# New England Legal Foundation

## 2019/2020 Year in Review

New England Legal Foundation

## Mission

The New England Legal Foundation is a 501(c)(3) not-for-profit public interest foundation whose mission is promoting public discourse on the proper role of free enterprise in our society and advancing free enterprise principles in the courtroom.

Since its founding in 1977, NELF has challenged intrusions by governments and special interest groups which would interfere with the economic freedoms of citizens and business enterprises in New England and the nation. Our ongoing mission is to champion individual economic liberties, traditional property rights, properly limited government, and balanced economic growth throughout our six state region.

# Vigorous Advocacy of Free Market Principles

New England Legal Foundation does not charge attorney's fees for its legal services. Its operating funds are provided through tax deductible contributions made by individuals, businesses, law firms, and private charitable foundations who believe in NELF's mission.

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# To Our Friends and Supporters

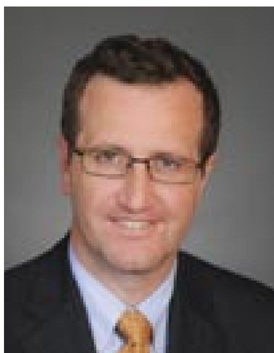
Martin J. Newhouse
*President*

As its cover indicates, this year's Year In Review actually covers two years, 2019 and 2020. When the time came in 2020 when we would normally have put together our 2019 annual report, we were in the initial, uncertain throes of the novel COVID-19 pandemic. We decided to delay our annual review until we could assess the full effects of the pandemic upon NELF, both operationally and financially, and the New England economy. Happily, while the pandemic caused some dislocations, NELF's operations continued for the most part without interruption, and we are now able provide you with our customary review of NELF's activities and accomplishments for both 2019 and 2020.

NELF enjoyed a very successful year in 2019, both in terms of our legal work and in terms of our finances, the latter benefitting greatly from our sixth annual John G.L. Cabot Award Dinner, described in more detail later in this report. As we began 2020, we had every reason to expect that we would be able to continue to build on these successes. However, for NELF, as for the world at large, the outbreak of the pandemic in early 2020 disrupted the best-laid plans. Its consequences, which first began to be felt strongly in mid-March 2020, made it impossible for us to continue our public outreach and, most importantly, derailed plans for our annual award dinner in the fall. (As we write, planning for our seventh Cabot Award Dinner in October 2021 is well underway with every indication that it will be a great success.)

Paul G. Cushing
*Chair (2019-2020)*

While the pandemic interrupted our 2020 plans, it did not blunt our commitment to NELF's core mission of filing amicus curiae briefs in significant, precedent-setting appellate cases affecting New England businesses and property owners. Much as in 2019, throughout 2020 we participated in important cases in the New England state and federal courts, as well as in the United States Supreme Court. It is a measure of our influence, we believe, that NELF's unique contributions were reflected in a number of major decisions issued in these two years. Although NELF's views did not always prevail, our rigorous, textually based reasoning and our legal insights have led more than one state supreme court justice to urge us to "keep filing your briefs." Because our briefs continue to be warmly welcomed and seriously considered by courts, we believe that the likelihood that our arguments will succeed remains undiminished.


Kevin P. Martin
*Chair (2021)*

NELF's 2019 and 2020 cases are described in detail in the Docket portion of this Year-in-Review. The legal process did not stop during the pandemic, and neither did NELF. During these two years, NELF's legal staff, working under the supervision of NELF's President and consisting of Senior Staff Attorney Ben Robbins and Staff Attorney John Pagliaro, filed outstanding amicus briefs on a wide range of subjects. The legal issues dealt with included the fiduciary duties of college officers and trustees, the scope of remedies available to the SEC, whether state sales taxes may be charged on a license to use cloud-based software, joint-employer liability, the proper measure for contract damages, preemption of state law by a federal employment statute, attorney-client privilege and work-product protections against discovery in an attorney general investigation, and whether a statutorily authorized appropriation of an easement is a physical taking under the Fifth Amendment. As you will see in these pages, during this trying time we maintained NELF's position as the premier, public interest courtroom advocate for the business community and property owners of New England.

Needless to say, our vigorous advocacy of free market principles and traditional property rights during 2019 and 2020 was possible only because NELF enjoys the active support, commitment, and hard work of the distinguished attorneys and other professionals who serve on its Board of Directors and on its six New England State Advisory Councils. Despite challenging, full-time positions in law firms and businesses, these individuals devote the time and effort needed to provide first rate governance and guidance to the Foundation. To these individuals, as well as to the companies, foundations and private citizens who support NELF, we extend not only our thanks but also our commitment to continue our dedication to the core values of our system of free enterprise in the years ahead.

*Martin J. Newhouse, President of NELF, presenting award to Susan H. Alexander.*

*Krish Gupta of Dell Technologies with Barbara Fiacco and John Shope of Foley Hoag.*

*Samuel Ntonme of Biogen and RosalineValcimond of Metropolitan Area Planning Council.*

# NELF's 6th Annual John G. L. Cabot Award Dinner

*On October 16, 2019, New England Legal Foundation held its sixth annual John G.L. Cabot Award Dinner at the Fairmont Copley Plaza in Boston. The evening's honoree was Susan H. Alexander, Executive Vice President, Chief Legal Officer and Secretary of Biogen, Inc.*

*Susan Alexander with the recipient of the 2015 Cabot award, Paul Dacier of Indigo AG.*

*Dan Klein, Christine Lee and Bill Shaw of Biogen.*

*Elijah Soko with Sam Schreine of PricewaterhouseCoopers and Tim Casey of Indigo AG.*

*Joe Blute and Yalonda Howze of Mintz Levin.*

*Jessica Driscoll and Alex Gordano of Sarepta Therapeutics.*

*Elizabeth Santovasi, Will Hooley, Emily Kline, Amy-Lee Goodman, Jessica Reese, Prasad Vasundhara, and Greg Schuster of Skadden Arps*

THE
# DOCKET
2019/2020
Year in Review

This edition of NELF's Year in Review, which covers both 2019 and 2020, describes the cases in which NELF participated during those two years and demonstrates the variety of issues that NELF typically may adress in advancing its mission.

## Government Regulation, Administration of Justice, and Other Business Issues

*To fulfill its mission, NELF seeks to identify cases that could set precedents substantially affecting the free enterprise system or reasonable economic growth.*

### Ending an unlawful fifty-year practice by lower federal courts, the United States Supreme Court agreed with NELF that in an SEC enforcement action federal courts lack equitable power to impose disgorgement as a penalty for violations of the securities laws.

*Liu v. Securities and Exchange Commission*
(United States Supreme Court)

This case involved the question of whether a major federal agency has long been obtaining certain kinds of court-ordered monetary relief unlawfully from private parties. For decades the Securities and Exchange Commission has invoked the equitable powers of federal courts in order to obtain judgments for the so-called "disgorgement" of funds allegedly acquired in violation of federal securities laws. In 2017, when the Supreme Court was considering what limitations period applies to such suits, five of the justices had wondered aloud during oral argument as to where exactly the SEC was authorized by statute to sue for this remedy. As the present case presented exactly that unresolved issue, NELF filed an amicus brief opposing the "disgorgements."

The SEC sued the petitioners, alleging that they had misappropriated funds as part of a sham investment scheme. The federal district court relied on its equitable powers to order petitioners to disgorge over $26 million. Notably, the SEC did not ask that those funds be distributed as restitution to the defrauded investors, and there exists no statute requiring that they be used for that purpose. The petitioners, having lost their Ninth Circuit appeal, petitioned the Supreme Court, which agreed to hear the case. The petitioners argued that since the Court decided in the 2017 case that such disgorgements are penalties, the federal court was without equitable jurisdiction to order disgorgement because a court acting in equity may not impose penalties.

In its amicus brief in support of the petitioners, NELF argued that, because the Supreme Court ruled in the earlier case that such disgorgements are a penalty under the securities laws, it follows that disgorgement may not be granted by a court as an equitable remedy. NELF argued that the Court's earlier characterization of disgorgement as a penalty was not confined to the issue of limitations of actions (the specific question addressed in the 2017 case), but applies equally to disgorgements considered as a form of court-ordered equitable relief. Finally, NELF refuted in detail two additional arguments made by the SEC. NELF showed that the restitution ordered in prior Supreme Court cases was strikingly unlike the disgorgements considered in the 2017 case or at issue in this case. Next, NELF refuted the SEC's argument that the Sarbanes-Oxley Act was enacted against a settled backdrop of decisions in which the Supreme Court had supposedly characterized disgorgement

as an equitable remedy, and that the Act had therefore legislatively ratified such remedies. In fact, as NELF showed, the cases relied on by the SEC do not show that, before the enactment of Sarbanes-Oxley, the Supreme Court had reached a clear, settled view that punitive securities disgorgements, or any other kind of punitive disgorgement, were relief available under the equitable powers of the federal courts.

In an 8-1 decision, issued on June 22, 2020, the Court held that "disgorgements," to be equitable, must be limited to stripping a wrongdoer of unlawful gains in order to return them to his victims. The relief must be restitutionary and aim to restore the status quo ante, as NELF had pointed out was the historical practice of the Court itself. With this decision, the Court ended a 50-year unlawful practice by the lower federal courts.

**In a victory for NELF and its supporters, the United States Supreme Court held that mere ambiguity in an arbitration agreement does not satisfy the Federal Arbitration Act's requirement that parties must expressly consent to class arbitration.**

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

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At issue in this case was whether the Federal Arbitration Act (FAA) permits a court to order class arbitration when the parties' agreement makes no express mention of class arbitration, but the court concludes nonetheless that certain contractual language is ambiguous and *could* be interpreted to support class arbitration. Nearly a decade ago, in *Stolt-Nielsen S.A. v. AnimalFeeds Internat'l Corp.*, 559 U.S. 662, 684 (2010), the Supreme Court held that, because class arbitration is so inimical to the individual arbitration contemplated by the FAA, "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." (Emphasis in original). In that case, however, the Court did not have to explain what constitutes a "contractual basis" authorizing class arbitration because the parties had *stipulated* that there was none. (Not only was their agreement silent on the issue, but the parties in *Stolt-Nielsen* also made the unusual stipulation before the arbitral panel that this silence meant that they had not agreed to class arbitration.) Faced in this case with an arbitration agreement that was purportedly ambiguous on the issue of class arbitration, the Court had to decide whether contractual ambiguity alone could provide the necessary contractual basis authorizing class arbitration under *Stolt-Nielsen* and the FAA.

Lamps Plus and one of its employees, Frank Varela, executed the company's standard arbitration agreement, in which the *two* parties ("I" and "the company") 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 all employment-related disputes, he was thereby waiving his right to sue in court and obtain a jury trial for those claims. (E.g., "I agree that arbitration shall be in lieu of any and all lawsuits *or other civil legal proceedings* relating to my employment." (emphasis added.)). The agreement further provided Varela with detailed notice of the kinds of employment-related claims that he was agreeing to arbitrate with his employer.

Notwithstanding the parties' arbitration agreement, Varela filed a class action complaint in federal court for the Central District of California, alleging that Lamps Plus, through one of its employees,

had wrongfully disclosed personal identifying information of its employees, in a mistaken response to a phishing scam requesting such information. Lamps Plus moved to compel arbitration on an individual basis. The district court ordered arbitration, but on a *classwide* basis. The Ninth Circuit affirmed, crediting Varela's argument that there was contractual language (namely, "lawsuits or *other civil legal proceedings*," quoted above) that could be interpreted to include class arbitration. (Needless to say, Lamps Plus argued strenuously that the agreement contemplated individual arbitration only.) The Ninth Circuit resolved this purported ambiguity by construing it against the drafter, Lamps Plus, under California contract law. Accordingly, the lower court held that the parties had consented to class arbitration.

NELF filed an amicus brief supporting Lamps Plus's position, arguing that, in fact, the parties' standard arbitration agreement provided *no* contractual basis supporting class arbitration. NELF argued that the agreement *unambiguously* provided for individual arbitration only. It was a simple contract between *two* parties to arbitrate their disputes, and nothing more. Not only was the agreement dead silent on the issue of class arbitration, but also, NELF argued, none of its boilerplate language could reasonably be interpreted to permit class arbitration. In particular, NELF argued that the language purportedly authorizing class arbitration ("lawsuits or *other civil legal proceedings*") added nothing new to the agreement. That language merely explained to the employee what it meant to agree, in the first sentence of the agreement, to submit *all* employment disputes with his employer to binding and final arbitration.

In a 5-4 decision issued on April 24, 2019, the Court agreed with NELF that the arbitration agreement at issue did not authorize class arbitration, but for different reasons. Surprisingly in NELF's view, the Court, in a majority opinion by Chief Justice Roberts, deferred to the Ninth Circuit's conclusion that the agreement was ambiguous on the issue of class arbitration, as a matter of California contract law (identifying such deference to state law as the Court's "normal practice"). In NELF's view, however, the entire question of whether an arbitration agreement supplies a contractual basis for class arbitration is a matter of *federal* law under the FAA. Even though the Court did defer to state law on that issue, the Court nonetheless went on to hold that this purported ambiguity made no difference under *federal* law, because neither contractual silence *nor* contractual ambiguity is sufficient to authorize class arbitration under the FAA. "Like silence," the Court explained, "ambiguity does not provide a sufficient basis to conclude that parties to an arbitration agreement agreed to sacrifice the principal advantage[s] of [individual] arbitration" contemplated by the FAA, namely, "its speed and simplicity and inexpensiveness." (Citation and internal punctuation marks omitted). In short, a court may not presume that a party has consented to the costly, burdensome and virtually unreviewable procedure of class arbitration, based on merely ambiguous contract language.

Importantly, the Court also held that the FAA preempted the lower court's attempt to resolve the purported contractual ambiguity on class arbitration by applying the general rule of state contract law that construes an ambiguity against the drafter. As the Court explained, that rule resolves a contractual ambiguity as a matter of public policy, based on considerations of relative bargaining strength. It does not address in any way what the parties actually agreed to. The FAA, however, requires the parties' consent to class arbitration. Therefore, the application of that general rule of state contract law to resolve the purported ambiguity would have impermissibly imposed class arbitration without the parties' consent. This the FAA does not permit

While the Court did hold that neither silence nor ambiguity is enough to satisfy the FAA, the Court never did state affirmatively what contractual language *is* required to warrant class arbitration under the FAA. At the very least, such language would have to be *un*ambiguous, but most likely it would have to be clear and unmistakable, given the high stakes involved in submitting to class arbitration. Notably, the Court relied for support on an analogous area of its FAA jurisprudence, in which the Court requires "clear and unmistakable" contract language to overcome the presumption that certain "gateway" issues of arbitrability (such as the validity and scope of the agreement) should be decided by a court, not an arbitrator. Just as the Court will not presume that parties who have agreed to arbitrate have also agreed to class arbitration,

[W]e presume [in our related FAA cases] that parties [to an arbitration agreement] have not authorized arbitrators to resolve certain "gateway" questions . . . . Although parties are free to authorize arbitrators to resolve such questions [or to conduct a class proceeding], we will not conclude that they have done so based on "silence or ambiguity" in their agreement . . . . Neither silence nor ambiguity provides a sufficient basis for concluding that parties to an arbitration agreement agreed to undermine the central benefits of arbitration itself.

**The Supreme Court does not accept the invitation to clarify whether statutory ambiguity truly exists when a Chevron deference analysis includes the common law presumption canon, which provides a clear rule of law but applies only in cases of statutory silence.**

*Baldwin v. United States*
(United States Supreme Court)

This case concerned *Chevron* deference. *Chevron* deference requires a two-part test under which a court will uphold a federal agency's interpretation of a federal statute in preference to its own if (i) the statute is ambiguous on the legal question at issue and (ii) the agency's interpretation of the statute is at least reasonable. Since its adoption in 1984, *Chevron* deference has been controversial on several grounds, in particular because it arguably cedes Article III judicial functions to Article II executive agencies and because it enshrines merely reasonable interpretations of statutes at the expense of the best interpretations.

The facts of the case were as follows. In 2011 Howard and Karen Baldwin filed for a refund of $167,663 on their 2005 income tax. Four months before the October 15 filing deadline, they mailed their paperwork to the Internal Revenue Service by regular-first-class mail. The IRS later said that it never had received their claim, and it refused to pay them. However, there was an easy way for them to prove that they had mailed the documents before the deadline. Under the common law mailbox rule, a document is deemed to be timely filed if the mailer can show by extrinsic evidence, such as witnesses, that the document was placed in the custody of the US Postal Service before the given deadline. Nearly twenty years earlier, in *Anderson v. United States*, 966 F.2d 487 (9th Cir.1992), the Ninth Circuit had affirmed the continuing vitality of this well-established common law rule. In *Anderson*, the Ninth Circuit examined the tax "statutory mailbox rule" set out in 26 U.S.C. § 7502, and found no clear intent in the statute to supplant the common law rule, and so it permitted proof of delivery to be rebuttably established by the common law rule.

It was on that basis that the Baldwins sued the IRS in federal court and won. But when the IRS appealed its loss, the Ninth Circuit abandoned *Anderson*. By the time of the Baldwins' lawsuit, the IRS had put in place a 2011 regulation interpreting § 7502 in its own way. The regulation strictly provides that, other than certified and registered mail receipts, "No other evidence of a postmark or of mailing will be prima facie evidence of delivery or raise a presumption that the document was delivered." 26 C.F.R. § 301.7502-1. The Ninth Circuit, granting *Chevron* deference to the 2011 regulation, set aside *Anderson*. The appeals court held that the statute's silence created an ambiguity about the status of the common law rule and that it was permissible for the IRS to resolve the supposed ambiguity in its favor by declaring that forms of proof not expressly authorized by § 7502 are prohibited.

In support of the Baldwins' Petition to the Supreme Court, NELF argued that, before a court applies *Chevron* deference, it must first exhaust its legal toolkit for statutory construction. NELF explained how the Ninth Circuit fell far short of that standard when it conducted only a cursory examination of the statute before pronouncing it ambiguous and deferring to the IRS's reading of the law.

