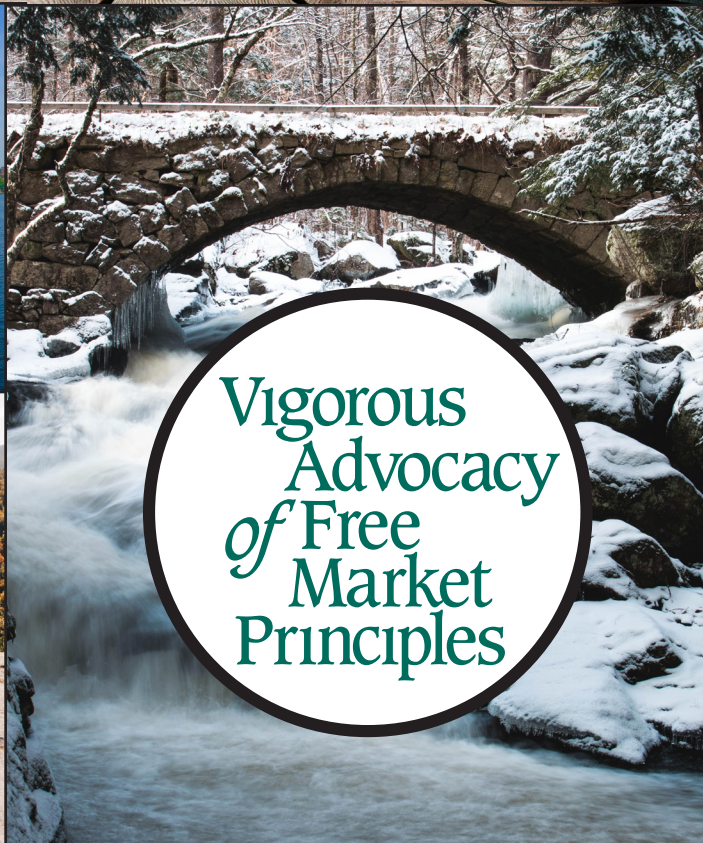




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New England Legal Foundation

YEAR IN REVIEW



Vigorous
Advocacy
of Free
Market
Principles

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.

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

In 2018 NELF focused its energies primarily on its core mission of filing amicus curiae briefs in significant, precedent-setting appellate cases affecting New England businesses and property owners. We participated in these case in the New England state and federal courts, as well as in the United States Supreme Court when the High Court’s decision on an issue would impact New England. It is a measure of NELF’s influence, we believe, that in a number of major decisions in 2018 NELF’s unique contribution as an amicus curiae was reflected in the courts’ own reasoning. Although NELF’s views did not always prevail, our rigorous reasoning and legal insights have led more than one state supreme court justice to urge us to “keep filing your briefs.” Because NELF’s briefs are warmly welcomed and seriously considered by courts, we believe that the likelihood that our arguments will succeed is increased.



Paul G. Cushing
Chair

NELF’s 2018 cases are described in detail in the Docket portion of this Year-in-Review. Under the supervision of NELF’s President, NELF’s Senior Staff Attorney Ben Robbins and Staff Attorney John Pagliaro filed outstanding amicus briefs on a wide range of subjects, including employment discrimination, regulatory taking, the scope of personal liability for corporate officials under the Massachusetts Wage Act, the constitutionality of a Massachusetts ballot initiative to impose a special tax on personal income above \$1 million, the application of the statute of repose for home improvement projects to a consumer protection claim based on a home improvement gone wrong, and the legal standards for online contract formation. Among its most significant accomplishments in 2018, NELF joined with other public interest groups in filing amicus briefs that succeeded in persuading the United States Supreme Court to overrule a 1985 decision that had barred property owners from bringing state-level Fifth Amendment takings claims in federal court.

Our public programming in 2018 included a spring breakfast seminar on the steps businesses and their counsel should take to meet the challenges of the #MeToo era. And in October, 2018, we held our fifth annual John G.L. Cabot Award Dinner. The 2018 award was presented to Mark T. Beaudouin, a member and former Chair of NELF’s Board, who is the Senior Vice President, General Counsel, and Secretary of Waters Corporation. As in prior years, over 300 guests drawn from distinguished national law firms and businesses joined us to honor Mark as he received this richly deserved award.



Brian A. Berube
Vice Chair

As in past years, NELF’s vigorous advocacy of free market principles on so many different fronts was possible only because it enjoys the active support, commitment, and hard work of the distinguished attorneys and other professionals who serve on the Board of Directors and the 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.

NELF's 5th Annual John G. L. Cabot Award Dinner

On October 23, 2018, New England Legal Foundation held its fifth annual John G.L. Cabot Award Dinner at the Fairmont Copley Plaza in Boston. The evening's guest of honor was Mark T. Beaudouin, Senior Vice President, General Counsel and Secretary of Waters Corporation.



NELF President Martin Newhouse presents the Cabot Award to Beaudouin.



Beaudouin addresses the guests.



Beaudouin (center) and his wife Kathleen talking with Paul Dacier of Indigo Ag, Inc., recipient of the 2015 Cabot Award.



Beaudouin with Lindsay G. McGuinness and Scott T. Bluni of Kacvinsky Daisak Bluni PLLC.



Malgorzata A. Mrozek and Terrance D. Lanier of Fitch Law Partners LLP with Spencer B. Ricks of Latham & Watkins.



Martin J. Newhouse, President of New England Legal Foundation (left), and his wife Professor Nancy Scott of Brandeis University, with Shelly Coben of the Boston Globe and retired Associate Justice of the Supreme Judicial Court Robert Cordy of McDermott, Will & Emery.



Jin Wang, Quincy Kayton, and Kritika Bharadwaj of McCarter & English.



Melanie V. Woodward and Deborah J. Manus of Nutter with Joseph G. Blute of Mintz, Levin, Cohn, Ferris, Glovsky and Popeo.



Nelson G. Apjohn of Nutter (left), Michael J. Askew of Raytheon Company, and David Warren of Verrill Dana.



Carol Anne Cushing, Paul D. Popeo of Choate Hall & Stewart, Paul Cushing of Partners HealthCare System, Inc., and Matthew Baltay of Foley Hoag.

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.

Urging the Supreme Court to hold that a mere ambiguity in an arbitration agreement does not satisfy the Federal Arbitration Act's requirement that parties must consent to class arbitration.

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

At issue in this case is 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). Faced in this case with an arbitration agreement that was purportedly ambiguous on the issue of class arbitration, the Court has 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 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. Lamps Plus appealed, but 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. 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 has filed an amicus brief supporting Lamps Plus, arguing that, in fact, the parties' standard arbitration agreement provided *no* contractual basis supporting class arbitration. NELF argues that the agreement *unambiguously* provided for individual arbitration only, that it was a simple contract between *two* parties to arbitrate their disputes, and nothing more. Not only was the agreement silent on

the issue of class arbitration, NELF argues, but also none of its boilerplate language could reasonably be interpreted to permit class arbitration. In particular, NELF argues 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.

