition, result is that most workers are employees under the FLSA



SCOTUS - EMPLOYMENT LAW CASES



FRIEDRICHS V. CALIFORNIA TEACHERS ASSOCIATION



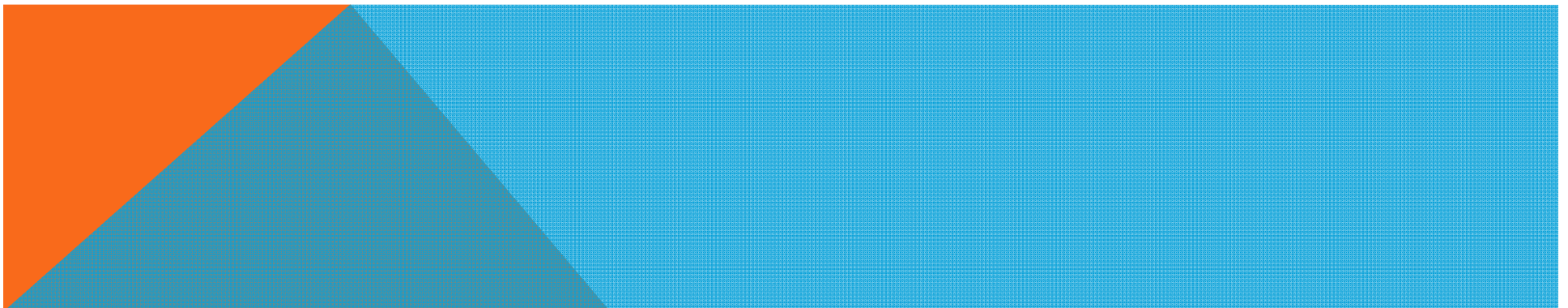
FRIEDRICHS V. CALIFORNIA TEACHERS ASSOCIATION

Factual Background

- California law requires that a union is the exclusive bargaining rep for public school employees
 - Requires proof from a majority of employees that they wish to be represented by the union
- Employees not required to join, but required to pay an “agency fee”

Procedural Background

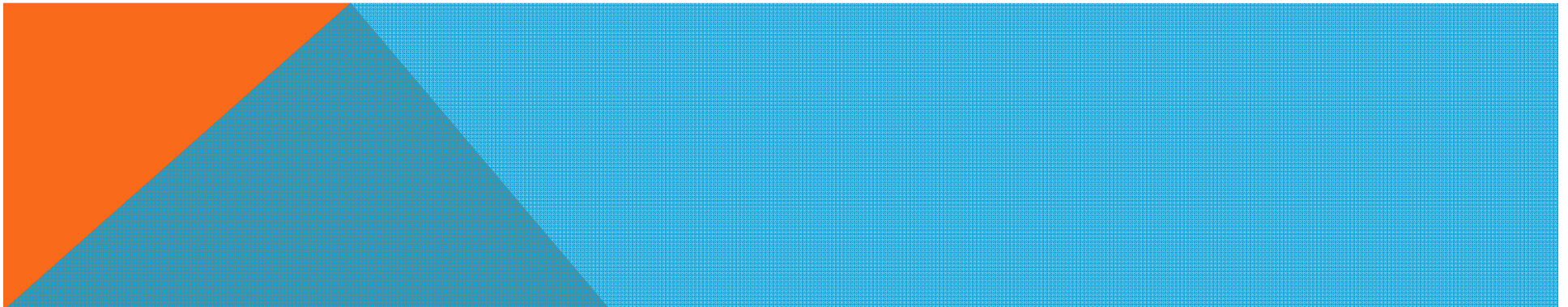
- Plaintiffs moved for judgment in favor of Defendants
 - *Abood v. Detroit Bd. of Edu.* (1977)
 - *Mitchell v. L.A. Unified Sch. Dist.* (9th Cir. 1992)
- 9th Cir. summarily affirmed decision



FRIEDRICHS V. CALIFORNIA TEACHERS ASSOCIATION

Legal Arguments

- *Aboud v. Detroit Bd. of Edu.* should be over turned
 - Forced Agency fees to public employee unions should not be permitted
 - Violation of First Amendment right for opt-out
- The union negotiates for the benefit of all teachers
 - Free-rider argument



