Recent Decisions

Urging rejection of a proposed Massachusetts ballot question approving an amendment to the Massachusetts Constitution that would impose an additional 4% tax on income above the first $1 million because, in clear violation of the Massachusetts Constitution, it deals with "unrelated" subjects.

Anderson v. Maura Healey (Massachusetts Supreme Judicial Court)

In a 5-2 decision issued on June 18, 2018, the Supreme Judicial Court, agreeing with NELF, held that the Attorney General wrongly certified an important tax question for appearance on the 2018 ballot. The question, originating as a popular ballot initiative, would have amended the state constitution to depart from the state's historic flat-tax rule and in order to impose an additional 4% tax on all income above the first $1 million. It would also have required the new revenues to be spent on public education and transportation infrastructure, "subject to appropriation" by the legislature. After the Attorney General certified the question for inclusion in the 2018 ballot, her decision was challenged in this lawsuit, whose sole issue was whether the ballot question met the Massachusetts constitutional requirements for popular ballot initiatives.

The complaint advanced three grounds for concluding that it did not: first, the constitution bars any question that deals with unrelated subjects or subjects that are not mutually dependent; second, no popular initiative may make a specific appropriation of funds; and third, the popular ballot initiative cannot be used to raise revenues.

NELF filed an amicus brief supporting the plaintiffs, focusing on the relatedness requirement, which it viewed as the weakest link in the certification. NELF pointed out that there is not much that meaningfully relates public education to transportation infrastructure other than that they are, at a high level of generality, both public benefits. Moreover, NELF noted that in the amendment the only connection between them was that they were to receive the revenues raised by the third, no less unrelated subject of the initiative, the 4% surtax, described by its advocates as a tax reform measure intended to create economic equity. NELF showed that in their statements about it political supporters of the proposed amendment were hard pressed to pull its disparate parts together into a coherent whole and that it remained essentially a cleverly repackaged version of the five preceding graduated income tax amendments that failed at the ballot box over the past 50 or so years.

In its decision, the Court, like NELF, also confined itself to the relatedness issue and, in agreement with NELF, ruled that "[t]he two subjects of the earmarked funding themselves are not related beyond the broadest conceptual level of public good. In addition, they are entirely separate from the subject of a stepped rather than a flat-rate income tax, which, by itself, has been the subject of five prior initiative petitions." Taking a further leaf from NELF's book, the Court took note of "[t]he difficulty the proponents have in stating the purported purpose of the initiative petition," a failing which the Court found to be "itself telling" concerning the existence of a coherent public policy connection between the three subjects of the initiative. "Examination of the diverse subjects of Initiative Petition 15-17 . . . discloses," the Court declared, "no 'operational relatedness among its substantive parts' . . . and we are unable to discern a common purpose or unified public policy that the voters fairly could vote up or down as a whole."

A majority of four justices also firmly declined to view the requirement that popular initiatives be confined to subjects "which are related or which are mutually dependent" as setting out two entirely distinct constraints. "To construe the phrase 'or which are mutually dependent' as eliminating the requirement of relatedness would be to vitiate the purpose of protecting the voters from misuse of the petitioning process for which it was enacted," they wrote, expressing their disagreement with the approach taken by the dissent. NELF, too, had expressed skepticism on this point and argued that "both of Article 48's limitations—relatedness and mutual dependence—would become meaningless were such mix-and-match pairings of revenue source and expenditure deemed to be constitutionally sufficient."

No similar initiative is permitted for the next two biennial state elections. So, at least for that time, the Commonwealth will not see a seventh attempt to depart from its constitutional policy of a flat tax.

Arguing that Massachusetts legal precedent and public policy require that Chapter 93A consumer protection claims based on a home improvement project gone wrong be subject to the statute of repose governing tort claims arising from such subject matter.

