

Mass Dissent

Massachusetts Chapter

National Lawyers Guild

14 Beacon St., Boston, MA 02108

September 2012

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BOARD MEETING

September 18, 6:00 pm

**14 Beacon St., 1st Fl.
Boston**

Supreme Court

Each September we review the Supreme Court's last term. This issue is somewhat unusual in two respects. First, all the cases we discuss were decided right at the end of the term, and second, three of the four were decided in a way most of us prefer. Our articles review *Arizona v. U.S.*, where the Court decided on June 25, 2012 that most of Arizona's odious immigration statute was unconstitutional; *Miller v. Alabama*, where the Court decided that mandating terms of life imprisonment for juveniles violates the Eighth Amendment; the Montana campaign financing case, where the Supreme Court struck down Montana's prohibition on corporate campaign expenditures; and, finally, the Court's decision upholding the Affordable Care Act.

But before we start celebrating, here are a few things to keep in mind. While *Miller v. Alabama* continues the Supreme Court's movement in the right (decent, humane) direction on criminal punishment of juveniles, the Montana case moves in the wrong direction for those who hoped that *Citizens United* might be limited where a good record could demonstrate the danger of corporate money in elections. And while *Arizona v. U.S.* did send a good message to Arizona, Alabama and other states that believe they are sufficiently sover-

eign to replace federal immigration law with their own law, it did leave standing perhaps the most troubling section of the Arizona law, allowing law enforcement to stop and detain persons "reasonably suspected" of being illegal aliens – as though that can be done constitutionally.

Finally, the Supreme Court's welcome Affordable Care Act decision has a dark side, since the 5-Justice majority was able to uphold the law only with the vote of the Chief Justice, who denied a Commerce Clause justification for the law but substituted a limited tax power justification. As Stanford Law Professor Pamela Kaplan wrote a few days after the decision in the *New York Times* ("No Respite for Liberals"), the Roberts Court continues to intensify the effort to reduce federal power, and in the coming term the Court "will have further opportunities to advance the conservative agenda" as it likely decides voting rights, affirmative action, and same sex marriage cases. A government that cannot regulate the economy under the Commerce Clause or enforce other rights under its spending power (another possible outcome of this decision) is hamstrung. Perhaps one legacy of last term will be a limitation on the federal government's ability to do (relative) good.

- David Kelston -

**NATIONAL LAWYERS GUILD
Massachusetts Chapter, Inc.**

14 Beacon St., Suite 407
Boston, MA 02108
tel.: 617-227-7335 • fax: 617-227-5495
nlgmass@igc.org • nlgmass-director@igc.org
www.nlgmass.org

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Join a Guild Committee

Street Law Clinic Project: The Street Law Clinic project provides workshops for Massachusetts organizations that address legal needs of various communities. Legal education workshops on 4th Amendment Rights (Stop & Search), Landlord/Tenant Disputes, Workers' Rights, Civil Disobedience Defense, Bankruptcy Law, Foreclosure Prevention Law, and Immigration Law are held at community organizations, youth centers, labor unions, shelters, and pre-release centers. If you are a Guild attorney, law student, or legal worker interested in leading a workshop, please contact the project at 617-723-4330 or nlgmass-slc@igc.org.

Lawyer Referral Service Panel (LRS): Members of the panel provide legal services at reasonable rates. Referral Service Administrative/Oversight Committee members: Neil Berman, Neil Burns, Joshua Goldstein, Jeremy Robin, and Azizah Yasin. For more information, contact the Referral Service Coordinator at 617-227-7008 or nlgmass@igc.org.

Foreclosure Prevention Task Force: Created in June 2008, the Task Force's goal is threefold: (1) advocate for policies that address issues that homeowners and tenants of foreclosed houses face, (2) to provide legal assistance to these homeowners and tenants, *and* (3) to conduct legal clinics for them. If you are interested in working with the Task Force, please call the office at 617-227-7335.

Mass Defense Committee: Consists of two sub-committees: (1) "Legal Observers" (students, lawyers, activists) who are trained to serve as legal observers at political demonstrations *and* (2) "Mass Defense Team" (criminal defense attorneys) who represent activists arrested for political activism. To get involved, please contact the office at 617-227-7335.

Litigation Committee: Established in 2010, the Committee brings civil lawsuits against large institutions (such as government agencies, law enforcement, banks, financial institutions, and/or large corporations) that engage in repressive or predatory actions that affect large numbers of people and that serve to perpetuate social, racial and/or economic injustice or inequality. To get involved, please contact the Guild office.

NLG National Immigration Project: Works to defend and extend the human and civil rights of all immigrants, both documented and undocumented. The Committee works in coalitions with community groups to organize support for immigrant rights in the face of right-wing political attacks. For more information contact the NLG National Immigration Project at 617-227-9727.

