

# Mass Dissent

Massachusetts Chapter

National Lawyers Guild

41 West St., Boston, MA 02111

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## BOARD MEETING

September 19, 6:00 pm

41 West St., 7th Fl.  
Boston

## Supreme Court & its Latest Term

This is our annual Supreme Court issue of *Mass Dissent*, and what was most important this term is what happened right after the term ended: Justice Kennedy announced his retirement. While Justice Kennedy has for years been the Court's swing vote, joining the four more liberal justices (Breyer, Ginsburg, Kagan, and Sotomayor), for instance, half of the time in 2016 on 5-3 or 5-4 votes, this past term, the *N.Y. Times* calculated, he never once joined the liberals in those close votes, leading to what the *Times* called a term "marked by division, disruption and an extraordinary string of 5-to-4 conservative victories ending in blockbuster rulings upholding President Trump's travel ban and dealing a body blow to public unions."

With new (expected) Justice Kavanaugh we can look forward to a similar, conservative, and distressing Court next term, one that likely would have been markedly different had, for

instance, President Obama's choice, Merrick Garland, joined the Court. "At least 14 cases this term likely would have come out the other way had the Senate let Garland through," Professor Lee Epstein said, including "the travel ban, racial gerrymandering, required [employee] arbitration, abortion information, and others." (We would include the political gerrymandering cases, where it seems likely the four more liberal justices, if joined by Justice Garland, would have taken on the issue rather than avoiding the cases on technical grounds).

We write in this issue about three of those conservative "blockbuster" victories: the travel ban, public unions, and Masterpiece Cakeshop cases, all with Justice Kennedy in the majority, as well as three important cases for our many members who practice criminal defense.

In these latter cases, the Supreme Court offered a few

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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 an NLG attorney, law student, or legal worker interested in leading a workshop, please contact the project at 617-227-7335 or nlgmass-slc@igc.org.

**Lawyer Referral Service Panel (LRS):** Members of the panel provide legal services at reasonable rates. Referral Service Committee members: Benjamin Dowling, Sebastian Korth, Douglas Lovenberg, and Jonathan Messinger. For more information, contact the LRS Coordinator at 617-227-7008 or nlgmass-lrs@igc.org.

**Foreclosure Prevention Task Force:** Created in June 2008, the Task Force's goal is threefold: (1) advocate for policies that address issues facing homeowners and tenants of foreclosed houses, (2) provide legal assistance to these homeowners and tenants, *and* (3) 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 NLG 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 perpetuate social, racial and/or economic injustice or inequality. To get involved, please contact the NLG office.

**NLG National Immigration Project:** Works to defend and extend the human and civil rights of all immigrants, documented and undocumented. The Project works in coalitions with community groups to organize support for immigrants' 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 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 HOUR

You are invited to the “NLG Presents - Think & Drink” Happy Hour - a quarterly event held on the **2nd Wednesday of January, April, September, and November (or June)**, at Red Hat Café in Boston. If you have ideas for a presentation or would like to be a speaker, please call the NLG office at 617-227-7335.

## NLG CONVENTION

This year's NLG Convention will be in **Portland, OR**, at **Benson Hotel**, from **Wednesday, October 31** to **Sunday, November 4**. The Convention will be filled with CLEs, workshops, panels, social events, tours of the city, and camaraderie. Hope you can attend! For more information and to register go to [www.nlg.org](http://www.nlg.org).

## Street Law Clinic Report

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

**July 11:** *Legal Observing* at rally organized by Northeastern students to put pressure on Northeastern University president to terminate their contract with ICE, by **Daniel D'Lugoff & Charles Haigh**.

**July 22:** *Legal Observer* training for Cosecha activists, by **Melinda Drew**. • *Direct Action* training for Cosecha activists who organized protests at Northeastern against the University's contract with ICE, by **Jeff Feuer & Lee Goldstein**.

**July 23:** *Legal Observing* at a rally at Northeastern University against their ICE contract, organized by Cosecha, by **Zach Coto, Celyne Camen, Cody Edgerly, Mia Lloyd, Olivia Paquette & Maria Solis Kennedy**.

**July 24:** *Direct Action* training in Lowell for an ICE Watch group, by **Makis Antzoulatos**.

**July 29:** *Direct Action* training for Cosecha activists who organized against Northeastern's contract with ICE, by **Jeff Feuer**.

