NATIONAL LAWYERS GUILD — MASSACHUSETTS CHAPTER

Mass Dissent

SEPTEMBER 2021 VOL. 44, NO. 4

Supreme Court

This is our annual *Mass Dissent* issue that focuses on the most recently-ended Supreme Court term, with articles about decisions that may interest our members, as well as trends at the Court. The particular cases we review are *Fulton v. California*, *Brnovich, Attorney General of Arizona v. Democratic National Committee* (and a case on a related issue, *Americans for Prosperity v. Bonta, A.G. of California*), *United States v. Cooley*, *Texas v. California*, and *Cedar Point Nursery v. Hassid*.

Fulton v. City of Philadelphia is the much written-about unanimous decision upholding religiously motivated practices barring LGBTQIA people from becoming foster parents. *Brnovich* is likely this term's case that will be most remembered, and most regretted by those on the left. At a time when democracy in this country is clearly in danger, *Brnovich* may do as much damage to Section 2 of the Voting Rights Act of 1965 as *Shelby v. Alabama* did to Section 5 in 2013. *Americans for Prosperity* holds out the prospect of yet more election finance reform efforts being struck down under a facial application of the exacting scrutiny standard. *U.S. v. Cooley* is another unanimous decision adding to recent case law protecting Native American tribal sovereignty. In *Texas v. California* the Court warded off another challenge to the Affordable Care Act, but that battle is not yet over, and in *Cedar Point Nursery v. Hassid*, the Court, in a property analysis that may have wide application, decided against farmworkers and for the agricultural land owner.

As for trends, the Court last term defied predictions, and

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NATIONAL LAWYERS GUILD
MASSACHUSETTS CHAPTER, INC.

185 Devonshire Street, Suite 302
Boston, MA 02110
tel.: 617-227-7335
nlgmass@riseup.net
nlgmass-director@riseup.net
https://nlgmass.org
Facebook & Twitter: @nlgmass

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Litigation Committee:
Established in 2011, the Committee brings civil lawsuits against large institutions (such as government agencies, law enforcement, banks, financial institutions, and/or large corporations) which 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 at 617-227-7335 or nlgmass-director@riseup.net.

Mass Defense Committee:
The Committee consists of two sub-committees: (1) "Legal Observers" who are trained to serve as NLG 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.

Street Law Clinic Project:
The Street Law Clinic project was established in 1989. It provides legal clinics and workshops in Massachusetts to address legal needs of various communities. Legal educational clinics and workshops on 4th Amendment Rights (Stop & Search) and Direct Action are held at community organizations, youth centers, labor unions, schools and shelters. If you are an NLG member and would like to lead a clinic or workshop, please contact the NLG office (nlgmass-director@riseup.net).

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NLGNIP works to defend and extend the human and civil rights of all immigrants, documented and undocumented. Located in Washington, DC, NLGNIP works in coalition with community groups to organize support for immigrants' rights in the face of right-wing political attacks. For more information contact 617-227-9727.

NLG International Committee (IC):
IC supports legal work around the world "to the end that human rights shall be regarded as more sacred than property interests." It plays an active role in international conferences, delegations and on-going projects that examine and seek to remedy conditions caused by illegal U.S. or corporate practices. IC has done work in Cuba, the Middle East, Korea, Haiti, and other countries. For more info go to https://nlginternational.org.

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GUILD CALENDAR

NLG ANNUAL DINNER

Hope you can join us at this year's NLG Testimonial Dinner on Friday, October 1st, at which we will award and celebrate:

Lawyer Award - **Ricardo Arroyo** (Boston City Council) & **Dick Bauer** (Greater Boston Legal Services).

Legal Worker Award - **Grace Ross** (Mass. Alliance Against Predatory Lending)

Student Award - **Noah Meister** (Western New England Law School).

NLG ANNUAL TESTIMONIAL DINNER
Friday, October 1, 2021
6:00 pm - 8:00 pm
Virtual

NLG CONVENTION

This year, as in 2020, the Convention will be convening virtually. The events will be scheduled to accommodate attendees across multiple time zones, and it will be aimed to make programming as accessible as possible.

The registration fees will be on a sliding scale and fee waivers will be available upon request.

Attendees who can't join events in real time will be able to access recordings of programming to watch it at their convenience.