Bridgwood v. A.J. Wood Construction, Inc. (Massachusetts Supreme Judicial Court)

Mass. G.L. c. 260, § 2B, establishes a six-year statute of repose for tort claims brought against architects, builders, or contractors for defects in the design, planning, or construction of an improvement to real property. In a 4-3 decision issued on August 29, 2018, the Supreme Judicial Court, agreeing with NELF, declined to permit a homeowner to recast as consumer protection claims under Mass. G.L. c. 93A her breach of implied warranty claims against two contractors. The homeowner had hoped, by pleading her claims as c. 93A violations, to avoid § 2B's six-year repose period and breathe new life into her claims, which were brought 15 years after work was done on her home.

The trial judge dismissed her c. 93A consumer protection claims because he found that they were essentially claims for breach of implied warranty and therefore sounded in tort. Since the gist of the claims was tortious, he ruled that they were extinguished by the six-year repose provision of § 2B, which applies only to torts. The homeowner appealed, contending not only that the trial judge's analysis was wrong, but that the analysis should never have been performed. The Supreme Judicial Court requested amicus briefing, and NELF filed an amicus brief in support of the defendants.

In its amicus brief, NELF defended the trial judge's analysis. Reviewing cases in which courts have analyzed claims for their substance or gist, rather than their form, for the purpose of answering a wide variety of legal questions, NELF showed that c. 93A claims have also regularly been analyzed in this way. As NELF discussed, while claims under c. 93A are not subject to the traditional limitations of preexisting causes of action, nonetheless they often involve claims analogous to common-law torts, and when that is the case, they are treated accordingly. NELF also pointed out Bridgewood's confusion between a per se violation of c. 93A and per se liability. Chapter 142A of the General Laws, which regulates home improvement contractors, makes any violation of its requirements a per se violation of c. 93A, and with that as her sole springboard, Bridgwood had fallaciously argued that the defendants were liable to her without the need for any further legal analysis. Such, NELF argued, is not the case.

Finally, NELF reviewed the public policy concerns that led the Legislature to enact the repose provision at issue in 1968. Acting in response to case law abolishing the rule that an architect or builder's liability ended once the work was accepted by the owner, the Legislature struck a balance between the public's right to a remedy and the need to place an outer limit on the now potentially open-ended tort liability of those involved in construction. As the Court said in one case, because "injury could occur many years after the architect or contractor had completed his work," in the absence of the repose statute, architects and builders would face "possible liability throughout their professional lives and into retirement." Fifty years later, those pressing concerns remain valid, and nothing in the text or legislative history of c. 93A indicates that its consumer protections are intended to annul the entirely distinct protections of § 2B in cases where a tortious claim that is clearly within the subject matter of § 2B is arbitrarily recast as a c. 93A claim.

Arguing that an online business should be allowed to enforce its mandatory arbitration policy and class action waiver against a customer, when those contract terms are viewable by clicking on a clearly marked hyperlink to the business's "terms and conditions," and the business has clearly provided that the customer is deemed to accept those terms once she has created an account with the business.

Cullinane v. Uber Technologies, Inc. (United States Court of Appeals for the First Circuit)**.**

This case raised an important issue of online contract formation that arises from a large and growing category of online standardized consumer agreements. At issue is whether a business has provided the online customer with sufficient notice of its mandatory arbitration policy and class action waiver, and whether the customer has consented to those terms, when the arbitration provisions are viewable only by clicking on a hyperlink to the agreement's terms and conditions, and the customer is not required to check an online box indicating that she has accepted those terms. Instead, the business has clearly provided that the customer will be deemed to have accepted all of the contract terms once she has created an online account.

The defendant business in this case is Uber Technologies, Inc., the online ride-sharing service. When a customer creates an online account with Uber, Uber clearly states that "[b]y creating an Uber account, you agree to the **Terms of Service & Privacy Policy**." (Emphasis in original.) The words "Terms of Service" appear as a highlighted button with a hyperlink that, if clicked, opens a ten-page agreement containing a mandatory arbitration clause and a class action waiver, under the bold-faced heading, "**Dispute Resolution**."

The plaintiff and putative lead class representative, Rachel Cullinane, argues, so far *without* success, that she had inadequate notice of Uber's arbitration provisions because they were viewable only in a separate document, and because Uber did not require her to state affirmatively that she had accepted those terms. In essence, she argues that Uber structured the online sign-up process to discourage her from finding out about Uber's arbitration policy. Consequently, Cullinane filed a putative class action in court, rather than submit her underlying claim to individual arbitration. (In her underlying claim, she alleges that Uber imposed fictitious fees that were hidden in charges for legitimate local tolls to and from Logan Airport, in violation of Mass. G. L. c. 93A.)

