LITIGATION REPORT

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The Massachusetts Supreme Judicial Court agrees with NELF that the denial of an employee's request for a lateral transfer is not an "adverse employment action" under Mass. G.L. c. 151B unless the employee can show that it made a material difference in the terms, conditions, or privileges of employment (here the opportunities for additional compensation).

Yee v. Massachusetts State Police (Massachusetts Supreme Judicial Court)

The issue in this case is whether the denial of a request for a lateral transfer (the same job but in a different location) can constitute an "adverse employment action" cognizable under G. L. c. 151B (the Massachusetts Employment Antidiscrimination statute), and if so, under what circumstances. To prevail under c. 151B, the employee must prove that he or she suffered "discriminat[ion] . . . in compensation or in terms, conditions or privileges of employment . . . ." G. L. c. 151B, § 4(1) (emphasis added). And the Massachusetts Supreme Judicial Court has interpreted this language to mean that the employee must "suffer[] an 'adverse employment action' which materially disadvantaged him [or her]." *MacCormack v. Boston Edison Co*., 423 Mass. 652, 663 (1996). (While the Superior Court did not reach the issue, the employee must also prove that the adverse employment decision was because of his protected status (in this case, race, ethnicity, and age) or his protected activity (not at issue here)).

Lieutenant Warren Yee is an Asian-American employee of the Massachusetts State Police. Since 2002, he has been stationed at Troop H, which is headquartered in South Boston. In December 2008, Lt. Yee, then age 54, requested a transfer to Troop F, headquartered in East Boston, at Logan Airport, because he believed it would offer him the opportunity to supplement his base pay with overtime and police detail work. Yee received no response to his request. Between 2008 and 2012, eight white males were either transferred as lieutenants to Troop F or were promoted from sergeant to lieutenant within Troop F. Five of those eight troopers were younger than Yee. In September 2012, Yee submitted another request for transfer to Troop F, this time asserting that he had been passed over because of his ethnicity and his age. Shortly thereafter, Shawn Lydon, a white male sergeant from Troop H, who was younger than Yee and had not requested a transfer, was promoted to lieutenant and was transferred to Troop F. In the two years that Lydon was stationed at Troop F, he earned $30,000 more annually in overtime than he had at his prior assignment at Troop H.

Yee sued the State Police under c. 151B, alleging that he was denied the requested transfer because of his race, ethnicity and his age. The Superior Court granted the State Police's motion for summary judgment, concluding that Yee failed to create a triable issue that he had suffered an adverse employment action. While the lower court acknowledged that the denial of a lateral transfer could be actionable under c. 15B, the lower court held that Yee had failed to create a triable issue that a transfer to Troop F would have allowed him to increase his earnings. The court rejected as too anecdotal and speculative Yee's reliance solely on Trooper Lydon's additional earnings while at Troop F to support his claim that the transfer would have also increased Yee's income. As the court explained, Yee could have submitted the earning histories of the eight other similarly situated lieutenants at Troop F, or even a more general statistical study on all lieutenants' earning histories at Troop F.

Yee appealed and the Massachusetts Supreme Judicial Court took his case for direct appellate review. The Court then requested amicus briefing on the following issue: "Can an employer's denial of an employee's request for a lateral transfer constitute an 'adverse employment action' that is cognizable under c. 151B, and if so, under what circumstances?"

NELF filed an amicus brief in support of the State police, arguing that both the plain language of c. 151B and the Court's clear case law, quoted above, have, in effect, already answered the amicus question presented in this case. The denial of lateral transfer can constitute an adverse employment action if it has "materially disadvantaged" the employee, *MacCormack*, 423 Mass. at 663, with respect to his "compensation or in terms, conditions or privileges of employment." G. L. c. 151B, § 4(1) (emphasis added). Accordingly, the employee must prove that the desired transfer would have materially improved his earning capacity or his opportunity for career advancement, or would have substantially improved "other objective terms and conditions of employment." *MacCormack*, 423 Mass. at 663. This is by necessity a detailed and objective case-specific inquiry. The failure to require such an objective and exacting standard would allow an employee to proceed on a claim that is based on mere speculation and unsupported subjective belief.

The SJC essentially agreed with NELF, holding that the denial of a lateral transfer is actionable "where an employee can show that there are material differences between two positions in the opportunity for compensation, or in the terms, conditions, or privileges of employment . . . . [T]he failure to grant a lateral transfer to the preferred position may constitute an adverse employment action under [those circumstances]."

However, the SJC disagreed with the Superior Court's decision granting the employer summary judgment. To be sure, the Court recognized that the summary judgment record was "sparse" on the issue of the different earning potentials at the two job locations, and that Yee's evidence concerning one single comparator employee may not persuade a jury that he suffered any cognizable injury under c. 151B. Nonetheless, the SJC concluded that Yee had met his burden of producing sufficient evidence to create a triable issue of an adverse employment action. "To satisfy the element of an adverse employment action in the prima facie case [of discrimination], it suffices that an employee who is denied a lateral transfer puts forward evidence of any objective indicator of desirability that would permit a reasonable factfinder to conclude that the sought for position is materially more advantageous." Therefore, the Court concluded that Yee had created a triable issue of an adverse employment action. Accordingly, the Court remanded the case to the Superior Court to decide whether Yee had also created a triable issue of discrimination (i.e., whether he satisfied his prima facie burden of producing some evidence that he was denied the lateral transfer because of his race, ethnicity, or age).

In a unanimous decision, the United States Supreme Court agreed with NELF that the Federal Arbitration Act does not permit a court to disregard the parties' delegation to the arbitrator of threshold disputes over arbitrability, even if the court believes such a dispute is "wholly groundless."

Henry Schein, Inc. et al. v. Archer and White Sales, Inc. (United States Supreme Court)

In a major victory for NELF and its supporters, the United States Supreme Court agreed unanimously with NELF and held that the Federal Arbitration Act requires a court to enforce parties' agreement to delegate to the arbitrator any threshold dispute over arbitrability, here the scope of the arbitration agreement. "The delegation provision is an agreement to arbitrate threshold issues concerning the arbitration agreement." *Rent-A-Center, Inc. v. Jackson*, 561 U.S. 63, 68 (2010). While questions of arbitrability presumptively belong in court, parties may nonetheless assign those preliminary questions to the arbitrator, "so long as the delegation is clear and unmistakable." *Id*., 561 U.S. at 79.