NLG CONVENTION
#Law4ThePeople
Monday-Sunday,
October 11-17, 2021
Virtual

NLG HAPPY HOUR

NLG "Think & Drink" Happy Hour is held quarterly on the **2nd Wednesday of January, April, September**, and **November**. The event brings together legal professionals and activists to discuss current political and legal topics. If you have ideas for a presentation or would like to be a speaker, please call the NLG office at 617-227-7335.

NLG BOARD MEETING

NLG-Mass Chapter members are invited to participate in monthly meetings of the Chapter's Board of Directors. The meetings are held on the **3rd Wednesday of the month** (except July and August), from **6:00-8:00 pm**, at the NLG Office (185 Devonshire St., Suite 302, Boston), but now virtually. Please notify the office if you plan to attend.

ARTICLES FOR *MASS DISSENT*

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

If you are interested in submitting an article, essay, analysis, or art work related to the topic, please e-mail your work to **nlgmass-director@riseup.net.**

The deadline for articles is September 10.

NLG Summer Retreat

At the end of July, a small, but potent!, group of NLG members gathered *via* Zoom to attend this year's Summer Retreat. The continuing pandemic has once again prevented us from having an in-person gathering.

The Retreat served as a place where we discussed the Chapter's current political and legal work - Mass Defense, Litigation, Street Law Clinic - as well as what lies for us in the future.

Stay tuned and get involved! We might need you.

Supreme Court

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that is good. With the appointment of Amy Coney Barrett to replace the late Justice Ginsburg, many observers expected a six-Judge conservative majority handing down blockbuster conservative decisions, and losses by liberals for decades to come. But that did not happen. While Chief Justice Roberts, for years the Court's "swing Justice," became less pivotal, his incrementalism continued, with the major exception of *Brnovich*.

The Court issued written decisions in only 39 cases, the lowest number in decades, and, as Adam Liptak wrote in the New York Times, "the center of the Court came to include four conservative Justices [excluding only Thomas and Alito] who, in various combinations, occasionally joined the Court's three-member liberal wing to form majorities in divided cases." In fact, the three most liberal Justices were in the majority in 13 of the 28 divided decisions, with at least two conservative votes coming from among the Chief Justice and the three Trump appointees – Gorsuch, Kavanaugh, and Coney Barrett. Moreover, all four of these justices joined the liberal bloc in these 13 cases the great majority of the time. Justice Kavanaugh was in the majority overall more than any other Justice, and he joined the more liberal decisions a remarkable (considering expectations) 11 of the 13 times the liberals prevailed.

Generally, and with the exception of *Brnovich*, incrementalism characterized the Court's last term, and that is about the best we can hope for from the current Court.

- David Kelston -

Hepatits C in the Department of Correction

We want to hear from you if you are (or were) a prisoner in the Department of Correction and have concerns about Hepatitis C, including if:

• You have asked to be tested for Hepatitis C but have been denied testing;
• You have Hepatitis C but have not be evaluated recently, or told whether and when you will be treated for it;
• You have Hepatitis C and have not been assigned priority level for treatment; and/or
• You have other questions or concerns about Hepatitis C treatment.

Prisoners' Legal Services and the National Lawyers Guild are monitoring the settlement in Fowler v. Tureo, a class action concerning the testing, evaluation, and treatment of Hepatitis C in the DOC. The Settlement calls for universal testing for Hepatitis C (the prisoner can decline testing,) regular assessments of those who have Hepatitis C, to determine their priority level for treatment, and treatment to be given within certain time frames to those who qualify. The settlement also limits the reasons why the DOC can deny treatment to prisoners who otherwise qualify for it.

If you have questions or concerns about Hepatitis C, please contact PLS or NLG with as much detail as you can give about your specific issue:

PLS: 617-482-2773 NLG: 617-227-7335

Street Law Clinic Report

The following clinics and trainings were conducted since last issue of Mass Dissent*:*

June 24: *Legal Observing* at a march in Boston in solidarity with Palestinians, organized by UMass Boston Students for Justice in Palestine, by **Benjamin Pitta**.

June 25-26: *Legal Observing* at a two-day occupation of Copley Square in Boston for trans lives liberation, by **Liam Hofmeister, Joe Lake, Emily Law**, and **Leila Selchaif**.