Does the Federal Arbitration Act permit a court to disregard the parties’ agreement that an arbitrator should decide all threshold issues of arbitrability and decide the parties’ dispute over arbitrability itself?

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

In this case, the United States Supreme Court will decide whether the Federal Arbitration Act (FAA) permits a court to decline to enforce the parties’ agreement that the arbitrator, not the court, will decide all gateway issues of arbitrability, such as whether the parties’ underlying dispute falls within the scope of their arbitration agreement. The agreement to empower the arbitrator to decide such threshold issues is known as a “delegation provision,” which “is an agreement to arbitrate threshold issues concerning the arbitration agreement.” *Rent-A-Center, Inc. v. Jackson*, 561 U.S. 63, 68 (2010). While questions of arbitrability presumptively are for a court to decide, under the FAA parties may nonetheless assign those preliminary questions to the arbitrator, “so long as the delegation is clear and unmistakable.” *Rent-A-Center*, 561 U.S. at 79.

Despite the Supreme Court’s clarity on this point, the Fifth Circuit in this case declined to enforce the delegation provision in the arbitration agreement between the petitioners, Henry Schein, Inc., *et al.* (Schein), and the respondent, Archer and White Sales, Inc. (Archer). The agreement contained a dispute resolution clause that provided, in relevant part: “Any dispute arising under or related to this Agreement (except for actions seeking injunctive relief . . .) shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association [(AAA)].” AAA Rule 7(a), in turn, provides that “the arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, *scope* or validity of the arbitration agreement.” (Emphasis added.) And the Fifth Circuit ruled, correctly, that the incorporation by reference of this AAA rule is “clear

and unmistakable evidence,” *Rent-A-Center*, 561 U.S. at 79, that the parties had agreed to delegate issues of arbitrability to the arbitrator.

Nevertheless, despite the parties’ arbitration agreement, Archer sued Schein in federal district court, seeking damages along with injunctive relief. Schein moved to compel arbitration, but the Fifth Circuit denied its motion. Archer opposed the motion to compel, on the ground that its complaint, in its entirety, was not arbitrable because it fell within the contract’s exception for “actions seeking injunctive relief.” Schein argued, by contrast, that the exception applied only to Archer’s request for injunctive relief, but that the damages claims were indeed arbitrable. Rather than enforce the parties’ agreement to have the *arbitrator* decide this threshold dispute over arbitrability, the Fifth Circuit took it upon itself to interpret the agreement’s exception, concluding that Schein’s argument for arbitrability was “wholly groundless.” Therefore, the court allowed Archer to proceed on its antitrust claims in federal court.

Schein applied for a stay of the federal court proceedings in the Supreme Court. The Supreme Court promptly granted the stay, and approximately two months later, granted Schein’s petition for certiorari.

NELF has filed an amicus brief in support of Schein, arguing that the FAA requires a court to enforce a valid agreement to arbitrate threshold disputes concerning the arbitrability of claims. Such an agreement is “[a] written provision . . . to settle by arbitration a controversy,” 9 U.S.C. § 2, and it therefore must be enforced, “save upon such grounds as exist at law or in equity for the revocation of any contract . . .” *Id.* Since no such contractual challenge was raised in this

case, NELF argues, the FAA required the Fifth Circuit to enforce the parties' agreement that the arbitrator would decide their dispute concerning the scope of their arbitration agreement.

Indeed, the FAA does not permit a court to usurp the arbitrator's contractually delegated power to decide threshold questions of arbitrability, as the Fifth Circuit did here when it evaluated the merits of

such a dispute under its "wholly groundless" standard. NELF points out that the FAA was enacted to abrogate the ancient "ouster" doctrine, under which courts refused to enforce arbitration agreements when they believed that those agreements wrongfully deprived them of their jurisdiction. In essence, NELF argues, the Fifth Circuit's "wholly groundless" standard is an impermissible attempt to revive this dead and buried doctrine.

Arguing that a state court, having determined that a tax was illegally assessed, may not then decide, based on so-called equitable factors, that its determination of invalidity will be prospective only, thereby allowing the taxing authority to keep the revenue from the illegal tax.

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

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

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

On remand, the taxpayers moved for summary judgment, arguing that they were owed refunds for 1994 and for subsequent years. The Library District cross-moved for summary judgment arguing that

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

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

them back . . . would be in contravention of the Fourteenth Amendment.” *McKesson*, 496 U.S. at 39.

Accordingly, NELF criticized the state court’s balancing of equities against the taxpayers’ due process rights. Not only was the court’s analysis of the equities entirely one-sided, but it was in all relevant regards the same as the equities-based argument that the Supreme Court rejected in *McKesson* as a reason for denying retrospective relief. The sole difference

was that here the “equities” were used at an earlier stage of the legal analysis, i.e., as a reason for denying retroactive recognition of the court’s ruling on the tax statutes. NELF argued that the relabeling of the *McKesson* equities analysis from a retrospective relief analysis to a retroactivity of law analysis was mere sleight of hand and equally impermissible.

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

Supporting an online business’s right to enforce its mandatory arbitration policy and class action waiver, when those contract terms are viewable by clicking on a clearly marked hyperlink to the business’s “terms and conditions,” and the business has clearly provided that a customer is deemed to accept those terms when creating an account.

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

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

The defendant business in this case was Uber Technologies, Inc., the online ride-sharing service. At all times relevant to the case, when a customer created an online account with Uber, Uber clearly stated that “[b]y creating an Uber account, you agree to the **Terms of Service & Privacy Policy**.” (Emphasis in original.) The words “Terms of Service” appeared as a highlighted button with a hyperlink that, if clicked, opened a ten-page agreement containing a mandatory arbitration clause and a class action waiver, under the bold-faced heading, “**Dispute Resolution**.”

The plaintiff and putative lead class representative, Rachel Cullinane, filed this putative class action in federal court, rather than submit her underlying claim to individual arbitration. She claimed that she had had inadequate notice of Uber’s arbitration provisions because they were viewable only in a separate document, and because Uber did not require her to state affirmatively that she had accepted those terms. Indeed, she argued that Uber’s structured online sign-up process discouraged her from finding out about Uber’s arbitration policy.

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

acceptance. Accordingly, NELF submitted, Cullinane had accepted Uber’s arbitration policy once she completed the online registration process, because Uber clearly stated that completion of that process would indicate her acceptance of Uber’s contract terms.