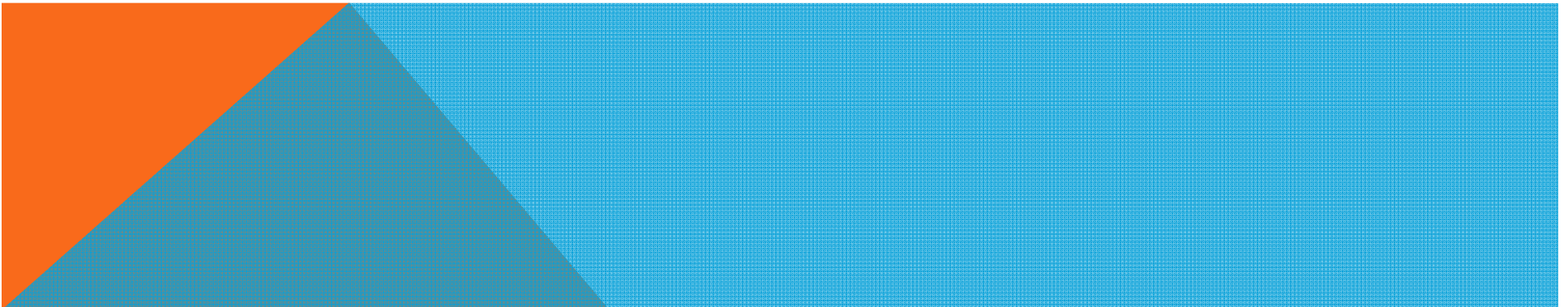
HEFFERNAN V. CITY OF PATERSON



HEFFERNAN V. CITY OF PATERSON

Factual Background

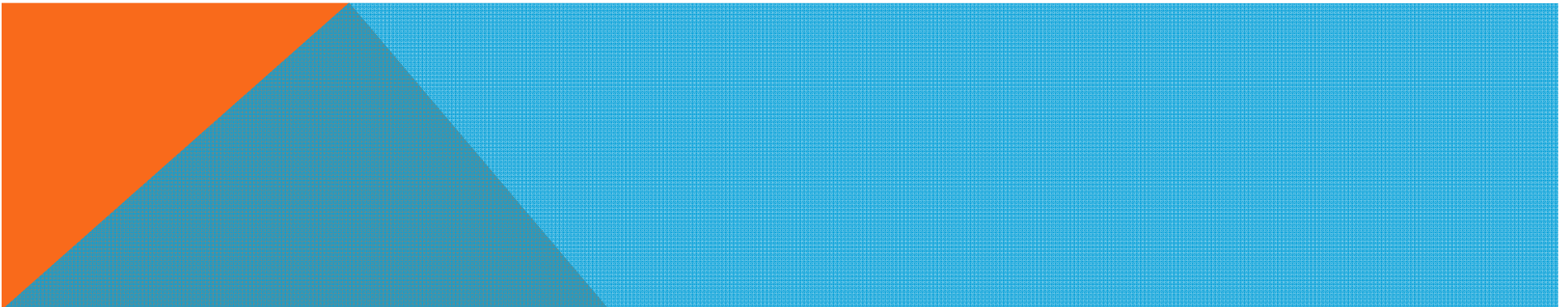
- Officer Heffernan's ill mother requested a mayoral candidate's yard sign – Spagnola
 - Running against current incumbent – Mayor Torres
 - Mayor Torres and Police Chief were friends
- Met Spagnola's campaign manager on a street corner to get the sign
- Co-worker saw him with sign and campaign manager – called Police Chief
- Demoted to walking patrol because of his political association with Spagnola
 - Heffernan was not eligible to vote in election (residency) and did not actually support candidate



HEFFERNAN V. CITY OF PATERSON

Procedural Background

- Jury Trial on Free Association Claim (not Speech Claim)
 - Heffernan prevails with \$105,000 damage award
- Judge recuses for conflict after trial and remands for new trial
- New judge grants summary judgment on First Amendment Speech Claim
- 3rd Cir. Reverses for failure to address Free Association Claim
- District court grants summary judgment in favor of City
- 3rd Cir. Affirms