June 26: *Legal Observing* at an action at Boston City Hall Plaza, organized by Youth Justice and Power Union to defund cops and reinvest in Boston communities, by **Benjamin Pitta**.

June 29: *Legal Observing* at an action in Waltham, in solidarity with Indigenous people fighting the pipeline in Minnesota and the compressor in Weymouth, by **Daniel Donadio**.

July 2: *Legal Observing* at a rally in Boston for clemency, as part of a 3-day long Car Caravan Clemency Tour, by **Daniel Donadio**.

July 3: *Legal Observing* for the Car Caravan Clemency Tour from MCI-Framingham to the Parole Board Offices in Boston, by **Daniel Donadio** & **Sarah Duncan**.

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New NLG-Mass Chapter On-line Store

Please visit our new on-line store where we offer items to commemorate our 50th Anniversary: a copy of a new 30-min. documentary about our Chapter's beginnings (on a pen with USB drive and on a USB drive) and a business card holder (\https://nlgmass.org/featured_news/nlg-mass-chapter-store/).

Fulton v. City of Philadelphia

by Kylah Clay

A much anticipated religious freedom decision by the Supreme Court resulted in a unanimous yet very narrow holding in *Fulton v. City of Philadelphia*[1]. The case developed in 2018 when the City of Philadelphia discovered discriminatory practices barring LGBTQ+ parents from becoming foster parents by two agencies contracted through the city. The city contacted the agencies stating that, unless and until the agencies agreed to follow the nondiscrimination requirements of their contract, the city would no longer refer children to the agencies. One agency agreed to comply, but the other agency, Catholic Social Services (CSS), refused on the basis that the contractual requirement infringed on its religious freedom. The Supreme Court agreed.

The Court's holding, written by Chief Justice Roberts, hinged on its interpretation of a policy that provided the City Commissioner of Human Services broad discretion to grant exemptions from antidiscrimination requirements. The Court structured its analysis around *Employment Division v. Smith*[2], which held that a law that is generally applicable and neutral is subject to rational review, rather than the more rigorous standard of strict scrutiny. The Court held that the case "falls outside the scope of Smith" because the policy providing the Commissioner broad authority to decide whether an agency could qualify for an exemption to the antidiscrimination policy was not generally applicable and neutral[3]. Consequently, the City of Philadelphia had to establish "whether it has [a compelling] interest in denying an exception to CSS[4]." The city asserted that it had compelling interests in maximizing the number of foster parents, reducing its liability, and ensuring the equal protection of prospective foster parents. While the Court acknowledged that the interest in protecting prospective foster parents of the LGBTQ+ community is a "weighty one," it ultimately decided that "this interest cannot justify denying CSS an exception for its religious exercise[5]." The decision is narrowly tailored to the facts of this case and the "system of exceptions under the [city's] contract" that allow the Commissioner to arbitrarily decide which agencies can be exempt from the nondiscrimination policies.

While this is a deeply upsetting set back to the fight for LGBTQ+ rights and equality, the holding is limited to the interpretation of the particular contract at issue and does not "create a general right for taxpayer-funded foster care agencies to discriminate" against the LGBTQ+ community[6].

The contract between CSS and the City of Philadelphia is no longer active, but disputes regarding religious freedom are certainly expected to arise, especially given the current

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1 *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021)
2 *Employment Div., Dept. of Human Resources Ore. v. Smith*, 494 U.S. 872 (1990)
3 *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 145 (2021)
4 Id. at 151.
5 Id. at 151.
6 Mary Catherine Roper, What *Fulton v. City of Philadelphia* LGBQ&T Families and Individuals, ACLU Pennsylvania, (June 18, 2021), https://www.aclupa.org/en/news/what-fulton-v-city-philadelphia-means-lgbqt-families-and-individuals.

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makeup of the Court. The *Fulton* decision was highly anticipated to overrule *Smith*, and although many religious organizations advocated for *Smith* to be overturned, its holding remains intact today. Nevertheless, a concurring opinion authored by Justice Alito and joined by Justices Thomas and Gorsuch stated that *Smith* should be overruled, arguing that all laws that burden religious freedom should be subject to the most stringent constitutional review. Notably, Justice Barrett wrote that there are compelling "textual and structural arguments against *Smith*" but to overturn *Smith* would result in "a number of issues to work through[.][7]"

Kylah Clay is a 3L at Suffolk University Law School and a graduate student at Boston University. She is President of the NLG Suffolk Law School Chapter.