**July 31:** *Legal Observing* at a Cosecha rally at Northeastern by **Celyne Camen, Zach Coto, Cody**

### NLG Happy Hour CHALLENGING ABUSIVE POLICING PRACTICES

*an evening with*  
**BosCops Collective**

\*\*\*\*\*

**Wednesday, September 12, 2018**

**6:00 - 8:00 pm**

**Red Hat Cafe (9 Bowdoin St., Boston)**

Join us for an important discussion with **Fatema Ahmad**, Deputy Director of the Muslim Justice League, and other members of the **BosCops Collective**, a group of individuals and organizations that have come together to challenge abusive policing and criminalization of communities in and around Boston.

**Edgery, Olivia Paquette, Emely Portillo & Maria Solis Kennedy.**

**August 6:** *Legal Observer* training at Northeastern Law School, by **Melinda Drew**.

## 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](mailto:nlgmass-director@igc.org).

**The deadline for articles is September 15.**



## Welcome Kayla Degala-Paraiso

We are pleased to welcome Kayla Degala-Paraiso to the NLG-Mass Chapter as our Administrative Coordinator and referral service help. Hailing from New Haven, CT, Kayla recently graduated from Pitzer College in Los Angeles with a B.A. in Political Science and a B.A. in English/World Literature. When she was not submersed in Maoist and post-colonial theories, she competed on the Pomona-Pitzer track and field team, taught yoga, studied abroad in Italy and in Nepal, wrote creative non-fiction, and organized through the Filipinx student association, Kasama. As a new Boston resident, Kayla is excited to run, once again, in the revitalizing New England autumn, and to discover Boston's jazz and hip hop scenes. She is also eager to connect with local communities through both grassroots political action and the NLG. If she is not answering calls for the NLG Lawyer Referral Service, you can catch Kayla giving basic climbing instruction at the Rock Spot climbing gym or building community



through Boston Philippine Education, Advocacy, and Resources.

## NLG Summer Retreat

On a hot Thursday afternoon in August, a group on NLG-Mass Chapter members gathered in Dorchester for the Annual Summer Retreat. We had an engaging and inspiring conversation about the current state of the NLG, where we see us in the near future, and what paths we should take to accomplish our goals and to continue fighting wrongs created by bad laws and policies.

We also discussed financial stability of the Chapter and how to secure funding for all our programs and works.

If you would like to be involved in any of the Chapter's committees please contact our office at 617-227-7335



NLG Summer Retreat participants enjoy an engaging, inspiring and very productive discussion.

*Photo by Eden Williams*

## Supreme Court's Criminal Law Cases

by Benjamin Falkner

It has seemed in recent years that the Court has been shrinking the privacy protections of the Fourth Amendment bit by bit. This year, in a trio of Fourth Amendment cases, the Court expanded those privacy protections, even if ever so slightly.

In the first case, in a unanimous opinion written by Justice Kennedy, the Court held, in *Byrd v. United States*, that someone in otherwise lawful possession of a rental car has a reasonable expectation of privacy even if the rental agreement does not list them as an authorized driver. Mr. Byrd's girlfriend had rented a car, and the rental agreement permitted only certain persons to drive the car, and denied coverage in the event of damage caused by a non-authorized driver. Though he was not listed, Mr. Byrd drove the car on the highway, where he attracted the attention of a state trooper, who stopped Byrd "because he was driving with his hands at the '10 and 2' position on the steering wheel, sitting far back from the steering wheel, and driving a rental car." One can only assume that Mr. Byrd was stopped for driving while black and for no other reason, though this fact went unstated. Since Mr. Byrd was not named on the rental contract, the officers believed that they did not need his consent to search the car.

Not so fast, said the Court. In a rare example of the justices employing a kernel of real-world knowledge, the Court noted that car-rental agreements have long lists of restrictions, like driving on unpaved roads or driving while using a handheld cell phone, and

that such provisions have nothing to do with a driver's reasonable expectation of privacy. As a result, the Court ruled that the "mere fact that a driver in lawful possession or control of a rental car is not listed on the rental agreement will not defeat his or her otherwise reasonable expectation of privacy."

