

# IN BRIEF

NEWSLETTER | FALL 2023



PIONEER  
PUBLIC INTEREST  
LAW CENTER



*The Honorable Frank J. Bailey  
President  
U.S. Bankruptcy Judge (ret.)*

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## President's Message

As the new year comes into view, we at PPILC tally our progress in ensuring that children receive the education to which they are entitled, safeguarding free enterprise, and protecting the rights of people to exercise their constitutional freedoms. While we have indeed made significant progress in just our first year, individuals that have suffered from government overreach and abuse continue to reach out to us for help. We are proud to continue to grow our board with business leaders and accomplished lawyers, and are gratified by our impressive roster of collaborators from private law firms and public interest organizations. However, the need for our work continues to increase. Expanding our impact will require additional legal bandwidth—and additional resources. As we approach the close of 2023, I hope you will consider including PPILC in your year-end charitable giving.

## A Message from Andrew Horgan, Chief Development Officer

Inspiring. Engaging. Impactful. At the conclusion of my first month as the Chief Development Officer for Pioneer Institute and Pioneer Public Interest Law Center, I find myself coming back to these three words when thinking about our mission. The work of Judge Bailey, the Board of Directors, and the legal team is driving change not only in Massachusetts, but throughout the country. As you will read in this newsletter, the Law Center continues to have success and is tackling public policy issues in areas that affect the lives of everyday people.

The impact of this work is amplified by the support of individuals, foundations, and corporations who believe in the power of the Judiciary to help promote educational options, hold the government accountable, and promote economic opportunity for all members of society. As we continue to grow the capacities of PPILC, I welcome you to join us in this effort. I am confident you too will be energized, inspired, and engaged by the impactful work of the Law Center arguably at a time in our country's history when we need it most.

## Success Stories

### *Supreme Judicial Court agrees with Pioneer Law Center in ruling that protects the rights of immigrant entrepreneurs and small business owners*

In March 2023, we filed an *amicus* brief in support of a Vietnamese immigrant who took her savings from operating a nail salon in Randolph and purchased the small commercial building in which her business is located. After a revenge killing occurred outside of her tenant's nightclub, the victim's family sued her, arguing that a commercial landlord's duty to prevent reasonably foreseeable criminal acts by third parties encompasses a duty to learn of criminal acts that occurred prior to the landlord's purchase of the property.

In our brief, we brought to the SJC's attention the negative public policy implications of the appellant's proposal to extend premises liability in this manner. We argued that such a rule would unfairly impact immigrant entrepreneurs, who are often unsophisticated buyers of commercial real estate in crime-ridden neighborhoods. Imposing a duty to conduct "criminal background checks" on commercial properties would increase the cost of buying and would likely raise premises liability insurance rates in high-crime areas, thus depressing commercial real estate values and sales in these neighborhoods.

Such a change would disincentivize owning property in high-crime neighborhoods, limiting economic opportunities in the Commonwealth.

On August 16, 2023, in the *Hill-Junius v. UTP Realty* case, the Court ruled that "viewing the record in the light most favorable to the [plaintiff], the execution-style shooting of the decedent was not reasonably foreseeable to [the] property owner and landlord, and there was thus no duty on the part of [the land owner] to protect the decedent against this criminal act by a third party." This is a



powerful ruling that protects investors in developing neighborhoods from potential catastrophic liability for doing nothing more than owning the relevant property. It also reduces the costs of property ownership in such areas by managing insurance costs, thus increasing access to commercial property ownership.

### *Defendant in unconstitutional takings case vacates judgment of foreclosure after PPILC brings lawsuit*

As we reported in the summer edition of *In Brief*, our client Nancy Rodriguez owned her house for over 20 years, paid off her mortgage, but fell behind on her taxes when she became ill. Her home was assessed at over \$220,000 in value and she owed only \$3,700 in taxes when Worcester sold the tax lien to a private company that specializes in obtaining windfall profits from homeowners.

Together with Greater Boston Legal Services and Morgan Lewis, we sued the private lien buyer and the City of Worcester to get Rodriguez her equity back through an approach not yet seen in the federal First Circuit. After robust motion practice in which the lien buyer sought to get the court to dismiss our cases, those efforts largely failed. We were about to engage in depositions and discovery when the lien buyer voluntarily and unilaterally reversed the foreclosure judgment. We are now engaged in mediation to close out the case entirely. This victory for Rodriguez and her family will ultimately ensure that they continue in ownership of their family home or receive the value of the investment in that home.