7 *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 152 (2021)

Street Law Clinic Report

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July 4: *Legal Observing* for the Car Caravan Clemency Tour at a picnic in front of Gov. Baker's house in Swampscott, by **Margaret Chalupowski** & **Daniel Donadio**.

July 7: *Stop & Search-Know Your Rights* clinic for ROCA in Chelsea, by **Makis Antzoulatos**.

July 12: *Stop & Search-Know Your Rights* clinic for Indivisible Pittsfield (Western Mass.), by **Mason Kortz**.

July 20: *Legal Observer* training for law students at Suffolk Law School, by **Melinda Drew**.

July 29: *Direct Action* training in Boston for Extinction Rebellion, by **Jeff Feuer.**

August 3: *Legal Observer* training for at Suffolk Law School, by **Melinda Drew**. • *Stop & Search-Know Your Rights* clinic for Roca in Chelsea, by **Makis Antzoulatos**.

August 12: *Legal Observing* at an action at the State House in support of COVID Housing Equity Bill, organized by CityLife/VidaUrbana, Right to the City, and Homes for All MA, by **Melissa Rodriguez & Sarah Tansey.**

August 16: *Direct Action* training in Boston for parents and families who are affected by the policies of the Massachusetts Department of Children & Families, by **Makis Antzoulatos.**

August 19: *Stop & Search-Know Your Rights* clinic for Lawrence School Committee, by **Mason Kortz** & **Kylah Clay** (Suffolk Law School student).

August 25: *Legal Observing* at an action in Jamaica Plain, organized by environment groups to address climate change, by **Elizabeth Martin, Elizabeth Ramirez**, and **Lily Ann Ritter.**

August 27: *Legal Observing* at rally and march for "Licenses Today, Papers Tomorrow" in Worcester, organized by Movimiento Cosecha, by **Victoria Baratian** & **Mathew Freimuth.**

Brnovich, Attorney General of Arizona v. Democratic National Committee

by David Kelston

The language of Section 2 of the Voting Rights Act of 1965 (VRA) is wonderfully expansive: "No voting qualification or prerequisite to voting or … practice … by any State or political subdivision" shall deny nor "abridge" the right "to vote on account of race or color." A practice that creates "less opportunity" for voters of color "to participate in the political process and to elect representatives of their own choice" violates Section 2. But *Brnovich* may very well be the signature case from the October Term, 2020, and it considerably narrows Section 2. Decided July 1, 2021. The case elicited New York Times headlines like "Did the Supreme Court Just Kill The Voting Rights Act" and "On Voting Rights, Justice Alito Is Stuck In The 1980s." And indeed it is a troubling decision.

In *Brnovich*, the DNC challenged two changes to Arizona voting law. First, if a voter votes in the wrong precinct, the vote henceforth will not be counted. Second, the Arizona legislature made it a crime for any person other than a family member, postal worker or election official to collect for deposit early votes. The DNC alleged that both restrictions had an adverse and disparate effect on the state's American Indian, Hispanic, and African-American citizens in violation of Section 2. Justice Alito, writing for the six-member majority (Roberts, Thomas, Gorsuch, Kavanaugh, and Barrett), rejected the challenge, and significantly restricted Section 2 (and voting rights generally) in the course of doing so.

Justice Alito began with well-deserved praise for the VRA (a "landmark" in the "effort to achieve at long last what the Fifteenth Amendment had sought to bring about 95 years earlier – end to the denial of the right to vote based on race") – before eviscerating Section 2, just as the Court had eviscerated the other critical section of the VRA, Section 5, seven years earlier in *Shelby County v. Holder*, 570 U.S. 529 (2013). The *Brnovich* Court reviewed Arizona voting law generally, finding it (presumably accurately) expansive on its face in promoting the opportunity to vote, including 27 days of early voting by mail or in person at an early voting location in each county. Then Justice Alito analyzed Section 2, finding that the section's "key requirement" is that the voting process must be "equally open" to "minority and non-minority groups." To determine whether the process is "equally open," the majority held that one looks at the burden the challenged practice places on voting, which the Court called "highly relevant" because any practice places some burden on voting. The Court further held that the fact finder might look at what burdens were imposed on voting in 1982, when the statute was amended (to make it clear that a showing of intentional discrimination was not necessary), as part of the process of considering the "legitimate" state interests in so burdening voting, with a "strong and entirely legitimate state interest" being "prevention of fraud" even, it appears, where there is no evidence of fraud in the jurisdiction in question. Based on the "equally open" standard, the Court found Arizona's restrictions to be legitimate "time, place, and manner" limitations: voting in one's own precinct, or personally dropping your ballot off at the polling place or the post