NELF filed an amicus brief in support of Uber, arguing that, under well-established principles of Massachusetts contract law, a customer has indeed consented to a business's arbitration policy once the customer has indicated her consent to all of the terms contained in the agreement, in the manner of acceptance *defined by the business*. It is well settled in Massachusetts that a party who enters into a contract is bound by all of its terms, whether she has read them or not. That is, the contracting party is presumed to know all of the agreement's terms and has a *duty* to read them. This duty applies equally to contract terms that are incorporated by reference in that agreement, such as Uber's arbitration provisions that are viewable through a hyperlink in this case. It is also well settled in Massachusetts that the offeror, here Uber, controls the manner of acceptance. Accordingly, Cullinane accepted Uber's arbitration policy once she completed the online registration process, because Uber clearly stated that completion of that process would indicate her acceptance of Uber's contract terms.

In short, NELF argued that Massachusetts law treats contract formation as an *objective* process, in which the contracting party's actual state of mind is irrelevant once that party has manifested her consent to the terms of an agreement, in the manner of acceptance prescribed by the offeror. NELF pointed out that a decision in Cullinane's favor would contravene these bedrock principles of contract formation. Such a decision would allow a consumer to evade her contractual responsibility to read and understand the agreement's terms before she accepts them. She would then be free to attempt to undo the countless transactions that occur over the internet every day, by pleading ignorance of contract terms that she does not like. This, in turn, would disrupt and undermine free enterprise on the internet, to the financial detriment of the business community.

Unfortunately, the First Circuit decided against Uber on June 25, 2018. The Court disfavored from the outset Uber's use of the one-step "notice of deemed acquiescence" as the method of online contract formation, as opposed to requiring a consumer to stop, pause, and check off a box indicating that her or she has read the terms and conditions of the agreement before being able to proceed with the transaction): "We note at the outset that Uber chose not to use a common method of conspicuously informing users of the existence and location of terms and conditions: requiring users to click a box stating that they agree to a set of terms, often provided by hyperlink, before continuing to the next screen. Instead, Uber chose to rely on simply displaying a notice of deemed acquiescence and a link to the terms." The court also found that Uber did not display this "deemed acquiescence" language with sufficient prominence. (I.e., the court indicated that this one-step method of online acceptance, which more closely resembles a traditional signature to a contract.) *Cullinane v. Uber Techs., Inc.*, No. 16-2023, 2018 WL 3099388, at *6 (1st Cir. June 25, 2018).

Uber then filed a petition for rehearing or, in the alternative, for rehearing en banc, in which NELF participated by joining an amicus brief filed by the Chamber of Commerce. The First Circuit denied Uber's petition.

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 the Supreme Court on Wednesday, October 3, 2018.

Did the United States Fish and Wildlife Service act beyond 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 concerns 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 now before the court concerns 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 is 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 is 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 simply uninhabitable by the species, i.e., places where the frog would *perish*. To add insult to injury, the FWS also claims that its designation is 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.

This case was argued before the Supreme Court on Tuesday, October 2, 2018.

Arguing that the Federal Arbitration Act's exemption for "contracts of employment of seamen, railroad employees or any other class of workers engaged in foreign or interstate commerce" applies only to contracts establishing an employer-employee relationship and not to independent contractor agreements.