NLG Military Law Task Force: Provides legal advice and assistance to those in the military and to others, especially members of the GIRights Hotline, who are counseling military personnel on their rights. It also provides legal support and helps to find local legal referrals when needed. For advice and information, GI's can call 877-447-4487. To get involved, please contact Neil Berman (njberman2@juno.com) or Marguerite Helen (mugsm@mindspring.com).

GUILD NEWS

NLG HAPPY HOURS

We hope you will join us for this **month's NLG Happy Hour**. On the second Wednesday of each month, we rotate "Mentorship" Happy Hour with *"NLG Presents..."*. Please see **page 4** with a report and pictures from the last event. If you have an idea for a presentation topic or if you would like to be a speaker, please call the Guild office at 617-227-7335.

NLG CONVENTION

The NLG is celebrating its 75th birthday in 2012, and this year's NLG Convention will commemorate the occasion

with presentations and workshops on the past, present, and the future of the Guild. Major Panels will discuss "New COINTELPRO," "Strategies for Confronting Mass Incarceration," attacks on the Occupy Movement, and housing crisis. Our keynote speaker will be **Angela Davis**, an educator, activist, writer, and scholar. This year's Ernie Goodman Award will go to our own **Margaret Burnham**, law professor at Northeastern University School of Law, who, at 26, was a lead attorney on the Angela Davis defense team. The Convention will be held at the **Pasadena Hilton in Pasadena, CA, October 10- 14**. For more information or to register visit www.nlg.org/members/convention/ or call 212-679-5100.

Street Law Clinic Report

The following clinics and trainings were conducted for members of Boston area community organizations and agencies:

June 26: *Stop & Search* clinic for NAACP and Lawyers' Committee for Civil Rights, by **Carl Williams**.

NLG Motto Contest

This year, the NLG is celebrating its 75th Anniversary and the Mass Chapter - 43rd Anniversary! Even though we've been around for over 40 years, we've never had a motto. It's time to change it. We are opening an "NLG Motto" Contest. Please submit your ideas and suggestions to nlgmass-director@igc.org.

**For the winner, there will be
a wonderful prize!**

"Thank you" to Barbara, and "Welcome" to Stephanie

In July, we said "Good bye" to Barbara Lee who left the Guild to pursue new adventures in San Francisco. She was a highly valued employee and we wish her all the best in California. Barbara was replaced by **Stephanie Fail**. Stephanie is a journalist and Occupy Boston activist. This year, she will finish her degree in anthropology at UMass Boston. Please give her a call at 617-227-7008 and welcome her to the Guild.

NLG Mentorship Happy Hour

Welcome New and Returning Law Students

**Wednesday, September 12, 2012
6:00 – 8:00 pm**

Red Hat Cafe (9 Bowdoin St., Boston)

Let's start the new academic year with a good company of Guild comrades, tasty snacks, and refreshing beverages. You will have a chance to meet Guild lawyers, legal workers, and law students from other law school. See you there!

ARTICLES FOR MASS DISSENT

The October issue of *Mass Dissent* will focus on prisoners' rights.

If you are interested in submitting an article, essay, analysis, or art work (cartoons, pictures) related to the topic, please e-mail your work to nlgmass-director@igc.org.

The deadline for articles is September 15.

“NLG Presents...” Happy Hour

A small but lively group discussed with chapter member **Judy Somberg** the history of United States intervention in El Salvador and the role that the U.S. may have played in the recent elections there.

Judy had led a group of eight NLG members to observe the March 2012 legislative elections and recounted their experiences there. See her article in the April *Mass Dissent* for more about that trip (you can visit it at <http://www.nlgmass.org/2012/04/nlg-election-delegation-returns-from-el-salvador/>).

(r.) Judy Somberg discusses what she observed in El Salvador while Barb Dougan intently listens. *Photo by Barbara Lee*



Summer Retreat

At the end of July, the Chapter hosted the Annual Summer Retreat. Once again, Judy Somberg opened her beautiful Cambridge home and garden for us. On the agenda was an analysis of the Guild’s work this year and a discussion on issues we should consider in the upcoming year. Our main focus will be on the Litigation Committee. If you are interested in litigating with the NLG, please call our office.

Talking, eating, and drinking at the Retreat.
(Below l.-r.) Jonathan Messinger & Beverly Chorbajin.
Photos by Urszula Masny-Latos



Citizens United II: Money Talks, Supreme Court Listens, Progressives Silenced

by Jeff Thorn

Undaunted by record heat, the U.S. Supreme Court this summer continued its fight for corporate first amendment speech rights in *American Tradition Partnership v. Bullock*. The decision found unconstitutional Montana's Corrupt Practices Act, and overturned a 2011 Montana Supreme Court decision upholding the Act. On the books since 1912, the Act had forbidden corporations from "making contributions or expenditures in connection with a candidate or political committee supporting or opposing a candidate or political party." The ruling allowed American Tradition Partnership – an organization fighting against "environmental extremists," amongst other causes – to continue its self-described effort to "to solicit and anonymously spend [in unlimited quantities] the funds of other corporations, individuals and entities to influence the outcome of Montana elections."