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office, is simply a "usual burden" that every voter faces, the Court held. Finally, in a nod to common sense, the majority claimed that the plaintiffs provided little or no evidence that the Arizona restrictions actually created disparate results, while the majority more generally rejected a disparate impact test under Section 2.

Justice Kagan's much discussed dissent was forcefully to the contrary, but was joined only by Justices Breyer and Sotomayor. After providing a history of the VRA that well deserves reading, she made her straightforward case: Courts are to strike down voting rules that contribute to racial disparity in the opportunity to vote, which clearly resulted from the Arizona rules. Native Americans, because of disparities in the number of polling locations, post offices, and access to vehicles, disproportionately relied on third parties to deliver their votes. Arizona's practice of frequently changing polling places in minority districts assured that strict adherence to counting only ballots cast in the current precinct had a disparate impact on voters of color. Justice Kagan's conclusion is stark: by looking at "opportunity," or even evidence of discriminatory purpose, and emphasizing the state's interest in what might be called efficiency, rather than focusing on the outcomes and effects of the challenged practices on communities of color, the Court significantly undercut Section 2 of the VRA. And the conservatives delivered a body blow to disparate impact analysis at a time when it will be needed more than ever.

Americans For Prosperity Foundation v. Bonta, A.G. Of California

While on a different topic, *Americans for Prosperity* may be a companion case to *Brnovich*, and signals the Court's continuing unwillingness to limit donor confidentiality, *e.g.*, dark money in politics. At issue in *Americans for Prosperity* was a California law that required charities to disclose their major donors (over $5,000) in reports filed with the state government. The Chief Justice wrote for the six-member majority, and Justice Sotomayor wrote for herself and Justices Breyer and Kagan. Chief Justice Roberts, after noting that there was widespread amicus support for *Americans for Prosperity*'s position that forced disclosure of the identities of the donors violated the First Amendment and put donors to unpopular groups at risk of harm (including support from the ACLU), determined that California's required disclosure law had to withstand "exacting scrutiny require[ing] that a government-mandated disclosure requirement be narrowly tailored to the government's asserted interest." The Court decided that California's law violated donors' associational rights, and relying on, *inter alia*, *NAACP v. Alabama*, 375 U.S. 449 (1958), rejected the state's investigative rationale and found the law facially unconstitutional, rejecting the Ninth Circuit's conclusion that California had a sufficiently strong interest in preventing charitable fraud and self-dealing.

Justice Sotomayor wrote that the majority was departing from the Court's historical practice of case-by-case assessment for associational burdens by forced disclosure and replacing it with a "one

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United States v. Cooley

by Mary Levine

In *United States v. Cooley*[1], the Supreme Court unanimously protected inherent tribal sovereignty, holding that a tribal police officer had the jurisdictional authority to search a non-Indian member on a public right-of-way within Indian land. Sequentially, *Cooley* follows the seminal *McGirt v. Oklahoma*[2], which affirmed the existence of reservation borders unless explicitly reduced by an act of Congress. These cases both reveal the surprising determination by the current conservative-leaning Court to protect tribal land, both in the context of defining "Indian Country" and in assertions of tribal jurisdiction.

In *Cooley*, Officer James Saylor of the Crow Reservation Police Department temporarily detained and searched a non-Indian person located on the reservation, Joshua James Cooley[3]. Cooley had parked his pickup truck on a public right-of-way located in the Crow Reservation, and Officer Saylor—after deeming Cooley suspicious—conducted a search of his truck, subsequently discovering evidence of methamphetamine[4]. Cooley sought to suppress the evidence of methamphetamine on the grounds that Officer Saylor acted outside of his jurisdiction as Crow Tribe law enforcement when he seized Cooley and searched his vehicle[5]. Accordingly, the Court addressed whether a tribal government retains jurisdiction over a non-Indian member during a search and seizure on Indian land[6]. The Court answered this question affirmatively, recognizing the unworkability and dangerousness of the 9th Circuit's construction requiring tribal officers to first discern Indian status prior to a search[7]. Rather then inquiring into an individual's tribal or non-tribal status, the Court instead protected this act of jurisdiction because the conduct implicated the tribe's political integrity, economic security, and health and welfare[8]. Nevertheless, despite this major win for tribal nations, the *Cooley* decision left many questions unanswered within Federal Indian jurisprudence, and further continued to implicitly assert the notion of domestic dependency upon tribal nations.