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

NELF has filed an amicus brief in this case, in which the United States Supreme Court will decide the scope of the Federal Arbitration Act's exemption for "*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). Does this exemption apply only to contracts that establish an employer-employee relationship, or does it also apply to independent contractor agreements? *In Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001**)**, the Court held that the exemption applied only to interstate transportation workers, not to all workers generally. (In that case, the Court was not asked to interpret the "contract of employment" language that is now in dispute.) At issue, then, is whether the FAA exempts the *entire* interstate transportation workforce from its scope, or whether the exemption applies only to those transportation workers who are subject to an employer-employee agreement. This case matters to NELF and its supporters because an unduly 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 ambiguous, especially 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. Accordingly, the lower court held that the FAA exempted 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. Notwithstanding the parties' agreement, Oliveira filed a putative class action against Prime in the federal district court for the District of Massachusetts, alleging that Prime had misclassified him, and all other similarly situated truck drivers, as independent contractors, in violation of the Fair Labor Standards Act. Because the First Circuit concluded that the FAA exempted independent contractor agreements, the court denied Prime's motion to compel arbitration on an individual basis and allowed Oliveira's putative class action to proceed in court.

In its amicus brief, NELF argues 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 offers 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.

On October 3, 2018, the Court heard oral argument. The case is now under advisement.

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.

Does the Federal Arbitration Act Permit a Court to Disregard the Parties' Agreement to Have the Arbitrator Decide All Threshold Issues of Arbitrability and to Decide for Itself the Merits of the Parties' Dispute Over Arbitrability?

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

In this case, the United States Supreme Court will decide whether the Federal Arbitration Act permits a court to decline to enforce the parties' agreement that the *arbitrator*, not the court, will decide all gateway issues of arbitrability, such as whether the parties' underlying dispute falls within the scope of their arbitration agreement. This is known as a "delegation provision" in an arbitration agreement, as distinguished from the core provision to submit certain substantive disputes to arbitration. "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." *Rent-A-Center*, 561 U.S. at 79.

Surprisingly, in this case the Fifth Circuit declined to enforce the delegation provision in the arbitration agreement 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.) And the Fifth Circuit ruled, correctly, that the incorporation by reference of this AAA rule is "clear and unmistakable evidence," *Rent-A-Center*, 561 U.S. at 79, that the parties had agreed to delegate issues of arbitrability to the arbitrator.

Nevertheless, 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, but the Fifth Circuit denied its motion. Archer opposed the motion to compel, on the ground that its complaint, in its entirety, was not arbitrable 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. Rather than enforce the parties' agreement to have the *arbitrator* decide this threshold dispute over arbitrability, the Fifth Circuit took it upon itself to interpret the agreement's exception, concluding that Schein's argument for arbitrability was "wholly groundless." Therefore, the court allowed Archer to proceed on its antitrust claims in federal court.

Schein applied for a *stay* of the federal court proceedings in the Supreme Court, over one month before it filed its petition for certiorari. The Supreme Court promptly *granted* the stay, and approximately two months later, granted Schein's petition for certiorari.

NELF has 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.* Since no such contractual challenge was raised in this case, the FAA required the Fifth Circuit to enforce the parties' agreement that the arbitrator would decide their dispute concerning the scope of their arbitration agreement.

NELF also argues that the FAA does not permit a court to usurp the arbitrator's contractually delegated power to decide threshold questions of arbitrability, as the Fifth Circuit did here when it evaluated the merits of such a dispute under its "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.

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

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 decide an important question regarding an eminent domain taking that the Supreme Court itself created when it decided *Kelo v. City of New London,* 545 U.S. 469 (2005).

The case involves a challenge to an eminent domain taking in Louisiana. Specifically, the St. Bernard Port Authority (a public entity) owns a port facility called Chalmette located six miles north of the (formerly) privately owned Violet Dock facility. Associated Terminals, a private company, runs Chalmette for St. Bernard. Wishing to expand the Chalmette facility, St. Bernard entered into negotiations to buy Violet Dock from its owners. When those negotiations failed, St. Bernard exercised its eminent domain power to take Violet Dock in order to convert it into a cargo handling facility over the course of years, with Associated (the private company already managing Chalmette) to also manage Violet Dock.

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

In *Kelo,* a majority of the Supreme Court found that the City of New London 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 argues 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 some *conceivable basis* in the record for finding that the taking served a public purpose.

The issue of what standard should be applied by courts in deciding whether, in a *Kelo* situation, the taking was genuinely for a public purpose—as opposed to being in favor of 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 a wide disparity in how both state and federal courts have dealt with this important question. And now the Louisiana Supreme Court has established a basically toothless "standard" that conceivably could justify any *Kelo*-type taking, whatever the actual facts of the case.