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

Despite NELF’s arguments, on June 15, 2018, the First Circuit ruled that, under Massachusetts law, the plaintiff had not been given reasonable notice of the arbitration clause and, therefore, could not be compelled to arbitrate her claims. The Court disfavored from the outset Uber’s use of the one-step “notice of deemed acquiescence” as the method of online contract formation, as opposed to requiring a consumer to stop, pause, and check off a box indicating that her or she has read the terms and conditions of the agreement before being able to proceed with the transaction: “We note at the outset that Uber chose not to use a common method of conspicuously informing users of the existence and location of terms and conditions: requiring users to click a box stating that they agree to a set of terms, often provided by hyperlink, before continuing to the next screen. Instead, Uber chose to rely on simply displaying a notice of deemed acquiescence and a link to the terms.” The court also found that Uber did not display this “deemed acquiescence” language with sufficient prominence. A subsequent motion for *En Banc* review was denied.

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

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

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

The trial judge dismissed her c. 93A consumer protection claims because he found that they were

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

In its amicus brief, NELF defended the trial judge’s analysis. Reviewing cases in which courts have analyzed claims for their substance or gist, rather than their form, for the purpose of answering a wide variety of legal questions, NELF showed that c. 93A claims have also regularly been analyzed in this way. As NELF discussed, while claims under c. 93A are

not subject to the traditional limitations of preexisting causes of action, nonetheless they often involve claims analogous to common-law torts, and when that is the case, they are treated accordingly. NELF also pointed out Bridgwood's confusion between a per se violation of c. 93A and per se liability. Chapter 142A of the General Laws, which regulates home improvement contractors, makes any violation of its requirements a per se violation of c. 93A, and with that as her sole springboard, Bridgwood had fallaciously argued that the defendants were liable to her without the need for any further legal analysis. Such, NELF argued, is not the case.

Finally, NELF reviewed the public policy concerns that led the Legislature to enact the repose provision at issue in 1968. Acting in response to case law abolishing the rule that an architect or builder's liability

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

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

Anderson v. Maura Healey
(Massachusetts Supreme Judicial Court)

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

The complaint advanced three grounds for concluding that it did not: first, the constitution bars any question that deals with unrelated subjects or subjects that are not mutually dependent; second, no popular initia-

tive may make a specific appropriation of funds; and third, the popular ballot initiative cannot be used to raise revenues.

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

ments that failed at the ballot box over the past 50 or so years.

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

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

No similar popular ballot initiative is permitted for the next two biennial state elections. Unfortunately, a legislative ballot initiative, which is not subject to the relatedness limitation, has recently passed the legislature.

Arguing that, when a minority member of a Massachusetts limited liability company opposes the company’s merger, the minority member is limited by statute to “the exclusive remedy of . . . resign[ing] as a member and obtaining a judicial appraisal of his ownership interest.

Allison v. Eriksson
(Massachusetts Supreme Judicial Court)

In this case, the Massachusetts Supreme Judicial Court requested amicus briefing on the issue of what remedies are available to a minority member of a Massachusetts limited liability company who alleges that the controlling members have structured a “freezeout” merger. NELF argued in its amicus brief that the Massachusetts Limited Liability Company statute disposes of this issue because it restricts such a plaintiff to the “*exclusive remedy of . . . resign[ing] as a member,*” G. L. c. 156C, § 60(b), and obtaining a judicial appraisal and buyout of his ownership interest in the company. Section 60(b) of the LLC statute provides, in relevant part:

The *exclusive remedy* of a member of a domestic limited liability company, which has voted to consolidate or to merge with another entity under the provisions of

sections fifty-nine to sixty-three, inclusive, . . . who objects to such consolidation or merger, shall be the right to resign as a member and to receive any distribution with respect to his limited liability company interest”

G. L. 156C, § 60(b) (emphasis added).

Notwithstanding this unambiguous statutory language, the Superior Court (Kaplan, J.) in this case held that a minority member may also sue the controlling members of the company for breach of fiduciary duty, under *Donahue v. Rodd Electrottype Co. of New England*, 367 Mass. 578 (1975), and its progeny. Accordingly, the lower court conducted a bench trial and found that Dr. Elof Eriksson, the defendant and controlling member of Applied Tissue Technologies, LLC (ATT), a failing Massachusetts biotech start-up,

had breached his duties to the minority member, W. Robert Allison, a graduate of Harvard College and Stanford University Law School, when Dr. Eriksson voted to approve a merger of ATT with another Delaware limited liability company (“llc”) to salvage the company’s business. The lower court found for Allison and ordered Eriksson to rewrite the terms of the merger agreement, to comport with the court’s own conception of fairness.

Supporting reversal of the lower court’s verdict, NELF argued, in support of Dr. Eriksson, that a judicial appraisal is the exclusive remedy for a minority member of an LLC who opposes a merger. The plain language of the LLC statute mandates this result and therefore precludes the LLC member from pursuing a *Donahue* claim against the controlling member and seeking broad equitable remedies. NELF also argued that, contrary to the Superior Court’s view in this case, there is *no* SJC precedent that permits a trial court to set aside this exclusive statutory remedy under the LLC statute and review the overall fairness of an LLC merger under *Donahue*. In this regard, NELF carefully distinguished two prominent SJC cases--*Coggins v. New England Patriots Football Club, Inc.*, 397 Mass. 525 (1986), and *Pointer v. Castellani*, 455 Mass. 537 (2009)--upon which the lower court relied to support its decision.

In its decision issued on May 30, 2018, the SJC, disagreeing with NELF, held that, in the circumstances

of this case, the judicial buyout provided by G.L. c. §60(b) was not the exclusive remedy for a minority member challenging the merger. The Court based its decision on its interpretation of § 60(b), which states that the merger has been conducted “under the provisions of sections fifty-nine to sixty-three . . .” The Court read this quoted language as requiring the majority member’s *compliance* with the cited statutory provisions in order to invoke § 60(b) as the minority member’s exclusive remedy. In particular, § 63(b) provides that, “[t]o the extent that, at law or in equity, a member or manager has duties, including fiduciary duties, and liabilities relating thereto to a limited liability company or to another member or manager, . . . the member’s or manager’s duties and liabilities may be expanded or restricted by provisions in the operating agreement.” Applying § 63(b), the Court concluded that the operating agreement had created protections for Allison, the minority member, which were “akin to those provided at law to a close corporation,” and that Eriksson had breached those duties (even though, as NELF had argued, the agreement did *not* address the circumstances of a merger.) Therefore, reasoned the Court, Eriksson’s purported breach of his contractual duties when he structured the merger constituted, in effect, a breach of his *Donahue* duties owed to Allison, thereby excusing Allison from pursuing his exclusive statutory remedy of a judicial buyout under § 60(b)

Suggesting that the Maine Supreme Judicial Court adopt reliance damages as the proper measure of compensation for breach of an agreement to negotiate in good faith.

Eastern Maine Electric Corporative, Inc. v. First Wind Holdings LLC, et al.
(Maine Supreme Judicial Court Sitting as the Law Court)

This case raised an issue of first impression in Maine, namely what should be the proper measure of damages where a court has determined that there has been a violation of a duty to negotiate in good faith. Here, the jury, after finding that the duty had been breached and over the defendants’ objection, was permitted by the trial judge to award “lost profits” to the plaintiff. The appellant, Eastern Maine Electric Corporate, Inc., while not conceding that the jury finding that it had violated its duty was legally correct, also disputed that “lost profits” are a proper measure of damages.