Next, NELF explained that statutory silence does not always equate to ambiguity. In particular, one of the most important traditional tools of statutory construction—the common law presumption canon, which was applicable in this case—can exist only in the silence of a statute. This canon exists because the common law forms the unwritten historical legal background against which some statutes are drafted. Indeed, although silent and unexpressed, a background common law principle, when otherwise applicable, may not be read out of a statute unless Congress's intention to supplant it is made clear. Finally, NELF pointed out that where the common law has long been applied as a silent background principle, as it undeniably was here, the Supreme Court has expressly recognized that the "silence" creates no legal ambiguity. NELF noted that neither the Ninth Circuit nor the IRS could point to a single "clear and explicit" word in the statute that could reasonably convey the intent to supplant the common law rule. The mailbox rule therefore remained available to the Baldwins.

Despite NELF's vigorous and detailed arguments, the Supreme Court denied certiorari on February 24, 2020, with a dissent from denial by Associate Justice Thomas.

## The Massachusetts Court rejects NELF's arguments and holds that when a company charges a fee for an online service that is based on the company's remote software, the company has engaged in a taxable sale of tangible personal property.

*Citrix Systems, Inc. v. Commissioner of Revenue*
(Massachusetts Supreme Judicial Court)

This important tax case was before the Massachusetts Supreme Judicial Court (SJC) on direct appellate review. Its disposition has affected the many companies that provide online services for a fee in the Commonwealth. At issue is whether such a transaction constitutes a taxable retail sale of the company's software, as the Appellate Tax Board (ATB) concluded below, or whether it is instead a *non-taxable* sale of the company's *services*, as the taxpayer, Citrix Systems, Inc., argues. Citrix offers its paying subscribers online screen-sharing services. NELF has filed an amicus brief in the case in support of Citrix.

The Massachusetts Sales Tax Statute, G. L. c. 64H, defines a taxable sale as "the transfer of title or *possession . . . of tangible personal property* . . . for a consideration." G. L. c. 64H, § 1 (definitions of terms) (emphasis added). "Tangible personal property," in turn, expressly includes "[a] transfer of *standardized computer software*, including but not limited to electronic, telephonic, or similar transfer." *Id.* (emphasis added). The statute does *not* apply to the sale of services (except for the sale of telecommunications services, which is inapplicable here). Therefore, the issue in this case is whether Citrix has "transferred possession" of its software to its customers, and has thereby engaged in a taxable sale of its software, when it charges its customers a fee for its online services.

Complicating matters is a Department of Revenue (DOR) regulation that includes "transfers of rights to use *software installed on a remote server*" in its definition of the taxable sale of software. 830 C.M.R. § 64H.1.3 (emphasis added). The DOR has illustrated that regulation with an important example, the so-called "TurboTax example," in which a customer "wants to acquire prewritten computer software to prepare her personal income tax return." 830 C.M.R. § 64H.1.3(14)(a) (Example 2). According to that example, a taxable transfer of software occurs when a vendor gives "the option of purchasing the software on a disk . . . or . . . on the vendor's server . . . . *In either case, the functionality of the software is the same.*" *Id.* (emphasis added). That is, a company's transfer to the customer of the right to use its software, housed on the company's remote server, can constitute the necessary "transfer of *possession*" of that software under the statute, but only when the software is *self contained* and could also run directly on the customer's own computer.

In its amicus brief, NELF argued, in support of Citrix, that Citrix has sold its customers a service, not its proprietary software that is an integral and *integrated* part of that service. Citrix simply allows its customers to submit requests to Citrix's system, which in turn runs and controls the software that delivers the desired service. Consistent with its ordinary meaning, "transfer of possession" of property under the Sales Tax Statute means the transfer of the ownership-type right to control or direct the use of that property. *See Browning-Ferris Ind., Inc. v. State Tax Comm'n*, 375 Mass. 326, 330 (1978) (discussing same, and finding taxable sale when customers paid for use of company's garbage dumpsters placed on customers' property, because dumpsters were under customers' control). Under that clear definition, Citrix's customers do not possess its software, let alone even have direct access to the software. Instead, Citrix alone possesses the software, because the software *must* remain at all times on Citrix's vast infrastructure to function at all. And that vast infrastructure of software and hardware is subject to the constant oversight and control by Citrix's employees. Moreover, Citrix "controlled the code, maintained it, and updated it as it saw fit. [A customer] only accessed [the endpoint software] that allowed it to submit requests to the [Citrix] system that controlled the code." *Auto-Owners Ins. Co. v. Department of Treasury*, 313 Mich. App. 56, 72 (2015) (subscription to Westlaw not taxable sale of software under substantially similar Michigan sales tax statute).

Indeed, a brief consideration of this Westlaw example illustrates why this case should be resolved in Citrix's favor. As with Citrix and its customers, neither Westlaw nor *its* customers would ever think that, by subscribing to Westlaw's online research services, attorneys and judges have also purchased Westlaw's software. Nothing of the kind. Attorneys and judges have simply paid for the ability to

research on Westlaw, which alone directs and controls the software that yields the research results.

In that light, the customer who pays for Citrix's online services is really no different from the customer of yesteryear who paid to operate a juke box or a coin-operated laundry machine. "In matters of taxation we should follow the pattern of our decisions . . . ." *City of Boston v. Mac-Gray Co., Inc.*, 371 Mass. 825, 828 (1977). In all of these examples, the customer has simply paid for the receipt of a service, which the company's underlying system delivers. Never does the customer access, direct, or control that underlying system. *See id.* (company placing coin-operated laundry machines in apartment buildings sold a service, not the underlying property providing the service: "The taxpayer is in the business of *selling opportunities* to use equipment for laundering and drying purposes and is not in the business of selling or leasing washing machines and clothes dryers.") (emphasis added).

Since Citrix did not "transfer possession" of its software to its customers, as required by the statute, there can be no taxable sale of that software. Clearly, the ATB's reliance on the DOR regulation, discussed above, was misplaced. The ATB apparently failed to recognize that, while the regulation's "transfer of the right to use software installed on a remote server" *might* amount to the necessary transfer of possession of that software under the Sales Tax Statute, such as in the TurboTax example discussed above, no such transfer of possession occurred here. That is, the regulation does not announce a *per-se* rule of taxation but instead requires a case-specific application. The ATB apparently "confuse[d] control over application software with mere receipt of a service from an [Application Service Provider] that itself uses the application software." *Tax Management Multistate Tax*, Vol. 17, No. 11 (BNA Nov. 26, 2010). In sum, NELF argued that, for all of these compelling reasons, the Court should reverse the ATB's decision and decide in favor of Citrix.

In its decision, issued on February 5, 2020, the Massachusetts Court rejected NELF's arguments and held that Citrix's subscription fees constituted the taxable sale of tangible personal property. In a crucial part of its decision, the Court concluded that the 2005 amendment to the sales tax statute supported the DOR regulation, discussed above, that imposes a sales tax on "transfers of rights to use software installed on a remote server." In particular, the 2005 amendment added the following sentence to the statutory definition of "tangible personal property": "A transfer of standardized computer software, including but not limited to electronic, telephonic, or similar transfer, shall also be considered a transfer of tangible personal property." NELF had argued that that amendment to the term "tangible personal property" did not affect in any way the independent statutory definition of a taxable "sale" as requiring a "transfer of *possession*" of that property. The Court apparently concluded that the 2005 amendment was sufficiently ambiguous to permit DOR to interpret it as relaxing the "transfer of possession" requirement for the taxable sale of software:

> [B]efore 2005, this court held that the transfer of title or possession was a hallmark of a taxable sale. . . . However, in 2005 the Legislature expanded the definition of tangible personal property to include "transfer[s] of standardized computer software, including but not limited to electronic, telephonic, or similar transfer."[10] St. 2005, c. 163, § 34. The 2005 amendment created uniform sales tax treatment for sales of standardized software that did not depend on the method of delivery.

Accordingly, the Court deferred to the ATB's application of that regulation to Citrix's business model.

## Opposing the EPA's attempted expansion of its authority under 42 U.S.C. § 7411(d) of the Clean Air Act to allow it to impose by agency dictate industry-wide systems for reducing emissions, such as a cap-and-trade regime.

*North American Coal Corp. v. Environmental Protection Agency*
(United States Supreme Court)

In 2015, the EPA issued certain regulations for its "Clean Power Plan" (CPP), based on 42 U.S.C. §7411. The statute allows the EPA to publish emissions guidelines that govern the creation of state standards "for any existing source" of air pollution. The petitioner claims that it was always understood from § 7411(d) that the EPA's guidelines are limited to those consistent with "standards" that are

achievable by and at the individual physical sources of emission and by using technology applicable to those sources. But in the CPP, the EPA promoted a novel, industry-wide national "system" for reducing carbon dioxide emissions by shifting power generation away from some existing sources to other, preferred ones. The EPA's rule in effect requires owners of existing coal and natural gas plants to shift production elsewhere or buy credits from lower-emitting sources. In other words, rather than identify the best available technical systems to reduce emissions "for any existing source," the EPA decided that the best overall "system" would be a nationwide "system" that closes existing sources or forces the owners of them to subsidize other companies.

Before the DC Circuit, some energy producers, plus 29 states and state agencies, sought a stay of the CPP pending briefing and decision. When the circuit court denied a stay, the Supreme Court, in an apparently unprecedentedly move, granted it and remanded. While the terse order provides no reasoning, the legal standard implies that a majority of justices must have concluded that there was a reasonable probability that the Court would grant certiorari and a fair prospect that the Court would reverse the decision below. On remand the issue was not decided because the EPA repealed the CPP and substituted another plan more obviously in accordance with the statute. The EPA decided that the approach it had taken in the CPP lacked legal authorization.

The repeal then became the subject of twelve lawsuits alleging that repeal was arbitrary and capricious because it was based on the EPA's erroneous belief that § 7411 precludes a plan like the CPP. In January 2021 two judges of the DC Circuit panel agreed and one dissented, apparently negating the EPA's repeal of the CPP. This petition followed, as did *West Virginia v. EPA*, No. 20-1530, in which 19 states are petitioners.

NELF has filed an amicus brief in support of the Petitioner, urging the Supreme Court to grant certiorari in what is obviously a major case dealing with the scope of agency powers, and one highly likely to be taken on the merits by the Court.

In its brief, NELF proceeds along two lines, challenging the circuit court's assertion that neither Congress nor earlier EPA regulators had ever seen §7411(d) as limiting the scope to EPA regulation to on-site pollution guidelines. First, NELF cited statutory support, oddly overlooked by the petitioners in both this case and a companion case (No. 20-1530), to show that Congress had long held exactly that view. In 42 U.S.C. § 7401(a) we find the statement that "[t]he Congress finds . . . that air pollution prevention . . . is . . . the reduction or elimination, through any measures, of the amount of pollutants produced or created *at the source* . . . and air pollution control *at its source* is the primary responsibility of States and local governments" (emphasis added).

Secondly, NELF showed that EPA, too, has long held the views it espoused in its decision to repeal the CPP as ultra vires, contrary to the circuit court's statement that such views had never been held by the agency. NELF examined EPA rule making from as far back as 40 Fed. Reg. 53,340 (Nov. 17, 1975). There EPA discussed the legislative history and statutory context of §7411(d), and explicitly stated its understanding that Congress intended "a technology based approach," which would be applied to the individual existing sources of pollution.

Hence, NELF argues, the approach taken by the agency in the CPP was contrary to both Congress's express written wishes and EPA's own established view of its legal authority. The Supreme Court should therefore grant certiorari to correct the appeals court and settle this important issue.

## The Massachusetts Appeals Court agrees with NELF that a judgment creditor may permissibly levy an execution on property protected by a homestead estate and then suspend the execution until such time as the homestead protection lapses.

*Hartog Baer & Hand APC vs. Clarke*
*(Massachusetts Appeals Court)*

This case involved a Massachusetts execution on a California judgment, but the issue raised was not a jurisdictional one. The question posed was whether a judgment creditor may establish the priority of its judgment lien by levying on property that is protected by a homestead estate, and may then suspend the completion of levy until such time as the homestead protection has lapsed.

Thomas Clarke resides in Chatham, Massachusetts. In a family dispute, his sister obtained a California judgment against him, which he failed to pay, and there are no California assets with which to satisfy it. His sister assigned the rights to the judgment to the law firm of Hartog Baer & Hand, which had represented her. In 2018, Hartog Baer commenced an action in Massachusetts to enforce the California judgment against Clarke's Chatham property. In 2016, while the California litigation was pending, Clarke had recorded a declaration of homestead on the property.

In the Massachusetts action Clarke agreed that judgment might be taken against him for the California judgment, and in 2019 the sheriff levied upon the Chatham property other than any interest in it which is exempted from levy by law. The property secures a line of credit for $100,000, but while there is equity in the property over and above that amount, the total available value remains less than the $500,000 of protection afforded by the homestead. At present, then, there exists no surplus value unprotected by the homestead and liable to immediate liquidation. Over Clarke's objections the trial court upheld the levy, ruling that "plaintiff has protected its interest in the value of the property without interfering with the protection afforded the defendant by the homestead." Clarke appealed, arguing, with no real elaboration, that the homestead protection forms an absolute shield against any and all levying. The Appeals Court sought amicus briefing on the issue.

In a detailed, step-by-step brief filed in support of the creditor, NELF laid out the reasons for affirming the trial court. NELF first explained that Massachusetts statutes acknowledge that if a debtor possesses a reversionary interest in land, a creditor may levy upon that interest in and of itself, separately from other interests. More specifically, a reversionary interest may be seized and taken on levy of execution "so far as the nature of the estate and the title of the debtor will admit." That means that even when a debtor enjoys an estate entitling him to possession and occupancy of the land now, a creditor may still lawfully levy on the debtor's reversionary interest (if any), short of taking actual possession now. The reason for this is that the reversionary interest is a future estate, i.e., it grants legal rights that may be exercised only in the future, and hence it is an estate that does not interfere with a debtor's present possessory estate over the land.

NELF next noted that a homestead estate is a statutorily created interest in the use and occupation of a home and that it endures as long as the owner uses the home as his principal residence. G. L. c. 188, §§ 1, 2(a), 3(a), 4. Hence, the homestead is itself a present interest and is distinct from any future interest, such as a reversion. Because the reversionary interest is distinct from the homestead, it may be freely alienated even when a homestead exists, as case law was cited to show. More to the point here, it is because the reversion is a distinct interest that it may be seized on execution by a judgment creditor without thereby encroaching on the protection afforded to an existing homestead, as case law also shows.

Finally, NELF argued that to suspend the levy on a reversionary interest is entirely proper. Indeed, it is legally impossible for the creditor to do otherwise once the levy has commenced and the reversionary interest has been formally seized on execution. The levy must be suspended at that point because the reversion grants only future use and possession of the property, whereas the homesteader's present use of it continues to be protected by c. 188. The property right acquired by the creditor at the time of initial levy may, however, be exercised after the homestead estate has lapsed. In the interim, the levy does not harm the homestead in any way. The "plaintiff has protected its interest in the value of the property without interfering with the protection afforded the defendant by the homestead," just as the trial court ruled.

In an April 2021 decision, the Appeals Court agreed with NELF. The Court rejected Clarke's claim of sweeping, unqualified protection, and ruled that the suspension of the levy left intact all the protection Clarke was entitled to under homestead law. It also held that the plaintiff firm had acted appropriately to protect any future interest that may become available for later levy. Clarke applied to the Supreme Judicial Court for further appellate review, but the application was denied.

## Disagreeing with NELF, the Massachusetts Court holds that a private public-service corporation that owns a utility cover in a public way, despite being responsible by city ordinance for maintenance and repair of that portion of the road, does not get the benefit of Mass. G. L. c. 84, under which anyone allegedly injured by a defect in a public way must provide notice within 30 days of the injury to the "person by law obligated" to repair the way.

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

This case arose 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 marked TRIGEN – BOSTON and 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 in the case revolved around a plaintiff's statutory obligation to provide notice of his injury within thirty days to the "person by law obligated" with keeping in repair that part of the roadway. Meyer gave notice on day thirty-six.

Two questions were posed . First, was Meyer excused from providing the notice because it was allegedly "impossible" for him to do so? Meyer claimed that the supposedly insuperable difficulty of identifying the "person" entitled to notice fit within the statutory tolling provision for mental and physical incapacity.

Second, does a private corporation have a right to notice if it is legally "obligated" to repair the roadway? *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 answering no, Meyer engaged in a lengthy and involved review of the notice statute's origins in the Massachusetts Bay Colony, and he claimed to show that "person" in this legal context has always meant an agent of government. In order to deal with cases in which the Supreme Judicial Court has long ruled that private railroad corporations count as such persons, Meyer argued that from the late-19th century on railroads have been so intensively regulated that they were what he calls "quasi-governmental corporations."

NELF filed an amicus brief in which it first set out a number of ways in which, using readily available public sources, Meyer could have easily identified Veolia as the successor of Trigen and owner of the utility cover. Hence, there was no "impossibility."

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." Then NELF showed that the rationale of the railroad cases rested simply on the definitional principle under which it is "unquestionable" that corporations are civilly legal "persons"; the rationale of those decisions had nothing to do with railroad corporations uniquely.

NELF made another important correction to Meyer's argument. NELF showed that the legislature classifies railroads and companies like Veolia as "public service corporations." As the Supreme Judicial Court has long recognized, these are privately owned, publicly regulated entities that distribute services broadly to the general public by making permissive use of the public streets; consequently, they are "more than affected with a 'public interest,'" in the court's own words. Hence, even were a "quasi-governmental" character required in order to have a right to notice under § 18, it would be found in public service corporations like Veolia.

Finally, NELF discussed the historical background the notice statute. NELF demonstrated that both in colonial times and at the time of the earliest relevant statute, Stat. 1786, c. 81, the legislature was perfectly well aware that under English common law the duty to both repair and maintain public ways sometimes devolved on private parties, as explained in old British legal treatises NELF cited. NELF also cited an important 1883 Massachusetts case, overlooked by the parties, in which Judge Holmes, writing for the Court, invoked the common law to explain that private persons could indeed be entitled to Chapter 84 notice.