The U.S. Supreme Court's 5-4 per curiam decision – which fell significantly short of 200 words – followed firmly in the footsteps of *Citizens United* (2010), another 5-4 decision, where the U.S. Supreme Court had ruled that corporations must be allowed to use "general treasury funds" (and need not create separate Political Action Committee "PAC" organizations) for "independent political expenditures." (Direct contributions from corporations to federal candidate campaigns remained illegal.) In *Citizens*, the Court concluded that "[n]o sufficient governmental interest justifies

limits on the political speech of nonprofit or for-profit corporations."

In addressing the 2010 *Citizens* ruling, the 2011 Montana Supreme Court had emphasized that *Citizens* did not categorically prohibit the regulation of independent corporate expenditures for candidates, but instead mandated strict scrutiny of such regulation. The Montana court – ruling 5-2 – had found that "material factual distinctions" abounded between *Citizens* and *American Tradition*, and that Montana's Corrupt Practices Act passed strict scrutiny and thus should be considered constitutional. The decision had given some hope that, at least at a state and local level, the flow of corporate money into politics might be limited.

The Montana Supreme Court found a compelling state interest, first, in the fact that prior to the enactment of the Corrupt Practices Act, Montana had suffered "naked corporate manipulation of the ... government," with mining companies vying for control of the state. The court also asserted that the potential for election manipulation – greater in Montana than federally, because of Montana's sparse population, low campaign costs, dependence on certain industries, and history of corporate influence – remained today, and constituted "unique and compelling interests" for the state, warranting the Corrupt Practices Act. The court further highlighted how narrowly tailored Montana's legal limitations were, and how they differed significantly from the federal election laws ruled on in *Citizens United* – noting that corporations could, with relative ease in Montana, form

corporate PAC committees, and also that they held the right to impact business activities through ballot issues not concerning political actors.

Such arguments were tossed by the Supreme Court in two sentences – with the assertion that there could be no "serious doubt" that *Citizens* applied to Montana and Montana law, and that "Montana's arguments in support of the judgment below either were already rejected in *Citizens United*, or fail to meaningfully distinguish that case." A few commentators held out hope that other related laws and cases might be "meaningfully distinguish[ed]" from *Citizens*, others talked Constitutional amendment.

For the realistic rest, the decision stands for the notion that any election finance reform has a long hard road ahead. In conjunction with *SpeechNow.org v. FEC*, (Fed. Ct. App. 2010), *Citizens United* is credited with spawning the advent of Super PACs, which have at least quintupled in number since 2010, and with allowing corporations (as well as individuals and other organizations) to make unlimited contributions for political campaigns – as long as the Super PAC avoids "direct" candidate coordination. The 2012 elections will, no doubt, see a record amount of election money spent (around \$6 billion) – though wealthy individuals have so far accounted for the vast majority of Super PAC donations (with corporations accounting for only 11% of such donations). In fact, some reform minded organizations have noted that corporations have already jumped ahead of Super PACS to the benefits of,

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The Arizona Immigration Case

by David Kelston

Arizona v. the United States - another important case decided (generally the right way) in the Court's last week - is surprisingly civil, with the five-member majority (absent Justice Kagan, who recused herself), hardly mentioning the dissents, and the separate dissents by Justices Scalia, Thomas, and Alito, generally maintaining a measured tone. But Justice Scalia's dissent, at the least, is both unusual and extreme in content if not in tone. First the opinion of the Court, written by Justice Kennedy, and joined by Justices Ginsberg, Breyer and Sotomayor, and by the Chief Justice.

Arizona's anti-immigration statute (S.B. 1070) was enacted in 2010, and like its Alabama counterpart is both scary and, surprisingly, makes us appreciate the fact that federal law, while hardly tolerant and enforced in ways that often smack of totalitarianism, is far better than what at least some of the states would do if they could. Five states - Alabama, Georgia, South Carolina, Indiana, and Utah - have enacted laws like Arizona's.

The Arizona statute was enjoined in its entirety by the District Court, which was affirmed by the Ninth Circuit. The Supreme Court struck down three of the statute's four parts, while sending signals that the last provision, when actually enforced, may also be vulnerable to a challenge on federal preemption grounds.

The Court's preemption analysis was fairly straightforward. Under the Supremacy Clause federal law is "the supreme Law of the Land; and the Judge in every State shall be bound thereby, any

Thing in the constitution of Law of any State to the Contrary notwithstanding." Art. VI, cl. 2. Under the supremacy analysis, Congress has the power to preempt state law by an express preemption provision, through a pervasive "framework of [federal] regulations," or in certain other circumstances, including where the federal interest is "so dominant" that preemption will be inferred, or where state laws conflict with federal law. The Supreme Court in *Arizona v. U.S.* relied on "inferred" preemption.