The arbitration agreement here was between the petitioners, Henry Schein, Inc., *et al*. (Schein), and the respondent, Archer and White Sales, Inc. (Archer). Schein manufactures dental equipment, and, during the relevant time period, Archer distributed, sold, and serviced Schein's product, pursuant to the parties' dealership agreement. The agreement contained a dispute resolution clause that provided, in relevant part: "Any dispute arising under or related to this Agreement (except for actions seeking injunctive relief . . .) shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association [(AAA)]." AAA Rule 7(a), in turn, provides that "the arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, *scope* or validity of the arbitration agreement." (Emphasis added.)

Despite the parties' arbitration agreement, Archer sued Schein in federal district court, alleging the violation of federal and state antitrust laws. In its complaint, Archer sought damages along with injunctive relief. Schein moved to compel arbitration. Archer opposed the motion to compel, on the ground that its complaint, which primarily sought damages, was not arbitrable *in its entirety* because it fell within the contract's exception for "actions seeking injunctive relief." Schein argued, by contrast, that the exception applied only to Archer's request for injunctive relief, but that the damages claims were indeed arbitrable.

The Fifth Circuit denied Schein's motion to compel arbitration. The court began its opinion by expressing doubts about whether the wording of the parties' agreement did in fact "clearly and unmistakably" delegate to the arbitrator their dispute over arbitrability. But the court declined to decide this issue. Instead, the court held that, assuming the agreement *did* clearly and unmistakably delegate the issue to the arbitrator, the court nonetheless had the discretion to decline to enforce the agreement if it concluded that the dispute was "wholly groundless." The court so concluded and refused to enforce the arbitration agreement on that basis, allowing Archer to proceed with its antitrust claims in federal court. Therefore, the question before the Supreme Court on certiorari was whether the FAA permits a court to decline to enforce an agreement that clearly and unmistakably delegates questions of arbitrability to an arbitrator if the court concludes the claim of arbitrability is "wholly groundless."

NELF filed an amicus brief in support of Schein, arguing that the FAA requires a court to enforce a valid agreement to arbitrate threshold disputes concerning the arbitrability of claims. Such an agreement is "[a] written provision . . . to settle by arbitration a controversy," 9 U.S.C. § 2, and it therefore must be enforced, "save upon such grounds as exist at law or in equity for the revocation of any contract . . . ." *Id*. Accordingly, the FAA does not permit a court to usurp the arbitrator's contractually delegated power to decide threshold questions of arbitrability, such as under the Fifth Circuit's "wholly groundless" standard. Once the parties have agreed to arbitrate disputes over arbitrability, courts no longer have the power to adjudicate those disputes in any way. Indeed, the FAA was enacted to abrogate the ancient "ouster" doctrine, under which courts refused to enforce arbitration agreements when they believed that those agreements wrongfully deprived them of their jurisdiction. In essence, the Fifth Circuit's "wholly groundless" standard is an impermissible attempt to revive this dead and buried doctrine.

In a unanimous decision, issued January 8, 2019, the Court agreed with NELF and held that

> the "wholly groundless" exception is inconsistent with the text of the Act and with our precedent. We must interpret the Act as written, and the Act in turn requires that we interpret the contract as written. When the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract. . . . That is true even if the court thinks that the argument that the arbitration agreement applies to a particular dispute is wholly groundless.

Accordingly, the Court vacated the Fifth Circuit's judgment for Archer and remanded the case to that court, to decide whether the agreement did clearly and unmistakably delegate the parties' threshold dispute to the arbitrator.

Once again agreeing with NELF, the Massachusetts Supreme Judicial Court held that an award of "back pay" under the federal WARN Act, does not constitute "wages earned" the may be recovered under the Massachusetts Wage Act.

Calixto and another v. Coughlin, et al. (Massachusetts Supreme Judicial Court)

In a major victory for Massachusetts employers, the SJC agreed unanimously with NELF, holding that an award of "back pay" required under the Worker Adjustment and Relocation Notification Act, 20 U.S.C. § 2101 *et al.* (WARN Act), when an employer fails to its employees 60 days' notice before closing operations, does not constitute "wages earned" recoverable under the Massachusetts Wage Act.

At issue was an unsatisfied judgment of back pay that a class of plaintiffs had obtained in federal court against their former employer for violating the notice requirement of the WARN Act before shutting down. The plaintiffs sought to satisfy their WARN Act judgment in the courts of Massachusetts, at treble the amount, as "wages earned" under the Wage Act, against their former employer's executive officers in their individual capacities. Unlike the WARN Act, the Wage Act imposes personal liability, and treble damages, on the employer's "president and treasurer . .

. and any officers or agents having the management of such corporation," for the employer's failure to pay an employee her "wages earned." G. L. c. 149, § 148. *See also* G. L. c. 149, § 150. The Superior Court dismissed the plaintiffs' Wage Act claim, concluding that an award of "back pay" under the WARN Act does not constitute "wages earned" under the Wage Act.

In its amicus brief, NELF argued that an award of "back pay" under the WARN Act does not compensate an employees for "wages earned" under the Wage Act. Back pay is a traditional remedy to compensate the employee for the wages she *would have earne*d if her employer had not violated the law, here by failing to provide her with 60 days' notice. By contrast, the Wage Act applies only to the wages that an individual has *actually earned* while she is employed, i.e., for the work that she has completed.

In particular, the WARN Act compensates the individual who "suffers an employment loss," i.e., has been terminated prematurely, because her former employer "order[ed] a plant closing or mass layoff in violation" of the statute's 60-day notice requirement. The award makes the individual whole by awarding her the wages she would have earned for "each day of [the] violation," id., i.e., for each work day that she has lost due to the premature termination. Therefore, the WARN Act plaintiff has not actually earned the lost wages for which she is being compensated by an award of back pay.

By contrast, the Wage Act provides that "[e]very person having *employees in his [or her] service* shall pay weekly or bi-weekly each such employee *the wages earned* by him [or her]." G. L. c. 149, § 148(emphasis added). And this Court has held that wages are "earned" under the Wage Act only "[w]here an employee *has completed* the labor, service, or performance required of him [or her] . . . ." *Awuah v. Coverall N. Am., Inc.*, 460 Mass. 484, 492 (2011) (emphasis added). But an individual who has been terminated prematurely under the WARN Act is no longer "an employee in [the employer's] service." G. L. c. 149, § 148. Therefore, she can no longer "earn" wages for purposes of the Wage Act, albeit through no fault or her own. Therefore, an award of back pay for the employee who is wrongfully terminated under the WARN Act cannot constitute "wages earned" under the Wage Act. Stated otherwise, an employer's failure to provide the notice required under the WARN Act does not result in the failure to pay "wages earned" under the Wage Act. And courts from other jurisdictions have also concluded that an award of "back pay" under the WARN Act does not constitute "wages earned" under comparable state wage laws.