In its May 8, 2019 decision, the Court ruled that Veolia, as a private party, was not entitled to notice. The Court first decided from elsewhere in the statute that the right to notice was understood to be

available only for a party that was obligated to both repair and *maintain* the way. Unhappily, the Court then misinterpreted the common law background as excluding private parties from ever having a legal obligation to *maintain* a public way, rather than merely to repair it, and more specifically the Court ignored that the Boston ordinance governing utilities covers does impose both a *maintenance* and repair duty on Veolia.

The Court also left unaddressed the public character of privately-owned utilities that function as public service corporations. It assumed erroneously that because a municipality may be the party ultimately legally responsible for repair and maintenance of ways, a private party cannot have a legally enforceable duty to do these things in the first instance. The common law is to the contrary, and even the very statute the Court cited to illustrate its point states the opposite! The Court's decision clearly seems a result-oriented one, the product of "legislating from the bench" in order to update a law that seemed to the Court to produce the "wrong" result.

## Arguing that Part 4 of the Standard Massachusetts Automobile Policy Does Not Provide Coverage for "Inherent Diminished Value."

*Ercolini v. Commerce Insurance Company*
(Massachusetts Supreme Judicial Court)

This case, which is before the Massachusetts Supreme Judicial Court on Direct Appellate Review, involves an important question concerning automobile insurance coverage under Massachusetts law.

The issue before the SJC is as follows. When an insured motorist's vehicle suffers damage due to the negligence of another driver, and that damage does not amount to a total loss, currently in Massachusetts all that the injured party recovers from the insurance company is the cost of repairing the damaged car. In this putative class action, the Court is being asked by the plaintiffs to rule that Massachusetts auto insurance also covers--and should therefore pay to the innocent motorist--the amount of so-called "inherent diminished value" (IDV) that allegedly results whenever a car is involved in an accident.

IDV refers to the fact that, even after repairs, cars that have been in an accident may not recover their full pre-accident market value. In other words, the owner possessed more value in the car before the accident than he has after the accident, even allowing for the value of repairs. Commerce argued in the trial court that recovery for IDV is not allowed under Massachusetts tort law or its insurance regulations. Commerce's view prevailed in the trial court. The plaintiffs appealed on the issue of IDV coverage and obtained direct appellant review by the SJC.

NELF filed a brief in which it supported Commerce on those crucial two points. Reviewing Massachusetts tort law relating to the damage of chattel, NELF set out the established guiding principles of recovery. While diminution of value is used as the measure of recovery when property has sustained permanent damage, when property has been harmed by the negligence of another, it is equally well established that diminution of value is not used as the only measure of damages. If the injury is reasonably curable by repairs, the expense of repairs, if less than the diminished market value, is the traditional measure of recovery. By undertaking repairs, one measure of damages, i.e., the cash paid for the repairs, is substituted for another measure, i.e., the diminution in the property's value caused by the negligent party. In this way, too, duplicative recovery would be avoided. NELF then briefly examined insurance regulations and showed that there is total silence in the regulatory scheme concerning recovery of IDV under Part 4 of the standard auto policy.

## Agreeing with NELF, the Massachusetts Supreme Judicial Court dismissed this qui tam action against a business under the Massachusetts False Claims Act when the complaint was based primarily on information in the public domain

*Commonwealth ex rel. Rosenberg v. JPMorgan Chase & co., et al. (Massachusetts Supreme Judicial Court)*

This case concerned the scope of the so-called "public disclosure bar" of the Massachusetts False Claims Act (MFCA), G. L. c. 12, § 5G(c). The bar requires a court to dismiss a MFCA complaint "if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed . . . from the news media."

The Johan Rosenberg sued JP Morgan, Citigroup, Merrill Lynch, and Morgan Stanley, alleging that they had colluded to commit fraud against the Commonwealth, in their contractual capacity as "remarketing agents" for government bonds issued by the Commonwealth. He alleged that he conducted a detailed forensic analysis of financial information pertaining to the defendants' management of bonds issued by the Commonwealth. Based on his analysis of this public information, Rosenberg formulated a legal theory that the defendants had engaged in fraud against the Commonwealth.

The defendants sought dismissal under the MFCA's public disclosure bar on the grounds that Rosenberg used financial information available in the public domain. The Superior Court granted the defendants' motion to dismiss.

NELF's amicus brief in support of the defendants made two principal arguments First, NELF argued that Rosenberg's complaint was properly dismissed because "substantially the same . . . transactions as alleged in [his complaint] were publicly disclosed . . . from the news media." G. L. c. 12, § 5G(c). NELF pointed out that Rosenberg had not brought to light any new facts in his complaint; rather, he merely had derived legal theories based on public facts. In particular, NELF argued that the Commonwealth itself already had access to the same information and so did not need Rosenberg to bring this information to its attention.

Moreover, even if Rosenberg had analyzed public information with a certain degree of sophistication or "creativity," this fact alone was insufficient to escape the bar. "A relator cannot bring a qui tam suit based on publicly disclosed facts, even if her expertise makes her the first to understand the alleged fraud." United States ex rel. Conrad v. Abbott Labs., Inc., No. 02-11738-RWZ, 2013 WL 682740, *4 (D. Mass. Feb. 25, 2013) (Zobel, J.).

As a secondary argument, NELF dealt with the fact that the publicly available information came from websites. Although these are not traditional news sources usually thought to be encompassed by the public disclosure bar, NELF argued that they should nonetheless be considered a contemporary form of "news media" for purposes of the public disclosure bar. NELF wrote:

> Generally accessible websites are available to anyone with an internet connection and a web browser, and access is not restricted. Though they are not traditional news sources, they serve the same purpose as newspapers or radio broadcasts, to provide the general public with access to information. They are easily accessible and any stranger to a fraud transaction could discover the relevant information on them.

In its decision of May 11, 2021, the SJC affirmed the Superior Court's dismissal of Rosenberg's complaint. In essence, the Court embraced both of NELF's arguments. First, the Court concluded that Rosenberg based his complaint on material facts that were already available to the public. As NELF had argued, the Court also concluded that Rosenberg's creative interpretation of this public information could not save his claim. Secondly, the Court agreed with NELF that certain websites could constitute a contemporary form of "news media" for purposes of the public disclosure bar. "'[N]ews media' is broad enough to encompass the many ways in which people in the modern world obtain financial news, including from publicly available websites on the Internet." The Court based this conclusion on the broad meaning of the term and on the clear purpose of the statute, which is "to strike a balance between encouraging private persons to root out fraud and[, at the same time,] stifling parasitic lawsuits."

Facebook complied with the first and second of the Attorney General's civil investigative demands (CIDs) by providing the requested information and documents.

However, Facebook refused to respond to the Attorney General's third CID, which requested information and communications from Facebook's own investigation. Facebook asserted that its attorney-led internal investigation was protected by both the attorney-client privilege and the attorney work- product doctrine. In response, the Attorney General filed a petition in Superior Court to compel compliance. The Superior Court ruled in favor of the Attorney General on both defenses raised by Facebook, finding insufficient evidence that the company was motivated primarily by fear of litigation. Facebook appealed the decision to the Supreme Judicial Court.

## The Massachusetts Supreme Judicial Court rules, in agreement with NELF, that both the attorney-client privilege and the attorney work product doctrine protect a company from compelled disclosure to the Massachusetts Attorney General of information and communications generated by an internal investigation overseen and conducted by outside counsel on behalf of the company.

*Facebook v. Attorney General*
(Massachusetts Supreme Judicial Court)

This case arose from the news stories published in March 2018 reporting that Cambridge Analytics had improperly purchased vast amounts of Facebook users' personal information from a Facebook app provider. Facebook retained outside counsel to investigate other app providers to determine whether there were other misappropriations of users' personal information and, if so, whether Facebook might incur liability. Facebook made periodic public statements describing in general terms the purpose and scope of this purely internal investigation, reassuring its users and the general public that it was doing its best to remedy the problem.

At the same time, the Attorney General of Massachusetts began a civil investigation of how this misappropriation might have harmed Massachusetts Facebook users.

NELF joined as a co-amicus on the brief of the United States Chamber of Commerce filed in support of Facebook. The amici pointed out that the SJC has long aligned its interpretation of the attorney-client privilege and the work product doctrine with that of the federal courts and that authoritative federal decisions have come to the opposite conclusion from that of the Superior Court in this case. Those opinions have held that an internal investigation does not lose either its privileged status or the protection of the work product doctrine simply because the investigation fulfills a business purpose along with a legal purpose. Those opinions have also rejected the proposition that the privilege is waived merely because the client corporation discloses the existence of the investigation in general terms.

As amici pointed out, the SJC, following the lead of the majority of federal courts of appeals, has also rejected the "primary motive" test and has instead embraced a more forgiving "because of" test, which acknowledges the reality that a business acts with a mixture of legitimate reasons. Amici also took the Superior Court to task for concluding that Facebook had put the entire investigation at issue merely by describing it in general terms to the public. Amici cited authoritative federal case law to bolster the point.

Amici also highlighted the danger that the results of business's internal investigation, if disclosed, could serve as a roadmap for litigation *against* the company, identifying vulnerabilities that may never have been otherwise discovered by an adversary. Allowing an adversary such access would contravene SJC precedent, which rejects the "unfair disadvantage that would result" if a party "with adverse interests, and who seeks to vindicate those interests against a corporation, could access the corporation's confidential communications with counsel." *Chambers v. Gold Medal Bakery, Inc.*, 464 Mass. 383, 395 (2013).

Finally, amici argued that the Superior Court's decision would make Massachusetts law on the attorney-client privilege and work product doctrine an anomaly and an outlier, undermining national uniformity in the enforcement of the protections afforded a business's relationship with its counsel. This is especially problematic for a nationwide corporation, or any corporation with a multi-state presence, such as Facebook and several of amici's supporters, which often face

litigation and investigations over the same subject matter in multiple jurisdictions.

In its decision of March 24, 2021, the SJC agreed on all these legal points and affirmed that both attorney-client privilege and the work product doctrine applied in this case. In particular, the Court *rejected* the Superior Court's conclusion that the disputed internal investigation was not conducted in anticipation of litigation. "[That investigation] is meaningfully distinct from Facebook's ongoing enforcement program. It is staffed by *outside counsel and outside forensic consultants*, and it has its own distinct methodology. *It is focused on past violations*, not ongoing operations, and it serves a very different purpose: *defending Facebook* against the vast litigation it is facing, rather than just improving its ongoing operations." (Emphasis added). The Court then remanded for further fact finding consistent with its ruling.

## The Massachusetts Supreme Judicial Court agrees with NELF that vendors are entitled to seek an abatement of sales taxes from the Appellate Tax Board under the general abatement statute even though they allegedly had not complied with the Commissioner of Revenue's regulations that purported to create a pre-requisite to obtaining a reduction of sales tax

*Oracle USA, Inc. et al. v. Commissioner of Revenue (Massachusetts Supreme Judicial Court)*

This case raised the important business issue of whether there is more than one way of obtain a certain important kind of tax apportionment. The question arises when a Massachusetts seller of software sells to a business purchaser that uses the software partly inside and partly outside Massachusetts. A tax statute provides that "[t]he commissioner [of revenue] may, by regulation, provide rules for apportioning [sales] tax in those instances in which software is transferred for use in more than one state." Mass. G. L. c. 54H, § 1 (emphasis added). At issue, then, was whether the statute creates a right of apportionment that exists independently of the Commissioner's implementing regulations.

Before the Appellate Tax board (ATB), the Commissioner argued that the statute permitted him exclusively to decide whether or not to recognize any right of apportionment by allowing him to decide on what, if any, procedures would be required to obtain an apportionment. Since none of the sellers here had followed his procedures, the Commissioner argued that they had waived their right to apportionment and could not obtain it under the generally applicable statutory abatement process, which applies to "[a] person aggrieved by the assessment of a tax" who alleges to have paid an excessive tax. Mass. G. L. c. 62C, § 37. In opposition, the sellers argued that the disputed statutory language created a right of apportionment that exists independently of regulations implementing that right. Therefore, they argued, they could seek an apportionment under the general statutory abatement process. After the ATB ruled for the sellers, the appeal went to the SJC, which sought amicus briefing.

In its amicus brief, NELF argued that the ATB had ruled correctly. NELF focused on the key statutory language, quoted above, which provides that "[t]he commissioner [of revenue] may, by regulation, provide rules for apportioning tax in those instances in which software is transferred for use in more than one state." The question, again, was whether this statutory language created a right to sales tax allocation that exists independently of the Commissioner's implementing regulations, or whether the language delegated to the Commissioner the power, through regulation, to determine whether such a right exists. NELF argued that the former reading must be the

correct interpretation of the statute because otherwise the Commissioner, an executive branch official, would have in effect a discretionary power to tax, a power which is inherently legislative. NELF based its reasoning on the fundamental principle of the separations of powers, which is codified in Article 30 of the Massachusetts Declaration of Rights and prohibits the legislative, executive, and judicial branches from exercising the powers of the other branches.

In its May 2021 opinion, the Court affirmed the ATB's decision and based its conclusion primarily on the separation of powers argument that NELF alone had briefed. Indeed, the Court devoted a substantial portion of its opinion to this argument, and its treatment of the issue is remarkably similar to NELF's own analysis of the issue, down to the smallest detail. Turning to the regulations, the Court agreed with NELF also that the regulations were a valid, streamlined, but ultimately nonexclusive means to obtain an apportionment of the sales tax, when the sales tax was due. As the Court observed, nothing in the statute or the regulations themselves, precluded a taxpayer from pursuing the far more burdensome general abatement process.

## The First Circuit agrees with NELF that, under Massachusetts law, a college's officers and trustees do not owe a fiduciary duty to the college's students; they owe fiduciary duties solely to the institution that they serve.

*Squeri et al. v. Mount Ida College*
(U.S. Court of Appeals for the First Circuit)

The case arose from the sudden announcement in May 2018 that Mount Ida College would close permanently and that its students could transfer to the University of Massachusetts to complete their education. Former students of Mount Ida sued, alleging that they were injured because U. Mass did not offer their areas of study and because Mount Ida's late announcement did not afford them sufficient time to transfer to other schools. The students named as defendants Mount Ida and its officers and trustees, and raised a host of Massachusetts statutory and common law claims, including breach of contract, violation of G. L. c. 93A, and breach of a fiduciary duty. The District Court dismissed all of the students' claims, and the students appealed to the First Circuit.

Because the case raised an important issue of individual liability under Massachusetts nonprofit corporate law, NELF filed an amicus brief in support of the defendant trustees and officers, focusing solely on the students' claim that these defendants owed them a fiduciary duty in handling the school's closure. NELF argued that the lower court correctly dismissed the claim because, under established Massachusetts law, the officers and trustees owed fiduciary duties only to the college. Indeed, the Massachusetts nonprofit corporation statute, G. L. c. 180, expressly codifies the three fiduciary duties that officers and directors owe to the nonprofit corporate entity they serve: a duty of good faith, a duty of care, and, central to this case, a duty of *loyalty*.

Accordingly, NELF argued, the defendants' sole fiduciary duty was to serve the best interests of Mount Ida. To be sure, NELF pointed out, Mount Ida's officials could, consistent with loyalty to the college, also consider the students' interests when they made decisions concerning the college's closing. Nonetheless, they were duty-bound to give priority in their decision-making to the college's best interests.

NELF also argued that the plaintiffs' position contravenes this principle of undivided corporate loyalty because the students' interests were arguably in conflict with those of the institution. Adopting the students' position would therefore put the officers and trustees in the untenable position of "serv[ing] two masters whose interests [were] antagonistic." *Spiegel v. Beacon Participations, Inc., et al.*, 297 Mass. 398, 411 (1937). Similarly, NELF criticized the students' reliance on cases that do not involve a defendant who owes a statutorily mandated fiduciary duty to serve the best interests of another party, whose interests might conflict with those of the plaintiff.

Moreover, NELF pressed the point that Massachusetts law awards the Attorney General exclusive discretionary statutory authority to

sue the defendants for allegedly breaching duties that they owed to Mount Ida. Indeed, the Attorney General's exclusive oversight of charitable corporations "[under] G .L. c. 12, §§ 8-8[M], has for many years constituted a *comprehensive system for the regulation of charitable organizations in the Commonwealth*." *Mary C. Wheeler Sch., Inc. v. Bd. of Assessors of Seekonk*, 368 Mass. 344, 352 (1975) (emphasis added). Notably, the Attorney General *did* exercise her exclusive statutory enforcement powers, under Mass. Gen. Laws ch. 12, § 8H, and conducted a civil investigation of the circumstances surrounding Mount Ida's closing. However, as reported in the press and not contradicted by the Attorney General, she concluded that it would not be in the public interest to sue Mount Ida's officials.

In its unanimous decision, the First Circuit, agreeing with NELF on all key points, affirmed the dismissal of the plaintiffs' fiduciary claim, along with the rest of their complaint. As NELF had argued, the Court too noted that the defendants had a statutory fiduciary duty to serve the best interests of the college, and that this statutory duty precluded the recognition of potentially competing duties owed to the students. The Court did not mince any words when it wrote that "[t]he interests of the students alleged on the facts here are *in direct conflict* with those of the institution. Early disclosure of financial distress might well have endangered the ability of the institution to recover and made the financial distress even worse." (Emphasis added). Finally, as NELF had argued it should do, the Court deferred to the detailed statutory scheme that vests in the Attorney General the exclusive right to oversee and enforce the fiduciary duties that the defendants owed to the college.

## The Massachusetts Supreme Judicial Court, disagreeing with NELF, ruled that consumers did not enter into a valid arbitration agreement with a company by signing up with its online mobile app to buy services.

*Kauders v. Uber Technologies, Inc.*
(Massachusetts Supreme Judicial Court)

On January 4, 2021, the Massachusetts Supreme Judicial Court (SJC) issued its opinion in this case in which, disagreeing with NELF, it held that when the plaintiffs had signed up to obtain rides from Uber through its mobile phone application, they had not entered into an enforceable contract with Uber. Consequently, the Court held, Uber could not enforce the arbitration provision contained in the contractual terms and conditions by which it had claimed the plaintiffs were bound.