In the second case, in an eight to one opinion written by Justice Sotomayor, the Court held, in *Collins v. Virginia*, that the automobile exception to the warrant requirement does not apply to vehicles parked in the driveway of a home. Justice Alito supplied the lone dissent. In this case, an officer investigating the theft of a motorcycle stood on the street and saw a motorcycle covered with a tarp parked in the driveway of Mr. Collins' home. The officer walked onto the residential property and up to the top of the driveway where the motorcycle was parked. There, he lifted up the tarp to reveal the motorcycle for which he was searching. The government argued that the officer did not need a warrant because of the automobile exception to the warrant requirement.

The government's argument was dead on arrival. The Court observed that "searching a vehicle parked in the curtilage [the private area around a home] involves not only the invasion of the Fourth Amendment interest in the vehicle but also an invasion of the sanctity of the curtilage." In order to search a vehicle under the automobile exception, the law requires the officer to have a lawful right of access to the vehicle. "The automobile exception does not afford the necessary lawful right of access to search a vehicle parked within a home or its

curtilage because it does not justify an intrusion on a person's separate and substantial Fourth Amendment interest in his home and curtilage." Thus, the Court ruled that, since the officer had no right to walk onto Collins' driveway, he had no right to search the motorcycle by lifting the tarp.

In the third case, a five to four opinion written by Justice Roberts and joined by Ginsburg, Breyer, Sotomayor and Kagan, the Court held, in *Carpenter v. U.S.*, that the government needs a warrant to obtain cell-site location information ("CSLI"). Many cell phones connect to cell sites several times a minute whenever their signal is on, constantly generating time-stamped records of the phones location known as CSLI. As the number of cell phones and cell sites grows, "modern cell phones generate increasingly vast amounts of increasingly precise CSLI."

The Court observed that, "[m]uch like GPS tracking of a vehicle, cell phone location information is detailed, encyclopedic, and effortlessly compiled." It further observed that, "In light of the deeply revealing nature of CSLI, its depth, breadth, and comprehensive reach, and the inescapable and automatic nature of its collection, the fact that such information is gathered by a third party does not make it any less deserving of Fourth Amendment protection."

As a result, the Court held that "an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI." In turn, the Court found that the government must generally obtain a warrant supported by probable

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## *Tale of Two Cases: Trump v. Hawaii and Masterpiece Cake*

by David Kelston

We write about these two important cases from last term together because (surprise) the Court's conservative majority in each gives very different weight to the underlying actor's intent – ignoring Trump's while relying on a Colorado Commission's – to reach its conservative outcome. Thus, as is so often the case, ideology prevails, though in quite different contexts.

### Trump v. Hawaii

In this, the President's third visit to the courts to defend his third iteration of the travel ban, he prevailed, vacating the nationwide preliminary injunction. What is perhaps most important about Trump's victory is that a fair reading of the case makes it clear that his opposition never had a chance in this Supreme Court. Put differently, and more broadly, the case shows something quite disturbing: this president, this classic "strong man" who vilifies the press (and the courts when necessary), who mobilizes his (white) base by appeals to their grievances (they are the oppressed, no one cares about them except him) and attacks their supposed enemies (every-one who is not white), is, to our detriment, capable of strategic thinking, or at least capable of listening to lawyers who think strategically. Thus, ignorant though he may be (ignorance

seems endemic among strong men), Trump is no fool, and the third iteration of his travel ban passed Supreme Court review because the president was capable of tinkering with it so it was almost certain to do so.

Specifically, this third iteration ("Proclamation No. 9645, issued September, 2017), made three changes to its predecessors: 1) a "world-wide" review by the Homeland Security and State Department of all foreign governments to determine which had deficient information-sharing practices with the U.S. such that we could not determine who traveling from that country to ours might be a security risk; 2) thereafter a 50-day period during which the U.S. would "encourage" countries that failed the test to improve their procedures; and only then 3) identification of seven countries whose nationals would be subject to entry restrictions tailored to each country – Iran, Libya, North Korea, Syria, Venezuela, and Yemen<sup>1</sup> – with case-by-case waivers and six-month reviews, the first of which led to the lifting of the restriction on Chad. Thus, said the administration, the restrictions had nothing to do with religion – two of the countries are not even Muslim-majority countries – and everything to do with national security.