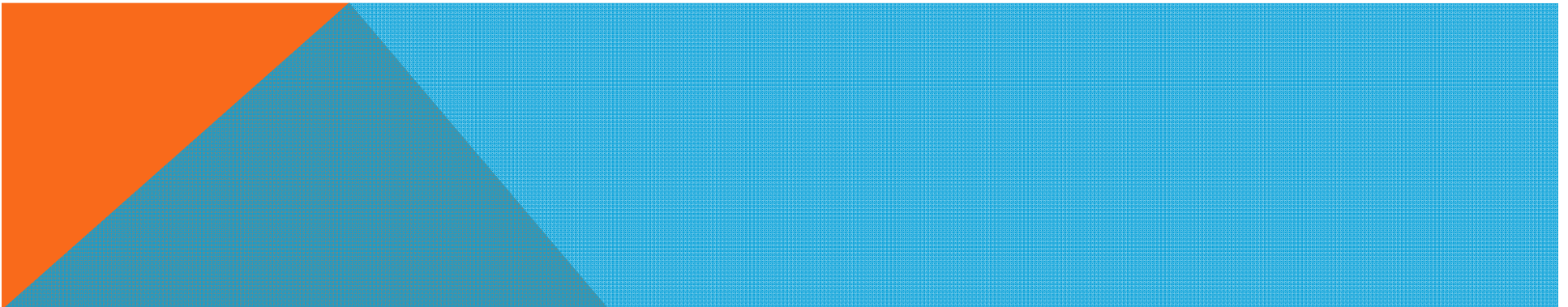
HEFFERNAN V. CITY OF PATERSON

Legal Arguments – Speech Claim

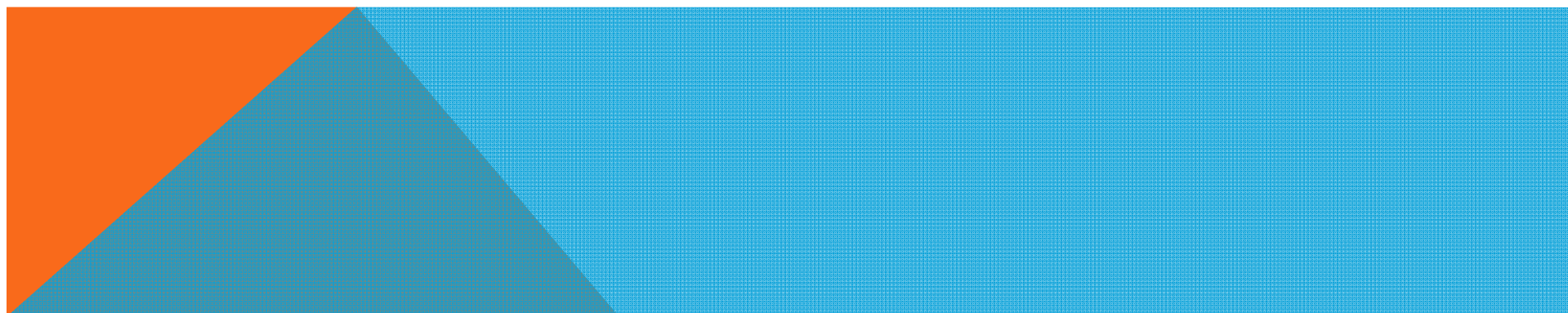
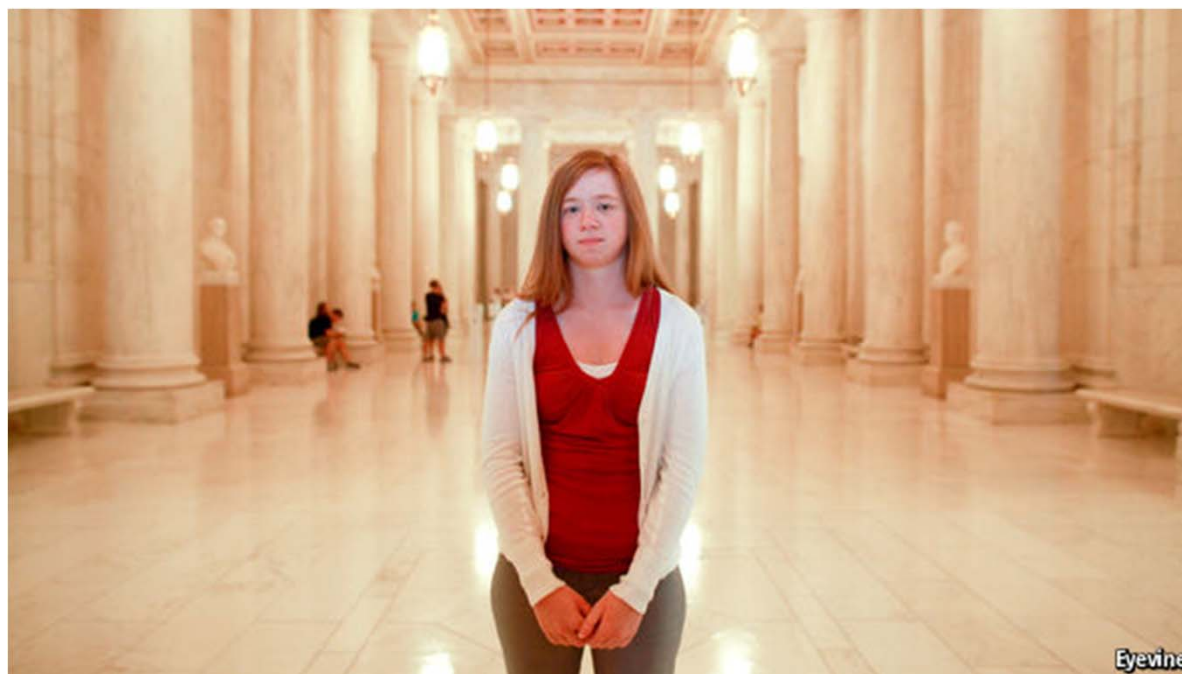
- Actual Speech
- Expressive Speech
- Perceived Speech
- Aiding and Abetting Speech