The case had reached the SJC in an unusual posture. The plaintiffs, Christopher and Hannah Kauders had sued Uber in the Massachusetts Superior Court in 2016 alleging that Uber had illegally discriminated against Christopher Kauders because he is blind and was accompanied by a guide dog. Uber moved to compel arbitration under the arbitration provision included in the terms and conditions to which it said the Kauders had agreed with they signed up with Uber through the mobile app. The Superior Court, finding that the plaintiffs were bound by the terms and conditions ordered the case to arbitration. The case was duly arbitrated in 2018 and the arbitrator found in Uber's favor on the ground that the drivers who had allegedly refused to provide services to Christopher Kauders were independent contractors. When, however, Uber returned to Superior Court, to enforce the award, the Kauders' counsel called the court's attention to the First Circuit's decision in *Cullinane v. Uber Techs, Inc.,* 893 F.3d 53 (1st Cir. 2018), which had ruled that the plaintiff in that case did not have an enforceable arbitration provision with Uber. The Superior Court then reconsidered and reversed its earlier decision and held that no contract had been formed. Thus, before the SJC was the question not only whether a valid contract had been formed, but also whether the Superior Court had abused its discretion in reconsidering its original decision on arbitrability *after* the matter had been fully arbitrated.

While the SJC found that the Superior Court had, indeed, abused its discretion in reconsidering the arbitrability question, it decided, on the grounds of judicial economy, to hear that contract formation issue nonetheless, since it would inevitably come up in any appeal of the arbitrator's award.

NELF, in its amicus brief in support of Uber, had emphasized the basic contract law principle that Uber, as the offeror, has the exclusive power to define *how* the plaintiffs would manifest their acceptance of the contract's terms. NELF then argued that Uber's clear language, combined with its prominent hyperlink to its terms of service, provided the plaintiffs with *reason to know* that, when they clicked

the "Done" button, they were doing two things at once. They were creating an Uber rider account, but they were also agreeing to Uber's terms of service, which included its arbitration provision. NELF argued that, thus, it was clear that Uber's final registration screen in the process provided the plaintiffs with notice that they would be bound by Uber's terms of service, and the opportunity to read those terms (by clicking on the prominent hyperlink provided), *before* they clicked the "Done" button and completed the registration process.

Where, however, NELF saw clarity in Uber's terms, the SJC did not. Not focusing on Uber's powers as offeror, the Court instead focused entirely on the offeree or customer. Agreeing with the Massachusetts Appeals Court, the SJC held that the proper framework for analyzing online contract formation was a two-prong test: "whether there is reasonable notice of the terms and reasonable manifestation of assent." Disagreeing strongly with NELF, the Court found that there had not been reasonable notice to the Krauders of the terms.

Aside from its own textual analysis of the registration screens (which differed from NELF's), the Court was also influenced in its holding by two factors that NELF had not discussed. First, the Court contrasted the nature of the ride services for which a user was signing up with Uber's extensive terms and conditions that, in addition to an arbitration provision, included indemnifying Uber for all injuries suffered due to a rider's breach, permission to use the riders' data for other purposes, a broad limitation of Uber's liability, a no-refund provision, a disclaimer of all warranties, etc. The Court observed, "[i]t is by no means obvious that signing up via an app for ride services would be accompanied by the type of extensive terms and conditions present here."

The second factor, perhaps more damaging in the SJC's view to Uber's position was the fact that, as the Court observed, case law involving Uber and its drivers revealed a very different "interface of the app provided to drivers by Uber." In contrast to the interface to potential customers, potential drivers were provided with a clearer opportunity, and even a requirement, to consider terms and conditions, and potential drivers were required to confirm that they had reviewed and accepted their agreement by clicking "YES, I AGREE." The Court quoted a Third Circuit decision as follows, "[a]fter clicking 'YES, I AGREE,' [the driver] was prompted to confirm that he reviewed and accepted the [agreement] a second time." The SJC noted: "The contrast between the notice provided to drivers and that provided to users is telling."

In addition to concluding that the Krauders had no received reasonable notice of the terms and conditions, and therefore that on that basis alone a contract could not have been found, the Court also found that "the interface here also obscured the manifestation of assent to those terms."

In short, despite NELF's legal arguments, the Court held that there was no enforceable agreement between Uber and the plaintiffs and, thus, the dispute was not arbitrable. The Court accordingly remanded the matter to the Superior Court for further proceedings.

## Supporting the statutory requirement that the New Hampshire Department of Environmental Services must perform a cost-benefit analysis before establishing maximum levels of a contaminant in the public water supply.

*Plymouth Village Water & Sewer District, et al. v. New Hampshire Dept. of Environmental Services*
(New Hampshire Supreme Court)

This interlocutory appeal arose out of an action brought by the plaintiffs, including 3M Company, to enjoin the enforcement by the New Hampshire Dept. of Environmental Services (DES) of its recently adopted rules governing the maximum contaminant levels (MCLs) of certain chemicals found in public water supplies. In its amicus brief NELF supported 3M on the sole issue on which the plaintiffs prevailed below, i.e., whether DES should have performed a fully quantified cost-benefit analysis before setting MCLs and imposing substantial compliance costs on the public and businesses.

On July 10, 2018, the governor of New Hampshire signed a law aimed at regulating PFAS (per- and polyfluoroalkyl substances) contamination of the public waters of the state. As relevant to NELF's amicus brief, the statute (RSA 485:3, (I)(b)) requires the DES to set MCLs after "*consideration* of the extent to which the contaminant

is found in New Hampshire, the ability to detect the contaminant in public water systems, the ability to remove the contaminant from drinking water, *and the costs and benefits to affected parties that will result from establishing the standard*." (Emphasis added.)

On January 4, 2019, the DES published proposed MCLs and set a schedule for public hearing and comment, noting that very recent research might cause it to set substantially lower final MCLs. After the hearing and comment period, on June 28, 2019, the department's final rulemaking set MCLs substantially lower than originally proposed. DES stated that the principal reason for this was new evidence showing that PFAS were passed from mothers to their breastfeeding infants. With the change, the estimated range of compliance costs rose from $7-14 million for the proposed MCLs to as much as $190 million for the final ones.

At issue on appeal is what the statutorily mandated "consideration" of costs and benefits means. In its amicus brief, NELF argued that RSA 485:3, I(b) should be understood not only textually, but also against the background of the costs DES has historically imposed by its regulations. DES has a history of skirting the state's constitutional ban on unfunded mandates being imposed on political subdivisions of the state. In the past, for example, DES argued that functions, such as water and sewer, because undertaken by private entities as well as municipalities, are excluded from the ban. This led the legislature to enact RSA 541-A:25, in which it reinforced and broadened constitutional prohibition and included "sewer and water" functions specifically. It is consistent with this background, NELF argues, to read RSA 485:3, I(b) as expressing the legislature's intent that DES account in the most punctilious and most thoroughly documented manner for any proposed fiscal impositions stemming from regulation of MCLs. That means a consideration of costs and benefits specifically in the form of a full cost-benefit analysis. The judge was therefore entirely correct when he said of the DES's predominantly qualitative consideration of "costs and benefits," "Any rational interpretation of the statute requires more."

As NELF laid out in its brief (on which the Business & Industry Association of New Hampshire was co-amicus), from its first step in the rule-making process DES openly acknowledged that its methodology would fall far short of an adequately quantified cost-benefit analysis. It stated that the data necessary for such an analysis are lacking, and yet it proceeded undaunted by this critical shortcoming. For example, in a report issued at that time, it told all "affected" stakeholders what to expect and what not to expect, and specifically that they should expect a merely "qualitative description of anticipated costs" because it was unable to "determine[e] costs associated with a number of different potential standards and captur[e] marginal costs." Similarly, as to the benefits side of the analysis, DES announced that its informed rule-making would be analytically hobbled there too. "In general," DES wrote "it is difficult to quantify the monetized benefits for environmental and public health standards."

As NELF recounted, DES's approach remained unchanged in June 2019, when it issued the final MCLs, with their hugely increased costs compared to those of the proposed MCLs. Despite the glaring analytical deficiencies of its approach, DES confidently opined that "after considering what currently is known about costs and benefits NHDES believes that the benefit of adopting these rules is not outweighed by the costs of implementing the proposed health based standards."

NELF observed that, when the judge granted the injunction against enforcement of the MCLs, DES should not have been surprised. It had repeatedly, from the initiation of its rule making, declared that it lacked the data needed to conduct the statutorily mandated cost-benefit analysis; yet, undeterred, it proceeded to issue extraordinarily costly MCLs in the unsubstantiated belief that the costs do not outweigh the benefits. NELF therefore urged the New Hampshire Supreme Court to rule that the injunction was justified and to uphold its issuance.

In August of 2020 the appeal was dismissed as moot because of intervening legislative action.

## Urging the First Circuit not to undermine the rule that there is no general duty to disclose to the public all ongoing communications exchanged by a company and its regulatory agency

*Securities and Exchange Commission v. David Johnston*
(United States Court of Appeals for the First Circuit)

This case arose out of the attempt to secure regulatory approval of a cancer drug manufactured by Aveo Pharmaceuticals, Inc. (Aveo). The Securities and Exchange Commission (SEC) alleged that Aveo's former CFO David Johnston made materially misleading statements to investors about Aveo's communications with the Food and Drug Administration (FDA) concerning the drug.

Representatives from Aveo met with FDA in advance of submitting an application for approval of the drug tivozanib (Tivo), which was intended to treat renal cell carcinoma. The minutes of the meeting indicate that the FDA voiced doubts about both the drug's safety and its efficacy, and recommended that Aveo conduct a second randomized clinical trial.

Johnston and others in Aveo later allegedly drew up a "script" of talking points in order to limit the company's disclosures when questioned publicly about the meeting and any need for a second clinical trial to address FDA concerns. In this case, the SEC alleged that Johnston and Aveo deliberately withheld the fact that, as sign of the seriousness of those concerns, the FDA had recommended that a second clinical trial would be in Aveo's "best interests." SEC claimed that Johnston's selective disclosures, once he chose voluntarily to communicate information to the market about the meeting with the FDA, were misleading by material omission.

In late 2018, a jury found Johnston liable for securities fraud. He timely appealed. In his appeal, Johnston relied on the well-established legal principle that there is no general duty compelling disclosure of interim communication with a regulatory agency like the FDA, even when investors might deem the information to be material.

NELF filed an amicus brief in support of Johnston on that point, urging the First Circuit to be careful not to undermine that principle when ruling on Johnston's appeal.

NELF noted that under securities law, a duty to disclose material nonpublic information arises only (1) if a regulation, statute or rule requires it, or (2) if disclosure is required to prevent a public statement from being misleading, or (3) if a defendant is engaged in insider trading. Otherwise, it remains settled law that "[s]ilence, absent a duty to disclose, is not misleading under Rule 10b-5" and Section 10(b) and does not constitute fraud. *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 44 (2011) (quoting *Basic Inc. v. Levinson*, 485 U.S. 224, 239 n.17 (1988)).

Hence, in the absence of one of those three duties, "firms are entitled to keep silent (about good news as well as bad news)," *Gallagher v. Abbott Labs.*, 269 F.3d 806, 808 (7th Cir. 2001), even if the information is something "a reasonable investor would very much like to know," *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1432 (3d Cir. 1997) (quoting *In re Time Warner Inc. Sec. Litig.*, 9 F.3d 259, 267 (2d Cir. 1993)).

NELF reminded the First Circuit that it has previously acknowledged as much in an FDA medical device case and that it has explained, as the rationale for this important rule, that the burden and risks to management of an unlimited, general obligation to disclose would be extreme and could easily disadvantage shareholders in numerous ways. Ongoing disclosures, NELF cautioned, could also disrupt the FDA review process and confuse the public more than inform it.

In its January 22, 2021 decision, the First Circuit, while restating and affirming the legal principle that was the subject of NELF's brief, also affirmed the verdict against Johnston.

# Individual Economic and Property Rights

*To fulfill its mission, NELF seeks to identify cases that could set precedents The right to work and the right to own and use property are essential to our economic strength. Protecting individual economic and property rights is a fundamental NELF goal.*

**In a major victory for property rights and for NELF and its supporters, the United States Supreme Court Overruled Williamson County Regional Planning Commission v. Hamilton Bank, which for three decades had created a Catch-22 in which owners had to sue in state court for "ripen" a federal takings claim, only to find the doors to federal court later barred to them.**

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

For over thirty years NELF joined with other property rights organizations in urging the Supreme Court to overrule the so-called *Williamson County* ripening requirement. In *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), the Supreme Court issued one of the most controversial rulings in the history of constitutional property rights. It ruled that a Fifth Amendment takings claim against a local government 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 property owner have exhausted state remedies and have received a final determination that just compensation would not be forthcoming, thereby "ripening" the claim for federal litigation. Typically, however, after the property owner filed a federal action, the "ripe" claim was dismissed because the state court's judgment was afforded preclusive effect under the full faith and credit statute, 28 U.S.C. § 1738. If dismissal did not befall the claim under that statute, a host of other grounds for dismissal were found, such as claims-splitting, all tracing back to *Williamson County's* ripening requirement.

This bait-and-switch ruling remained the law for over three decades. As commentators noted, under *Williamson County* the property rights secured by the Takings Clause were the only federal rights denied a federal forum in this way, even when pursued under 42 U.S.C. § 1983, which is intended as a federal bulwark against the states for the protection of Constitutional rights. Courts and commentators exhausted the resources of the English language in denouncing the requirement, calling it "ill-considered," "bewildering," "worse than mere chaos," "misleading," "deceptive," "inherently nonsensical," "shocking," "absurd,"' "unjust," "pernicious," "a weapon of mass obstruction," etc. In a stream of petitions since 1985, landowners and their amici had vainly implored the Court to reconsider. So the grant of certiorari in the present case was long awaited.

While many powerful amicus briefs were filed in support of Mrs. Knick, NELF's brief was unique in critiquing each step of the *Williamson County* Court's reasoning. NELF first criticized the Court's reliance on *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1013 (1984), for support of the view that state litigation can supply an "adequate [post-deprivation] process" for obtaining just compensation. NELF pointed out that *Monsanto* involved private negotiations and arbitration intended to determine only the extent of a taking, if any, not to award just compensation. Next, NELF highlighted the circularity of the Court's analogy under which federal litigation under the federal Tucker Act supposedly ripens takings claims for just compensation against the federal government. In fact, NELF observed, litigation under the Tucker Act cannot *ripen* a takings claim because the Act is the mandatory statutory vehicle for *resolving* such claims, which, by definition, must be ripe before they arrive in court.

The confusion between ripening a claim and resolving it runs through much of *Williamson County*. NELF stressed that the Court's fundamental error lay in believing that the state's refusal to pay just compensation culminates only when a state court denies a money damages remedy to the aggrieved owner. But just compensation is not a remedy; it is a condition placed on the government's power to take. Only when just compensation has *not* been paid does an injury arise requiring a money damages remedy. These two forms of compensation are not the same; they are mutually exclusive alternatives. Hence, the Court erred in relying on *Cherokee Nation v. Southern Kan. Ry. Co.*, 135 U.S. 641 (1890), which set out strictures for an "adequate [post-deprivation] process" for paying just compensation when there has been an admitted taking whose valuation still must be determined. Such procedures are legally distinct from the typical post-deprivation lawsuit aimed at establishing liability in the first place and then obtaining a money damages remedy. Admittedly, NELF pointed out, before *Williamson County* a line of cases had rested on the same confusion. NELF concluded that the *Williamson County* decision "was ill supported and badly reasoned," and urged the Court to abandon it.

On June 21, 2019, Supreme Court delivered a major victory for property owners, overturning *Williamson County* in its entirety. Calling its state litigation requirement a "Catch-22" that relegates the Takings Clause to the status of "a poor relation among provisions of the Bill of Rights," the Court identified some of the same faults in that case's reasoning as NELF had critiqued. The Court concluded, in words echoing NELF's own, "*Williamson County* was not just wrong. Its reasoning was exceptionally ill founded and conflicted with much of our takings jurisprudence." As the Court repeatedly now stressed, a claim for just compensation is ripe "at the time" when property is taken without just compensation.

Perhaps understandably, the Court partly played down *Williamson County's* reign of error by portraying it as an aberration from the Court's sound takings jurisprudence both before and after that decision and by noting that the unfortunate consequences that would flow from the 1985 decision were not unforeseeable at the time. Though overturning *Williamson County* and "restoring takings claims to the full-fledged constitutional status the Framers envisioned," the Court did so without addressing the confusion between just compensation and a money damages remedy, and thereby afforded the dissent an opportunity to cite a line of cases which, in the dissent's view, the majority inexcusably slighted.

Rather melodramatically, the dissent also predicted that the ruling will open the floodgates to federal courts and "will inevitably turn even well-meaning government officials into lawbreakers." However, we note that takings litigation has long regularly sought to prove that public officials have unlawfully taken, and yet officials seem undeterred, even when they encroach on property physically. *See Arkansas Game and Fish Commission v. United States*, 568 U.S. 23 (2012) (officials argue no taking in intermittently flooding forest for six years and destroying trees). Indeed, three of the dissenting justices once dismissed their present concerns as empty alarmism. *See id.* at 36. ("Time and again in Takings Clause cases, the Court has heard the prophecy that recognizing a just compensation claim would unduly impede the government's ability to act in the public interest.").

## Emphasizing the continuity of its per se takings jurisprudence, the U.S. Supreme Court agrees with NELF's view of three of its prior per se takings cases and rules that a California labor regulation effects a taking because it strips business owners of their right to exclude union organizers from their property.

*Cedar Point Nursery et al. vs. Hassid*
(U.S. Supreme Court)

This was a takings case accepted by the Court on the merits, and it arose, oddly enough, out of California labor law. However, the question accepted by the Court was one of pure takings law. The question was whether an uncompensated appropriation of an easement that is limited in time effects a per se physical taking under the Fifth Amendment.

In 1975, the California Agricultural Labor Relations Board issued a regulation giving union organizers a right to access the property of agricultural employers. The law mandates that agricultural businesses must allow labor organizers onto their property three times a day for no more than three hours per day for up to 120 days each year. The regulation provides no mechanism for compensation. But for the law, the plaintiff businesses would forbid the union any access to their property.

Two businesses sued, seeking to halt enforcement of the law on the grounds that it effects an uncompensated taking by physically seizing an easement for the benefit of union organizers. The district court dismissed the complaint for failure to state a claim.