While there is a split in the decisions on this issue throughout the country, NELF filed an amicus brief urging the Maine Supreme Judicial Court to adopt a general rule that where, as here, a deal has never been finalized, the appropriate measure of compensation for the violation of a duty to negotiate in good faith, should be reliance damages, not lost profits. NELF relied on the reasoning of the New York court in *Goodstein Constr. Corp. v. City of New York*, which focused its legal analysis on the precise nature of the sole obligation that was breached, which was not a breach of a contract, but a breach of the duty of

negotiating in good faith a contract not yet in existence. Since the contract was never executed, NELF argued it would be anomalous to award expectancy damages for the breach of an agreement that was never finalized.

In addition, NELF pointed out several policy and logical reasons that dictate that reliance damages are the most appropriate form of compensation when there has been a failure to negotiate in good faith. Among these, NELF noted that holding “lost profits” to be the measure of compensation could have a deleterious effect on the use of term sheets and other interim agreements that are routinely used

as the parties work through their negotiations; such a ruling would create an *in terrorem* regime in which such interim documents could be potential bases for “lost profits” damages, which are typically much larger than the actual costs that the parties have sunk into their contract negotiations. (In this case, the lost profits damage award was \$13.6 million, which was exponentially larger than the costs actually incurred by the plaintiff in the negotiations, which were estimated to be no more than \$350,000.)

Shortly after NELF filed its brief, the case settled and NELF was advised that the settlement was likely due “in significant part” to NELF’s efforts.

Arguing that, under Mass. G. L. c. 184, an individual injured by a defect in a public way must provide notice within 30 days of the injury to the private corporate owner of the utility cover allegedly responsible for the accident.

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

The plaintiff in this case, Meyer, was injured when his bike hit a defect on the surface of Sudbury Street in Boston. Apparently, a small utility cover owned by the defendant Veolia was not lying flush with the road surface. The legal issues in the case involved the plaintiff’s statutory obligation to provide notice of his injury within thirty days to the “person by law charged” with keeping in repair that part of the roadway. Meyer gave notice on day thirty-six.

The questions posed are two. First, was Meyer excused from providing notice within thirty days because it was allegedly “impossible” for him to do so? Second, does a private corporate defendant in fact have a right to notice within thirty days, because it is legally “charged” with maintaining the roadway in a safe condition? This question challenges the premise of the first one. In answering it no, Meyer engages in a very lengthy and involved review of the statutory history of the Massachusetts liability and notice statutes pertaining to roadway defects, and he claims to show that the statutory “person” has always meant an agent of government, as the terms preceding it in the statute might suggest. See G.L. c. 84, § 18 (injured party “shall, within thirty days [of the injury], give to the county, city, town or person by law obliged to keep said way in repair” notice of

the injury). In order to deal with cases in which the Supreme Judicial Court has long ruled that railroad corporations count as such persons, Meyer argues that from the late-19th century on railroads have been so intensively regulated that they are what he calls “quasi-governmental corporations.”

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

Next, NELF rebuts Meyer’s convoluted historical arguments. First, NELF reviews 18th century dictionaries, as well as the definitional sections of the Massachusetts General Laws from 1836 to the present, in order to show that commercial corporations have long been recognized as full legal persons. Next, NELF undermines Meyer’s argument that railroads were some sort of special exception to a rule that private parties do not count as persons entitled to Chapter 84 notice. NELF shows that the rationale of the railroad decisions rested on a definitional principle under which it is “unquestionable” that corporations are civilly legal persons; the rationale

of these decisions had nothing to do with railroads corporations specifically or business regulation in general. (NELF also corrects Meyer's terminology and shows that the legislature classifies railroads and companies like Veolia as public service corporations.) Finally, NELF demonstrates 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 repair and maintain ways was not always

and everywhere solely the responsibility of the local government parishes and their agents. The duty could devolve on private parties, as explained in old British legal treatises NELF cites. NELF also cites an important 1883 Massachusetts case, overlooked by the parties, in which Justice Oliver Wendell Holmes, writing for the SJC, invoked the common law to explain that private persons could indeed be entitled to Chapter 84 notice.

Opposing the Massachusetts Commissioner of Revenue's Position That, Under the Massachusetts Sales Tax Statutes, a Purchaser of Goods Who Believes She Has Been Erroneously Charged A Sales Tax May Sue a Vendor For Breach of Contract To Recover The Amount Paid.

Worldwide TechServices v. Commissioner of Revenue, et al.
(Massachusetts Supreme Judicial Court)

This case was the most recent chapter in a long-running dispute between Dell and certain Massachusetts purchasers of Dell computers, who alleged that Dell improperly charged them a Massachusetts sales tax on service contracts for the Dell computers that they had purchased. While NELF was not involved in the central procedural issue in this case, NELF filed an amicus brief rebutting an argument made by the Massachusetts Commissioner of Revenue in his brief that, under the Massachusetts Sales Tax Statute, a purchaser has a statutory right to sue a vendor in contract to recover an allegedly erroneous sales tax, as opposed to seeking an abatement from the Massachusetts Department of Revenue (to which, as required by statute, the vendor had remitted the disputed sales taxes).

Quoting directly from NELF's brief, the Massachusetts Supreme Judicial Court, in its November 2018 decision, rejected the Commissioner's position and

concluded that the statutory provision upon which the Commissioner was relying provides no such remedy to the purchaser. Agreeing with NELF, the Court explained that the statute actually protects the *vendor*, not the purchaser, by requiring the purchaser to reimburse the vendor for the sales tax that the vendor has paid to the Commonwealth for a taxable sales transaction: "[The statute] is designed to protect the vendor by imposing a reimbursement requirement on the purchaser. *As explained by the amicus*: 'Nowhere does [the statute] mention or even suggest any right of action by the purchaser against the vendor.'" (Emphasis added.)

The Court's decision represented a victory, not only for NELF, but also for businesses in Massachusetts, who, thanks to this decision, will not be exposed to potential private civil liability for performing their statutory duty to collect a sales tax.

Individual Economic and Property Rights

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.

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

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

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

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

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

supporting the petition of a landowner who had been cited for violation of the regulation.

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

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

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

Finally, NELF argues that underlying the erroneous reasoning of *Williamson County* is the unexamined assumption that payment of just compensation under the Takings Clause is a remedy. It is not; it is a constitutional condition placed upon the power of government to take, as the Court has stated repeatedly throughout its history. Only when just compensation has *not* been paid does there arise an injury requiring a remedy, as the Court has

also repeated declared. Hence, cases dealing with post-deprivation procedures regulating merely the timing, amount, and manner of the payment of *just compensation* confessedly owed by the state do not support the Court's conclusion that a state court post-deprivation lawsuit for a *money damages remedy* ripens a takings claim by finally determining that the "State" refuses to pay just compensation.