Plaintiffs challenged the Proclamation – except applied to Venezuela and North Korea – as violating the Immigration and Nationality Act (INA) and the

Establishment Clause of the First Amendment because it was motivated not by legitimate concerns for national security but instead by animus toward Muslims. The Chief Justice, joined by Justices Kennedy, Thomas, Alito, and Gorsuch, had little trouble finding the Proclamation lawful.

First, the majority found that the INA establishes numerous grounds to exclude "aliens abroad" from the United State whenever the president finds that their "entry would be detrimental to the interests of the United States," citing 8 USC 1182(f). "By its terms," in language sure to be quoted for years, the Chief Justice wrote, "§1182(f) exudes deference to the president in every clause." The 12-page Proclamation, the Chief Justice wrote, thoroughly describes the process, agency evaluations, and recommendations underlying the president's chosen restrictions, was well within the president's discretion under the INA, and "plaintiffs' request for a searching inquiry into the persuasiveness of the president's justifications [was] inconsistent with the broad statutory text and the deference traditionally accorded the president" in matters of national security. As to the Establishment Clause, the majority essentially found irrelevant "precedents concerning laws and policies applied domestically," as well as Trump's numerous statements showing animus toward Muslims and his determination to keep them out of the country, statements the Court courteously described as "casting doubt on the official objective of the Proclamation." While, to its

<sup>1</sup> E.g., blanket prohibitions on Iran, North Korea, and Syria; lesser restrictions on the remaining countries, with exceptions for lawful permanent residents of the U.S. trying to return and those granted asylum in this country.

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## Tale of Two Cases

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credit, the majority noted various of Trump's most offensive tweets (including tweeting links to anti-Muslim propaganda videos) and expressed its discomfort with his campaign and later statements, it emphasized the "authority of the presidency itself" (not just "a particular president") and the fact that the Proclamation "is factually neutral toward religion." Thus, even assuming that the courts could inquire into the persuasiveness of the president's findings in support of the Proclamation, and assuming that the Court could apply a rational basis review to the Proclamation that considered the extrinsic evidence, the Proclamation would still be upheld as reasonably resulting from a justification (national security) independent of unconstitutional animus. In reaching its conclusion, the Court reviewed in some detail, and relied on the Proclamation's procedures reviewed above ("worldwide" review of vetting and information sharing, 50-day opportunity to improve procedures, etc.) as well as the presence in the list of two countries, North Korea and Venezuela, that are not majority Muslim.

Finally, while determining that the plaintiffs had not shown a likelihood of success on the merits, and thus that the preliminary injunction issued by the Hawaii District Court must be vacated, the majority "overruled" the Court's earlier and notoriously

wrong decision in Korematsu v. United States, 323 U.S. 214 (1944), stating that it upheld a policy that was unconstitutional and "morally repugnant."

In his brief concurrence, a kind of hopeless swan song, Justice Kennedy both endorsed the opinion of the majority (which he joined) in its "substantial deference ... accorded to the Executive in the conduct of foreign affairs," while he urged Trump (without naming him) to respect the Constitution. Justice Thomas also wrote an additional concurrence to find additional problems with plaintiffs' claims, question national injunctions, and generally bolster his position as the Court's most conservative vote. In dissent, Justices Breyer and Kagan questioned the Proclamation as applied in order to leave some hope for the further proceedings at the District Court (*e.g.*, "The State Department reported that during the Proclamation's first month, two waivers were approved out of 6,555 eligible applicants.") Thus, said Justice Breyer, the injunction should stay in place while further fact-findings are made below. By contrast, Justices Sotomayor, in a dissent joined by Justice Ginsburg, minced no words in finding that the Proclamation "masquerades behind a façade of national-security concerns." Their detailed deconstruction of the supposed neutrality of the Proclamation is great reading,<sup>2</sup> even as we realize that it is from only two of the nine justices, as is their repeated insistence that

facial neutrality is not determinative in the Establishment Clause context.