NELF also argued that a decision equating "back pay" under the WARN Act with "wages earned" under the Wage Act would eviscerate the WARN Act's "faltering company" defense, which affords a financially troubled company an affirmative defense to liability when, at the time notice of termination would have been due, the company was "actively seeking capital or business" to salvage the company, and the company believed, "reasonably and in good faith," that giving timely notice of a plant closing would have jeopardized those business opportunities. Also, notably, the WARN Act does *not* impose personal liability on a company's officers. This was arguably a deliberate choice by Congress to allow executive officers to exercise their business judgment and take the necessary steps to protect a financially troubled company and its workforce, without having to fear incurring personal liability for their efforts.

By contrast, the Wage Act *does* impose personal liability, *and* treble damages, on the "president and treasurer . . . and any officers or agents having the management of such corporation." G. L. c. 149, § 148. *See also* G. L. c. 149, § 150 (awarding treble damages to prevailing employee). And it is highly likely that the "president and treasurer . . . and any officers or agents having the management of such corporation" are the very corporate officers responsible for making the difficult decisions to try and salvage a financially troubled company and its workforce. Accordingly, if "back pay" under the WARN Act were held to be "wages earned" under the Wage Act, a company's executive officers would risk exposing themselves to personal liability for treble damages whenever they tried in good faith to keep their company a going concern, but ultimately did not succeed. This would contravene the very purpose of the WARN Act's "faltering company" exception, namely to create a safe harbor for a company and its executive officers in their efforts to preserve the life of the company and its workforce. Such a decision would also interfere with those executive officers' efforts to fulfill their fiduciary duties to act "in the best interests of the corporation." G. L. c. 156D, § 8.42(a)(3).

Finally, NELF argued that the plaintiffs in this case, all 206 former employees, sought and obtained in federal court a so-called "back pay" award that was *not* limited to the wages they would have earned during the required notice period. Instead, the award is *punitive* in nature, and has nothing remotely to do with "wages earned," because it "compensates" the plaintiffs for all *60 calendar days* of the notice period, not just for the lost work days that would have occurred during that notice period. In so calculating their "back pay," for all 60 calendar days of the notice period, the plaintiffs and the federal court have implicitly adopted the minority view, held by only one federal circuit court, "that [the] WARN [Act] uses the term 'back pay" simply as a label to describe the *daily rate of damages* payable." *United Steelworkers of Am., AFL-CIO-CLC v. N. Star Steel Co.*, 5 F.3d 39, 43 (3d Cir. 1993) (emphasis added) ("back pay" under WARN Act compensates for each calendar day, not for each work day, by which employer falls short of notice requirement). Clearly, the plaintiffs were awarded at a "daily rate of damages payable," which is really a *daily fine* imposed on their former employer for each day of the violation, multiplied by all 206 former employees. In the end, the plaintiffs have no recourse under the Wage Act because their award of "back pay" under the WARN Act is not "wages earned" under the Wage Act. Accordingly, the plaintiffs should not be permitted to satisfy their WARN Act judgment of back pay, at treble the amount, against their former employer's executive officers under the Wage Act, when the WARN Act does not provide for any such relief. This is especially so because the WARN Act provides that its remedies shall be *exclusive*. *See* 29 U.S.C. § 2104(b) ("The remedies provided for in this section shall be the exclusive remedies for any violation of this chapter."). Only Congress can provide the remedies that the plaintiffs seek to satisfy their judgment against their former employer under the WARN Act.

Agreeing with NELF, the SJC held that an award of back pay under the WARN Act does not constitute "wages earned" under the Wage Act. The Court explained that wages are "earned" only when an employee has actually performed work for the employer. By contrast, an award of back pay compensates the employee for the wages she would have or should have earned, but for the employer's violation of the law, here by failing to provide her with sufficient notice of termination under the WARN Act.

The United States Supreme Court rejected NELF's arguments and held that the FAA"s exemption of "*contracts of employment* of seamen, railroad employees or any other class of workers engaged in foreign or interstate commerce" from its provisions applies to all transportation worker agreements, including contracts with independent contractors.

New Prime, Inc. v. Oliveira (United States Supreme Court)

In a unanimous decision issued January 15, 2019, the Supreme Court rejected NELF's position in this case and concluded that the Federal Arbitration Act exempts all transportation worker contracts, whether they establish an employee-employee or independent contractor relationship.

The FAA exempts "*contracts of employment* of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1 (emphasis added). At issue was the meaning of "contracts of employment." (In *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001**)**, the Court had held that the exemption applied only to interstate transportation workers, not to all workers generally. In that case, however, the Court was not asked to interpret the "contract of employment" language that is now in dispute.) This case mattered to NELF and its supporters because a broad interpretation of "contracts of employment" would mean that no interstate transportation carrier could ever enforce its arbitration agreements and class action waivers against any of its workforce under the FAA, be they employees or independent contractors.

The First Circuit in this case concluded that the term "contract of employment" was sufficiently broad at the time of the FAA's enactment, in 1925, to embrace any contract to perform work, regardless of the legal status of the worker. And the Supreme Court essentially agreed, reinforcing its general rule that statutory language should be interpreted in its historical context, to give full effect to congressional intent. Accordingly, both courts held that the FAA exempts the Independent Contractor Operating Agreement that the plaintiff, truck driver Dominic Oliveira, had signed with New Prime, Inc. ("Prime"), the operator of an interstate trucking company. That agreement specified the terms of Oliveira's independent contractor relationship with Prime. It also required Oliveira to arbitrate all work-related disputes on an individual basis.

In its amicus brief, NELF had argued that the phrase "contracts of employment" should be interpreted in its immediate context, under the rule of *noscitur a sociis* ("it is known from its associates"). The phrase modifies "seamen" and "railroad employees," two prominent classes of transportation employees. This indicates that "contracts of employment" must establish an employer-employee relationship. This meaning is confirmed by applying the related rule of *ejusdem generis* ("of the same kind"), to the residual phrase "any other class of workers," which immediately follows seamen and railroad employees in the exemption. In *Circuit City*, the Court applied *ejusdem generis* to narrow the meaning of that residual phrase "any other class of workers" to other transportation workers only, because the phrase followed specific examples of transportation workers. Here, application of *ejusdem generis* takes the analysis one step further, by limiting the same residual phrase to other transportation workers who are employees, because seamen and railway employees are specific examples of transportation workers who are employees. These rules of statutory construction serve the overarching purpose of the FAA. The exemption is embedded in a statute whose purpose is to ensure the judicial enforcement of arbitration agreements according to their terms. This broad statutory purpose counsels in favor of enforcing, not exempting, arbitration agreements under the FAA.