Arguing that the United States Fish and Wildlife Service acted beyond its authority when it designated private property as a critical habitat for a creature that does not live on the property and would die if placed there.

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

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

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

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

has not offered to buy the land in order to construct a habitat for the frogs at its own cost.

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

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

The Supreme Court granted certiorari on January 22, 2018, and on April 30, 2018, NELF joined the Cato

Institute on its amicus brief. In addition to making the criticisms mentioned above, the brief also argues that FWS’s expansive definition of “critical habitat” implements the Endangered Species Act far beyond any reasonable reading of the Commerce and Necessary and Proper Clauses. Specifically, the regulation is not necessary because Unit 1 doesn’t play any role in the frog’s conservation, and is not proper because it infringes on state land-use regulation without sufficient justification. Moreover, the mere existence of land like Unit 1 does not constitute “economic activity” under the Commerce Clause. In short, the courts

below sanctioned a rewriting of the ESA when they granted *Chevron* deference to the FWS.

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

Requesting that the Supreme Court articulate the standard to be applied in determining, under *Kelo v. City of New London*, 545 U.S. 469 (2005), whether a governmental body’s claim that it is taking private property for a public purpose is merely a pretext.

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

In this case NELF has joined with the National Federation of Independent Business, the Cato Institute, the Atlantic Legal Foundation, and other co-amici in an amicus brief in support of Petitioner Violet Dock Port, Inc. LLC, urging the Supreme Court to grant certiorari to decide an important question regarding an eminent domain taking that the Supreme Court itself created when it decided *Kelo v. City of New London*, 545 U.S. 469 (2005).

In *Kelo*, the Supreme Court held that the City of New London did not violate the Fifth Amendment’s “public use” requirement when it took private property (specifically, Mrs. Kelo’s house) in order to turn it over to a private developer for a private development (as opposed to developing the property for the use of the public, such as, *e.g.*, a public park, highway, etc.). The Court found that the “public use” requirement was satisfied due to the expectation that the private development would provide jobs and increase the New London’s tax revenue.

While the Supreme Court thus upheld a taking by government for the purposes of “economic redevelopment,” it also said that government may not “take property under the mere pretext of a public purpose, when its actual purpose [is] to bestow a private benefit.” 545 U.S. at 478 (2005). In his

conurrence, Justice Kennedy emphasized that courts should strike down any government act where there is a “clear showing” that the taking “is intended to favor a particular private party, with only incidental or pretextual public benefits.” 545 U.S. at 491. Unfortunately, the Supreme Court did not provide in that case, nor has it since provided, any standard, however, for making such a showing. Because the Supreme Court has never articulated the standard to be applied, there has developed a wide disparity in how both state and federal courts have dealt with this important question of whether a governmental claim of public use is just a pretext. And now, in this case, the Louisiana Supreme Court has established a basically toothless “standard” that conceivably could justify any *Kelo*-type taking, whatever the actual facts of the case.

The case involves a challenge to an eminent domain taking in Louisiana. Specifically, the St. Bernard Port Authority (a public entity) owns a port facility called Chalmette located six miles north of the (formerly) privately owned Violet Dock facility. Associated Terminals, a private company, runs Chalmette for St. Bernard. Wishing to expand the Chalmette facility, St. Bernard entered into negotiations to buy Violet Dock from its owners. When those negotiations failed, St. Bernard exercised its eminent domain

power to take Violet Dock in order to convert it into a cargo handling facility over the course of years, with Associated (the private company already managing Chalmette) to also manage Violet Dock.

Claiming that the taking violated the Louisiana Constitution, Violet Dock sued in state court and ultimately lost before the Louisiana Supreme Court. Violet Dock has now petitioned the United States Supreme Court for certiorari, arguing, *inter alia*,

that the Louisiana Supreme Court failed to fulfill its duty under *Kelo* of taking seriously the plaintiff's objection that the taking was motivated, not by a public purpose, but to benefit another private party. In fact, the Louisiana Supreme Court held that, under *Kelo*, the public use requirement is satisfied so

long as there is some *conceivable basis* in the record for finding that the taking served a public purpose.

In light of the Louisiana Supreme Court's decision, and the general confusion that has persisted since the *Kelo* decision, NELF has joined as a co-amicus in NFIB's brief, which asks the Supreme Court to grant certiorari in order to use this case to revisit *Kelo* and, if the decision remains valid, to establish the standard that courts should apply in assessing the validity of a challenge to the "public purpose" rationale put forward by a public entity that wishes to take private property for the purpose of providing it to or benefiting another private party. (The amicus brief also asks the Court to reconsider its decision *Kelo*, which is a position that NELF also supports, having filed an amicus brief in support of Ms. Kelo in that case.)

Opposing Regulatory Encroachment on Coastal Property Rights.

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

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

NELF's client, Elena Hall, owns a parking lot on shorefront property in Provincetown that provides Ms. Hall with her sole significant source of income.

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

NELF has 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 has worked closely with the experts in scrutinizing carefully the historical maps pertaining to Provincetown Harbor and in determining that the application of the mean high tide line derived from the earliest reliable historical map to Ms. Hall's property leaves the disputed portion of her property free and clear of the

designation "Commonwealth tidelands." NELF is now awaiting DEP's response, and attorneys for the parties will then meet in chambers to decide whether the case must go to a full adjudicatory hearing or can be settled. NELF has also researched and briefed potential legal challenges to DEP's regulation and license conditions under the Takings Clause and the *ultra vires* doctrine, which NELF would be prepared to reach should it not succeed on its position with respect to the historic high water mark.

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.

Successfully arguing that the National Labor Relations Act does not override the Federal Arbitration Act's requirement that class and collective action waivers in employment arbitration agreements must be enforced.

Epic Systems v. Lewis; Ernst & Young LLP v. Morris; National Labor Relations Board v. Murphy Oil USA, INC
(United States Supreme Court on the merits)

In a 5-4 decision issued on May 21, 2018, in the above-referenced three consolidated cases, the Supreme Court agreed with NELF, holding that § 7 of the National Labor Relations Act's protection of employees' right to engage in "other concerted activities" does not displace the Federal Arbitration Act's mandate to enforce class and collection action waivers in employment arbitration agreements. The employment agreements at issue in each case required employees to arbitrate any work-related disputes on an individual basis only. Those provisions were challenged on the ground that the NLRA's statutory protection of "other concerted activities" overrode the FAA and made those contractual provisions unenforceable.

A majority of the Court, agreeing with NELF, rejected this argument. The Court held that the NLRA's general residual phrase, "other concerted activities," only guarantees employees the right to join together in the *workplace* to address working conditions among themselves and with their employer. As NELF had argued in its brief, the Court found that

group legal action was simply not the "strength in numbers" that Congress had in mind when it enacted the NLRA to protect employees' freedom of association in the workplace.