### **Masterpiece Cake**

Justices Sotomayor and Ginsburg's traditional Establishment Clause analysis was followed in this case – but by the conservative majority for a conservative purpose. The issue in Masterpiece was the baker's refusal to prepare a wedding cake for a same sex couple because of the baker's religious objection to same sex marriages. The couple filed a claim of discrimination on the basis of sexual orientation with the Colorado Civil Rights Commission, which found a violation of the Colorado Anti-Discrimination Act. The Colorado courts affirmed, and Justice Kennedy wrote the opinion of the Court, joined by Chief Justice Roberts and Justices Breyer, Alito, Kagan, and Gorsuch, Justices Ginsburg and Sotomayor dissenting (Justices Breyer and Kagan also wrote a separate concurring opinion).

Justice Kennedy found that the case presented a difficult question of the proper reconciliation of two principles: the state's right to protect "the rights and dignity of gay persons" wishing to marry but facing discrimination, and the right "of all persons to exercise fundamental freedoms under the First Amendment," *i.e.*, freedom of speech and free exercise of religion. The "delicate question" of when one must yield to the other, Justice Kennedy wrote, "needed to be determined by an adjudication in which religious hostility on the part of the state" would play no part. Then, the Court essentially avoided the

2. *E.g.*, the ban on North Koreans and Venezuelans targets nationals previously subject to exclusion (North Korea) or only a handful of government officials (Venezuela); the "worldwide review" was reported in a spare 17 pages and the review was led by a man who had publicly expressed his support for the "great idea" of banning Muslims, etc.

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## *Janus v. State, County and Municipal Employees: Can the Labor Movement Counterstrike?*

by Andrew McLeod & Jonathan  
Messinger

On June 27, 2018, the U.S. Supreme Court released their decision in favor of Mark Janus, an Illinois child safety specialist who contested his Union “agency fee” of \$535 per year.

In *Janus*, the 5-4 conservative majority dismantled *Abood v. Detroit Board of Education*, 431 U. S. 209, pro-Union precedent which stood for more than forty years, rationalizing that paying Union dues is a form of compelled speech.

Justice Alito, writing for the five-member majority in *Janus* (with Chief Justice Roberts and Justices Kennedy, Thomas, and Gorsuch), reasoned that the state’s authorizing the compulsory agency fee – that part of union dues attributable to the union’s collective bargaining costs but not its other political work – required an “exacting” scrutiny standard, and the majority overruled *Abood* as inconsistent with First Amendment principles, *i.e.*, Janus’ right to “refrain” from subsidizing union speech. The majority dismissed as not compelling *Abood*’s concerns with labor peace and avoiding free rider problems.

But as Justice Kagan, writing in dissent for herself and Justices Breyer, Ginsburg, and Sotomayor, made clear, the 41-year-old *Abood* decision, involving Detroit’s teacher’s union, served important interests and was widely relied on by states and unions across the country by requiring employees who have not joined the union to pay it a

service charge. These interests included facilitating reaching agreements by enabling a single union representative to speak for the employees – the “principle of exclusive union representation” that has been a “central element in industrial relations since the New Deal,” long a norm in the private employment sphere – and requiring that unions be adequately funded for the arrangement to work. The agency fee, the *Abood* Court recognized, distributed the union’s costs of collective bargaining fairly to all employees who benefit, union members or not, thus avoiding the problem of “free riders,” consistent with the union’s legal duty compelling it to fairly represent all workers in the bargaining unit, whether or not they joined the union. As the dissent emphasized, overturning *Abood* will produce a “collective action problem of nightmarish proportion” – every employee will have a perverse economic incentive not to pay the union while benefitting from its services. And as *Abood* held, “[w]here the state imposes upon the union a duty to deliver services, it may permit the union to demand reimbursement for this.” 500 U.S. at 556. All this the majority ignored, in the culmination of a six year-long campaign to cripple the fastest growing union sector in the country, see *Knox v. Service Employees*, 567 U.S. 298 (2012) and *Friedrichs v. California Teachers Association*, 576 U.S. \_\_\_\_ (2016) (per curiam).

*Janus* needs to be seen in the context of declining union membership in the U.S. United States Labor Union membership is declining (7% of private work-

ers, 35% of public employees, 10% overall), in no small part due to political pressure from employer lobbyists who oppose collective bargaining rights. Twenty-eight states have passed Right to Work (for less) legislation, six since 2012 (bucking this trend, however, on August 7, 2018, Missouri voters rejected Right to Work for Less legislation). By contrast, overall workplace Union membership peaked in 1954 at 35% and remained as high as 20% as recently as 1983. But now, compulsory membership in government labor unions in the United States is no more, and only twenty-three States require union dues or service fees.