Legal Arguments – Association Claim

- Actual Political Association
- Perceived Political Association



FISHER V. UNIVERSITY OF TEXAS AT AUSTIN



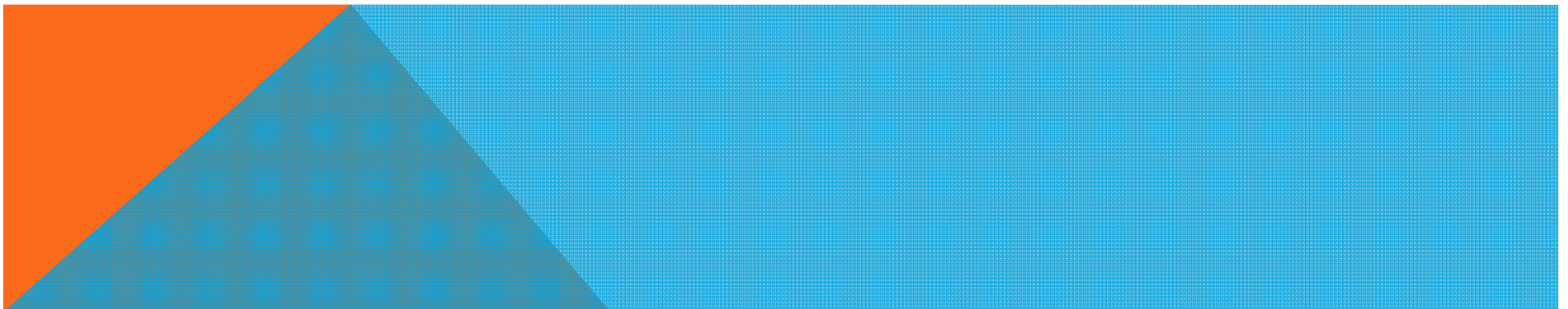
FISHER V. UNIVERSITY OF TEXAS AT AUSTIN

Affirmative Action case from 2013 term

- UTA uses race as a factor in admissions – whether that violates Fisher’s (Caucasian) right to Equal Protection
- Remanded because the court failed to utilize strict scrutiny in determining whether UTA can prove that its admissions program is narrowly tailored to obtain the educational benefits of diversity

On remand – 5th Circuit Affirmed

- UTA demonstrated that race-conscious holistic review as necessary by patching holes that mechanical admissions program left in its ability to achieve rich diversity that contributed to its academic mission



QUESTIONS?