First, the Arizona law made it a state crime for "willful failure to complete or carry an alien registration document" in violation of federal law. In other words, Arizona gave itself the right to enforce federal immigration law by making its violation a state misdemeanor. The Court found that the federal government comprehensively regulates alien registration, including the punishment for non-compliance, see *Hines v. Davidowitz*, 312 U.S. 52. The core of the Court's reasoning here was exactly right: "Were the [Arizona registration provision] to come into force, the State would have the power to bring criminal charges against individuals for violating a federal law even in circumstances where federal officials ... determine that prosecution would frustrate federal policies." In other words - and this is what Arizona wanted - Arizona could be tougher, even using federal law, than the federal government chooses to be.

Next, the Supreme Court addressed §5(c) of the Arizona statute, which made it a state crime for "an unauthorized alien to knowingly apply for work, solicit work ... or perform work as an employee" in Arizona. Thus, and

there is no federal counterpart to this, Arizona criminalized an "unauthorized alien's" even applying for a job. The Court struck down this provision on the grounds that Congress, in enacting current federal law, imposed civil penalties against aliens who take unauthorized jobs (*e.g.*, they lose eligibility to become lawful permanent residents), rejecting criminal penalties as unnecessary and unworkable. Thus, allowing states to impose such penalties would be inconsistent with federal policy and objectives.

Next, the Court struck down §6 of the Arizona law, allowing state police to arrest anyone the officer "reasonably believes" is "removable from the United States." But, the Court noted, "it is not a crime for a removable alien to remain present in the United States," and the alien may be "removed" only following federal administrative proceedings. Thus, the Court concluded, the Arizona statute at §6 conflicted with federal law, or at least, as the Court said, "creates an obstacle to the full purposes and objectives of Congress," and it was thus also preempted.

Finally, the Court addressed §2(B), requiring Arizona state officers to make a "reasonable attempt" to "determine the immigration status" of any person they stop, detain or arrest, if the officer has "reasonable suspicion ... that the person is an alien and is unlawfully present in the United States"; and the immigration status of any person arrested "shall" be determined before the person is released. Of course it is virtually certain that an officer's "reasonable suspicion" could only be based on odious profiling, and the "shall be determined" provision is

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Mandatory Life Without Parole Sentencing for Juveniles Violates Eighth Amendment

by Dave Samuels

Over the last seven years, the Supreme Court has repeatedly applied the Eighth Amendment to fundamentally change the law surrounding the sentencing of juvenile offenders. The Court's landmark decision in *Roper v. Simmons* outlawed the death penalty for youths under the age of 18. Five years later in *Graham v. Florida*, the Court found the sentencing of juveniles to life in prison without the possibility of parole for non-homicide crimes to be unconstitutional. In the wake of these cases, however, several unanswered questions emerged. One question centered on the constitutionality of mandatory sentencing laws requiring life imprisonment without parole for juveniles tried as adults and convicted in homicide crimes. This past term, the Supreme Court delivered its answer in *Miller v. Alabama*, holding such mandatory sentencing of juveniles to a lifetime in prison without the possibility of parole violated the Eighth Amendment's ban on cruel and unusual punishment.

The *Miller* case combined two lower court cases, *Miller v. Alabama* and *Jackson v. Hobbs*, involving two 14 year-old boys tried as adults and convicted of murder. The defendant in *Miller*, a victim of an abusive stepfather and drug-addicted mother, killed his mother's drug dealer. After an evening of drinking and doing drugs with the dealer, the defendant and a friend beat the dealer after he caught them trying to steal money from him, and set fire to his trailer, killing him in the process.

In *Jackson*, the defendant was present during an attempted robbery committed by his friends in which a store cashier was killed. Although his involvement in the robbery was not definitive, he was tried and convicted of felony murder for the actions of his friends.

Interestingly, the Court's 5-4 decision in *Miller*, written by Justice Kagan, (joined by Justices Kennedy, Ginsberg, Breyer, and Sotomayor) eschewed the typical investigation into "objective indicia of society's standards, as expressed in legislative enactments and state practice" used to determine whether a punishment is cruel and unusual—a point that did not go unnoticed by the dissenters. Rather, the majority opinion stands as a natural extension of the Court's holdings in *Roper* and *Graham*, relying mainly on the reasoning of those cases (which did demonstrate the requisite indicia). The two cases make clear that "[t]he concept of proportionality is central to the Eighth Amendment." To that end, the Eighth Amendment "guarantees individuals the right not to be subjected to excessive sanctions," and that right "flows from the basic 'precept of justice that punishment for crime should be graduated and proportioned.'" This concern for "proportional punishment" served as the foundation for the majority's opinion.