Historically, Federal Indian jurisprudence has distinguished civil and criminal jurisdictional questions. Under *Oliphant v. Suquamish Indian Tribe*[9], the Court held that tribal governments do not retain criminal jurisdiction over non-native persons on tribal land. However, under *Montana v. U.S.*[10], the Court determined that tribal governments may retain civil jurisdiction over non-members on tribal land where: (1) the non-member entered into a contractual relationship with the tribe or its members, or (2) the conduct of the non-member threatens or has some direct effect on the political integrity, economic security, or health and welfare of the tribe[11]. Surprisingly, despite being presented an issue in the criminal context—similar to the facts in

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1 United States v. Cooley, 141 S. Ct. 1638 (2021).
2 McGirt v. Oklahoma, 140 S. Ct. 2452 (2020).
3 Cooley, 141 S. Ct. at 1642.
4 Id. at 1641-42.
5 Id. at 1642.
6 Id.
7 Id. at 1645.
7 . Id. at 1645.
9 Oliphant v. Suquamish Tribe, 435 U.S. 191, 212 (1978).
10 Montana v. United States, 450 U.S. 544 (1981).
11 Id. at 566.

United States v. Cooley

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Oliphant—the Court in *Cooley* relied on *Montana* to hold that the tribal government had jurisdiction over Cooley's conduct, finding that the *Montana* test "fit the present case, almost like a glove.[12]" As a result of the *Montana* application, the Court left ambiguous the civil and criminal distinction, leaving tribal governments unclear as to adequate assertions of jurisdiction.

Moreover, *Montana* presents a general presumption against tribal governments for controlling conduct by non-Indian members, unless the tribal governments can meet one of the two limited exceptions. Therefore, while the Court in *Cooley* protected inherent tribal sovereignty in this instance, there still remains an extremely limiting and problematic jurisdictional test for tribal governments. Additionally, *Cooley* is the first time the Court has ever utilized the second *Montana* exception; however, the exception was invoked only in the criminal context. This has therefore established precedent that the second *Montana* exception is only implicated where criminal issues are presented, ignoring the reality that civil issues—such as tax regulatory implications, insurance issues, and so on—may be sufficient to threaten or directly effect a tribe's political integrity, economic security, or health and welfare.[13] As such, while *Cooley* stands as a major win for tribal governments, Justice Breyer's opinion remains consistent with the federal judiciary's constant limitations upon the rightful jurisdictional control owed to tribal governments.

Finally, and most importantly, the Court's continued reliance on the Marshall trilogy—*Johnson v. McIntosh*[14], *Cherokee Nation v. Georgia*[15], and *Worcester v. Georgia*[16] —remains problematic as a means of implicitly accepting decisions deeply rooted in racism and American tribal control. As many Federal Indian scholars point out, the *Marshall* trilogy "recognized this foundational principle of white racial superiority and applied it to the entire North American continent.[17]" Accordingly, the *Marshall* trilogy treated Indians as an "inferior" race by accepting the doctrine of discovery, establishing a legal doctrine to take tribal land, perpetuating stereotypes of "savagery" through its language, and passively permitting discrimination and racist practices by shifting the deference to Congress. Again, the Court in *Cooley* provided enhanced tribal sovereignty for Indian nations; however, the Court continues to refuse to overturn and reject the racist foundations upon which these holdings stand.

Overall, *Cooley* serves as a significant win for tribal nation's inherent sovereignty; however, there remains a looming disconnect between the federal government, the federal judiciary, and genuine tribal independence.