A divided panel of the Ninth Circuit held that even if the regulation did create an easement, it would not effect a per se physical taking because it does not allow occupation "24 hours a day, 365 days a year." The court suggested that the claim would have been better formulated as a *Penn Central* regulatory taking, but made clear that such a claim would also fail. Eight judges dissented strongly from denial of rehearing en banc. The dissenters asserted that the property interest in question would be recognized under California property law an easement in gross; that the claim should be analyzed as a per se physical taking; and that the lack of occupation "24 hours a day, 365 days a year" did not negate the per se nature of the claim.

Finding that Supreme Court law has often been vague, equivocal, or even contradictory on many points involved in the analysis of the question, NELF filed an amicus brief that focused on three cases relied upon by the defendants and the Ninth Circuit. In doing so, NELF hoped to assist the plaintiffs by dispelling the confusion that has plagued interpretations of these three cases and has permitted them to be used to negate claims such as theirs.

NELF first elucidated *Portsmouth Harbor Land and Hotel Co. v. United States*, 260 U.S. 327 (1922). Carefully examining the text of the decision against the history of the underlying dispute, NELF showed that the Court focused exclusively on the physical character of the government's actions in firing coastal artillery over private property and on whether these actions could be seen to imply an intention physically to subordinate private property to the public interest, i.e., to take an easement for the government. The decision did not consider or weigh the extent of any harms suffered by the claimant, contrary to any use made of *Portsmouth Harbor* to characterize plaintiffs' claims here as misguided regulatory claims.

Similarly, NELF showed that in *United States v. Causby*, 328 U.S. 256 (1946), the Court explicitly declared it would follow the "philosophy of *Portsmouth Harbor*" and thus it considered whether direct airspace invasions made by military aircraft were an exercise of such dominion and control over the private property below that an easement of flight had been imposed physically on the property by the government. As in *Portsmouth Harbor*, it was character of the government's action as a "direct invasion" that determined the question whether there was a taking, not a weighing of the degree of value or use remaining in property after regulation.

Finally, NELF discussed *Kaiser Aetna v. United States*, 444 U.S. 164 (1979). There the Court analyzed an imposed navigational servitude that would have granted the public free access to a private marina against the will of the owners. NELF showed that the Court treated the public access as a physical invasion and as a direct appropriation of a property interest, much like the taking of an entire fee interest by eminent domain. For such an easement, the Court ruled, the government would have to pay compensation.

NELF took pains to clarify the reasoning of *Kaiser Aetna* in view of its favorable references to *Penn Central's* regulatory takings analysis. Zeroing in on the pivotal passage of the Court's reasoning, NELF pointed out that there the Court characterized the government's actions as physical invasions and contrasted them to regulatory action that involves no invasion or seizure. NELF drew particular attention to the *Kaiser Aetna* Court's own reliance on four cases involving physical seizure or invasion (including *Portsmouth Harbor* and *Causby*) and to its contrasting those cases with a solitary regulatory case. NELF concluded that despite some wording that might suggest otherwise, the Court's own contrast between one *Penn Central* case which involved "no physical invasion" and four cases involving physical invasions not unlike the one it found in the facts of *Kaiser Aetna* demonstrates that *Kaiser Aetna* was decided as a physical takings case, not as a regulatory one.

Thus, none of the three cases supports the view that the putative takings claims of the petitioners in this case arose from mere regulation of economic activity and are to be analyzed under *Penn Central*. Rather, all three cases support the petitioners in their *per se*, physical takings claims.

On June 23, 2021, the Court ruled 6 to 3 that the California labor regulation effected *per se*, physical takings of an easement in gross. The Court stressed the continuity of its decision with its past treatment of physical takings versus regulatory takings and of temporary or intermittent takings versus permanent takings. It took the same view as NELF and discussed *Plymouth Harbor*, *Causby*, and *Kaiser Aetna* as *per se*, physical takings cases. "The upshot of this line of precedent is that government-authorized invasions of property . . . are physical takings requiring just compensation," the Court ruled. "The fact that the regulation grants access only to union organizers and only for a limited time does not transform it from a physical taking into a use restriction."

## Urging the United States Supreme Court to clarify the relationship between the concepts of use and value when they are used to determine whether a regulation of property has left so little value (or use) to an owner that the regulation has effected a taking of property under the Fifth Amendment.

*Bridge Aina Le'a, LLC v. State of Hawaii Land Use Commission*
(U.S. Supreme Court)

This case raised important issues of how property is to be valued when a court analyzes whether a regulatory taking has occurred. An analysis of the value left to the owner after the regulation is imposed on private property is a key part of the quantification required by Justice Holmes' rule that a taking occurs only when the regulation goes "too far."

The land at issue consisted of 1,060 acres of largely vacant and barren lava flow on the island of Hawaii. In 1989 it was rezoned from an agricultural to an urban district on condition that the owner-developers build a certain amount of affordable housing. Bridge Aina Le'a LLC ("Bridge") acquired the property in 1999, and in 2005 it persuaded the commission to reduce affordable units to 385 out of a total of 1,550 units. In return, the commission required that occupancy certificates for all affordable units be obtained by November 2005.

After many vicissitudes and compromises, in April of 2011 the commission found that Bridge had failed to obtain the certificates and meet other conditions. Thereupon, the commission declared the 1989 urban classification of the land to be void, and the land reverted to agricultural use status, thereby precluding further housing development. Bridge appealed. In 2014, the Hawaii Supreme Court struck down the reversion because the commission had erred in finding that Bridge had not "substantially commenced" use of the property, a finding necessary to the commission's power to revert.

Meanwhile, Bridge had brought an action against the commission, alleging that the zoning reversion, while in effect, had created a temporary total taking in violation of the Fifth Amendment. It cited both the separate standards of *Lucas v. South Carolina Coastal*

Council, 505 U.S. 1003 (1992), and *Penn Central Transportation Company v. City of New York*, 438 U.S. 104 (1978). A federal jury found a taking under both standards. The Ninth Circuit reversed, finding that no taking under either. This petition followed.

NELF joined the Pacific Legal Foundation in an amicus brief in support of the land owners. The principal question briefed concerned the concepts of "use" and "value" when used to determine the residual rights an owner retains after regulation of the property. Takings analysis requires an assessment of whether "all economically viable (or beneficial) use" of the land has been taken; alternatively, the courts speak of an absence of any residual "value." Amici explained the difference between what may appear at first to be equivalent concepts and that they may lead to different results. As petitioner stated, "part of the confusion has its roots in [the Supreme] Court's opinions, in which the difference between 'use' and 'value' appears muddled." Petition at 21. *Compare Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992) (taking "where regulation denies all economically beneficial or productive use of land") *with Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005) ("the complete elimination of a property's value is the determinative factor"). The amicus brief discussed how the "muddle" has caused serious splits among both federal and state courts, a situation that NELF and PLF urged the Court to resolve by granting certiorari.

The amicus brief also argued that the Court should take the case in order to clarify another important distinction. Amici argued for making a distinction between prospectively temporary regulations and retrospectively temporary regulations. A prospectively temporary regulation is one that is at the outset intended to be temporary (thereby allowing the owner to formulate reasonable expectations of future use), while a retrospectively temporary regulation is intended to be permanent but winds up being temporary because it gets rescinded for one reason or another. The latter, amici argued, is far more unsettling to reasonable property expectations than the former and may warrant a finding of unlawful taking even when a temporary regulation of the first kind might not.

Not entirely to our surprise, the Court denied certiorari. As we surmised might be the case, this important but vexed issue is likely to get a hearing in the Court only after organizations like NELF lay siege to the Court for years, as proved necessary to get the Court to agree in *Murr* to clarify the takings concept of the "parcel of the whole" and to reconsider in *Knick* the disastrous *Williamson County* ripeness doctrine. The sooner the siege begins on behalf of the important issues raised in this Hawaii case, the better.

## 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 proceeding (which is not yet concluded) NELF, with the aid of expert testimony, challenged DEP's mapping of the "historic mean high water mark" and argued as well that DEP's regulation exceeds that agency's statutory authority and effects an unconstitutional taking of private

property. To the extent there are future proceedings, 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.

As a first stage, in the administrative proceeding, 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."

DEP responded to NELF's filing informally, and the next step was to have been a meeting with the administrative law judge to schedule an adjudicatory hearing. To date, no such scheduling meeting has been noticed. Because, pending further proceedings, the *status quo ante* exists, *i.e.,* Ms. Hall has full use of her property, it has not been in NELF's client's interest to request further proceedings, which might put her enjoyment of her property in jeopardy. At the same time, interestingly, DEP has also not requested that a scheduling meeting be held, perhaps because they recognize flaws in their overall methodology.

# Employer/Employee Relationships

*NELF is committed to maintaining a proper balance between the rights of employers and employees so that business can flourish and provide employment opportunities.*

**The United States Supreme Court agreed with NELF that the participants in an ERISA defined benefit plan do not have standing to sue under Article III of the United States Constitution when they merely allege that the plan administrators' alleged breach of their ERISA duties caused a funding shortfall in the plan, without alleging how that loss harmed their pension benefits in any way.**

*Thole v. U.S. Bank*
(United States Supreme Court)

The United States Supreme Court granted certiorari in this important case and *sua sponte* requested the parties to brief the issue "[w]hether petitioners have demonstrated *Article III standing*" when they filed suit. Focusing solely on this question, NELF filed an amicus brief in support of U.S. Bank arguing that the petitioners, retired employees of U.S. Bank who are participants in their employer's defined benefit plan, had not demonstrated the necessary "injury in fact" under Article III. They had merely alleged that the respondents breached their ERISA duties owed to the plan, causing the *plan* to suffer a financial loss, whereby its liabilities exceeded its assets for a few consecutive years. But the petitioners had failed to allege how a funding deficiency, standing alone, created the real risk of harm to their pension benefits.

Article III of the United States Constitution limits the federal courts' jurisdiction to "cases" or "controversies." And the Supreme Court has repeatedly held that this requires the plaintiff to establish an *injury*

*in fact* (along with causation and redressability of the injury through litigation). An injury in fact, in turn, requires the plaintiff to establish a concrete and *particularized* harm that is actual *or imminent*, not conjectural or hypothetical. *See, e.g., Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (in which NELF had filed an apparently influential amicus brief). At minimum, then, the plaintiff must demonstrate the imminent risk of harm to her own personal interest. Petitioners are retired employees of the respondent, U.S. Bank, one of the nation's largest banks. Petitioners are also vested participants in their employer's "defined benefit pension plan," which is heavily regulated under ERISA, precisely to minimize (if not *eliminate*) the risk of any financial loss to plan participants. Under ERISA's comprehensive statutory scheme, the plan participant in a defined benefit plan (unlike the now more common defined contribution/individual account plan, such asa 401(k)), the plan participant has no claim to any of the plan's assets. Instead, the participant only has a personal stake in receiving her fixed periodic payments guaranteed under the plan. This reflects the fact that ERISA requires the employer to bear the entire risk of maintaining adequate funding in the plan at all times. Accordingly, ERISA imposes stringent and detailed *minimum funding requirements* on the employer to restore any loss to the plan whenever there is a funding deficiency, i.e., whenever the present value of the plan's assets is less than the present value of all benefits that have vested or accrued at the beginning of each plan year (i.e., 100% actuarial funding)., Moreover, if an employer does not or *cannot* fulfill its minimum funding requirements when the plan suffers a deficiency, and the plan must be terminated, Congress has created the elaborate safety net of the FDIC-like *Pension Benefit Guaranty Corporation* (PBGC), to assume all payment obligations under the plan, up to a certain monthly amount (According to the respondents, the petitioners in this case would have been covered 100% by the PBGC if that had ever been necessary.) In short, ERISA does all that it can do to *eliminate* the risk of any actual or imminent harm to plan participants by ensuring their uninterrupted receipt of pension benefits, *even* under dire financial circumstances (which were not alleged here).

This case revolved around the stock market crash of 2008, and how that event, combined with the plan administrators' alleged breach of various ERISA duties, substantially reduced the value of the plan's assets for a few consecutive years and caused a funding shortfall for a few consecutive years (apparently this was the common fate of nearly 80% of all such plans at the time, according to U.S. Bank). Petitioners sued their employer in federal court for the District of Minnesota, alleging that, in so breaching their ERISA duties, the plan administrators increased the risk of plan default.

U.S. Bank moved to dismiss under Fed. R. Civ. P. 12(b)(1) for lack of Article III standing/subject matter jurisdiction, and the federal district court *denied* the motion. The court concluded that the petitioners alleged a sufficient risk of harm to satisfy Article III when they alleged that the plan administrators' breach of their ERISA duties caused a substantial loss to the plan's assets. While the court acknowledged U.S. Bank's countervailing arguments--primarily that it was in *full compliance* with ERISA's minimum funding requirements, and that it had more than sufficient liquid assets to cover any loss to the plan's assets--the court nonetheless allowed the petitioners to proceed with their case.

However, months after the complaint was filed, the value of the plan's assets increased and the plan enjoyed a funding surplus, whereby the plan's assets exceeded its liabilities. Accordingly, U.S. Bank moved to dismiss again, this time on Article III mootness grounds.  This time the district court allowed the motion. The Eighth Circuit affirmed, but on statutory grounds, not constitutional grounds. That is, the  court concluded that the petitioners were no longer within the area of concern of ERISA's civil remedies provisions, because the plan surplus eliminated any risk of harm, and because the employer alone enjoyed the benefit of the plan's surplus value. Petitioners then sought certiorari solely on this more recent mootness stage of the case. However, as noted above, the Court granted cert. and asked the *additional* question whether the petitioners had ever demonstrated Article III standing from the beginning of the case, when they first filed suit.

In its amicus brief, NELF argued that the petitioners had not alleged an injury in fact because they failed to allege how the respondents' alleged misconduct caused any imminent risk of harm to their pension benefits. Instead, the petitioners merely alleged that the respondents caused a funding deficiency in the plan. And ERISA is a comprehensive statutory scheme that virtually *eliminates* the risk of any financial loss to the participants in a plan with a funding shortfall. As the Court itself has explained:

> Misconduct by the administrators of a defined benefit plan will not affect an individual's entitlement to a defined benefit unless it creates or enhances the risk of default by the entire plan. It was that default risk that prompted Congress to require defined benefit plans (but not defined contribution

plans) to satisfy complex minimum funding requirements, and to make premium payments to the Pension Benefit Guaranty Corporation for plan termination insurance.

*LaRue v. DeWolff, Boberg & Associates, Inc.*, 552 U.S. 248, 255 (2008).

That is, a funding deficiency is an unremarkable and fully *anticipated* occurrence under ERISA, which responds with *exhaustive* remedial measures to prevent any financial loss to plan participants. It is these very remedial measures that negate any showing that there is a "substantial risk" of financial harm to plan participants, or that such harm is "certainly impending." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) ("An allegation of *future injury* may suffice if the threatened injury is certainly impending, or there is a substantial risk that the harm will occur.") (citation and internal quotation marks omitted). First and foremost, ERISA requires employers to restore any financial loss to the plan, in order to establish at least 100% funding. (The petitioners do not allege that the respondents had failed in any way to fulfill their ERISA funding obligations once the plan suffered a shortfall. Indeed, the subsequent history of this case indicates that the respondents had complied with their ERISA dutier and had succeeded in restoring a *surplus* to the plan's funds). Second, ERISA further reduces the risk of harm to plan participants by providing for "termination insurance" via the PBGC, which is empowered to take over a financially troubled plan and pay participants their benefits, in the event that the employer fails to fulfill its funding obligations (again, *not* alleged here). In sum, Congress has done all that it could do in ERISA to eliminate the risk of harm to plan participants when there is a funding deficiency. Therefore, a bare allegation of a funding shortfall cannot establish an injury in fact.

Notably, Congress itself does *not* consider a plan to be "at risk" or "underfunded" unless the plan's liabilities exceed its assets by more than 20%. 29 U.S.C. § 1083(f)(3)(C)(ii) (plan becomes "underfunded" when liabilities exceed assets by more than 20%), (i)(4)(A)(i) ("A plan is in at-risk status for a plan year if . . . the funding target attainment percentage for the preceding plan year . . . is less than 80 percent"). Nowhere do the petitioners allege that the plan's funding level ever fell below 80%. Therefore, in Congress's *own* judgment, the plan's funding shortfall did not put the petitioners at any cognizable risk of losing their pension benefits. *See Spokeo*, 136 S. Ct. at 1549 ("In determining whether an intangible harm constitutes injury in fact," federal courts should consult "the judgment of Congress.").

In short, a mere funding deficiency in an ERISA plan, standing alone, cannot establish an Article III injury in fact, let alone the "significant risk of plan default" that the petitioners allege. Both ERISA and the employer here have responded thoroughly to this accounting shortfall and have staved off any risk of default, rendering such an occurrence a remote and unlikely possibility. Indeed, a plan participant would need to allege *additional* facts to show that she faced the imminent risk of losing her plan benefits. In fact, such a risk of harm could only arise *if* the employer either refused or was unable to meet its ERISA funding obligations, *if* the plan then faced the likelihood of a "distress" termination (29 U.S.C. § 1341(c)), and *if* the PBGC, in assuming management of the plan, could not cover the full amount of the participants' pension payments. Nowhere did the petitioners in this case allege *any* one of these additional facts. And even if they had, such a "theory" of standing would remain an incurably "speculative chain of possibilities . . . . [It] does not satisfy the requirement that threatened injury must be *certainly impending*." *Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 410 (2013) (emphasis added) (discussing *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009)).

NELF also argued that the petitioners have misinterpreted *Spokeo* to justify their heavy reliance on the common law of trusts, and its long recognition of representational standing on the part of a trust beneficiary to sue on behalf of an injured trust, even without showing any personal loss. *See Spokeo*, 136 S. Ct. at 1549 (courts may consider traditional Anglo-American common law when deciding whether a violation of a statutory duty, by itself, may establish a "concrete intangible harm"). Contrary to the petitioners' reading of *Spokeo*, nothing in that case relaxes or weakens in any way Article III's "particularization" requirement--a showing of an actual or imminent *personal* loss to the plaintiff. Indeed, *Spokeo* emphasizes that "[f]or an injury to be 'particularized,' it *must* affect the plaintiff in a personal and individual way." *Spokeo*, 136 S. Ct. at 1548 (emphasis added) (citation and internal quotation marks omitted). Instead, the issue in *Spokeo* was Article III's "concreteness" requirement, which is not at issue here.