The Court identified "two strands of precedent reflecting [its] concern with proportionate punishment." The first strand adopted categorical bans on sentencing practices that make no distinctions between the culpability of a class of offenders and the severity of the penalty. The decisions in *Roper*

and *Graham* held that for the purposes of sentencing, the Constitution recognizes a difference between children and adults. The Court identified three distinctions between juveniles and adults: children's lack of maturity and appreciation of consequences; their vulnerability to external pressure and circumstances; and their undeveloped character. These distinctions lessen children's "moral culpability," making them "less deserving of the most severe punishments." The mandatory sentencing schemes at issue in this case, however, prevented the sentence from taking into account these differences and others the Court elaborated on.

The second strand relied on the demand for individualized sentencing when imposing the death penalty established by the Court in *Woodson v. North Carolina* in 1976. Embracing Chief Justice Roberts' concurrence in *Graham* likening the "[t]reat[ment] [of] juvenile life sentences as analogous to capital punishment," the majority in *Miller* deemed life imprisonment without the possibility of parole to be the harshest penalty for juveniles (given the Court's previous holding in *Roper*). As such, with the harshest penalty at play, as in capital punishment cases for adults, individualized sentencing was required to allow juvenile defendants to advance, and juries and judges to assess, "any mitigating factors, so that the [harshest punishment] is reserved only for the most culpable defendants committing the most serious offenses."

With those two considerations

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The Arizona Case

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virtually certain to lead to excessive detention for numerous arrestees who fit the profile, regardless of their actual immigration status. But the Court found §2(B) not facially unlawful, since cooperation

Citizens United

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and difficulties in tracking, donations to non-profits engaged in election “issue” spending, rather than Super PAC “candidate” spending.

How to get big money out of politics, in short, isn’t soon to be resolved. What is clear, though, is that American Tradition is another step back.

Jeff Thorn is an attorney with Adkins Kelston & Zavez in Boston. He also serves on the NLG Litigation Committee.

between federal and state officials is an important feature of the immigration system (i.e., the local police should communicate with ICE) and 2(B) may, the Court determined, be enforced in a way that will not lead to unreasonable detentions. While we shall see, and while 2(B) will be implemented (and challenged) in Arizona, it is virtually certain to cause havoc, and great harm, before, if ever, it too is struck down. It should be noted that this provision has been considered the centerpiece of the statute by many of its supporters, such that the fact that it has thus far survived Supreme Court scrutiny allowed Arizona’s conservative Gov. Jan Brewer to characterize the Supreme Court decision as a victory.

Arizona v. U.S. tells us something most of us already know. Numerous states believe that the federal government is “soft” on illegal immigration, and if they were to have their way, we would see a war in the states against persons “reasonably suspected” of being illegals - e.g., poor people with limited English. And Justice Scalia, for his

part, would be on the front lines. His dissent, in fact, revolves around his oft-repeated contention that states are “sovereign” and should be able to exclude those they wish to exclude. He even relies on international law and, in an extraordinary aside, comments that Arizona is “entitled to have ‘its own immigration policy,’” (emphasis in the original) and that Obama’s enacting part of the “Dream Act” through non-enforcement, announced post argument in the Arizona case, shows that the federal government in fact refuses to enforce immigration law. The obvious corollary is that the states must do so. While Scalia was the only Justice clearly to enunciate that position, perhaps because he had to go completely outside the record before the Court to do so, others on the Court likely agree with him, as do many states. This battle goes on.

David Kelston is of Counsel at Stern Shapiro Weissberg & Garin. He is Chair of the Massachusetts Chapter of the NLG.

Life Without Parole for Juveniles

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in mind, the Court reached the conclusion that sentencing schemes that mandate life imprisonment without the possibility of parole for juveniles violates the Eighth Amendment. The Court chose not to rule on the broader issue raised by the juvenile defendants of whether the Eighth Amendment requires a categorical bar on life without parole for juveniles in any circumstance, mandated or not. Without saying as much, the Court did provide an answer however, suggesting that “given all [it] ha[s]

said . . . about children’s diminished culpability and heightened capacity for change,” it believed “appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.” The suggestion that there may be “appropriate occasions” for the imposition of such a sentence sets the stage for what may be the next case in this line of the Court’s jurisprudence.

As one of the 29 states that until recently mandated life in prison without parole for juveniles convicted of homicide crimes, Massachusetts must now rewrite its laws to comply with the ruling.

According to the Massachusetts Bar, “[a] current legislative working group is already discussing a range of potential options.”¹ The Massachusetts Bar also reports that there are approximately 61 people who have already been convicted under the old statute while juveniles and 20 more individuals currently awaiting trial. Those already convicted may have recourse in seeking post conviction relief under Mass. Criminal Procedure Rule 30 allowing for a new sentence or trial.