In its brief, NELF also offered a plausible historical explanation for this exemption. The FAA's exemption for the employment contracts of seamen and railroad employees was apparently intended to leave undisturbed those employees' statutory right, under the Jones Act and the Federal Employers' Liability Act (FELA), respectively, to sue their employer in court for work-related injuries. The FELA and the Jones Act granted those transportation employees a liberalized tort remedy, due to their particularly hazardous working conditions and the inadequacy of state tort law to compensate them for their injuries. Since independent contractors are not covered by the FELA or the Jones Act, Congress would have had no reason to exempt them from the FAA's scope.

The Court essentially rejected those arguments. First, the Court concluded that seamen and railroad employees apparently included all kinds of workers under those and other related federal statutes and regulatory decisions when the FAA was enacted in 1925. The Court also noted that Congress chose the word "worker" in the catch-all phrase "any other class of workers," as opposed to "employees" or "servants." As the Court explained: "That word choice may not mean everything, but it does supply further evidence still that Congress used the term 'contracts of employment' in a broad sense to capture any contract for the performance of work by workers."

The United States Supreme Court agrees with NELF that the United States Fish and Wildlife Service exceeded its authority when it designated private property as a critical habitat for a creature that does not live on the property and would die if placed there?

Weyerhauser Company v. United States Fish and Wildlife Service (United States Supreme Court)

This case concerned the Fish and wildlife Service's (FWS) promulgation of regulations that are, we believe, ultra vires and encroach unlawfully on property rights.

At the center of the case is the dusky gopher frog, an endangered species that can survive only in habitat that contains three very specific criteria: (i) small, isolated, ephemeral ponds for breeding; (ii) a non-breeding habitat consisting of an upland, open-canopy forest located close to the ponds; and (iii) terrain like that described in (ii.) but connecting its non-breeding grounds to the ponds where it breeds. Crucial to any understanding of the case is that all three features must be present if a successful breeding population of the frogs is to be established on any site.

The legal dispute concerned the "critical habitat" designation of 1,544 acres of privately owned forest ("Unit 1") in Louisiana. The frog neither lives there nor could live there because the land does not contain all three of its habitat requirements. For it to be otherwise, the entire existing forest of loblolly pine would have to be cut down and the land replanted with saplings of a different species, which would then take years to mature before a population of frogs could be moved there. The cost would run into the millions of dollars, and none of the private owners has any interest in rendering their land unusable, at great cost, except to the frogs, and the government has not offered to buy the land in order to construct a habitat for the frogs at its own cost.

NELF's objection to FWS's designation of Unit 1 as critical habitat was that the Endangered Species Act does not authorize it, while it does not benefit the frogs in the least and prevents the land from being put to its highest and best use. The only land FWS is authorized to designate as critical habitat is limited to "any *habitat* of [an endangered species] which is then considered to be critical *habitat*." 16 U.S.C. § 1533(a)(3)(A)(i) (emphasis added). As six dissenters from denial of en banc review by the Fifth Circuit explained, that plain language means that "[w]hatever is 'critical habitat' * * * must first be 'any habitat of such species'"—that is, it must be at present "a place where the species" does or could "naturally live or grow." It was undisputed that Unit 1 does not fit that description.

In addition, areas not occupied by the endangered species, like Unit 1, may be designated as critical habitat only if "such areas are *essential for the conservation* of the species." 16 U.S.C. § 1532(5)(A)(ii) (emphasis added). There is no sensible reading of that phrase that includes areas that are uninhabitable by the species, i.e., places where the frog would *perish*. To add insult to injury, the FWS also claimed that its designation was judicially unreviewable.

The Supreme Court granted certiorari on January 22, 2018, and on April 30, 2018, NELF joined the Cato Institute on its amicus brief. In addition to making the criticisms mentioned above, the brief also argues that FWS's expansive definition of "critical habitat" implements the Endangered Species Act far beyond any reasonable reading of the Commerce and Necessary and Proper Clauses. Specifically, the regulation is not necessary because Unit 1 doesn't play any role in the frog's conservation, and is not proper because it infringes on state land-use regulation without sufficient justification. Moreover, the mere existence of land like Unit 1 does not constitute "economic activity" under the Commerce Clause. In short, the courts below sanctioned a rewriting of the ESA when they granted *Chevron* deference to the FWS.

In its November 27, 2018 decision, the Court agreed with NELF that only actual habitat may be designated critical habitat, and it ruled that the FWS's determinations are judicially reviewable. The Court remanded to the circuit court to consider several additional arguments of the FWS that were not before the Supreme Court on a properly developed record.

What standard should be applied by courts in determining, under *Kelo v. City of New London,* 545 U.S. 469 (2005), whether a governmental body's claim that it is taking private property for a public purpose is merely pretextual?

Violet Dock Port, Inc. LLC v. St. Bernard Port, Harbor & Terminal District (United States Supreme Court)

In this case NELF has joined with the National Federation of Independent Business, the Cato Institute, the Atlantic Legal Foundation, and other co-amici in an amicus brief in support of Petitioner Violet Dock Port, Inc. LLC, urging the Supreme Court to grant certiorari to clarify an important issue that the Supreme Court itself created when it decided *Kelo v. City of New*

London, 545 U.S. 469 (2005), and permitted private property to be taken by eminent domain for a "public use" and then be turned over to a private party.

In this case, the St. Bernard Port Authority (a public entity in Louisiana)) owns a port facility called Chalmette, which Associated Terminals, a private company, runs for St. Bernard. Wishing to expand its cargo handling capacity, St. Bernard entered into negotiations to buy Violet Dock, a marine facility located six miles south of Chalmette. When those negotiations failed, St. Bernard exercised its eminent domain power to take Violet Dock, with Associated (the private company already managing Chalmette) contracting to manage Violet Dock also.