Again, as NELF had argued in its brief, the Court emphasized from the outset that the enforceability of the arbitration agreements was a question of harmonizing the FAA with the NLRA, and that the starting point of that analysis was the FAA's mandate to enforce arbitration agreements according to their terms. And, as NELF had argued, the Court explained that, in order to displace the FAA's mandate to enforce these arbitration agreements according to their terms, the plaintiffs would have to establish that "other concerted activities" must clearly and unambiguously include group legal action. And any doubts on that score must be resolved in favor of the FAA.

In its opinion, the Court explained that § 7 of the NLRA enumerates specific protected concerted activities, followed by the catchall phrase "other

concerted activities.” And, as NELF urged it to do, the Court applied the rule of *ejusdem generis* (“of the same kind”), agreeing with NELF that “other concerted activities” should be defined and limited by the specific concerted activities that precede it. Those specific concerted activities identify certain ways in which employees can organize in the workplace and address working conditions with their employer. Clearly, “other concerted activities” protects other, similar ways in which employees can join together in the workplace, short of forming a union or engaging in collective bargaining. Those activities simply would have nothing to do with group legal action. The Court found that to interpret the phrase so broadly would render § 7’s list of concerted activities superfluous, and it would also go far beyond the

NRLA’s express purpose of protecting freedom of association in the workplace.

In essence, the Court restored the peaceful coexistence of two unrelated federal statutes that had remained undisturbed until only very recent times, as NELF had urged the Court to do. While the FAA requires the enforcement of arbitration agreements according to their terms, the NLRA serves the different purpose of protecting employees’ freedom of association in the workplace. Neither statute limits the other. And, because the NLRA covers most employees in the private sector, the Supreme Court’s decision also left undisturbed those existing employment arbitration agreements that contain class arbitration waivers.

Articulating the test for whether an employer’s denial of an employee’s request for a lateral transfer constitutes an “adverse employment action” under the Massachusetts Employment Antidiscrimination Statute, G.L. c. 151B

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

Lieutenant Warren Yee is an Asian-American employee of the Massachusetts State Police. He was promoted to his current rank of lieutenant in 1998. Since 2002, he has been stationed at Troop H, which is headquartered in South Boston. In December 2008, Lt. Yee, then age 54, submitted a request for transfer to Troop F, headquartered in East Boston, at Logan Airport, because he believed it would offer him the opportunity to supplement his base pay with overtime and police detail work. Yee received no response to his request. Between 2008 and 2012, eight white males were either transferred as lieutenants to Troop F or were promoted from sergeant to lieutenant within Troop F. Five of those eight troopers were younger than Yee. In September 2012, Yee submitted another request for transfer to Troop F, this time asserting that he had been passed over because of his ethnicity and his age. Shortly thereafter, Shawn Lydon, a white male sergeant from Troop H, who was younger than Yee and had not requested a transfer, was promoted to lieutenant and was transferred to Troop F. In the two years that Lydon was stationed at Troop F, he earned \$30,000 more annually in overtime than he had at his prior assignment at Troop H.

Yee sued the State Police for discrimination under Massachusetts General Laws c. 151B, alleging that he was denied the requested transfer because of his ethnicity and his age. The Superior Court granted the State Police’s motion for summary judgment, concluding that Yee had suffered no adverse employment action. In particular, the lower court held that Yee had failed to create a triable issue that a transfer to Troop F would have allowed him to increase his earnings. The court rejected as too anecdotal and speculative Yee’s reliance only on Lydon’s additional earnings while at Troop F to support his claim that the transfer would have also increased Yee’s income. As the court explained, Yee could have submitted the earning histories of the eight other similarly situated lieutenants at Troop F, or even a more general statistical study on all lieutenants’ earning histories at Troop F. In short, Yee failed to substantiate his subjective belief of greater compensation opportunities at Troop F with sufficient objective evidence of other similarly situated employees’ actual earnings there.

Yee appealed and the Massachusetts Supreme Judicial Court took his case for direct appellate review. The Court then requested amicus briefing on the

following issue: “Can an employer’s denial of an employee’s request for a lateral transfer constitute an ‘adverse employment action’ that is cognizable under c. 151B, and if so, under what circumstances?”

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

Accordingly, the application of the *MacCormack* test to the denial of a lateral transfer should require the

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

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

Contending that the Dodd-Frank Act’s whistleblower anti-retaliation provision does not apply to employees who have not reported a violation of the securities laws to the Securities Exchange Commission because the Act defines a “whistleblower” as an individual who “provide[s] information relating to a violation of the securities laws to the Commission?”

Digital Realty Trust v. Somers
(United States Supreme Court)

In this important case, the United States Supreme Court, adopting many of NELF’s arguments, unanimously agreed with NELF that the whistleblower anti-retaliation provision of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010

(Dodd-Frank) applies, by its own plain terms, only to an employee who has reported a potential violation of the securities laws to the Securities Exchange Commission (SEC). That is, Dodd-Frank does *not* protect the employee who has only reported to man-

agement, such as the plaintiff in this case. Such an employee is protected by the Sarbanes Oxley Act (SOX), *not* Dodd-Frank. This statutory distinction is crucial for employers because Dodd-Frank, unlike SOX, provides the whistleblower with *enhanced* remedies, including a *direct* right to sue the employer in federal court for *double back pay*, along with a generous *six-to-ten year* limitations period. (Dodd-Frank also awards the whistleblower a substantial monetary bounty if her reporting to the SEC results in a successful administrative or judicial enforcement action by that agency.) By contrast, SOX does not provide the internal whistleblower with either a direct right to sue the employer, double back pay, or a generous limitations period. Instead, SOX requires the employee to file an administrative complaint with the Department of Labor within 180 days of the alleged retaliation before gaining the right to sue in court. And SOX limits the employee to recovering actual damages only.

Agreeing with NELF, the Court explained that Dodd-Frank was enacted specifically to strengthen the SEC's role in enforcing the securities laws, by providing special incentives (bounty awards) and protections (enhanced anti-retaliation remedies) to the employee who reports to the SEC. To that end, Dodd-Frank expressly defines a whistleblower as an individual who reports to the SEC. As NELF had argued, the Court explained that those incentives and remedies go *hand in hand* and are limited to the employee who reports to the SEC.

The confusion in this case arose because a subsection of Dodd-Frank's anti-retaliation provision protects the "whistleblower" (i.e., the employee who reports to the SEC) who makes disclosures that are required

or protected under SOX. SOX, however, affords protection to the employee who reports a potential securities law violation to his employer only, unlike Dodd-Frank. And the Ninth Circuit in this case interpreted this disputed subsection of Dodd-Frank to mean that Dodd-Frank also protects the employee who only reports to his employer. According to the Ninth Circuit, then, the employee who reports only to his employer is entitled to Dodd-Frank's enhanced remedies.