David Samuels studies law at Tulane Law School and will start his third year in September. In the summer of 2012, he interned with the Litigation Committee of the NLG Massachusetts Chapter.

¹ Peter Elikann, *Fundamental reconsideration of juvenile offenders*, Massachusetts Bar Lawyers Journal (Aug. 2012), available at <http://www.massbar.org/publications/lawyers-journal/2012/august/fundamental-reconsideration-of-juvenile-offenders>.

The Affordable Health Care Decision

by David Kelston

Many of us (I am included) breathed a sigh of relief when the constitutionality of the Affordable Care Act was upheld. But we should make no mistake. We've come a long way, in the wrong direction, when the individual mandate – a conservative, Heritage Foundation alternative – can barely survive constitutional challenge, and then only by means of a taxing power analysis that has a very limited reach.

Chief Justice Roberts, who is widely assumed to have switched mid-steam from the four-member conservative bloc (Justices Scalia, Kennedy, Thomas and Alito) that was prepared to strike down the Act in its entirety, was essentially a “majority of one,” with his unique opinion: the individual mandate runs afoul of the Commerce Clause, but is constitutional under, and only under, the taxing power. The decision is also the first in the Court's history to strike down an act of Congress – here the expansion of Medicaid – on the grounds that the law as enacted under the spending power of the Constitution was coercive.

The Affordable Care Act addresses a pressing problem. About 50 million Americans have no health insurance, some by choice but most because they cannot afford it. Not surprisingly, the uninsured get little preventative care and rely largely on emergency room visits. Health care providers pass along the cost of this care in the form of higher premiums. On its face, regulating this market would seem easily to fit within the federal government's broad powers under Article I, sec. 8 of the

Constitution, giving Congress the power to “regulate Commerce ... concerning the several States,” and Congress certainly thought so when it enacted the individual mandate. The mandate works as follows. Beginning in 2014, most Americans will be required to have “minimum essential” health insurance, and those who do not comply will be required to pay the federal government a penalty, calculated as a percentage of household income with a floor (\$695 annually in 2016) and a ceiling based on the average annual premium the person would have to pay for qualifying health insurance. The penalty, which is meant to cover the health care costs of those who do not comply with the law, will be paid to the IRS with taxes, but is not subject to IRS levy or criminal penalty. In fact, the Congressional Budget office predicts that in 2017 total penalty payments will be about \$4 billion, which is, relatively speaking, a trivial amount. (The Bush tax cuts cost about \$150 billion a year, by comparison).

The Affordable Care Act also provides for a major expansion of Medicaid. Medicaid, enacted in 1965, gives the states financial assistance to provide health services to pregnant women, children, needy families, and certain others. Under the Act – where the goal is universal medical coverage – state programs, many of which only provide medical coverage to adults with children if their income is below the federal poverty guidelines, must now provide that federally-subsidized coverage to adults with incomes up to 133 percent of the federal poverty level. And while states are free to opt out of the expanded Medicaid, where the vast

majority of the costs are paid by the federal government, the Act gives them a choice that was not to some states liking: take what is offered, in total, or don't take it at all, but you cannot take it on your own terms, that is, refuse to cover more Americans pursuant to the Act's expansion provision but keep your prior level of Medicaid federal funding.