## Speaking Engagements

- Frank Bailey served as a panelist at a full-day program regarding financial restructuring in the cannabis industry nationally. The program was sponsored by Burns & Levinson, LLP and included many companies and financial institutions in Boston.
- John LaLiberte and Frank Bailey attended the *Pro Bono Fair* for lawyers and law students sponsored by Boston area law schools and the Boston Bar Association. Our team fielded questions about how the legal community can contribute to our public policy work by volunteering time and skills.

### **Thank you to our co-counsel and partners**



KING & SPALDING



Morgan Lewis

SIDLEY



## Current Cases

### ***Challenging constitutionality of Massachusetts' tax lien statutory scheme***

Ashley Mills inherited her family home in Springfield, Massachusetts from her grandfather. Ashley is a 25-year old single mother to a two-year old child and is employed by the U.S. Postal Service. Ashley also suffers from a serious hearing deficit. When she inherited the family home, there were tax arrearages that her family had a difficult time curing despite several opportunities provided by the city.

When we met Ashley, she was facing a hearing at which the city was about to foreclose on her right to redeem the home, even though only about \$20,000 in taxes were due and the home was worth over \$250,000. The concern was that if the city took the home under existing law, it would have no requirement, and perhaps no ability, to pay Ashley the value of the property in excess of the tax arrearage.

Given that the Massachusetts Legislature has not amended the tax lien statute to bring it into line with the U.S. Supreme Court's ruling in *Tyler v. Hennepin County* and no state court has addressed the constitutionality of the tax lien statute, Pioneer Public Interest Law Center and Greater Boston Legal Services brought a unique action directly in the state Supreme Judicial Court seeking a ruling on the viability of the tax lien law.

The SJC has directed the case to the Superior Court for an initial ruling, but we are dedicated to getting this issue onto the fast track for decision. It has been six months since *Tyler* invalidated a similar Minnesota statute and it is time for Massachusetts to catch up.

### ***SCOTUS amicus brief challenges Dodd-Frank's denial of rights to those charged with securities violations***

George Jarquesy established two hedge funds managing \$24 million in assets from over 100 investors. The Securities Exchange Commission (SEC) brought fraud claims against Jarquesy in a so-called in-house proceeding. After an evidentiary hearing by an administrative law judge, Jarquesy was found guilty of securities fraud, fined more than \$1 million, and banned from participating in the securities industry. The SEC affirmed the fraud findings and rejected several constitutional arguments.

On appeal, a divided Court of Appeals for the Fifth Circuit reversed, finding multiple constitutional violations. Among their findings was that the scheme that allows the SEC to adjudicate claims before an administrative law judge violated Jarquesy's Seventh Amendment right to a jury trial.

In 2010, in the wake of the 2008 financial crisis, Congress passed the Dodd-Frank Act, which purported to empower the SEC to impose harsh sanctions through its own administrative adjudications with very limited after-the-fact review by a federal court of appeals. Congress had declined to provide these extraordinary powers to the SEC for decades, but finally yielded them to the SEC under Dodd-Frank.

PPILC, together with King & Spaulding, LLC, has filed an *amicus* brief in the Supreme Court in support of Jarquesy, asking the Court to affirm the Fifth Circuit. Those in the investment industry should be entitled to adjudicate claims against them before a federal judge—one who has been appointed by the president and has lifetime tenure. Allowing the SEC to adjudicate its own prosecutions violates constitutional requirements, as the SEC is literally on the same side as the prosecution and the tribunal—the administrative law judge—is employed by the SEC, creating both an apparent and actual conflict of interest. These aspects of the Dodd-Frank Act should be stricken and the constitutional rights of those charged with fraud should be restored.



### ***PPILC sues to require Boston Public Schools to reveal violence statistics***

Colman Herman is an investigative and independent journalist. He is investigating allegations of sexual misconduct, bullying, bias, and other conduct perpetrated on students by both school employees and other students. He seeks access, following his public records requests to the City of Boston and the Boston Public Schools to 457 reports entitled "Summary of the Investigation Into Allegation(s)" ("Investigative Summaries") prepared by the BPS' Office of Equity.

Specifically, Herman has requested that the city and BPS produce investigative summaries prepared from 2016-2022 related to nondiscrimination, sexual misconduct, and bias. PPILC recently commenced an action on Herman's behalf for injunctive and declaratory relief pursuant to the state's Public Records Law and the Massachusetts Declaratory Judgment Act.





### ***PPILC nears success in saving alpaca farmer's small business***

This is another equity theft case following the U.S. Supreme Court's ruling in *Tyler v. Hennepin County* in favor of the taxpayer. PPILC and the Pacific Legal Foundation have commenced settlement discussions with the town of Bolton in the hopes of resolving the dispute without further litigation. A settlement conference is now scheduled in U.S. District Court. Our client, Alan DiPietro, hopes to continue to grow his small alpaca farming business without fear he might lose his farm.