In that connection, it is of little consequence that Congress has permitted plan participants to sue on behalf of the entire plan whenever they allege that the plan's trustees have breached their ERISA duties owed to the plan. This is because Article III demands that a federal court engage in an independent inquiry to determine whether a statutory claim causes the plaintiff to suffer an actual or imminent personal harm. "Injury in fact is a constitutional requirement, and it

is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Spokeo*, 136 S. Ct. at 1547-48 (citation and internal punctuation marks omitted).

Finally NELF argued that, even though a plan participant may not have Article III standing to sue under ERISA on behalf of the plan, that should not prevent the Secretary of Labor from doing so. *See* 29 U.S.C. § 1132(a)(2) ("A civil action may be brought . . . by *the Secretary*, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title [29 U.S.C. § 1109].") (emphasis added). Moreover, an Article III injury is *presumed* whenever the United States brings suit to "take Care that the Laws be faithfully executed." U.S. Const., Art. II, § 3. *See also Vermont Agency of Nat'l Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 771 (2000) ("It is beyond doubt that" federal government suffers "injury to its sovereignty arising from violation of its laws . . . ."). Indeed, any other judicial interpretation of Article III would obstruct the federal government's exercise of its Article II duty to ensure compliance with federal law. *See Clinton v. Jones*, 520 U.S. 681, 701 (1997) ('[T]he separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties."' (citation and internal quotation marks omitted). *See also Buckley v. Valeo*, 424 U.S. 1, 138 (1976) ("A lawsuit is the ultimate remedy for a breach of the law, and it is to the [Executive Branch] . . . that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed.' Art. II, § 3.'"). In short, public enforcement of ERISA duties is always an option if a private party cannot establish Article III standing.

On June 1, 2020, the Supreme Court agreed with NELF, 5-4, that the plaintiffs in this case lacked Article III standing. Writing for the majority, Justice Kavanaugh concluded that the plaintiffs simply have no stake in the outcome of this case because they have received all of their pension payments to date, and they have a lifelong *contractual* right to continue receiving those fixed payments, regardless of the performance of the plan assets, over which they have no ownership interest. As NELF had stated in its brief, the Court emphasized that the employer must make up for any plan shortfall and enjoys the benefit of any plan surplus. While the plaintiffs had focused primarily on *the risk of plan default* when they first litigated the issue of Article III standing in the District Court, Justice Kavanaugh observed that the plaintiffs were not pressing that theory of standing before the Supreme Court. Therefore, in his view, the plaintiffs' lack of standing was cut and dried. However, because the plaintiffs' amici *did* brief that theory of standing extensively (as did NELF), the Court nonetheless addressed and rejected it for the same reasons that NELF had briefed, including the statutory safety net of the PBGC in the (here unalleged) event that the employer were to fail in fulfilling its funding obligations. As the Court observed, in language substantially similar to that contained in NELF's brief, "a bare allegation of plan underfunding does not itself demonstrate a substantially increased risk that the plan and the employer would both fail."

## The Supreme Court disagreed with NELF's argument that the Federal Arbitration Act'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 only to employees, and not to 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.

In its January 15, 2019 decision, the Supreme 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 Massachusetts Supreme Judicial Court agrees with NELF that corporate officers may not be held personally liable under the Massachusetts Wage Act for a violation of an entirely different statute, the Massachusetts Prevailing Wage Act

*Donis v. American Waste Services, LLC*
(Massachusetts Supreme Judicial Court)

This case was before the Massachusetts Supreme Judicial Court (SJC) on further appellate review, and the Court requested amicus briefing on the following important issue of personal liability under Massachusetts wage laws. When an employee sues his employer under § 27F of the Massachusetts Prevailing Wage Act, G. L. c. 149, § 27F, a detailed statute that regulates the wages of employees performing under certain public works contracts, can that employee also sue the employer's "president and treasurer . . . and any officers or agents having the management of such corporation," as provided under the general Massachusetts Wage Act, G. L. c. 149, § 148? Section 27F contains its own liability and private remedies provisions, which do not impose any such personal liability on corporate officers.

Nonetheless, both the Superior Court and the Appeals Court in this case held that the plaintiffs, ten former employees of American Waste Services, LLC (AWS), a company that contracts with cities and towns, under § 27F, for trash and recycling services, could sue both AWS and AWS's officers, under the Wage Act. As a result, the Appeals Court affirmed a final judgment of mandatory treble damages ($357,108, representing three times actual damages of $119,036) against defendants Christopher Carney and Michael Galvin, who were the co-owners and, respectively, AWS's president and vice president.

Moreover, the facts of this case are particularly troubling, because AWS violated the Prevailing Wage Act through no fault of its own. Instead, it is undisputed that certain town officials who awarded the contracts to AWS failed to fulfill their statutory obligation, under § 27F, to obtain from the Commonwealth's Division of Labor Standards a current prevailing wage rate schedule to attach to each contract when it was renewed or extended. As a result, AWS was unknowingly paying less than the prevailing wage on some of its renewed or extended contracts. Nevertheless, § 27F imposes liability on "whoever pays less than said rates of wages," and the Appeals Court interpreted this language to establish strict liability.

NELF filed an amicus brief in support of the defendants, arguing that § 27F of the Prevailing Wage Act should be deemed the *exclusive remedy* for employees who perform under those public works contracts that are regulated by that statute. Under § 27F, "[a]n elaborate and comprehensive statutory system has been established fully and completely dealing with the subject matter [of certain public works contracts]. It was intended to be an exclusive remedy. The legislative intent cannot be thwarted [by allowing an employee to bypass that statute and sue under the Wage Act]." *Huff v. City of Holyoke*, 386 Mass. 582, 585 (1982) (citation and internal quotation marks omitted) (discussing G.L. c. 84, § 15, which provides exclusive remedy for claim of personal injury or property damage against governmental entities responsible for defects in a way).

Indeed, § 27F is a comprehensive and *self-contained* statute, with its own detailed liability and remedies provisions. Moreover, the statute focuses narrowly on the prevailing wages and other contractual requirements pertaining to certain non-construction public works contracts. By contrast, the Wage Act is a general, catch-all statute ensuring the timely payment of wages earned, affording a statutory remedy to the employee who has no other specific statutory remedy available. See *Crocker v. Townsend Oil Co.*, 464 Mass. 1 (2012) (employees who proved misclassification as independent contractors but whose claims for nonpayment of premium overtime, under G. L. c. 151,§ 1A, were time-barred could nonetheless pursue timely Wage Act claims to recover unpaid overtime hours worked, but at regular rate of pay). Therefore, the employees' claims in this case should be governed by the liability provision of the Prevailing Wage Act, not the broader liability provision of the Wage Act. *See Monell v. Bos. Pads, LLC*, 471 Mass. 566, 577 (2015) (applying "the familiar canon of construction providing that a specific statute . . . controls over the provisions of a general statute," and holding that real estate licensing statute, not general independent contractor statute, determined proper classification of real estate agents as independent contractors, even though real estate statute required real estate brokers to *supervise and control* agents' work, and such

control would have rendered agents employees under general independent contractor statute).

In addition, the Legislature's omission of any personal liability provision in § 27F should be deemed a deliberate policy choice that must be honored, especially because the Legislature did include a personal liability provision in the general Wage Act *and* in a neighboring, related section of the Prevailing Wage Act that regulates construction contracts. G. L. c. 149, § 27 ("The president and treasurer of a corporation and any officers or agents having the management of such corporation shall also be deemed to be employers of the employees of any corporation within the meaning of sections 26 to 27B, inclusive."). Accordingly, "[t]he omission of particular language from a statute is deemed deliberate where the Legislature included [the] omitted language in related or similar statutes." *Commonwealth v. Johnson*, 482 Mass. 830, 835 (2019) (citation and internal quotation marks omitted). Since the omission of a personal liability provision in § 27F was clearly intentional, only the Legislature could change this. "If the Legislature intentionally omits language from a statute, no court can supply it." *Doe v. Superintendent of Sch. of Worcester,* 421 Mass. 117, 128 (1995). If allowed to stand, however, the lower courts' decisions would contravene this core principle of statutory construction by allowing an employee who falls under § 27F, and is therefore limited to suing his employer, to bypass § 27F and sue the employer's officers under the Wage Act. As a result, the Prevailing Wage Act's detailed liability and remedies sections would be rendered virtually meaningless. This result would violate "[the] common tenet of statutory construction, that, wherever possible, no provision of a legislative enactment should be treated as superfluous." *Monell*, 471 Mass. at 576.

Finally, NELF argued that the Appeals Court misinterpreted the SJC's decision in *Crocker v. Townsend Oil*, quoted above, to support its holding that an employee suing his employer under the Prevailing Wage Act can also sue his employer's officers for personal liability under the Wage Act. *Crocker* does not support that holding and actually defeats it. In that case, the SJC actually held that an employee could *not* evade the restrictions of a specific wage law by attempting to recover the specialized wages available under that statute as if they were regular "wages earned" under the Wage Act. In particular, the plaintiffs in *Crocker* argued that they had been misclassified as independent contractors and that they were therefore entitled to recover for the nonpayment of overtime hours worked as employees, at the premium statutory rate of time-and-a-half, under G. L. c. 151, § 1A. However, the two-year statute of limitations had already run for any overtime claims, under G. L. c. 151, § 20a. Accordingly, the plaintiffs attempted to avoid that limitations period by suing under the Wage Act, which has a three-year limitations period, and by arguing that their claims for time-and-a-half overtime were really just claims for the nonpayment of regular "wages earned" that were recoverable under the Wage Act.

The Court in *Crocker* rejected the plaintiffs' argument outright and embraced the employer's argument that "[a]llowing the plaintiffs to assert claims for unpaid overtime under the Wage Act has the practical effect of obviating the Legislature's determination that a shorter limitations period should apply for unpaid overtime claims under G.L. c. 151, § 1A.". As a result, the Court held that the plaintiffs could only recover "for unpaid overtime work at the regular rate under the Wage Act," not at the premium rate under the overtime statute. In so holding, the Court in *Crocker* made it clear that an employee who seeks to recover specialized wages available under a specific wage statute cannot avoid the restrictions of that statute by seeking to recover those specialized wages as if they were regular "wages earned" under the Wage Act.

In its decision issued on July 21, 2020, the Massachusetts court agreed with NELF, holding that, as NELF had argued, the plaintiffs may not recover under the Wage Act, and benefit from its extraordinary remedies, for a violation of the separate Prevailing Wage Law.

NELF submitted an amicus brief in support of the employer, urging the SJC to reject the plaintiff's argument and affirm—as the Court already had done by implication in at least one decision—that Rule 23's requirements must apply to a motion for class certification under the Wage Act.

In a unanimous decision issued on April 12, 2019, the SJC agreed with NELF and held that Rule 23 governs class actions brought under the Massachusetts Wage Act. As NELF had argued, the Court held that, far from announcing a different standard for class certification, the statute's "similarly situated" language merely clarified that, for the first time in the Wage Act's history, employees had the private right to pursue both individual *and* class claims under that statute. (Indeed, as NELF also had pointed out in its brief, and as the Court had noted in prior decisions, the Wage Act was an exclusively *criminal* statute until the 1993 amendment.)

## The Massachusetts Court agrees with NELF 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 independently 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)

This case raised the important question wThis case raised the important question whether the Massachusetts Wage Act, which provides that an employee may sue "on his own behalf, or for himself and for others similarly situated," M. G. L. c. 149, § 150, permitted employees to pursue a class action without satisfying the class action requirements of Rule 23 of the Massachusetts Rules of Civil Procedure. Rule 23governs all class actions in the Massachusetts courts, unless the Legislature expressly provides otherwise. In this connection, the plaintiff here argued that the Wage Act's "similarly situated" language indicated such a legislative intent, because the Legislature added that language to the Wage Act in 1993 when it created a private remedy, even though Mass. R. Civ. P. 23 (adopted in 1973) already existed.

As NELF had also argued, the Court explained that, when the Legislature has intended to depart from the general court rules governing civil actions, it has done so expressly, and in some detail. Notably, when G. L. c. 93A, § 9, was amended in 1969 to provide a private remedy for both individual and class claims, the Legislature provided, in a separate paragraph, the specific class certification requirements for a consumer wishing to pursue a c. 93A claim on behalf of "numerous other persons *similarly situated*." Those requirements, drafted before Massachusetts had adopted the rules of civil procedure, incorporated Fed. R. Civ. P. 23(a), but *not* Fed. R. Civ. P. 23(b)(3) (predominance and superiority). No such detailed and selective language occurs in the Wage Act.

Finally, the Court agreed with NELF that "it is clear from our previous application of rule 23 to class actions brought under the wage laws in *Salvas v. Wal-Mart Stores, Inc.*, 452 Mass. 337, 371-372 (2008), that rule 23 has the necessary structure and adaptability to advance the very legitimate policy rationales underlying the Legislature's decision to provide for class proceedings under the Wage Act." Indeed, the Court and NELF quoted the same language from *Salvas* praising the efficacy of Rule 23 for Wage Act claims: "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." *Salvas*, 452 Mass. at 371.

Ironically, after agreeing with NELF that Rule 23 applies to the Wage Act, the Court concluded that the plaintiff *had* satisfied Rule 23's requirements for class certification, contrary to the lower court's ruling. Therefore, the Court reversed the lower court's denial of class certification. Nonetheless, the decision is a victory for employers because the Court rejected the plaintiff's effort to provide an essentially "free form" class action procedure under the Wage Act.

## Declining to rule on the proper standard of causation, the Massachusetts Court, while acknowledging NELF's brief on the issue, holds that the "but-for" standard of causation was satisfied in this case of alleged retaliation brought under the federal Family and Medical Leave Act and so there was no prejudice to the defendant.

*DaPrato v. Massachusetts Water Resource Authority*
(Massachusetts Supreme Judicial Court)

This case raised an issue of first impression in Massachusetts in an important area of federal employment law. The question was whether a plaintiff who alleges that his employer fired him for his having taken medical leave under the federal Family and Medical Leave Act (FMLA) may prove his claim by showing that the leave counted as a merely negative factor against him or must he show that leave was a but-for cause of the retaliation.

Confusion about causation has arisen because the Department of Labor's implementing regulation states that "employers cannot use the taking of FMLA leave as a *negative factor* in employment actions." 29 C.F.R. § 825.220(c) (emphasis added). This means that a retaliation claim may be proved if leave acted even to the slightest degree as a *negative* factor in motivating the employer's action. On the other hand, the U.S. Supreme Court's decision in *University of Texas Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517 (2013), held that by default but-for causation must be used for federal tort-like antidiscrimination claims, whenever another standard is not indicated in the statute. Courts have generally deferred to DOL's view on the grounds that the FMLA is "ambiguous" and so courts give *Chevron* deference to DOL's resolution of the supposed "ambiguity."

In 2014 Richard DaPrato informed the Massachusetts Water Resource Authority, for which he worked, that he would require a series of leg surgeries and wanted leave under the FMLA. He was granted leave for the first surgery, but there followed a complicated series of events involving, according to whom you choose to believe, either honest misunderstandings or unfair treatment of DaPrato. Events culminated in DaPrato's being fired "because of," as the MWRA said at the time, DaPrato's alleged dishonesty about his entitlement to pay and his fitness for work. In December of 2015, DaPrato sued under the FMLA, alleging that he was fired in retaliation for taking leave. A jury found for DaPrato, and a judgment of about $2 million entered. On appeal, the MWRA argued, in part, that the judge's instructions to the jury, which were arguably at least somewhat confusing, improperly permitted the jurors to find for DaPrato even if FMLA leave was not a but-for cause of his being fired, but merely a negative factor motivating the decision.

NELF filed a brief arguing that but-for causation must be proved. NELF noted that courts go stray by failing to evaluate *Nassar* in the same terms in which it is written. The key passages of *Nassar* analyze the causation of federal statutes that sound in tort, including workplace anti-discrimination laws, in terms of background common law principles, interpretive presumptions, default rules, and what would be sufficient to overcome them. Specifically, *Nassar* holds that Congress legislates against the background of common law tort, whose implied, default standard is but-for causation; hence, in order to be applicable, but-for causation need not be spelled in words like "because" or "because of." Rather, the *Nassar* court ruled that it is departures from the implied, default rule that must be written into statutes, i.e., the common law background principle applies, "absent an indication to the contrary in the statute itself."

Understood in these terms, *Nassar* established the crucial point that *silence in a statute does not create an ambiguity when there exists a default presumption of but-for causation*. As NELF documented, the Supreme Court has long required that a departure from background common law principles must be stated in clear and unambiguous language in a statute before it will be recognized by courts. Equally, the Court has held elsewhere that a statutory silence that is filled with a unexpressed default rule or a background common law principle cannot support a reading that departs from "ordinary" principles and cannot be construed as creating an ambiguity. Hence, such "silence" cannot justify a court's giving *Chevron* deference to an agency's interpretation that is aimed at clarifying the supposed ambiguity of the statute.

NELF then traced the history of DOL's regulation back to two sections of an FMLA statute, and demonstrated that one section is

silent on causation, while the other contains a casual term ("for") that means but-for causation. Recalling again that *Nassar* teaches that the silence is filled with a presumption of but-for causation, NELF concluded that in the first section there exists no ambiguity justifying *Chevron* deference to DOL; and that in the second section "for" is the identical word found in the phrase "but-for causation" and betokens that meaning by dictionary definition; and finally that the absence of clear language "to the contrary" also requires the background principles of but-for causation to apply. Moreover, the only rationale that the DOL has ever offered for its choice of negative factor causation is that FMLA retaliation causation should track the causation of Title VII retaliation claims, which was assumed at that time to be negative factor causation. In its brief NELF pointed out that since that rationale was offered by DOL in 1993, the *Nassar* Court decided that Title VII retaliation claims require but-for causation. In short, every properly informed analysis arrives at the same conclusion.