12 Cooley, 141 S. Ct. at 1643.

13 Elizabeth Reese, Affirmation of inherent tribal power to police blurs civil and criminal Indian law tests, SCOTUSblog (Jun. 7, 2021, 10:29 PM), https://www.scotusblog.com/2021/06/affirmation-of-inherent-tribal-power-to-police-blurs-civil-and-criminal-indian-law-tests/.

14 Johnson v. McIntosh, 21 U.S. 543 (1823).

15 Cherokee Nation v. Georgia, 5 Pet. 1 (1831).

16 Worcester v. Georgia, 6 Pet. 515 (1832).

17 Robert Williams, Like a Loaded Weapon, The Rehnquist Court, Indian Rights, and the Legal History of Racism in America (2005).

Mary Levine is a 3L at Suffolk Law School, concentrating in international law. She is also Secretary of the NLG Suffolk student chapter.

Texas v. California

by Micah Iberosi-Parnell

On June 17, 2021, the Supreme Court dismissed the latest challenge to the Affordable Care Act ("ACA") in a 7-2 decision. Seven justices in the majority decided that Texas, 17 other Republican-led states, and 2 individuals failed to show standing to challenge the ACA. The Supreme Court's ruling ended the two-year-plus saga over whether the ACA would survive the Trump Era.

Supreme Court's Decision

If the Supreme Court had sided with Texas and the Republican states, up to 31 million Americans could have lost their health insurance. Instead, the majority held that Texas and the other states lacked standing and intentionally refused to discuss whether individual mandate was constitutional or severable from the rest of the law.

Specifically, the Supreme Court said Texas failed to show that increased enrollment on state-sponsored health plans and increased administrative costs were "predictable effect[s]" of Congress reducing the shared responsibility payment to $0 in 2017, and Texas and the other states could not point to any real effect that the $0 payment had on them. (They only showed evidence of what was caused by other parts of the ACA or shared responsibility payment before it was reduced.)

Background and Arguments

The Republican states alleged that the entire ACA was rendered unconstitutional after Congress lowered the tax penalty for individuals without health insurance to $0 in 2017 as a part of the Republican-led tax reform. When the ACA was passed in 2011, the law required everyone to have health insurance or face a financial penalty. The requirement was called the "individual mandate," and the financial penalty was referred to as the "shared responsibility payment". Its purpose was to encourage young and healthy people to buy health insurance and help lower premiums for older, sicker enrollees.

Texas argued that in the 2012 case, *NFIB v. Sebelius*, the Supreme Court only upheld the ACA because the individual mandate and shared responsibility payments were valid "taxes" under the Constitution. Texas also claimed that the individual mandate was the cornerstone of the ACA and without it the rest of the law would fall.

Texas said the $0 penalty was evidence that Congress repealed the individual mandate. Combining that with severability, *Texas* contended that the entire ACA must be ruled unconstitutional because the entire law relied on the individual mandate being constitutional.

Initially, the federal government was named as the defendant in the case. But the Department of Justice under the Trump Administration never stepped in to defend the constitutionality of the ACA's individual mandate. Instead, the federal government changed its position three times at the district court and before the case reached the Supreme Court. Instead, California and 15 other states stepped in to defend the law.

Many legal experts were especially skeptical of Texas' argument that the rest of the ACA is not severable from now-unenforceable individual mandate. The ACA is essentially 10 laws in one. The first section implemented the individual mandate. Other parts of the law do dozens of different things like expand Medicaid, reform Medicare payment systems, increase funding to other social programs, and more.

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Cedar Point Nursery v. Hassid

by Kylah Clay

The Supreme Court's recent decision in *Cedar Point Nursery v. Hassid*[1] clarifies some aspects of the Takings Clause and provides a glimpse into how the Court's current composition will impact property rights. At the core of the case was a California regulation that allowed labor organizations a "right to take access" to land owned by agricultural employers "in order to solicit support for unionization."[2] Under this regulation, labor organizations could essentially "take access" to the property owner's land for up to four days a month so long as they provide written notice in advance. Conflict arose in October 2015 when United Farm Workers ("UFW") arrived without notice on Cedar Point Nursery's strawberry farm to promote unionization. According to the Court, UFW's presence led some employees to join them in protest and others to "leave the worksite altogether."[3]

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1 141 S. Ct. 2063 (2021)
2 Id. at 2069.
3 Id. at 2070.