Claiming that the taking violated the Louisiana Constitution, Violet Dock sued in state court and ultimately lost before the Louisiana Supreme Court. Violet Dock now petitioned the United States Supreme Court for certiorari, claiming, *inter alia,* that the facts of the case were "suspicious" in the sense discussed in Justice Kennedy's qualified concurrence in *Kelo v. City New London,* 545 U.S. 469, 503 (2005).

In *Kelo*, a majority of the Supreme Court had found that the City of New London, Connecticut, did not violate the Fifth Amendment's "public use" requirement when it took private property (specifically, Mrs. Kelo's house) in order to turn it over to a private developer with the expectation that the property would be developed in a way that would provide jobs and increase the city's tax revenue. The *Kelo* analogy to this case—which is not entirely perfect—is that here a public authority has taken a profit-making business to, in effect, remove competition and hand the property over to another private entity to manage.

While the Supreme Court in *Kelo* upheld a taking for the purposes of "economic redevelopment," it also said that government may not "take property under the mere pretext of a public purpose, when its actual purpose [is] to bestow a private benefit." 545 U.S. at 478 (2005). In his concurrence, Justice Kennedy emphasized that courts should strike down any government act where there is a "clear showing" that the taking "is intended to favor a particular private party, with only incidental or pretextual public benefits." 545 U.S. at 491.

In its Petition, the Petitioner argued that the Louisiana Supreme Court failed to fulfill its duty under *Kelo* of taking seriously the plaintiff's objection that the taking was motivated, not by a public purpose, but to benefit another private party (Associated Terminals). In fact, the Louisiana Supreme Court held that the public use requirement is satisfied so long as there is any *conceivable basis* in the record for finding that the taking served a public purpose.

How to decide whether, in a *Kelo* situation, the taking is genuinely intended for a public purpose, rather than being intended as a benefit to a private party, has been a vexed question ever since the *Kelo* decision itself. (Indeed, NELF has joined in amicus briefs in the past on this point.) Because the Supreme Court has never articulated the standard to be applied, there has developed among state and federal courts a wide disparity of opinion on this important question. The Louisiana Supreme Court's decision sets out perhaps the most toothless "standard" of all.

It is in light of this chaotic situation NELF joined as a co-amicus on NFIB's brief, which asks the Supreme Court to grant certiorari in order to bring order out of the welter of views. (The amicus brief also asks the Court to reconsider its decision *Kelo,* which is a position that NELF also supports, having filed an amicus brief in support of Mrs. Kelo in that case.)

Despite the arguments made by NELF and the other amici, the Supreme Court denied certiorari on October 15, 2018.

May a State Court, Having Determined That a Tax Was Illegally Assessed, Rule, Based on Equitable Factors, That Its Determination of Invalidity Will be Prospective Only, Thereby Allowing the State to Keep the Taxpayers' Money?

Coleman et al. v. Campbell County Library Board of Trustees (United States Supreme Court)

In this case, NELF filed an amicus brief in support of a taxpayers Petition for Certiorari. The taxpayers reside in the Campbell County Library District of Kentucky. Their 2012 complaint against the district Library Board of Trustees ("Library District") sought a declaratory judgment that Kentucky statute KRS § 173.790 governs the Library District's setting of ad valorem tax rates; it also sought injunctive relief and refund of past overpayments. The Library District moved for summary judgment on the declaratory judgment count, claiming that a different statute, KRS § 132.023, governs rates.

The trial court held in favor of the taxpayers on that issue, but on appeal the Kentucky Court of Appeals harmonized the two statutes, finding that they have different applications. *Campbell County Library Bd. of Trs. v. Coleman*, 475 S.W.3d 40, 47-48 (Ky. App. 2015). At the end of its decision, the court was silent about the taxpayers' rights but fretted openly that 80 county library districts were "adversely affected" by its decision because they had only ever used the wrong statute in "good faith," and it hinted strongly to the trial court that it should not grant any relief to the taxpayers for that reason alone. The Kentucky Supreme Court denied review, and the Court of Appeals remanded.

On remand, the taxpayers moved for summary judgment, arguing that they were owed refunds for 1994 and for subsequent years. The Library District cross-moved for summary judgment arguing that the decision of the Court of Appeals should be given prospective application only. The trial agreed and granted the Library District's motion for summary judgment on all remaining counts. On appeal, the Court of Appeals affirmed in the decision. The appellate court readily conceded that collection of a tax constitutes a deprivation of property and that the post-deprivation procedural due process safeguards laid down in *McKesson Corporation v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990), apply here. But it also held that Kentucky law permits "good faith and equity" to be weighed against due process in the retroactivity analysis that antecedes any relief. It held that because the District had acted in good faith and because the mistake about the two statutes had been a reasonable one, the entire ruling in the previous appeal would have no retrospective effect. The Kentucky Supreme Court again denied review.

In its amicus brief, NELF urged the Supreme Court to grant certiorari on the ground that the decisions by the Kentucky courts circumvents the Supreme Court's due process precedent, which establishes that where, as here, taxpayers must pay their taxes first and obtain review later in a refund action, the Due Process Clause requires the State to afford a meaningful opportunity to the taxpayers to secure post-payment relief. Such relief, NELF argued, includes a refund of the taxes illegally collected. "[A]llowing the State to collect these unlawful taxes by coercive means and not incur any obligation *to pay them back* . . . would be in contravention of the Fourteenth Amendment." *McKesson,* 496 U.S. at 39.

Accordingly, NELF criticized the state court's balancing of equities against the taxpayers' due process rights. Not only was the court's analysis of the equities entirely one-sided, but it was in all relevant regards the same as the equities-based argument that the Supreme Court rejected in *McKesson* as a reason for denying retrospective relief. The sole difference was that here the "equities" were used at an earlier stage of the legal analysis, i.e., as a reason for denying retroactive recognition of the court's ruling on the tax statutes. NELF viewed the relabeling of the *McKesson* equities analysis from a retrospective relief one to a retroactivity of law one is mere sleight of hand.

Despite NELF's arguments, the Supreme Court denied certiorari on November 13, 2018.

Pending Cases

Urging the United States Supreme Court to overrule the portion of *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), that requires property owners to exhaust state court remedies before a federal takings claim will be deemed to be ripe for federal court adjudication.

Knick v. Township of Scott (United States Supreme Court)

The issue before the Court on the merits in this case—the correctness of the so-called "Williamson County state litigation ripening requirement"—is an issue concerning which NELF and the other major public interest law firms dedicated to supporting traditional property rights have long and repeatedly sought, over many years, Supreme Court review.