Finally, NELF examined briefs filed by the DOL in two post-*Nassar* cases in which it appeared as amicus in order to defend its choice of causation. NELF critiqued the DOL's reasoning for failing to understand the principles of *Nassar* and for straining to rationalize its mistaken choice *ex post facto*.

On June 5, 2019, the SJC issued its decision. It ruled that the judge's instructions, considered as a whole, sufficiently set out a but-for standard. The Court, although expressly acknowledging NELF's "extensive analysis contending for 'but-for' causation," declined to rule that but-for was the correct standard of causation, noting only that the MWRA received the benefit of the higher standard and yet lost anyway and so the MWRA was not prejudiced.

**The Massachusetts Court disagreed with NELF's argument that. when an employer has breached the employment contract of a research professional by withdrawing its promised support of the research laboratory that the employee had established with federal grant money, resulting in the loss of the lab, the employee is not entitled to damages for the cost of replacing the lost lab, but is instead limited to damages for her expected use of the lost lab.**

*Lynn Hlatky, Ph.D. v. Steward Health Care System, LLC*
(Massachusetts Judicial Supreme Court)

This case was before the Massachusetts Supreme Judicial Court (SJC) on direct appellate review, and the Court requested amicus briefing on an important damages question under Massachusetts contract law: what is the proper measure of damages when an employer has breached the employment contract of a research professional, by withdrawing its promised support of the laboratory that she had established (with no money or property of her own) to conduct her scientific research, resulting in the loss of the lab? Is such an employee entitled to a multi-million-dollar damages award equal to the replacement cost of the lost lab, as the trial court concluded here? Or is the employee limited instead to compensation for her *expected use* of the lost lab to conduct her research, including any demonstrable economic harm to her professional career, such as the loss of identifiable future earnings. In its decision of April 29, 2020, the SJC unanimously held that such an employee is entitled to a damages award in an amount sufficient to recreate the lost lab, which, the Court opined, represented the life work of the plaintiff, Dr. Lynn Hlatky, a radiobiologist.

Dr. Hlatky had established a laboratory to conduct her cancer research when she was employed at Harvard University, several years prior to her employment with the defendant, Steward Health Care System LLC. Hlatky conceded that she had no ownership interest in the lab, which she had established with federal grant money and with institutional support from her prior employers. Consistent with the accepted industry practice, Hlatky had brought the lab's equipment, staff, and grant money with her when she became an

employee of Steward. Hlatky entered into a written three-year employment contract with Steward (renewable by mutual agreement), in which Steward promised to " continue to provide support and suitable office space" for the lab. The contract also stated that it was Steward's "vision" that under Hlatky's leadership, the Center would "evolve into an internationally competitive program." However, Steward soon withdrew its support, reallocating funding to clinical trial research. As a result, the lab became mismanaged and was ultimately dissolved in a federal bankruptcy proceeding. Hlatky was no longer able to pursue her research, and she lost all of the cell samples that her lab had developed. Steward did not renew her employment contract.

Hlatky sued Steward for breach of contract and sought damages for the cost of replacing the lost lab. The jury found for Hlatky and awarded her nearly $23,000,000, representing the cost of reconstituting the lab and running it for six more years--the length of time that Hlatky had expected to continue her research before retiring. On remittitur, the trial court reduced the award to $10.2 million (based on Hlatky's testimony of the cost of reestablishing the lab, and her proven out-of-pocket mitigation costs) and excluded the future costs of running the lab.

Steward appealed the damages award--but not the finding of liability--arguing that Hlatky was only entitled to damages for her personal financial losses (such as her $200,000 mitigation costs), but not for the lost lab itself. Accordingly, Steward asked the SJC to vacate the $10 million damages award and either (1) reduce the award to Hlatky's $200,000 out-of-pocket mitigation expenses or (2) remand the case to the trial court to determine whether Hlatky had submitted sufficient evidence of her future lost earnings.

In its amicus brief in support of Steward, NELF argued that Hlatky was only entitled to recover for her *expected use* of the lost lab, not for the lost lab itself. NELF pointed out that it is black letter contract law that Hlatky should only recover "the value of the *bargained-for benefit* of which [she] ha[d] been deprived." *Salvas v. Wal-Mart Stores, Inc.*, 452 Mass. 337, 374 (2008) (emphasis added). Hlatky bargained for Steward's support of the lab, so that she could continue with her cancer research there. That alone was her compensable expectation interest under the agreement. She did not bargain for ownership of the lab. She only bargained for her uninterrupted *access* to the lab. Accordingly, NELF argued, Hlatky should only recover for that lost access to the lab. NELF acknowledged that the trial court might have been correct when it stated that Hlatky "had an expectation interest in the continuation of the research program that she created." But, NELF argued, this only meant that, since her lab research was the mainstay of her career, Hlatky's damages could entail any demonstrable and foreseeable economic harm to her career, such as the lost growth in her earning capacity, or the loss of identifiable future earnings. In other words, NELF argued, the trial court had erred when it concluded that Hlatky's expectation interest in the continuation of the lab warranted damages for the cost of replacing the lab itself, as if Hlatky's creation of the lab were tantamount to outright ownership of the lab.

In its decision, the SJC recognized that it was difficult to apply traditional contract principles to this unique set of facts. Nonetheless, the Court concluded that, under those traditional principles, Hlatky had a compensable expectation interest that Steward would properly support the lab throughout her term of employment and that, at the end of her employment with Steward, she would still have a fully functioning lab and cell samples to take with her to her next place of employment. The Court also concluded that, while Hlatky did not own the lab, she "personally suffered harm from the foreseeable destruction of her life's work." As the Court explained:

If Steward had fulfilled its obligation to provide support to the Center, Hlatky reasonably would have expected, at minimum, to have at the end of the three-year contract access to a functioning, turnkey laboratory with the capacity to continue the cancer research that had become her life's work. Because of Steward's breach, Hlatky lost her laboratory, equipment and, most importantly, the cell samples--the culmination of twenty-five years of work.

Accordingly, the Court unanimously affirmed the $10 million damages award, which represented Hlatky's estimate for the cost of reconstituting the lab.

However, the Court's opinion did not stop there. In an unanticipated twist, the Court was evenly divided (among the six members of the Court who participated in the decision) on the unprecedented issue of whether it should impose conditions on the damages award, to ensure that Hlatky use the $10 million for its intended purpose--the recreation of the lab--and not for an unrelated purpose, such as personal use. Justice Gants, joined by two other Justices, opined that the Court should impose such conditions, to avoid unjustly enriching Hlatky, while Justice Lenk, joined by the two remaining Justices, disagreed and opined that damages should be awarded

with no strings attached, as per usual. Since the Court was equally divided on the question, the Court affirmed the Superior Court's unconditional damage award. In NELF's view, the Justices' dispute on this issue underscores the doctrinal tension inherent in awarding (substantial) contract damages for the cost of replacing something that was never the plaintiff's personal property to lose. Only time will tell what precedential power the Court's opinion will have. As Justice Lenk aptly observed, "[t]hat similar situations could well arise again in our research-rich environment is hardly unthinkable," in light of the Commonwealth's numerous teaching hospitals, acute care hospitals and educational institutions.

## Arguing that, when employees sue their employer under the Massachusetts Wage Act, they cannot also sue an affiliated corporate entity and its management, unless they can prove sufficient facts to warrant piercing the corporate veil that separates that entity and its management from their employer.

*Cerulo and another v. Herbert G. Chambers, et al.*
(Massachusetts Judicial Supreme Court)

The Massachusetts Supreme Judicial Court (SJC) took this case for direct appellate review and requested amicus briefing on an important issue of corporate (and ensuing individual) liability under the Massachusetts Wage Act, G. L. c. 149, § 148. When an employee brings a Wage Act claim against his employer--i.e., the entity that pays him for his services--under what circumstances, if any, can the employee also sue an affiliated corporate entity and its managing officers for the same alleged violation? As the Superior Court in this case aptly put it, the issue is "whether and when an officer of Company A must answer to a Wage Act claim lodged by a person who gets his paycheck from Company B, an affiliate of Company A." Stated more precisely, the question here is, *how much* direction and control can one entity and its management exercise over another entity before they become a co-employer of the other entity's employees under the Wage Act?

In a potentially dangerous argument, the plaintiffs argue that the determination of co-employer status should be based on Massachusetts' independent contractor statute, which defines employment status (employee versus independent contractor) based on how much control is exercised by the employing entity. NELF's amicus brief in support of the defendants is aimed at driving home the arguments that (a) the Wage Act presumes that the "employer" is the person or entity that has hired a worker and has paid him for his work; (b) the only way that a plaintiff can seek to impose Wage Act liability on another corporate entity is by piercing the corporate veil separating his employer from that other entity; and (c).the independent contractor statute is irrelevant to this issue because it serves the unrelated purpose of characterizing the relationship between a worker and the entity that has hired him, as opposed to characterizing the relationship between that entity and another corporate entity.; and

The plaintiffs are Cooper Cerulo and Jordan Tetrault, who were each employed as a car salesperson by a Herb Chambers auto dealership located in Massachusetts. Cerulo and Tetrault filed a putative class action complaint against the dealerships, alleging that they failed to pay their employees overtime pay and Sunday premium pay, in violation of Massachusetts wage laws. But the plaintiffs also sued Jennings Road Management Corp. (JRM), a Connecticut corporation registered to do business in Massachusetts as "The Herb Chambers Companies," and JRM's top-ranking executives. The plaintiffs argue that those parties were their co-employer under the Wage Act because they allegedly directed and controlled the Massachusetts dealerships' business operations, including the terms and conditions of the plaintiffs' employment with those dealerships. (The plaintiffs do not specify the corporate relationship between JRM and the dealerships, other than alleging vaguely that the Massachusetts dealerships were "subcorporations" of JRM.)

JRM and its named executives filed a motion to dismiss, arguing that the dealerships were the plaintiffs' sole employer under the Wage Act. The defendants also argued that the plaintiffs' allegations of direction and control were insufficient to pierce the corporate veil that separated the defendants from those dealerships. The plaintiffs argued in opposition that they did not need to satisfy the veil-piercing test. Instead, they argued that the so-called "independent contractor" statute, G. L. c. 149, § 148B(a), should determine whether the defendants had established an employer-employee relationship with the plaintiffs. And under that

statutory provision, argued the plaintiffs, the defendants had allegedly exercised sufficient direction and control to constitute their employer.

The Superior Court agreed with the defendants and dismissed them from the case. The court also concluded that the independent contractor statute was irrelevant to resolving the *inter-corporate* issue that the plaintiffs had raised. As the court observed: "[T]he issue [addressed by the independent contractor statute] is whether a person is an employee or an independent contractor . . . . Whether and when the term 'employer' should extend to corporate affiliates, however, is not addressed in [that statutory provision]."

NELF argues in its amicus brief, submitted in support of the defendants, that the "employer" under the Wage Act is the person or entity that hires a worker and pays him for his work. Moreover, an employee cannot sue a corporate entity and its management who are allegedly affiliated with his employer unless he can *pierce the corporate veil* that separates those third parties from his employer. The SJC has held the Wage Act should be interpreted "to avoid doing violence to bedrock principles of corporate law." *Segal v. Genitrix, LLC*, 478 Mass. 551, 563 (2017) (internal quotations omitted). One such principle is "that corporations--*notwithstanding relationships between or among them*--ordinarily are regarded as *separate and distinct entities*." *Scott v NG U.S. 1, Inc.*, 450 Mass. 760, 766 (2016) (emphasis added). Accordingly, the SJC has held that a plaintiff suing more than one entity under the Wage Act cannot "characteriz[e] the defendants as a singular employer" without first piercing the corporate veil. *Sebago v. Boston Cab Dispatch, Inc.*, 471 Mass. 321, 328 (2015).

But the plaintiffs' mere allegations of pervasive control in this case fall far short of the "dubious manipulation and contrivance and finagling" required by that demanding test. *Scott*, 450 Mass. at 768.

As indicated above, NELF also argues that the independent contractor statute is irrelevant here because it serves the unrelated purpose of characterizing the relationship between a worker and the entity that has engaged him for his services, as opposed to characterizing the relationship between that entity and another corporate entity. "[That statute's] underlying purpose . . . is to protect workers by [presumptively] classifying them as employees, and thereby grant them the benefits and rights of employment . . . ." *Sebago*, 471 Mass. at 327 (citation and internal quotation marks omitted). No one disputes that the plaintiffs in this case are indeed employees of the dealerships and are therefore protected by the Commonwealth's wage laws. Hence the independent contractor statute's purpose has already been fulfilled, and that statute should play no role here.

As noted, the plaintiffs argue that the independent contractor statute should apply to their claims because they are employees of the dealerships, and those dealerships are subject to the direction and control of the defendants. But neither the statute nor corporate law would recognize an employer-employee relationship between the plaintiffs and the defendants merely because they were each associated with the dealerships in some way. *Cf. Beam Spirits & Wine, LLC v. Alcoholic Beverages Control Comm'n*, No. SUCV201302229C, 2014 WL 7506345, at *9 (Mass. Super. Aug. 18, 2014) (Gordon, J.) ("[T]he fact that [an individual] had an arguable affiliation with each of these two [corporate] parties will not . . . supply the connective tissue for an . . . . *If statutory liabilities could pass between businesses in such circumstances, corporate law as we know it would cease to exist.*") (emphasis in original).

Unfortunately, before the Massachusetts Court could consider and rule on the important question raised by this case, the parties reached a settlement and the appeal was dismissed on May 20, 2020. As a result, the important question of law at stake remains undecided.

## The Maine Law Court agrees with NELF that the federal Labor Management Relations Act (LMRA) preempts a claim of retaliation brought by a union employee under the Maine Whistleblowers' Protection Act (MWPA).

*Nadeau v. Twin Rivers Paper Company, LLC.*
(Maine Law Court)

This case before the Maine's highest court presented an important issue of federal preemption of state employment law. Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (LMRA), preempts any state law claim that "depends upon the meaning of a

collective-bargaining agreement." *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 405-6 (1988). Section 837 of the Maine Whistleblowers' Protection Act (MWPA), in turn, provides that "[t]his subchapter shall not be construed to diminish or impair the rights of a person under any collective bargaining agreement." 26 M.R.S. § 837. The issue in this case, therefore, was whether the LMRA preempted a MWPA claim brought by a union employee.

Nadeau sued his employer Twin Rivers Paper Company under the MWPA, alleging that he was terminated because he raised a grievance about allegedly unsafe working conditions. Twin Rivers denied retaliatory motivation but moved for summary judgment on the basis that Nadeau's whistleblower claim was preempted by the LMRA. The Superior Court granted the motion. It concluded that, since the MWPA "shall not be construed to diminish or impair the rights of a person under any [CBA]," 26 M.R.S. § 837, it was first required to interpret the terms of the CBA to determine whether there was any potential conflict between that CBA and the MWPA. But, as the court also recognized, § 301 of the LMRA preempted any interpretation of the CBA required by a state law. Nadeau appealed.

In its amicus brief filed before the Main Law Court, NELF argued in support of Twin Rivers that § 301 of the LMRA preempted Nadeau's whistleblower claim because § 837 of the state statute makes his whistleblower claim *depend on* an interpretation of his union's collective bargaining agreement. That is, the Maine Legislature had *invited* LMRA preemption by conditioning the enforcement of Nadeau's whistleblower claim on the absence of any conflict between the MWPA and the CBA. In particular, this express statutory restriction on the MWPA's scope would require a court to engage in a preliminary interpretation of the CBA to determine whether there were in fact a conflict between that statute and the CBA. But § 301 of the LMRA forbids a court to do precisely that. "[I]f the resolution of a state-law claim depends upon the meaning of a collective-bargaining agreement, the application of state law . . . is pre-empted." *Lingle,* 486 U.S. at 405-6. Indeed, *Lingle* anticipated the very issue presented in this case when the Court explained that the LMRA would preempt the enforcement of a state employment statute of general application if that statute required a court to interpret the terms of a CBA in certain cases.

Notably, § 837's plain language protects the collective bargaining rights of both employees and employers. The statute provides that it "shall not be construed to diminish or impair the rights of *a person* [and not just an employee] under any collective bargaining agreement." This would include management's right to discharge that employee for cause. In fact, the parties' collective bargaining agreement in this case contains a broad "management rights" section, which allows the employer to discipline an employee and to terminate that employee for just cause. These bargained-for rights to exercise management prerogative might conflict with Nadeau's statutory right to engage in a wide range of protected activity under the MWPA, and to sue Twin Rivers for discharging him because of this activity. However, § 301 of the LMRA bars this kind of probing state-law inquiry into the CBA.

NELF recognized that, of course, the Maine Legislature retains the right to amend the statute, such as by repealing § 837. Alternatively, Nadeau's union and Twin Rivers could negotiate an amendment to the parties' collective bargaining agreement to clarify that nothing contained within that agreement is intended to interfere in any way with an employee's rights under the MWPA. *See Martin v. Shaw's Supermarkets, Inc*., 105 F.3d 40, 44 (1st Cir. 1997) (suggesting similar contractual language to avoid LMRA preemption of Massachusetts Workers' Compensation Act claims, where that statute contains similar proviso avoiding conflict with collective bargaining agreement). However, NELF concluded, unless and until any such changes are made to the MWPA or the parties' agreement, § 301 of the LMRA should preempt Nadeau's MWPA claim.

In its decision, issued on March 30, 2021, the Maine Law Court agreed with NELF and affirmed the Superior Court's grant of summary judgment dismissing Nadeau's complaint. Importantly, the Court adopted NELF's argument that "rights of *a person* under a collective bargaining agreement" in the Maine statute refers to the rights of both employees and management. Therefore, the Court concluded that the Maine statute required a *preempted* determination of whether an employee's statutory rights conflict with any of the employer's contractual rights under a CBA. Indeed, as NELF had urged it to do, the Court engaged in a detailed analysis of some of the plaintiff's many challenges to Twin Paper's exercise of management prerogative under the terms of the CBA, to illustrate how Nadeau *himself* was putting at issue the interpretation of those very contractual terms on which Twin Papers based its disciplinary actions and ultimate termination of his employment.