Again agreeing with NELF, the Court reversed the lower court and concluded that this disputed subsection of Dodd-Frank protects the employee who reports to both the SEC and his employer, and then suffers retaliation because of his internal reporting. Adhering very closely to NELF's argument, the Court explained that this subsection protects the "dual" reporting employee when his employer does not know that the employee has reported to the SEC. (As NELF had noted, the Court observed that this would not be surprising because Dodd-Frank requires the SEC to preserve the confidentiality of a whistleblower's identity.) As NELF had argued, the Court explained that this subsection is necessary because, without it, the "dual" reporting employee would not be protected under Dodd-Frank for suffering retaliation for his internal reporting, even though he has *earned* protection under Dodd-Frank for reporting to the SEC. Without this subsection, then, such an employee would only be protected under SOX. Again agreeing with NELF, the Court emphasized that, even if this category of dual reporting employee were small, a court would have no choice but to enforce the statute according to its plain terms and restrict Dodd-Frank's remedies to the employee who reports to the SEC.

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

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

NELF has filed an amicus brief in this case, in which the United States Supreme Court will decide the scope of the Federal Arbitration Act's exemption for "contracts

of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1 (emphasis added). Does this

exemption apply only to contracts that establish an employer-employee relationship, or does it also apply to independent contractor agreements? In *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), the Court held that the exemption applied only to interstate transportation workers, not to all workers generally. (In that case, the Court was not asked to interpret the “contract of employment” language that is now in dispute.) At issue, then, is whether the FAA exempts the entire interstate transportation workforce from its scope, or whether the exemption applies only to those transportation workers who are subject to an employer-employee agreement. This case matters to NELF and its supporters because an unduly broad interpretation of “contracts of employment” would mean that no interstate transportation carrier could ever enforce its arbitration agreements and class action waivers against any of its workforce under the FAA, be they employees or independent contractors.

The First Circuit in this case concluded that the term “contract of employment” was sufficiently ambiguous, especially at the time of the FAA’s enactment in 1925, to embrace any contract to perform work, regardless of the legal status of the worker. Accordingly, the lower court held that the FAA exempted the Independent Contractor Operating Agreement that the plaintiff, truck driver Dominic Oliveira, had signed with New Prime, Inc. (“Prime”), the operator of an interstate trucking company. That agreement specified the terms of Oliveira’s independent contractor relationship with Prime. It also required Oliveira to arbitrate all work-related disputes on an individual basis. Notwithstanding the parties’ agreement, Oliveira filed a putative class action against Prime in the federal district court for the District of Massachusetts, alleging that Prime had misclassified him, and all other similarly situated truck drivers, as independent contractors, in violation of the Fair Labor Standards Act. Because the First Circuit concluded that the FAA exempted independent contractor agreements, the court denied Prime’s motion to compel arbitration on an individual basis and allowed Oliveira’s putative class action to proceed in court.

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

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

Combatting the claim that an award of “back pay” required under the Worker Adjustment and Relocation Notification Act, 20 U.S.C. § 2101 et al., constitutes “wages earned” under the Massachusetts Wage Act.

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

At issue in this case was an unsatisfied judgment of approximately \$2 million in back pay that a class of plaintiffs had obtained in federal court against their former employer for violating the notice requirement of the federal WARN Act before shutting down. Unable to recover the judgment from their now-defunct employer, the plaintiffs sued their employer’s former executive officers personally for *treble* that amount under the Massachusetts Wage Act.

NELF filed an amicus brief in support of the defendants, arguing principally that the plaintiffs could not recover under the Wage Act because, simply put, an award of “back pay” under the WARN Act does not compensate employees for “wages earned.” As NELF pointed out, back pay is a traditional remedy to compensate an employee for the wages the employee *would have earned* if the employer had not violated the law, here by failing to provide the employee with 60 days’ notice. Because, however, the Wage Act permits recovery only of the wages that an employee has *actually earned*, NELF argued that the Court should affirm the Superior Court’s dismissal of the plaintiffs’ complaint.

In its brief, NELF also argued that a decision equating “back pay” under the WARN Act with “wages

earned” under the Wage Act would eviscerate the WARN Act’s “faltering company” defense. Under that defense, a financially troubled company can avoid liability by showing that it was “actively seeking capital or business” to salvage the company and the company believed, “reasonably and in good faith,” that giving timely notice of a plant closing would have jeopardized those business opportunities. NELF also noted that allowing the plaintiffs to sue their employer’s former executives was inconsistent with the WARN Act, which does *not* impose personal liability on a company’s officers. NELF argued that this was arguably a deliberate choice by Congress to allow executive officers to exercise their business judgment and take the necessary steps to protect a financially troubled company and its workforce, without having to fear incurring personal liability for their efforts.

In a major victory for Massachusetts employers, the SJC agreed with NELF, and held that an award of back pay under the WARN Act is not for “wages earned” and, therefore, the plaintiffs had no valid cause of action under the Wage Act.

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

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

The Massachusetts Supreme Judicial Court has taken this case *sua sponte* for direct appellate review and has requested amicus briefing on the following issue: Can an employee bring a class action under the Massachusetts Wage Act without having to satisfy the

requirements of Mass. R. Civ. P. 23, when the Wage Act provides that an employee may sue “on his [or her] own behalf, or for himself [or herself] and for others similarly situated?” G. L. c. 149, § 150 (private remedy for failure to pay wages earned); G. L. c. 151, §

20 (private remedy for failure to pay minimum wage). In other words, why did the Legislature include this “similarly situated” language when it created a private right of action for wage claims in 1993, when Mass. R. Civ. P. 23, adopted in 1973, already permitted a plaintiff to seek a class action?

In its brief in support of P. F. Chang’s, NELF argues that the Wage Act’s general “similarly situated” language does not displace Rule 23’s specific requirements for bringing a class action. To establish that this language impliedly repeals Rule 23, Gammella would have to show that Rule 23 is “*so repugnant to and inconsistent with* the [Wage Act’s private remedy] that both cannot stand.” *George v. Nat’l Water Main Cleaning Co.*, 477 Mass. 371, 378 (2017) (emphasis added) (citation and internal punctuation marks omitted). This Gammella cannot do, simply because the Supreme Judicial Court’s greivous application of rule 23 to the question of class certification in *Salvas v. Walmart Stores, Inc.*, 452 class. 337 (2008), establishes that Rule 23’s requirements are actually *harmonious* with the Wage Act’s remedial purpose of allowing several employees to aggregate their small individual claims in one legal proceeding. *See Salvas*, 452 Mass. at 369 (“[C]lass actions [under Rule 23] protect the rights of groups of people who individually would be without effective strength to bring their opponents into court at all”) (citation and internal quotation marks omitted).

Far from impliedly repealing Rule 23, the Wage Act’s “similarly situated” language makes it clear that employees now have the *right* to pursue a class action under that rule. And this right would not be so clear

without the “similarly situated” language. Notably, § 2 of the Wage Act (G. L. c. 149, § 2) gives the Attorney General *exclusive* enforcement powers under the Wage Act, unless the statute specifically provides otherwise. If the Legislature had remained silent on the availability of class actions when it recognized a private remedy in 1993, *collective* enforcement of the statute would have arguably remained solely with the Attorney General.