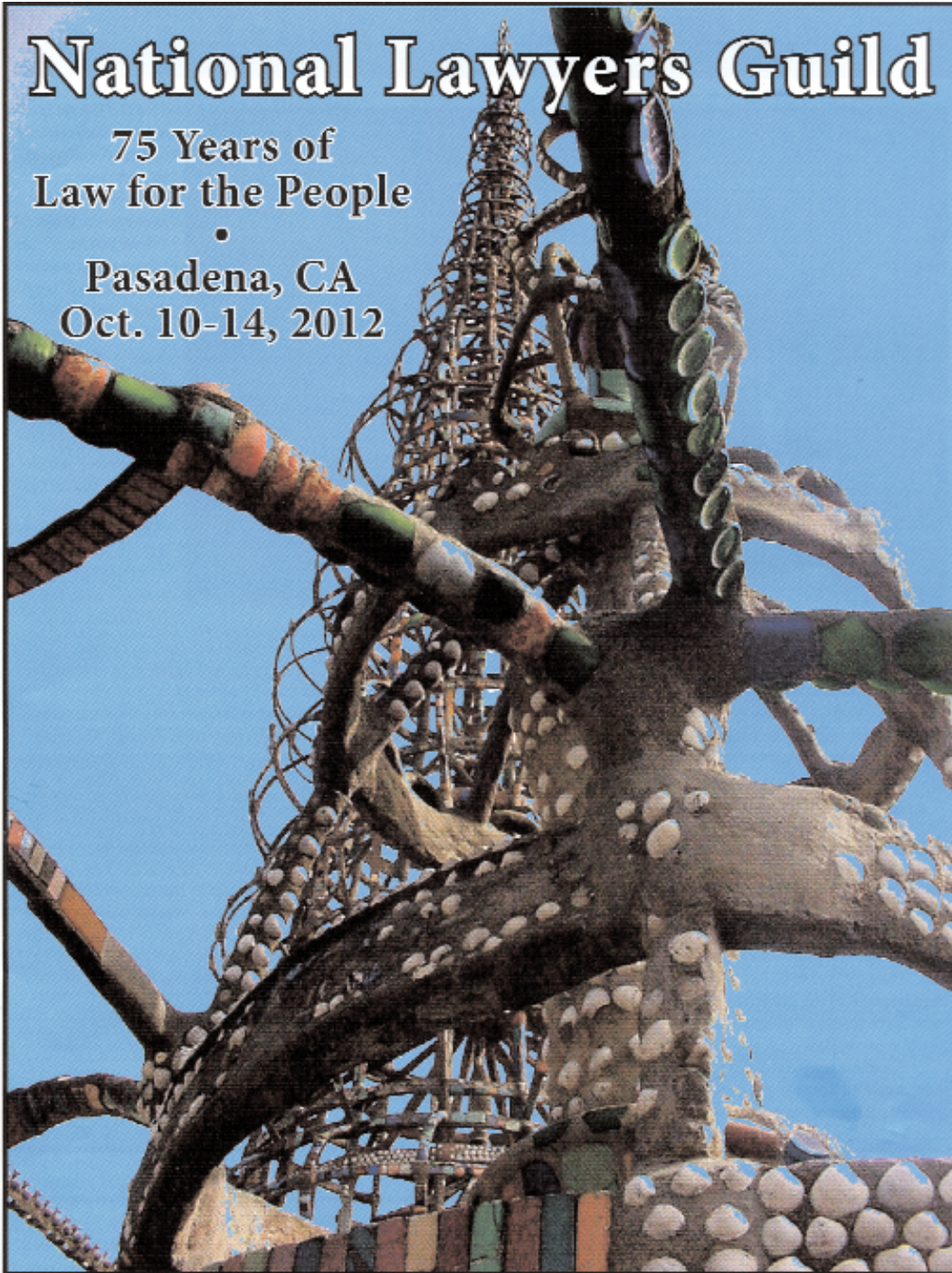
As to the individual mandate, the Chief Justice and four dissenters found that the Commerce Clause cannot compel any person “not engaged in commerce to purchase an unwanted product,” insurance. But, as Justice Ginsberg – and every liberal commentator – pointed out, everybody *is*, of necessity, in the health care market, since everybody uses health care services, and choosing to be uninsured is not a choice to stay out of commerce, it's just a choice to have someone else pay your way in commerce. Ultimately, the Chief Justice saved the mandate, and thus likely the entire Act, since its extensive regulation of the insurance market (*e.g.*, no denial of insurance for preexisting conditions) depends upon the healthy, as well as the unhealthy, having and paying for insurance. He did so by agreeing with the government's alternative argument, which is that the government undoubtedly does have the power to tax those who do not do certain things, and the mandate is nothing more than such a tax. But keep in mind that this analysis has its limitations. As the Chief Justice described it, “... it is estimated that four million people each year will choose to pay the IRS rather than buy insurance. We would expect Congress to be troubled by that prospect if such

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National Lawyers Guild

75 Years of
Law for the People

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Pasadena, CA
Oct. 10-14, 2012



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For hotel reservation, please call
626-577-1000 or 800-HILTONS (use
“NLG” code for the discounted rate by September 18.
To register, go to www.nlg.org/members/convention/

NLG Massachusetts Chapter Sustainers

In the spring of 2003, the Massachusetts Chapter of the NLG initiated the Chapter Sustainer Program. Since its inception, the Program has been very successful and has been enthusiastically joined by the following Guild members:

Adkins, Kelston & Zavez • 2 Anonymous • Michael Avery • Neil Berman • Howard Cooper • Barb Dougan • Robert Doyle • Melinda Drew & Jeff Feuer • Carolyn Federoff • Roger Geller & Marjorie Suisman • Lisa Gordon • Lee Goldstein & Shelley Kroll • Benjie Hiller • Andrei Joseph & Sharryn Ross • Myong Joun • Martin Kantrovitz • Nancy Kelly & John Willshire-Carrera • David Kelston • Eleanor Newhoff & Mark Stern • Petrucelly, Nadler & Norris • Hank Phillippi Ryan & Jonathan Shapiro • Allan Rodgers • Martin Rosenthal • Anne Sills & Howard Silverman • Judy Somberg • Stern, Shapiro, Weissberg & Garin

The Sustainer Program is one of the most important Chapter initiatives to secure its future existence. Please consider joining the Program.

YES, INCLUDE MY NAME AMONG NLG MASSACHUSETTS CHAPTER SUSTAINERS!