What is this ripening requirement? More than a quarter of a century ago, the Court ruled in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), that a federal takings claim against a non-federal government defendant cannot be brought in federal court until after the property owner has sued for compensation in state court and lost. Only then, the Court reasoned, would the "State" have definitively denied the plaintiff its Fifth Amendment right to just compensation, and only then would the takings claim be ripe for resolution in a federal court. Typically, however, after the property owner dutifully later files an action in federal court, the supposedly ripe claim is dismissed because the state court's adverse final judgment is found to have preclusive effect and must be accorded full faith and credit under 28 U.S.C. § 1738. Incredibly, this morass has been the state of the law for more than twenty-five years. The Court has at long last now agreed to review this requirement.

The case arises out of a local zoning ordinance of the town of Scott, Pennsylvania. The regulation requires that any private property on which the town finds a burial site be freely open to the general public at all times. On June 5, 2018, NELF filed an amicus brief supporting the petition of a landowner who had been cited for violation of the regulation.

NELF argues that the "adequate process" for obtaining just compensation which is discussed in *Ruckelshaus v. Monsanto Co*., 467 U.S. 986, 1013 (1984), and which is fundamental to the *Williamson County* Court's reasoning, does not support the state litigation requirement because it refers to private negotiations and arbitration, not to court proceedings. In addition, that process determined only the extent of any taking that occurred, and so cannot support a state litigation requirement which hinges on the separate takings issue of denial of just compensation.

For the same two reasons, *Monsanto* does not support the next step in *Williamson County* reasoning, either, i.e., that federal litigation under the Tucker Act ripens federal takings claims for just compensation. Litigation under the Tucker Act cannot *ripen* a takings claim because its purpose is to *resolve* such claims. Hence, any analogy to the supposed ripening power of state litigation fails.

Moreover, NELF observes, the Court, despite clearly stating earlier in *Williamson County* that exhaustion of remedies is not required for a 42 U.S.C. § 1983 takings claim, required precisely that when it set out the state litigation requirement. It did so in the mistaken belief that a state court's final judgment denying money damages is merely the judicial analog of local government's failure to pay just compensation. In adopting that belief, the Court brought to a head its blurring of the distinction between ripening a claim and judicially resolving it.

Finally, NELF argues that underlying the erroneous reasoning of *Williamson County* is the unexamined assumption that payment of just compensation under the Takings Clause is a remedy. It is not; it is a constitutional condition placed upon the power of government to take, as the Court has stated repeatedly throughout its history. Only when just compensation has *not* been paid does there arise an injury requiring a remedy, as the Court has also repeated declared. Hence, cases dealing with post-deprivation procedures regulating merely the timing, amount, and manner of the payment of *just compensation* confessedly owed by the state do not support the Court's conclusion that a state court post-deprivation lawsuit for a *money damages remedy* ripens a takings claim by finally determining that the "State" refuses to pay just compensation.

This case was argued before an eight-justice Supreme Court on Wednesday, October 3, 2018. At the Court's own request, a reargument was held before a full bench on January 16, 2019.. The reargument was directed to certain issues previously identified by the Court.

Does the Federal Arbitration Act Permit a Court to Order Two Parties to an Arbitration Agreement to Submit to Class Arbitration When the Arbitration Agreement Makes No Mention of Class Procedures and Merely States That the Two Parties Agree to Arbitrate Their Dispute?

Lamps Plus, Inc. v. Varela (United States Supreme Court)

Lamps Plus and Varela executed the company's standard arbitration agreement, in which the two parties agreed to "resolve[,] by final and binding arbitration as the exclusive remedy," "all disputes, claims or controversies arising out of or relating to this Agreement, the employment relationship between the parties, or the termination of the employment relationship . . . ." The agreement also provided Varela with express notice that, by agreeing to arbitrate, he was waiving his right to sue in court and obtain a jury trial for his employment-related claims. The agreement further provided Varela with detailed notice of the kinds of employment-related claims that he was agreeing to arbitrate.

Notwithstanding the parties' arbitration agreement, Varela filed a class action complaint in federal court for the Central District of California, alleging that Lamps Plus had wrongfully disclosed personal identifying information of its employees, in response to a phishing scam. In particular, an unknown outsider had allegedly misappropriated the email address of a high-level Lamps Plus employee and had sent an email from that address to an actual Lamps Plus employee, requesting employees' W-2 tax forms. The recipient employee, thinking she was responding to a supervisor's legitimate request, allegedly sent copies of current and former employees' 2015 W-2 forms to the impostor.

Lamps Plus moved to compel arbitration on an individual basis. The district court ordered arbitration, but on a *classwide* basis. The Ninth Circuit affirmed, concluding that, under *Stolt-Nielsen*, the agreement provided a contractual basis authorizing class arbitration. Lamps Plus filed a petition for certiorari with the Supreme Court, which the Court granted on April 30.

In its amicus brief, filed in support of Lamps Plus, NELF argued that the Ninth Circuit erred because it "[i]mproperly inferred 'an implicit agreement to authorize class-action arbitration . . . from the fact of the parties' agreement to arbitrate.'" *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 574 (2013) (Alito, J., concurring) (quoting *Stolt-Nielsen*, 559 U.S. at 685). The standard arbitration agreement in this case, between an employer and one of its employees, makes no mention of class procedures. It is a simple agreement between the two parties to arbitrate their disputes, and nothing more. It therefore fails to provide the necessary "contractual basis" authorizing class arbitration, as required by the Federal Arbitration Act (FAA) and *Stolt-Nielsen S.A. v. AnimalFeeds Internat'l Corp.*, 559 U.S. 662 (2010).

NELF also argued that the Ninth Circuit erroneously "found" a contractual basis authorizing class arbitration in contract language that merely provides the employee with express notice that, by agreeing to arbitrate with his employer, he has waived his right to sue his employer in court. That contract language adds nothing new to the agreement and simply explains to the employee what it means to agree to arbitrate disputes with his employer. Therefore, it cannot provide a contractual basis authorizing class arbitration.

If allowed to stand, the Ninth Circuit's decision would effectively impose class arbitration as a mandatory implied term in any standard bilateral arbitration agreement that did not expressly preclude it. This would contravene the FAA and the Court's recent decisions interpreting the FAA.

NELF also argued that, in addition to *Stolt-Nielsen*, *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564 (2013), effectively decided the issue raised in this case. There, the Court was also faced with a standard bilateral arbitration agreement that made no mention of class proceedings. However, in *Oxford Health*, the parties had submitted the issue of class arbitration to the *arbitrator* to decide. Therefore, the Court had to affirm the arbitrator's erroneous award of class arbitration, because the FAA did not permit it to review the arbitrator's decision for mistakes of law or fact.