Union breakers have always tried to divide “closed shop”-compulsory membership advocates and “open shop”-voluntary membership advocates. In this context Janus is unquestionably a further blow to labor movement rights, compounded by the disturbingly unchecked, unapologetic tendencies of our elected--or should we say purchased, via Citizens United, 558 U.S. 310 “speech”--executive and legislative leaders lust for robber baron destruction of human capital, the environment, even reason, in their unending quest to line their coffers, indifferent to lasting negative consequences to We the People.

### **Can the labor movement counterstrike?**

Yes. Five ideas follow.

- **First**, note that Unions were illegal in the United States of America for many years, yet they

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## *Janus v. State, County and Municipal Employees*

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persevered. They still do. The Arizona, Oklahoma, West Virginia, and Kentucky teachers strikes in 2018 all happened in States that are Right to Work (for less) and thus technically illegal. Yet determined and organized workers united to fight these injustices.

- **Second**, Unity and Solidarity still define Unions. Many teachers who struck lacked official authority, or even leadership support, initially. Their fighting spirit was undeterred. Organizing drives, strikes, pro-Union legislation and electing labor supporting candidates can stem the tide of Union-busting.

- **Third**, Unions must better engage their members as truly democratic not-for-profit institutions. Are events and meetings promoted, including fun activities, and are communications consistently transparent, responsive and connective? Is each Union transparent, responsive and connecting with their members? Can we workers participate instead of merely standing by as our rights further degrade? Complaining

about Union leadership, alone, is ineffective. We must heighten our individual and collective morale and build our strength in numbers.

- **Fourth**, there is no need to sit idly by as decisions such as *Janus* further distort the First Amendment. Freedom of speech? Great idea! Thank you founders! Let us use our voices to promote worker rights and win public opinion. News outlets rarely cover Unions other than during labor conflicts, but this can be changed for the better. In the 1950's, labor unions had radio programs five nights a week on hundreds of stations. Now there are many options for distributing low cost content, as proven by successful campaigns such as the Teacher Strikes aforementioned. With Twitter, Instagram, YouTube, Facebook, podcasts and other current and/or future online streaming services, the labor movement can and should tell their story. Even many Union members themselves are not aware of how workers and families are helped. Pro-Unionists must spread these stories for the public good.

- **Fifth**, *Janus* favors Union "open shops" - dues are not compulsory. Many countries, even those with higher unionization rates than the United States, have struggled with the issue of compulsory membership. Some nations, such as Germany, disturbed by their Nazi legacy, have even outlawed them. Japan and England also require open shops. Yet Unions survive, even thrive, in these places.

*Janus* is certainly a harsh decision for Union members and supporters. But real wages continue to shrink in this distorted economy which expressly favors "owners" over workers and true unemployment remains high. What better time than now to join together, in solidarity, to increase our labor rights?

As Joe Hill once said: "Don't waste time mourning. Organize!"

*Andrew McLeod is a consultant, organizer, and media producer. Jonathan Messinger is a member of the NLG-Mass Chapter and a member of the NLG Litigation Committee.*

## *Supreme Court's Criminal Law Cases*

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cause before acquiring CSLI.

In a potentially hopeful signal, the Chief Justice reached back to, and resurrected the ancient warning of Louis Brandeis, in dissent:

*As Justice Brandeis explained*

*in his famous dissent, the Court is obligated—as "[s]ubtler and more far-reaching means of invading privacy have become available to the Government"—to ensure that the "progress of science" does not erode Fourth Amendment protections. *Olmstead v. U.S.*, 277 U. S. 438, 473–474 (1928).*

We hope that the Court will continue to heed its obligation.