I, _____, am making a commitment to support the Massachusetts Chapter of the Guild with an annual contribution of:
_____ \$500 (not including my membership dues)
\$ _____ (other above \$500)

As a sustainer I will receive:

- special listing in the Dinner Program;
- 1/8 page ad in the Dinner Program;
- acknowledgement in every issue of *Mass Dissent*;
- two (2) free raffle tickets for a Holiday Party raffle;
- invitation to special events.

Three ways to become a sustainer:

- contribute \$500 or more a year (in addition to dues)
- pair up with another person and pay \$250 each, or
- join the "Guild Circle" and pay \$50/month minimum.

Please mail to: NLG, Massachusetts Chapter
14 Beacon St., Suite 407, Boston, MA 02108

The Affordable Health Care Decision

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conduct were unlawful. That Congress apparently regards such extensive failure to comply with the mandate as tolerable suggests that Congress did not think it was creating four million outlaws. It suggests instead that the shared responsibility payment merely imposes a tax citizens may lawfully pay in lieu of buying health insurance." In other words, were Congress really to try to force people to do certain things – rather than refraining from doing other things – that likely would be unconstitutional.

As to the Medicaid expansion, the Solicitor General said in oral argument, more than once, that he really did not expect the federal government to withhold all Medicaid funds from a state

that opted out of the Medicaid expansion, and Justices Breyer and Kagan joined with the Chief Justice (and the dissenters) to find that the federal government's actually withholding all Medicaid funds in these circumstances would be coercive – and this was a first in constitutional jurisprudence under Congress' spending power. While the question here did seem closer than the Commerce Clause question, the fact is that some states now could help frustrate the Act's goal of universal coverage by opting out of the critical Medicaid expansion. The Act, in fact, depends for its effectiveness significantly on the expanded Medicaid program, which is estimated to provide insurance coverage to 19 million of the currently uninsured.

The Affordable Care Act is

certainly not perfect, but it moves us in the right direction, toward the acknowledgment that it is the government's job to see to it that everyone has decent health care and to promote equality. The extent, and the depth of opposition to the Act, and the Supreme Court's obvious discomfort with the federal government's ability even to address such important matters, speaks volumes about the conservative times we are in.

David Kelston of Counsel at Stern Shapiro Weissberg & Garin. He is a long-time Guild member and now serves as Chair of the NLG Massachusetts Chapter.

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The National Lawyers Guild is...



" ... an association dedicated to the need for basic change in the structure of our political and economic system. We seek to unite the lawyers, law students, legal workers and jailhouse lawyers of America in an organization which shall function as an effective political and social force in the service of people, to the end that human rights shall be regarded as more sacred than property interests."

Preamble to the Constitution of the National Lawyers Guild

Donate to Support the Guild!

The Massachusetts Chapter of the National Lawyers Guild's **Mass Defense Committee** provides legal representation and assistance to the **Occupy Boston** movement.

We need your support.

Please help by donating to the Mass Chapter by mailing this form and a check to **14 Beacon St., Suite 407, Boston, MA 02108** or visiting www.nlgmass.org/donate.

I, _____ (name), am donating \$ _____ to the NLG Mass Chapter to help support the Mass Defense Committee and their work,

Please Join Us!

Dues are calculated on a calendar year basis (Jan.1-Dec.31) according to your income*:

Jailhouse Lawyers	Free
Law Students	\$25
up to \$15,000	\$40
over \$15,000 to \$20,000	\$50
over \$20,000 to \$25,000	\$75
over \$25,000 to \$30,000	\$100
over \$30,000 to \$40,000	\$150
over \$40,000 to \$50,000	\$200
over \$50,000 to \$60,000	\$250
over \$60,000 to \$70,000	\$300
over \$70,000 to \$80,000	\$350
over \$80,000 to \$90,000	\$400
over \$100,000	\$500

* Any **new** member who joins after September 1 will be carried over to the following year. Dues may be paid in full or in quarterly installments. Dues of \$80 cover the basic membership costs, which include publication and mailing of *Mass Dissent* (the Chapter's monthly newsletter), national and regional dues, and the office and staff.

Fill out and send to:

National Lawyers Guild, Massachusetts Chapter
14 Beacon St., Suite 407, Boston, MA 02108

NAME: _____

ADDRESS: _____

CITY/STATE/ZIP: _____

PHONE: (w) _____ (h) _____

E-MAIL: _____

FAX: _____

Circle one:

____ Lawyer ____ Legal Worker ____ Law Student ____ Jailhouse Lawyer

Alumna/Alumnus of _____ Year _____

Dues (from schedule): _____

I am interested in working on the following projects:

- ____ Lawyer Referral Service
____ Street Law Clinic
____ Mass Defense Committee
____ Litigation Committee
____ *Mass Dissent* (monthly publication)
____ National Immigration Project