Texas v. California

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Practically, it appeared that the individual mandate was almost completely severable. For example, total enrollment in the ACA insurance exchanges between 2017 and 2021 remained stable at about 12 million enrollees.

Despite this, district court and the Fifth Circuit sided with Texas.

Aftermath

Media coverage of the Supreme Court's decision has largely framed it to be the end of major challenges to the ACA. But this coverage overlooks the fact that *Texas* didn't strengthen the ACA, and in fact left it open to challenges by stronger plaintiffs. For example, *Kelley v. Bercerra* is in federal district court and overseen by Judge O'Connor — the district court judge in *Texas*. The *Kelley* plaintiffs are only challenging Section 2713 of the ACA that prevents insurers from charging copays and coinsurance for "preventative services" like mammograms. They argue:

1. The ACA isn't clear enough about what preventative services health plans need to cover.
2. The organizations who do decide what preventative service must be covered were not properly appointed under the Constitution and can't be held properly accountable by the president because of it.

Multiple Supreme Court justices have indicated they are receptive to the types of arguments made by the *Kelley* plaintiffs. The Trump Era is over, but *Texas* will not be the last word on the ACA.

Micah Iberosi-Parnell is a member of the NLG-Mass Chapter's Litigation Committee.

Cedar Point Nursery v. Hassid

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Subsequently, Cedar Point Nursery filed suit against several UFW Board members in their official capacity. The suit requested declaratory and injunctive relief barring UFW from returning under the theory that the California regulation constitutes a physical taking without just compensation. Although the lower courts denied Cedar Point Nursery's claims, the Supreme Court held that the regulation constituted a per se taking and is therefore an unconstitutional violation of the property owners' Fifth and Fourteenth Amendment rights unless the government provides just compensation.

Notably, the Court declined to apply the balancing test established under *Penn Central Transportation Co. v. City of New York*,[4] instead holding that the physical appropriation of one's land constitutes a per se taking and does not require any additional analysis but a determination of proper compensation.[5] The Court relies on both the plain language of the statute, which allows a third party to "take access" of land, and its effect on property owners. Regardless of its temporary and intermittent nature, the Court explains, the regulation constitutes a significant intrusion on one's property rights, particularly the right to exclude. Although the Court does not directly overturn precedent, this rationale stands in contrast to previous case law, including *Loretto v. Teleprompter Manhattan CATV Corp*.[6], which held that a permanent physical occupation of land constitutes a per se taking, therefore requiring just compensation, but a temporary invasion must be addressed under the *Penn Central* test. By classifying this temporary invasion as a per se taking, the Court allows Cedar Point Nursery to bypass the difficult burden of establishing a taking under *Penn Central.* As a result, the only issue left for the Court to determine was what compensation was required.

This case will certainly have an impact on the future litigation of government regulations of land, particularly on the issues of rent control and inclusionary zoning. Moving forward, the Court makes it clear that the government must provide just compensation in order to provide union organizers access to private property. But it also leaves some unanswered questions. To what extent will this holding alter the general takings analysis? Does this holding expand the reach of a per se taking?

As the Court leans more strongly in favor of property rights, now is a crucial time to remember the core mission of the National Lawyers Guild, "to function as an effective force in the service of the people by valuing human rights and ecosystems over property interests."

4 438 U.S. 104 (1978)
5 Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2072 (2021)
6 458 U.S. 419 (1982)

Kylah Clay is a 3L at Suffolk University Law School and a graduate student at Boston University. She is President of the NLG Suffolk Law School Chapter.

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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 NLG members & friends:

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Brnovich, Attorney General of Arizona v. Democratic National Committee

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size fits all" test regardless of the actual risk from the disclosure or the actual burden on associational rights. She noted that if the "Court had simply granted as-applied relief," she would be sympathetic to the decision, though not in agreement with it.

But Justice Alito, in a concurrence joined by Justice Gorsuch, was pleased that "the exacting scrutiny standard drawn from our election-law jurisprudence has real teeth," "requiring both narrow tailoring and consideration of alternative means of obtaining the sought-after information." And Justice Alito was right – the standard has teeth, particularly its "narrowly tailored" standard, and it likely will contribute to undoing even more campaign finance and contribution disclosure laws. This case is of a piece with *Brnovich*.

David Kelston is an attorney in Boston. He serves on the Board of Directors and is Treasurer of the NLG-Massachusetts Chapter.

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