### ***Challenge to the Massachusetts Anti-Aid Amendment gains steam***

After a nearly yearlong effort, the Law Center has secured two lead plaintiffs for our challenge to the Anti-Aid Amendment to

be brought with the Institute for Justice (IJ). "Sandy" attends a Catholic school in Arlington and is not receiving the state-funded special education services to which she is entitled because the Anti-Aid Amendment requires that such services be provided in a neutral location. "Gale," who is in a Middleborough public school, is autistic and has a one-to-one aide whenever he is mainstreamed in his public school classroom. He and his twin sister wish to attend a Catholic school, but state law does not permit state funds for special education services to be used inside private schools.


### ***PPILC close to filing complaint to enforce law on teaching and testing civics***

The Pioneer Public Interest Law Center has completed work on a complaint against the education leaders in Massachusetts to enforce the Education Reform Act of 1993, which requires the state "to develop economic standards, and 'curriculum frameworks; for attaining those standards in certain 'core subjects': mathematics, science and technology, *history and social science*, English language arts, foreign languages, and the arts."

We emphasize that the Act specifically requires every senior attain competency in history and social science and sets forth specific minimum requirements and objectives for curriculum standards in those areas. They include instruction in at least the major principles of the Declaration of Independence, the United States Constitution, and *The Federalist Papers*. These requirements have not been achieved despite the decades that have passed.

The draft complaint has been circulated and we are in the process of identifying and enlisting potential students and parents as plaintiffs in the action.

## **Upcoming Events**



### ***Inaugural Brackett B. Denniston, III Program on Law and Democracy***

Pioneer Public Interest Law Center will sponsor the first in a series of annual programs dedicated to an in-depth discussion of critical issues challenging the rule of law in America. Please watch for more details in the coming weeks.

### ***The Second Annual "Reasonable Minds Can Differ: A Review of Critical Supreme Court Cases in the 2023-2024 Term"***

In March 2023, the Law Center hosted the first SCOTUS review, and the event was sold out. In February 2024, the Law Center will host a second in-depth analysis of the major cases before the United States Supreme Court in the 2023-2024 term. Please watch for an invitation and sign up early.

### ***Planned Government Transparency Forum***

Pioneer Public Interest Law Center is actively planning to assemble journalists from *CommonWealth Magazine*, *The Boston Globe*, and other written and broadcast media to share information about the problems they have in accessing public information in Massachusetts. The forum would meet regularly to discuss options for improving access to the state government.

## ***PPILC Challenging State Title 5 Septic Rules on Behalf of Cape Residents***

PPILC, in collaboration with New England Legal Foundation and attorneys at Sidley Austin, undertook the representation of several Dartmouth residents. This action was prompted by the Massachusetts Department of Environmental Protection announced amendments to Title 5 regulations that would adversely impact them through overbroad regulations which had not been shown to address nitrogen pollution to waterways.

Working with local residents with civil and environmental backgrounds, PPILC established that DEP adopted the amendments—slated to take effect July 7, 2023—in violation of its own regulations. Notably, the final regulations did not include earlier draft rules that would have allowed the state to designate coastal watersheds in southeastern Massachusetts, Martha's Vineyard, and Nantucket as Natural Resource Area Nitrogen Sensitive Areas (NSAs).

That plan was dropped following PPILC's involvement and extensive comments from leaders who argued that their communities had not been afforded the same time as Cape communities to investigate and address nitrogen nutrient pollution. Now, residents of Westport and southeastern Massachusetts are under no immediate obligation to implement upgrades to their septic systems.

The fact remains that DEP failed to follow its own regulations when adopting the Title 5 amendments. That substantive changes were made to the regulations without further public comment and input may be the basis for a further challenge.

## **Meet the Intern:**

***Kayla Turnof***  
***Brandeis University***  
***Undergraduate***  
***Legal Studies***  
***Program.***



"To me, my internship with Pioneer Public Interest Law Center has meant gaining valuable work experience in the legal field that I would not have been able to get in the classroom. I have been able to work on meaningful cases that help homeowners, children in public schools, and citizens facing unfair government regulations. I am glad to be working for Pioneer as this is the type of work I value."

We have recently met with Cape residents in communities designated as NSAs, and many have expressed interest in challenging the new regulations. We are assembling research reports to support arguments that the regulations were adopted in violation of DEP's own rules and that septic system upgrades potentially costing thousands of dollars will have little if any impact in reducing nitrogen pollution.



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