It is in light of this chaotic situation—and the Louisiana Supreme Court's seemingly complete surrender of the court's oversight in this area—that NELF has joined as a co-amicus in NFIB's brief, which asks the Supreme Court to grant certiorari in order to use this case to revisit *Kelo* and, if the decision remains valid, to establish the standard that courts should apply in assessing the validity of a challenge to the "public purpose" rationale put forward by a public entity that wishes to take private property for the purpose of providing it to or benefitting another private party. (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 Ms. Kelo in that case.)

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 has filed an amicus brief in support of the petitioners' Petition for Certiorari. The petitioners are taxpayers residing in the Campbell County Library District of Kentucky. Their 2012 complaint against the Campbell County 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). In particular, KRS § 173.790 applies when an increase of more than 4% is sought and requires approval by a petition signed by at least 51% of voters. 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 KRS § 132.023 and had done so 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. *See id*. 48 ("we believe the ultimate recourse for statutory change lies in the General Assembly, not the courts"). The Kentucky Supreme Court denied review, and the Court of Appeals remanded.

On remand, the taxpayers moved for summary judgment, arguing that the Library District had increased their 1999 tax by more than 4% without a use of a petition, and that they were owed refunds for that year and for subsequent years whose rates built on that error. (They also alleged that the Library District had raised taxes 20% since 2008 alone and had amassed about $3.1 million in cash reserves.) 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.

The taxpayers moved to alter, amend, or vacate the trial court's order, objecting (as relevant here) that the order denied them meaningful backward-looking relief as required by the Due Process Clause of the Fourteenth Amendment. The trial court denied the motion.

On appeal, the Court of Appeals affirmed in the published decision for which the petitioners seek certiorari, *Coleman v. Campbell Cty. Bd. of Trs*., 547 S.W.3d 526 (Ky. App. 2018), discretionary rev. denied, 2018 Ky. LEXIS 235. 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 denied review.

In its amicus brief, NELF urges the Supreme Court to grant certiorari on the ground that the decisions by the Kentucky courts to give only *prospective* effect to a finding that a tax is invalid 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 argues, 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 criticizes the state court's balancing of equities against the taxpayers' due process rights. Not only is the court's analysis entirely one-sided, but it is in all relevant regards the same as the equities-based argument that the Supreme Court rejected in *McKesson* as a reason for denying relief. The sole difference is that here the equities were used as a reason for not applying retroactively the court's earlier ruling on the tax statutes, thereby exempting the district from liability for unlawfully collected past taxes, and therefore forestalling the issue of relief. NELF views the relabeling of the *McKesson* equities analysis from a retrospective relief one to a retroactivity of law one here is mere sleight of hand.

Does an Award of "Back Pay" Required Under the Worker Adjustment and Relocation Notification Act, 20 U.S.C. § 2101 *et al.*, When and Employer Fails to Give an Employee 60 Days' Notice Before Closing Operations, Constitute 'Wages Earned' by That Employee Under the Massachusetts Wage Act?

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

In a prior federal court case, the plaintiffs, Jillian Calixto and Kathryn Reynolds, on behalf of themselves and 204 other similarly situated employees, obtained a default judgment of approximately $2 million in back pay under the federal Worker Adjustment and Relocation Notification Act (the "WARN Act") against their former employer, Isis Parenting, Inc., a company that provided child and parenting services in the greater Boston area. Isis Parenting did not provide its employees with the required notice of termination under the WARN Act before it ceased operations in January 2014.

The plaintiffs now seek to satisfy their WARN Act judgment, at *treble* the amount, against Isis Parenting's executive officers, in their *individual* capacities, as "wages earned" under the Wage Act. 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.

The plaintiffs appealed the Superior Court's dismissal of their claim and the Massachusetts Supreme Judicial Court has taken the case for direct appellate review. The Court has requested amicus briefing on the following issue: "Whether "back pay" paid by an employer to displaced workers under [the WARN Act] constitutes 'wages' for purposes of the Massachusetts wage act, G.L. c. 149, § 148."