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

Public Presentations and Seminars

Spring Breakfast Program

Continuing our tradition of outreach through public presentations, in 2018 NELF offered a breakfast program in May entitled “What Can Board Members and In-House Counsel Do to Protect Their Company in the #MeToo Era?” For this breakfast, NELF partnered with McDermott Will & Emery LLP to welcome over 50 attorneys to McDermott’s Boston offices for a timely panel discussion about what, in the #MeToo era, company management, board members, and in-house counsel can and should do to prevent harassment in the workplace, protect employees involved in such incidents, and protect their companies from missteps that can lead to liability. The panel discussion was introduced by NELF’s President, Martin J. Newhouse, and moderated by the Honorable Robert J. Cordy, partner at McDermott and Associate Justice of the Supreme Judicial Court of Massachusetts (2001-2016). The morning panelists were Melissa Brennan, Legal Counsel, Partners Healthcare, Krista Pratt, Employment Counsel, Biogen, as well as two leading McDermott partners Maria Rodriguez and Sarah Waters. The panelists focused on how a combination of experienced employment, white collar and SEC practitioners can save a company time, money, resources, and most importantly its reputation in the marketplace. The panelists provided practical advice and guidance with regard to, first, preventing workplace harassment and abuse and, second, how best to deal with such incidents so as to protect both the employees involved and their employer.

John G.L. Cabot Award Dinner

October saw NELF’s fifth annual John G.L. Cabot Award Dinner. The purpose of the dinner is to honor an outstanding individual in the New England community who shares NELF’s commitment to a balanced approach to free enterprise, reasonable

regulation, traditional property rights, and the rule of law. The 2018 award was presented to Mark T. Beaudouin, a member and former Chair of NELF’s Board, who is the Senior Vice President, General Counsel, and Secretary of Waters Corporation. Over 300 guests drawn from regional and national

businesses and distinguished national law firms joined us to honor Mark for receiving this richly deserved award. As in the past dinners, the evening celebration included a biographical video of Mark’s life and achievements, and a powerful video describing NELF’s origins, its mission, and its ongoing work. The event received nearly full-page pictorial coverage in Massachusetts Lawyers Weekly.

NELF in the News

In January, Massachusetts Lawyers Weekly published Senior Staff Attorney Ben Robbins’s comments on the Massachusetts Supreme Judicial Court’s favorable decision in *Segal v. Genitrix, LLC*, a case in which NELF filed an amicus brief authored by Ben. In his quoted remarks, Ben emphasized the great importance of the decision in creating a presumption that “if you are acting as a director with management oversight of the company or an outside investor exercising a degree of responsibility or control over how your own funds are being used, you are not an ‘agent of the employer’” and are not exposed to personal liability for wage claims. Ben also noted that the decision provided helpful guidance for proper jury instructions for such situations. In May SCOTUS blog published Ben Robbins’s commentary on the United States Supreme Court’s decision in *Epic Systems Corp. v. Lewis* (which is fully described in the Docket Section of this Year-in-Review). Ben’s commentary was entitled “The Federal Arbitration Act and the National Labor Relations Act are two ships that pass in the night.”

¹See n.7, above.

NELF 2018 John G.L. Cabot Award Dinner

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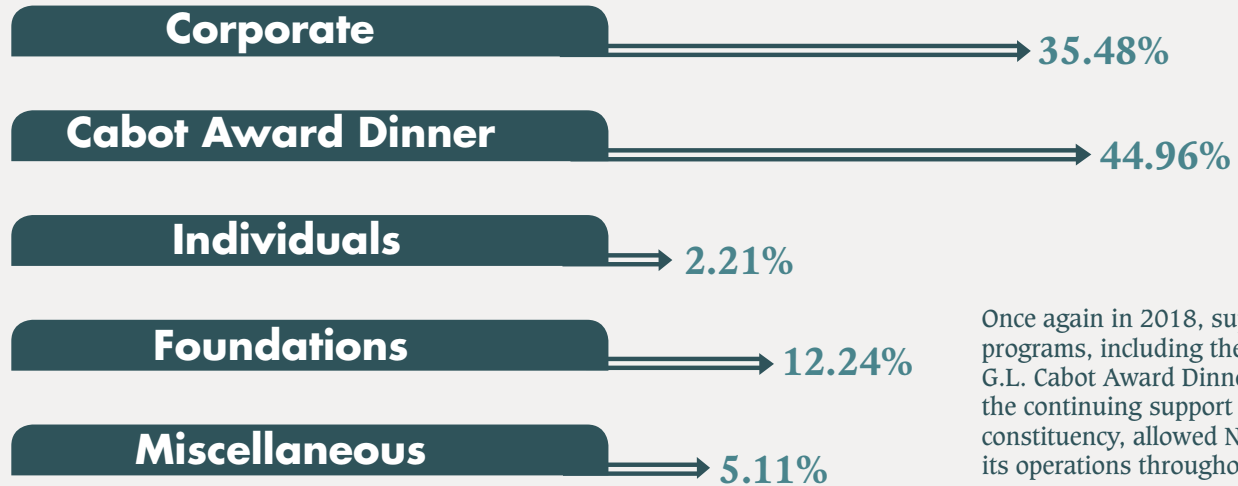
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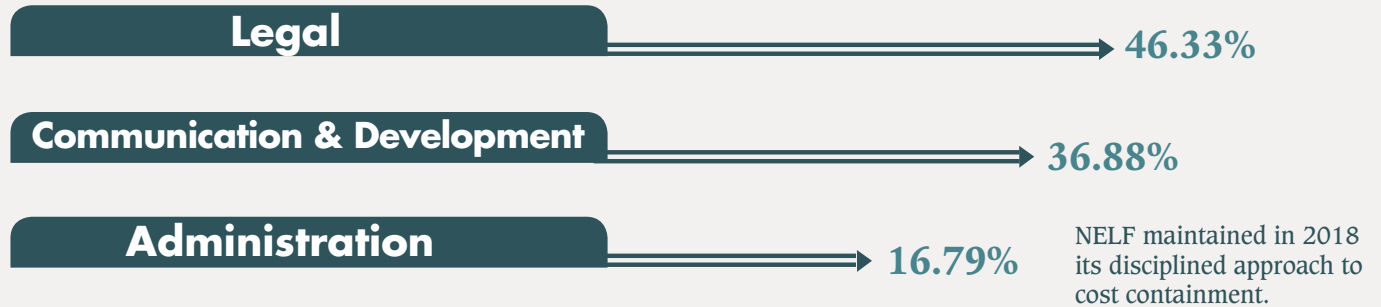


Once again in 2018, support from programs, including the fifth John G.L. Cabot Award Dinner, as well as the continuing support of our core constituency, allowed NELF to fund its operations throughout the year.

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