But the Court made it clear throughout its opinion in *Oxford Health* that the arbitrator had erred in finding a contractual basis authorizing class arbitration in a simple bilateral arbitration agreement, such as the one at issue here. In this case, the Court is free to do what it could not do in *Oxford Health*, namely to reject an erroneous interpretation of a standard bilateral arbitration agreement under *Stolt-Nielsen*.

The Court has scheduled oral argument for October 29, 2018.

Arguing that an employee bringing a class action under the Massachusetts Wage Act must satisfy the requirements of Mass. R. Civ. P. 23, even though the Wage Act provides that an employee may sue "on his own behalf, or for himself and for others similarly situated."

Gammella v. P. F. Chang's Chinese Bistro, Inc. (Massachusetts Judicial Supreme Court)

The Massachusetts Supreme Judicial Court has taken this case *sua sponte* for direct appellate review and has requested amicus briefing on the following issue: Can an employee bring a class action under the Massachusetts Wage Act without having to satisfy the requirements of Mass. R. Civ. P. 23, when the Wage Act provides that an employee may sue "on his [or her] own behalf, or for himself [or herself] and for others similarly situated?" G. L. c. 149, § 150 (private remedy for failure to pay wages earned); G. L. c. 151, § 20 (private remedy for failure to pay minimum wage). In other words, why did the Legislature include this "similarly situated" language when it created a private right of action for wage claims in 1993, when Mass. R. Civ. P. 23, adopted in 1973, already permitted a plaintiff to seek a class action?

It must be noted from the outset that the SJC has already applied Rule 23 to a motion for class certification under the Wage Act, with a *favorable* result for the employee class, but without ever discussing this threshold issue of law (presumably because the plaintiff had not raised it). *See Salvas v. Wal-Mart Stores, Inc.*, 452 Mass. 337 (2008) (Superior Court abused its discretion in denying class certification under Rule 23). Significantly, the *Salvas* Court praised the virtues of applying Rule 23's requirements to a motion for class certification under the Wage Act. "One of the great strengths of the rule 23 class action device is its *plasticity*. *Case-by-case considerations of practicality and fairness* have enabled rule 23 certification decisions to adapt appropriately to a variety of contexts, even within the same litigation." *Id*., 452 Mass. at 371 (emphasis added).

As with the SJC in *Salvas*, the Superior Court judge in this case (Lauriat, J.) did not discuss the Wage Act's "similarly situated" language when he applied Rule 23 and denied the motion for class certification filed by the plaintiff, Felice Gammella, a former hourly employee of the defendant, P. F. Chang's China Bistro, Inc. Gammella alleges, on behalf of himself and other similarly situated employees, that P. F. Chang's failed to pay its employees so-called "reporting pay," as required by a state regulation, when it dismissed them early from scheduled work shifts. (The regulation requires an employer to pay its employees for at least three hours of work when the employer cuts short a shift of three hours or more. The regulation does not apply to an employee who requests to leave early and is permitted to do so.) The lower court concluded that Gammella had failed to satisfy Rule 23(a)'s numerosity requirement because the time-keeping records that he submitted with his motion for class certification did not indicate whether an employee was *told* or was *permitted* to leave early.

In its brief in support of P. F. Chang's, NELF argued that the Wage Act's general "similarly situated" language does not displace Rule 23's specific requirements for bringing a class action. To establish that this language impliedly repeals Rule 23, Gammella would have to show that Rule 23 is "*so repugnant to and inconsistent with* the [Wage Act's private remedy] that both cannot stand." *George v. Nat'l Water Main Cleaning Co*., 477 Mass. 371, 378 (2017) (emphasis added) (citation and internal punctuation marks omitted). This Gammella cannot do, simply because *Salvas* establishes that Rule 23's requirements are actually *harmonious* with the Wage Act's remedial purpose of allowing several employees to aggregate their small individual claims in one legal proceeding. *See Salvas*, 452 Mass. at 369 ("[C]lass actions [under Rule 23] protect the rights of groups of people who individually would be without effective strength to bring their opponents into court at all") (citation and internal quotation marks omitted).

Far from impliedly repealing Rule 23, the Wage Act's "similarly situated" language makes it clear that employees now have the *right* to pursue a class action under that rule. And this right would not be so clear *without* the "similarly situated" language. Notably, § 2 of the Wage Act (G. L. c. 149, § 2) gives the Attorney General *exclusive* enforcement powers under the Wage Act, unless the statute specifically provides otherwise. If the Legislature had remained silent on the availability of class actions when it recognized a private remedy in 1993, *collective* enforcement of the statute would have arguably remained solely with the Attorney General.

The inclusion of this "similarly situated" language is also explained by the Wage Act's unique history. For over 100 hundred years, enforcement of the Wage Act resided solely with the Commonwealth, which frequently obtained, from offending employers, the payment of several employees' earned wages, on both an individual and a *collective* basis. The Legislature amended the Wage Act in 1993 against this vivid historical background of exclusive and sweeping governmental enforcement of the Wage Act. Therefore, the Legislature would have deemed it appropriate, if not necessary, to clarify that this private remedy included the right to seek collective enforcement of the statute--a right that only the Commonwealth had hitherto been permitted to exercise. Since Rule 23 was well established when the Legislature amended the Wage Act in 1993, the Legislature is presumed to have known about that rule when it referred to "similarly situated" employees. And since Rule 23 is not "repugnant to and inconsistent with" the Wage Act, the Legislature must have intended to permit employees to pursue a class action under *that* rule.

Under Mass. G. L. c. 184, must an individual injured by a defect in a public way provide notice within 30 days of the injury to the private corporate owner of the utility cover allegedly responsible for the accident if that owner was charged by law with keeping that portion of the road in repair?

Meyer v. Veolia Energy North America LLC (Massachusetts Supreme Judicial Court)

This case arises out of a bike ride gone bad. Meyer was injured when his bike hit a defect on the surface of Sudbury Street in Boston. Apparently, a small utility cover owned by the defendant Veolia was not lying flush with the road surface. (Veolia is in the business of delivering steam heat to Boston buildings.) The legal questions revolve around a plaintiff's statutory obligation to provide notice of his injury within thirty days to the "person by law charged" with keeping in repair that part of the roadway. Meyer gave notice on day thirty-six.