NELF will be filing an amicus brief on behalf of the defendants arguing that, as the Superior Court held, an award of "back pay" under the WARN Act is not "wages earned" under the Wage Act. Simply stated, an award of "back pay" under the WARN Act does not compensate an employees for "wages earned" under the Wage Act. The plain language of each statute makes this crystal clear. An award of back pay under 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. This is simply because her former employer has wrongfully deprived her of the opportunity to earn those wages by terminating her too soon. This is reinforced by the well-settled meaning of the term "back pay," which is a traditional labor-law remedy to compensate an employee for the wages she would have earned if the employer had not violated her rights (here the right to 60 days' notice before termination under the WARN Act). 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 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 will also argue 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. 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 will argue 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.[1] 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.

The Court has ordered oral argument for November 8, 2018.

Can an Employer's Denial of an Employee's Request for a Lateral Transfer Constitute an "Adverse Employment Action" Cognizable Under the Massachusetts Employment Antidiscrimination Statute, G.L. c. 151B, and, if so, under what circumstances?

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

Lieutenant Warren Yee is an Asian-American employee of the Massachusetts State Police. He was promoted to his current rank of lieutenant in 1998. Since 2002, he has been stationed at Troop H, which is headquartered in South Boston. In December 2008, Lt. Yee, then age 54, submitted a request for 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.

[1] *See* n.7, above.

Yee sued the State Police for discrimination under Massachusetts General Laws c. 151B, alleging that he was denied the requested transfer because of his ethnicity and his age. The Superior Court granted the State Police's motion for summary judgment, concluding that Yee had suffered no adverse employment action. In particular, 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 only on 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. In short, Yee failed to substantiate his subjective belief of greater compensation opportunities at Troop F with sufficient objective evidence of other similarly situated employees' actual earnings there.

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 has 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 under that statute have, in effect,already answered the question presented in this case. Chapter 151B provides that "[i]t shall be an unlawful practice . . . [f]or an employer . . . to *discriminate* against [an employee] in *compensation or in terms, conditions or privileges of employment* . . . ." G. L. c. 151B, § 4(1) (emphasis added). And the Court has interpreted this language to mean that the c. 151B plaintiff must "suffer[] an 'adverse employment action' which *materially disadvantaged* him [or her]." *MacCormack v. Boston Edison Co*., 423 Mass. 652, 663 (1996). In particular, the Court has instructed that this "materially disadvantaged" test requires the employee to produce "*objective evidence* that he [or she] had been disadvantaged in respect to salary, grade, or other *objective* terms and conditions of employment." *MacCormack*, 423 Mass. at 663 (emphasis added). This inquiry necessarily excludes any consideration of an employee's "subjective feelings of disappointment and disillusionment." *MacCormack*, 423 Mass. at 663. Instead, the inquiry focuses solely on how the employer's decision made an objectively measurable and substantial difference to the employee's compensation, terms, conditions, and privileges of employment.

Accordingly, the application of the *MacCormack* test to the denial of a lateral transfer should require the employee to prove that the desired transfer would have materially improved his or her earning capacity and opportunity for career advancement, or would have substantially improved "other objective terms and conditions of employment." *MacCormack*, 423 Mass. at 663. That is, the employee would need to show that the desired transfer would have been the "objective equivalent" of a promotion. This is by necessity a case-specific inquiry requiring each employee to establish that, under his or her particular facts and circumstances, the denial of a transfer was the objective equivalent of the denial of a promotion.

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, as this case illustrates. In particular, the Superior Court concluded that Yee failed to produce sufficient comparative evidence of other State Police officers' additional earnings, through overtime and paid detail work, while they were stationed at Troop F. Indeed, courts from other jurisdictions have also concluded that an employee who is denied a lateral transfer has not suffered an adverse employment action based on an unsubstantiated claim of lost overtime opportunities. In short, Yee failed to show that the desired transfer would have made a material difference with respect to his "*compensation*, or in [the] terms, conditions or privileges of [his] employment." G. L. c. 151B, § 4(1) (emphasis added).

The Court heard oral argument on October 1, 2018.

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.