*Benjamin Falkner is the Secretary of the NLG-Mass Chapter and is a law partner at Krasnoo Klehm & Falkner in Andover.*

## Tale of Two Cases

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“delicate question” before it by blaming the Colorado Commission:

*Whatever the confluence of speech and free exercise principles might be in some cases, the Colorado Civil Rights Commission’s consideration of this case was inconsistent with the State’s obligation of religious neutrality. The reason and motive for the baker’s refusal were based on his sincere religious beliefs and convictions. The Court’s precedents make clear that the baker, in his capacity as the owner of a business serving the public, might have his right to free exercise of religion limited by generally applicable laws. Still, the delicate question of when free exercise of his religion must yield to an otherwise valid exercise of state power needed to be determined in an adjudication in which religious hostility on the part of the State itself would not be a factor in the balance the State sought to reach. That requirement, however, was not met here. When the Colorado Civil Rights Commission considered this case, it did not do so with the religious neutrality that the Constitution requires.*

The Commission’s sin? After finding through investigation that the baker routinely “turned away potential customers [seeking wedding cakes] on the basis of their sexual orientation,” it conducted a formal hearing before an Administrative Law Judge, who found that Colorado’s anti-

discrimination law was neutral and properly applied. The Commission affirmed the ALJ’s decision, finding that the Free Exercise Clause “does not release an individual of the obligation to comply with a valid and neutral law of general applicability,” a conclusion Justice Kennedy clearly endorsed: “It is unexceptional that Colorado law can protect gay persons, .. in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public.” But, said the Court, when the seven-member Commission convened its public hearing, two commissioners made statements that while religious beliefs are protected, actions may not be (a correct statement), and at a second hearing one commissioner made a rather heated statement that religion had been used historically to justify all manner of oppressive practices, including slavery (also, obviously, a true statement, though context is important). And these statements, wrote Justice Kennedy, “cast doubt on the fairness and impartiality” of the Commission’s adjudication. The majority set aside the Commission’s order on the grounds that the “official expressions of hostility to religion in some of the commissioners’ comments” were inconsistent with the Free Exercise Clause requirements.

While Justice Kagan, joined by Justice Breyer, concurred, she emphasized that it is established law, reaffirmed by the majority, she said, that “a vendor cannot escape public accommodations law because his religion disapproves selling a product to a [protected] group of customers,” Justices Thomas and Gorsuch

wrote separate concurrences, Justice Gorsuch suggesting and Justice Thomas outright saying that any governmental action restricting religion in any way must survive a strict scrutiny review, and adding that he would have invalidated the Commission’s decision, even without the Commissioners’ “disturbing” comments, on free speech grounds. Justice Ginsburg, joined in dissent by Justice Sotomayor, went to the heart of the matter: the baker would not provide goods and services to a same sex couple that he would provide to a heterosexual couple, and this violated the (neutral) Colorado statute, regardless of comments “of one or two Commissioners.”

Whatever else might be said about the two decisions, the contrast between the way in which the actor’s intent is treated is stark. To be sure, presidents will be afforded great deference in the matters of national security, but here the hostility to Muslims by this president, as recognized in both the majority and dissenting opinions, was palpable. In Masterpiece Cakeshop, the majority’s reliance on one Commissioner’s “disturbing” comments seemed an afterthought, hardly noticed by the courts below. Who sits on the Court always matters, and especially matters today with the president we face.

*David Kelston is a Treasurer of the NLG-Mass Chapter and an attorney at Shapiro Weissberg & Garin in Boston.*

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## Supreme Court and its Latest Term

*Continued from page 1*

rays of sunshine upon the otherwise generally bleak landscape. In three cases, the Court rebuffed the government's attempts to shrink the privacy protections of the Fourth Amendment. In the first case, the Court held that someone in otherwise lawful possession of a rental car has a reasonable expectation of privacy even if the rental agreement does not list them as an authorized driver. In the second, the Court held that the automobile exception to the warrant requirement does not apply to vehicles parked in the driveway of a private home. In the third, the Court held that cell-site location information is protected by the Fourth Amendment.

And a final note about Justice Kennedy.

We write in reviewing the travel ban case that President Trump showed strategic sense in that case in pursuing his reactionary and dangerous agenda. More generally, he appears to have done so both with his nominations for the lower federal courts and with Justice Kennedy, to whom Trump was unerringly polite and complimentary, and strategic – appointing his former clerk (Justice Gorsuch) to fill Justice Scalia's seat and now another Kennedy clerk to fill Justice Kennedy's own seat. It's no surprise that Justice Kennedy began his resignation letter with the words, "My dear Mr. President."

Our work is cut out for us, both - inside and outside the courts.

- David Kelston & Benjamin Falkner -

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