**Arguing that § 27F of the Massachusetts Prevailing Wage Act, a strict liability statute, permits an employer whose public work project is covered by the statute, to pay its employees at the wage rates issued by the Department of Labor Standards (DLS) at the beginning of the project for the duration of a multi-year contract, rather than requiring the employer to seek annual updates of the wage rates from DLS.**

*Rego et al. v. Allied Waste Services of Massachusetts, LLC*
(Massachusetts Appeals Court)

This case arises under § 27F of the Massachusetts Prevailing Wage Act, the *same* strict liability statute that was at issue in *Donis v. American Waste Services, LLC,* 485 Mass. 257 (2020), in which NELF had filed an amicus brief supporting the employer, with successful results. Section 27F requires the payment of the prevailing wage, as determined by the Commonwealth's Department of Labor Standards (DLS), to workers under certain public works contracts, such as the municipal trash and recycling services contracts at issue in *Donis* and in this case. In *Donis*, the particular issue was whether the employer's officers could be held personally liable under § 27F of the Massachusetts Wage Act for a breach of the Prevailing Wage Act. The Massachusetts Supreme Judicial Court agreed with NELF that the § 27F provides the *exclusive* remedy for employees falling within its scope, and that the Legislature has deliberately omitted any such personal liability in § 27F, unlike the Wage Act *and* a neighboring section of the same Prevailing Wage Act, § 27, which applies to public construction contracts.

At issue here is whether § 27F permits DLS, and by extension the employer, to set prevailing wage rates for the entire life of a multi-year, public works contract when that contract is formed, as DLS itself has expressly done here, or whether § 27F instead requires the employer to obtain an annual update from DLS of the prevailing wage rate applicable to the contract. Significantly, § 27F imposes no such annual requirement on the employer and merely provides that "said agreement, order or requisition [must] contain[] a stipulation requiring *prescribed rates of wages, as determined by the commissioner* [of DLS], to be paid to the operators of said trucks, vehicles or equipment." G. L. c. 149, § 27F (emphasis added). Moreover, DLS has long taken the position that, under § 27F, "[t]he wage rates will remain in effect for the duration of the project," as it expressly stated in the wage rate schedule that it issued here for the defendant, Allied Waste of Massachusetts, LLC, when Allied Waste entered into a contract with the town of Marshfield for the removal of trash and recycling materials, from July 1, 2015, through June 30, 2020. In particular, the wage rate schedule provided rates for Allied Waste's drivers and laborers, effective July 1, 2015, followed by an increased rate for each category of worker on January 1, 2016, followed again by another increased wage rate effective on July 1, 2016. That last rate remained in effect for the rest of the contract term, ending June 30, 2020.

The plaintiffs, five employees of Allied Waste, sued their employer under § 27F, alleging that Allied Waste failed to pay them the prevailing wage from 2017 through the end of the contract term, on June 30, 2020. While the plaintiffs do not dispute that Allied Waste *complied in full* with DLS's wage rate schedule, they argued nonetheless that Allied Waste had the statutory duty, under § 27F, to seek an annual adjustment of the prevailing wage rate from DLS, for the contract years 2017 through 2020. The Superior Court agreed with the plaintiffs and entered summary judgment in their favor, holding that Allied Waste was liable under § 27F. The court then ordered the parties to proceed with a trial on damages. In lieu of a trial, the parties filed a joint stipulation for the entry of judgment, which included approximately $209,692 in treble damages for unpaid wages for all five employees, in addition to post-judgment interest, running at $21.66 per day, and $55,000 in reasonable attorney's fees and costs. This appeal followed.

NELF will file a brief in support of Allied Waste, arguing that § 27F does not require an employer to obtain an annual adjustment from DLS for the prevailing wage rates applicable to its multi-year, public works contract. Nowhere does § 27F impose any such requirement, and a court is not at liberty to amend the statute by "read[ing] into the statute a provision which the Legislature did not see fit to put

there[.]" *Cobble Hill Ctr. LLC v. Somerville Redevelopment Auth.*, 487 Mass. 249, 256 (2021) (citation and quotation marks omitted).

This legislative silence on the issue in § 27F is especially significant because a neighboring section of the same statute, § 27, which applies to public *construction* contracts, *does* expressly require an annual adjustment of an employee's wage rates under the contract. "When the meaning of a statute is brought into question, a court properly should read other sections and should construe them together . . . ." *Carrasquillo v. Hampden Cty. Dist. Cts.*, 484 Mass. 367, 387 (2020) (citation and quotation marks omitted). In particular, § 27 provides:

> *Each year after the awarding of the contract*, the public official or public body [that has contracted with a construction company for the project] shall submit to the commissioner a list of the jobs upon which mechanics and apprentices and laborers are to be employed and *shall request that the commissioner update the determination of the rate of wages to be paid on each job*."

G. L. c. 149, § 27 (emphasis added). By contrast, no such language appears in § 27F. Unfortunately, the Superior Court failed altogether to consider § 27 in its opinion. Clearly, the Legislature's inclusion of this annual wage adjustment requirement in § 27 must mean that the omission of any such requirement in § 27F, a neighboring section within the same statute, was a *deliberate policy choice* of the Legislature. "The omission of particular language from a statute is *deemed deliberate* where the Legislature included such omitted language in related or similar statutes." *Fernandes v. Attleboro Hous. Auth.*, 470 Mass. 117, 129 (2014) (emphasis added). Accordingly, "[i]f the Legislature intentionally omits language from a statute, no court can supply it." *Donis v. Am. Waste Servs., LLC*, 485 Mass. 257, 266 (2020) (interpreting § 27F).

If upheld, the Superior Court's decision would render *superfluous* this annual rate setting requirement that the Legislature saw fit to include in § 27 but not in § 27F of the Prevailing Wage Act. "We do not interpret a statute so as to render it or any portion of it meaningless." *Young v. Contributory Ret. Appeal Bd.*, 486 Mass. 1, 11 (2020) (citation and quotation marks omitted). According to the Superior Court, the purpose of the Prevailing Wage Act can only be fulfilled if every employee who falls within its scope receives an annual adjustment of her wages for the life of a public contract, *regardless* of whether the applicable provision of the statute actually requires any such annual adjustment. As the court stated, "the defendant's interpretation of applying only the [same] wage rates . . . for the contract's duration [under § 27F] would subvert the purpose of the Prevailing Wage Act, namely, to pay workers engaged in public works projects, including trash collectors, wages on parity with other workers in the industry." But if that were the case, then there would be no need for the Legislature to spell out the right to an annual adjustment in § 27, because such a right would already be implied in that section. The precise language of § 27 that creates that annual right, highlighted above, would be reduced to mere surplusage. "[T]he canon against surplusage is strongest when, as here, an interpretation would render superfluous another part of the same statutory scheme[.]" *Donis*, 485 Mass. at 266 (citation and quotation marks omitted).

## Arguing that drivers for Lyft do not qualify for the Federal Arbitration Act's "transportation worker" exemption and thus are contractually required to arbitrate all wage-hour disputes, on an individual basis only.

*Cunningham et al. v. Lyft, Inc.*
(U.S. Court of Appeals for the First Circuit)

This case, a putative class action pending before the First Circuit, raises an important issue concerning the Federal Arbitration Act's "transportation worker" exemption. This exemption excludes from the FAA all "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 here is whether drivers for Lyft, Inc., an online ride-sharing service, belong to the exempted class of "workers *engaged in . . . interstate commerce*."

The plaintiff and putative class representative, Melody Cunningham,[1] is a driver for Lyft. When she signed up online as a Lyft driver, she agreed to Lyft's terms of service, which required the *individual* arbitration of all disputes. Despite the parties' arbitration agreement, Cunningham filed a class action complaint against Lyft in federal court for the District of Massachusetts, alleging that Lyft misclassified her as an independent contractor, thereby denying her the wages and other paid benefits due a Massachusetts employee. On the grounds that she was a transportation worker "engaged in interstate commerce," Cunningham opposed Lyft's motion to compel individual arbitration. The district court ruled that Lyft drivers were engaged in interstate commerce when they drove riders to or from Logan airport for their interstate trips because the drivers are then in the chain of interstate commerce. The court also stated that, "[a]s such, the Lyft drivers are similar to Amazon's last mile delivery driver engaged in interstate commerce in *Waithaka* [*v. Amazon.com, Inc.*, 404 F. Supp.3d 335 (D. Mass. 2019)]." It therefore denied Lyft's motion to compel the individual arbitration.

In its brief filed in support of Lyft, NELF argues that the drivers are essentially independent cab drivers taking passengers to their local destinations over short distances. Unlike seamen and railroad employees, their routine purpose is not the transportation of goods over long distances across state and international borders. The fact that some Lyft drivers may occasionally cross state lines in the course of their work does not transform those drivers, let alone *all* Lyft drivers, into a "class of workers engaged in . . . interstate commerce." .

In its brief NELF relied heavily on *United States v. Yellow Cab Co.*, 332 U.S. 218, 230-31 (1947). Like the Lyft drivers in this case, and *unlike* the last-mile drivers in *Waithaka*, the cab drivers in *Yellow Cab* had no contractual or other special arrangement with the railroad stations or trains when they drove Chicago residents to and from the stations. "None of the [cab drivers] [has a] contractual or other arrangement with the interstate railroads. Nor are their fares paid or collected as part of the railroad fares." *Yellow Cab*, 332 U.S. at 231.

The *Yellow Cab* Court therefore announced a bright line test for demarcating the practical limits of a passenger's interstate journey, which should apply with equal force to the facts of this case and dispose of the plaintiffs' argument that they engaged in interstate commerce when they drove riders to and from Logan airport:

> [A] traveler intending to make an interstate rail journey begins his interstate movement when he boards the train at the station and . . . his journey ends when he disembarks at the station in the city of destination. What happens prior or subsequent to that rail journey, *at least in the absence of some special arrangement*, is not a constituent part of the interstate movement.

*Id.* at 231-32 (emphasis added). Since Lyft drivers have no special arrangement with either Logan airport or the airlines, a Lyft passenger's interstate journey begins when she boards the plane and ends when she disembarks the plane. Therefore, the Lyft ride "is not a constituent part of [the passenger's] interstate movement." *Id.* at 232. Finally, the Court in *Yellow Cab* emphasized that the cab drivers were not involved in interstate commerce because the passengers alone made the decision to take a taxi to the train station. Neither the cab driver nor the train station was part of that decision.

The *Yellow Cab* Court's clear distinction between the fortuitous and the carefully arranged intrastate leg of a larger interstate journey serves not only to dispose of the plaintiffs' arguments here, but also to distinguish the First Circuit's recent decision in *Waithaka* from the facts of this case.

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## A Word About NELF's 2019-2020 Docket

For every case in which NELF files an amicus brief, there are other matters that NELF's attorneys have carefully reviewed and decided, for one reason or another, are not suitable for NELF's involvement. Often, this is because the trial court decision is intensely fact based and, therefore, does not present an issue of law suitable for amicus participation. In rare instances, when a case has been approved by NELF's Staff and NELF's Board-level Legal Review Committee as entirely appropriate for NELF to file an amicus brief, a brief is never filed because the attorneys representing the party NELF would be supporting ask us not to file (usually for tactical reasons). Our policy has always been that we will not file an amicus brief if the party we are supporting does not with us to do so, even in cases where we have thoroughly researched and drafted the potential brief.

[1] There are actually three other named plaintiffs, but for the sake of simplicity, NELF will only refer to the first named plaintiff, Melody Cunningham.

Public Presentations and Seminars

## Winter 2020 Virtual Forum

In the winter of 2020, still in the midst of the COVID-19 pandemic, NELF partnered with member firm **Foley Hoag LLP** and held its first online seminar. The program was entitled **"Meeting Corporate Sustainability and Profit Goals"**. NELF welcomed online attendees to a presentation given by a panel of experts who discussed how business and institutional lawyers can strive to satisfy the twin goals of maximizing profits while reducing carbon emissions in the fight against global climate change. The program was introduced by NELF's President **Martin J. Newhouse,** and moderated by Foley Hoag LLP partner and NELF Board member **John A. Shope**. The experts who participated were **Jennifer Wright,** Director, Global EHS & Sustainability, Biogen, Inc; **Adam Wade,** partner, Foley Hoag LLP; **James Boyle,** CEO, Sustainability Roundtable, Inc.; **Sebastian Lombardi,** Partner, Day Pitney LLP; and **Dennis Villanueva,** Senior Manager, Energy & Sustainability, Mass General Brigham. Drawing on their experiences in dealing with the parallel needs of both for-profit and non-profit institutions to meet both environmental and revenue goals, the panelists provided a wealth of practical advice to the online attendees.

## 2019 John G.L. Cabot Award Dinner

October 2019 saw NELF's sixth annual **John G.L. Cabot Award Dinner**. The purpose of the dinner is to honor an outstanding individual in the New England business and legal community who exemplifies NELF's commitment to a balanced approach to free enterprise, reasonable regulation, traditional property rights, |and the rule of law. The 2019 award was presented to **Susan H. Alexander**, a former member of NELF's Board and the Executive Vice President, Chief Legal Officer and Secretary of Biogen, Inc. Well over 300 guests, drawn from regional and national businesses and distinguished national law firms, joined us at the Fairmont Copley Plaza Hotel to honor Susan as she received this richly deserved award. As in past dinners, the evening celebration included a video of Susan's career and achievements, and a powerful video describing NELF's origins, mission, and ongoing work. The event received nearly full-page pictorial coverage in *Massachusetts Lawyers Weekly*.

NELF's 6th Annual John G. L. Cabot Award Dinner Sponsors

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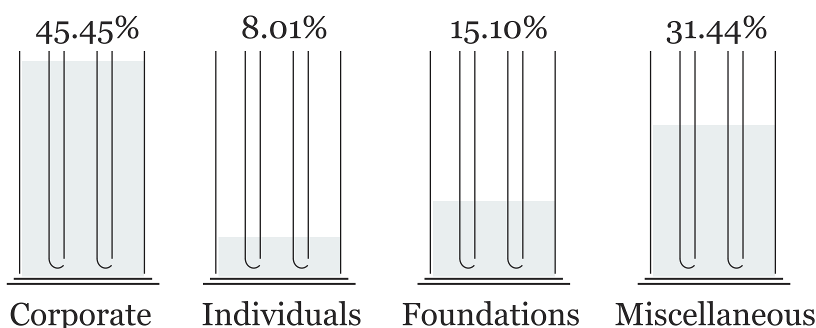
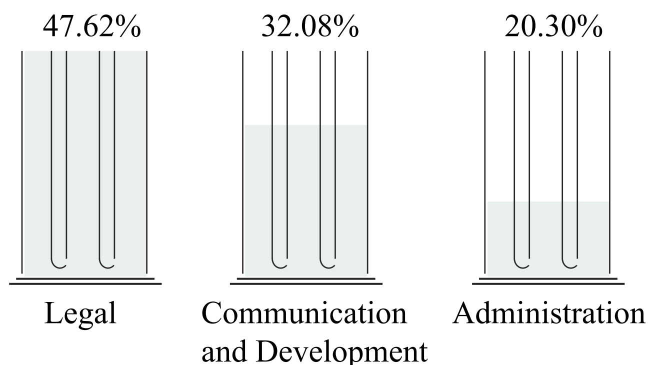
# NELF 2019/2020 Financial review

The COVID-19 pandemic had a major negative impact on NELF's revenues in 2020. In particular, due to the measures mandated to combat the pandemic, NELF was unable to hold its major fundraising event, the annual Cabot Award Dinner, in 2020. Fortunately, careful saving and investment over the years, as well as the contributions of our supporters, principally enabled NELF to fund operations without interruption. In addition, the Miscellaneous category of revenue for 2020 includes proceeds from a Small Business Administration Paycheck Protection Program loan, which also helped NELF weather the economic effects of the pandemic.

## 2020 Revenue



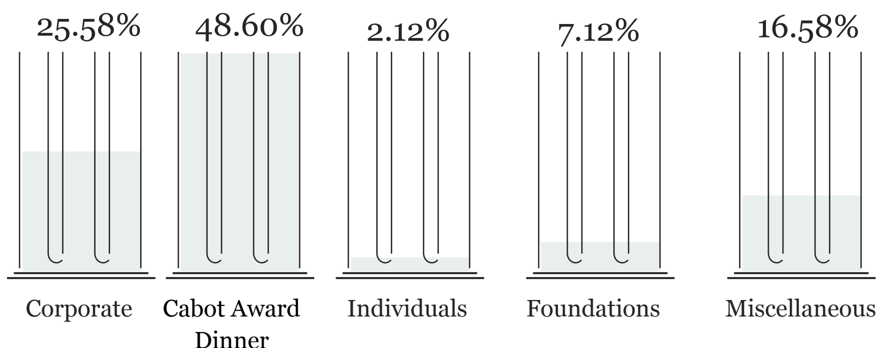

## 2020 Expenses



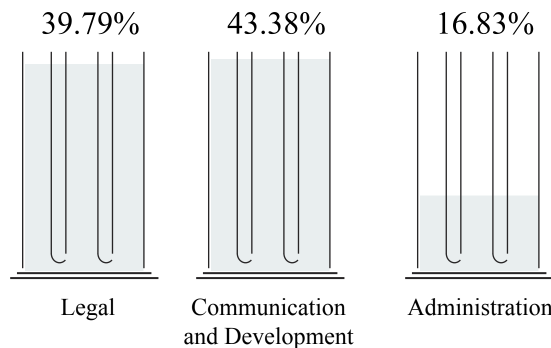

NELF continued to exercise discipline in connection with expenditures in 2020, guided by the goal that neither its core mission, nor its employees, should be impacted by the COVID-19 pandemic.

Once again in 2019, support from programs, including the sixth John G.L. Cabot Award Dinner, as well as the continuing support of our core constituency, allowed NELF to fund its operations throughout the year.

## 2019 Revenue




## 2019 Expenses



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## 2019/2020 Year in Review

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*NELF appreciates the hard work and dedication throughout 2019 and 2020 of Senior Staff Attorney Ben Robbins, Staff Attorney John Pagliaro, and Finance and Operations Manager Maria Karatalidis. Without their efforts, the accomplishment described in this volume would not have been possible.*

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