The questions posed are two. First, was Meyer excused from providing notice within thirty days because it was allegedly "impossible" for him to do so? Here Meyer claims that the supposedly insuperable difficulty of identifying the "person" entitled to notice fits within the statutory tolling provision for mental and physical incapacity. This is a mixed question of law and fact, and it assumes that the defendant corporation does have a right to notice.

Second, does a private corporate defendant in fact have a right to notice, even if legally "charged" with maintaining the roadway in a safe condition? This question challenges the premise of the first one. In answering it no, Meyer engages in a very lengthy and involved review of the statutory history of the Massachusetts liability and notice statutes pertaining to roadway defects, and he claims to show that the statutory "person" has always meant an agent of government, as the terms preceding it in the statute might suggest. *See* G.L. c. 84, § 18 (injured party "shall, within thirty days [of the injury], give to the county, city, town or person by law obliged to keep said way in repair" notice of the injury). In order to deal with cases in which the Supreme Judicial Court has long ruled that railroad corporations count as such persons, Meyer argues that from the late-19th century on railroads have been so intensively regulated that they are what he calls "quasi-governmental corporations."

Because much of the legal materials he relies on are arcane, even dating to colonial times, his argument is not easily dismissed as obviously wrong. It is not readily apparent whether his briefing is just a pastiche of historical and legal errors or a thoughtful, if somewhat pell-mell, historical analysis worthy of serious consideration. Since the SJC took the case sua sponte, it may not be apparent to the Court either, and that gives NELF cause to worry if Meyer's analysis is left unanswered, as it largely is in Veolia's brief.

NELF filed an amicus brief in which it first set out a number of ways in which Meyer could have easily identified the owner of the utility cover within thirty days. Hence, there was no "impossibility" and no mental or physical incapacity justifying a tolling of the running of the thirty days.

Next, NELF rebutted Meyer's convoluted historical arguments. First, NELF reviewed 18th century dictionaries, as well as the definitional sections of the Massachusetts General Laws from

1836 to the present, in order to show that commercial corporations have long been recognized as full legal persons. Next, NELF undermined Meyer's argument that railroads were some sort of special exception to a rule that private parties do not count as persons entitled to Chapter 84 notice. NELF showed that the rationale of the railroad decisions rested on a definitional principle under which it is "unquestionable" that corporations are civilly legal persons; the rationale of these decisions had nothing to do with railroads corporations specifically or business regulation in general. (NELF also corrects Meyer's terminology and shows that the legislature classifies railroads and companies like Veolia as public service corporations.) Finally, NELF demonstrated that both in colonial times and at the time that the earliest relevant statute, Stat. 1786, c. 81, the legislature was perfectly well aware that under English common law the duty to repair and maintain ways was not always and everywhere solely the responsibility of the local government parishes and their agents. The duty could devolve on private parties, as explained in old British legal treatises NELF cites. NELF also cited an important 1883 Massachusetts case, overlooked by the parties, in which Judge Holmes, writing for the SJC, invoked the common law to explain that private persons could indeed be entitled to Chapter 84 notice

Opposing regulatory encroachment on coastal property rights.

Hall v. Department of Environmental Protection (Massachusetts Division of Administrative Law Appeals)

In 1991, the Massachusetts Department of Environmental Protection (DEP) adopted a new regulation under G. L. c. 91 that reversed longstanding common law presumptions about the ownership of shorefront property. Because the most common means of shoreline increase is accretion (slow and gradual addition of upland at the mean high tide line) and because it is so difficult to prove imperceptible, gradual growth, Massachusetts courts have adopted a rebuttable presumption that a shoreline increase is due to accretion. The presumption is important because accretion accrues to the property owner, whereas shoreline increases due to major storms or unpermitted filling do not. The 1991 DEP regulation, 310 CMR § 9.02, reversed this presumption and placed the burden on property owners to prove that all land seaward of the "historic high tide" level has resulted exclusively from "natural accretion not caused by the owner . . . ."

Following promulgation of its regulation, DEP suggested that owners of shorefront property seaward of the "historic" high tide line, as mapped by DEP, apply for amnesty licenses. NELF's client, Elena Hall, owns a parking lot on shorefront property in Provincetown that provides Ms. Hall with her sole significant source of income. Approximately one-third of the parking lot and a portion of a small rental cottage on the property are seaward of DEP's "historic" high tide line. Ms. Hall applied for an amnesty license and DEP issued a license imposing several onerous and costly conditions on Ms. Hall's right to use her property seaward of the "historic" line.

Ms. Hall filed an administrative appeal with DEP and NELF agreed to take over Ms. Hall's representation in this test case of DEP's regulation. During the administrative and any subsequent judicial proceedings in this case, NELF will challenge DEP's mapping of the "historic mean high water mark" and argue that DEP's regulation exceeds that agency's statutory authority and effects an unconstitutional taking of private property. NELF will further argue that a license condition requiring a four-foot-wide public access way across the entire width of Ms. Hall's upland property to the beach effects a taking of her property requiring just compensation. This is so because the public's limited rights in tidelands do not include a right of access across private upland property to reach the water or coastal tidelands. DEP has therefore imposed a license condition that bears no relationship to any recognized public right, let alone a public right protected under c. 91 and affected by the licensed use of Ms. Hall's property.

NELF filed a potentially dispositive memorandum of law, accompanied by a detailed and thorough expert affidavit, with multiple map overlay exhibits, arguing that DEP simply has no jurisdiction over Ms. Hall's property. In particular, NELF staff worked closely with the experts in scrutinizing carefully the historical maps pertaining to Provincetown Harbor and in determining that the application of the mean high tide line derived from the earliest reliable historical map to Ms. Hall's property leaves the disputed portion of her property free and clear of the designation "Commonwealth tidelands." NELF received a piecemeal, informal response from DEP challenging various aspects of NELF's expert's methodology.

The Administrative Law Judge then ordered the parties' experts to meet, with the attorneys present, to exchange opinions and determine whether settlement was possible. While the meeting was productive, settlement is not possible at this time. DEP's most salient challenge concerned the historic location of a lighthouse upon which Ms. Hall's expert relied in determining the location of the historic mean high water mark. This challenge led the expert to reexamine the historic location of other lighthouses which he used in his methodology. NELF has also researched and briefed potential legal challenges to DEP's regulation and license conditions under the Takings Clause and the *ultra vires* doctrine, which NELF would be prepared to reach should it not succeed on its position with respect to the historic high water mark.