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Liberty & LAW



Judge Declares Board's Actions Illegal

By Scott Bullock

IJ's campaign to protect economic liberty took us across the Potomac to Maryland where two powerful licensing boards tried to stop an entrepreneur from pursuing a harmless occupation. This battle culminated in a July court victory, which both got our client back in business and marked a meaningful step forward in defending the right to earn an honest living.

Starting in 2006, IJ client Mercedes Clemens did what entrepreneurs have always done; she combined something she loved with a successful business plan. After spending 15 years in the graphic arts world, Mercedes decided that she wanted a career change. Mercedes had always loved horses and had been around them her whole life, so she began to study

the practice of equine massage, a practice valued by horse owners because it alleviates their horse's sore muscles, helps prepare for and recuperate from equestrian events, and simply relaxes naturally skittish horses.

In 2006, she completed both a private certification course in equine massage and graduated from a massage therapy school. She opened a massage practice for people, operating out of a medical office in Rockville, Md., while also offering equine massage to more than 30 clients throughout Maryland.

No sooner had she set up her business, however, than she received a cease-and-desist letter from the Maryland Board of Chiropractic Examiners, ordering her to stop performing animal massage and to take down her website. The board's position was

Maryland Entrepreneur continued on page 9



IJ recently scored a victory on behalf of Florida clients **Eva Locke**, left, and **Pat Levenson**.

By Clark Neily

IJ has more good news to share on our campaign to stop the cartelization of the interior design industry. Just weeks after taking down Connecticut's interior design law, we struck another blow for liberty by securing a preliminary injunction in our challenge to an even more sweeping law in Florida. As a result, the state can no longer censor interior designers, and we are one step closer to "renovating" Florida into a more freedom-friendly state that fosters entrepreneurship rather than tying it up with red tape.

Three years ago, IJ announced it would take on the interior design cartel led by a group of elitist insiders called the American Society of Interior Designers (ASID). ASID's lobbying campaign represents one of the most blatant examples of interest group politics IJ has ever encountered.

After successful lawsuits in New Mexico, Texas, Connecticut and Oklahoma, we set our sights on the cartel's crown jewel: Florida. Florida has the most sweeping interior design law in the country. To make mat-

ters even more egregious, the state farmed out enforcement of its law to a private law firm that acts as a kind of industry bounty hunter, going after people for even the most trivial perceived violations.

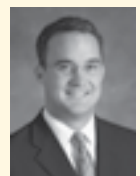
For example, Florida has an exemption that allows people to perform residential interior design work without a license, reserving the bigger, more lucrative commercial jobs for state-licensed interior designers. But people performing residential interior design work under the exemption are not allowed to use the term "interior designer" or other "words to that effect" (whatever those might be)—even when they are perfectly accurate. This led to hundreds of disciplinary actions against entrepreneurs for doing nothing more than truthfully describing work they lawfully perform.

Enter IJ's strategic litigation campaign. Having already established through court rulings in our Texas and Connecticut cases that the government may not censor the truthful commercial speech of interior designers, we promptly filed a preliminary injunction motion targeting that provision of Florida's law. Seeing the handwriting on the wall,

the State Board of Architecture and Interior Design did not even fight the injunction motion, but instead agreed to a court order that allows individuals to use the word "interior designer" and any other term that accurately describes work they lawfully perform in Florida.

That leaves the part of Florida's law that requires a government-issued license to perform commercial interior design work. Given that there has never been a documented instance of harm from interior design in the 47 states that do not regulate the practice of interior design, it is quite clear that licensing interior designers has nothing to do with protecting the public and everything to do with protecting industry insiders from fair competition. We are going to prove that in court and show how Florida's interior design law is riddled with constitutional defects from start to finish. By the time we are through, freedom will shine forth in the Sunshine State. ♦

Clark Neily is an Institute senior attorney.



Free Speech Blockbuster At the U.S. Supreme Court

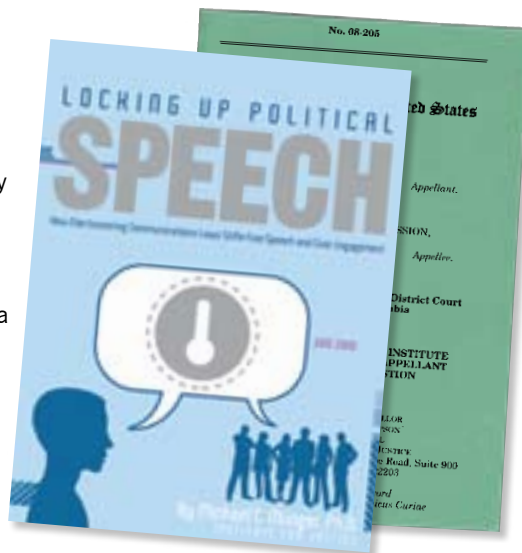
By Paul Sherman

On September 9, the U.S. Supreme Court heard a blockbuster case that could bring a major victory for First Amendment rights over so-called campaign finance reform.

The argument came about because in June the Court ordered a second argument in *Citizens United v. Federal Election Commission*, the “Hillary: The Movie” case. The Court wanted to consider whether to overturn two Supreme Court decisions—*Austin v. Michigan Chamber of Commerce* and *McConnell v. FEC*—that upheld bans on corporations, including nonprofits, spending their own money on their own speech.

Immediately, IJ began deploying legal, media and research resources to make the most of this unusual opportunity. On the very day the court made its announcement, IJ released a study that documents the critical need to rein in government-imposed speech regulations that have flourished since the Court’s decision in *McConnell*.

The study is the first to examine the impact of “electioneering communications” laws—the regulations at issue in *McConnell* and *Citizens United*—on ordinary nonprofit groups. The study shows that these laws impose heavy regulatory burdens on nonprofits, most of which lack the resources to comply. *Locking Up Political Speech: How Electioneering Communications Laws Stifle Free Speech and Civic Engagement* by Duke University political scientist Dr. Michael Munger is available at www.ij.org/citizensunited.



We featured this research in a friend-of-the-court brief for the reargument of *Citizens United*, urging that *Austin* and *McConnell* should be overturned because the regulation of independent political speech inevitably leads to widespread government censorship.

We also made our case in the court of public opinion for a return to robust protections for free speech. As IJ Senior Attorney Steve Simpson told the *National Law Journal*, “Under the First Amendment, the government has no business deciding which speakers gain admittance to the marketplace of ideas.”

A critical part of our communications strategy was to counter the scare-mongering of “reformers” who warned of opening the floodgates to corporate speech. Nationally syndicated columnist George F. Will picked up on this argument, quoting Steve, “Freeing corporate speech will lead to what more speech always leads to—a debate. Wal-Mart will support President Obama’s health-care

reform, as it has done, but the National Retail Federation will oppose it, as it has done Corporations do not speak with one voice any more than individuals do.”

Based on the September 9 argument, First Amendment advocates have reason to hope *Austin* and *McConnell*, two cornerstones of political speech regulation, will be overturned.

Although this would be an important first step, in order to truly free political speech the Court must reconsider three decades of bad campaign finance precedent. Luckily, it may have the chance to do so soon in *SpeechNow.org v. FEC*, a case being litigated jointly by IJ and the Center for Competitive Politics. *SpeechNow.org* challenges federal laws that require any group of people that wants to speak independently about candidates to become a “political committee” and abide by strict limits on the amount of money they may accept. These 30-year-old laws make it nearly impossible for independent groups to raise the money to speak effectively. *SpeechNow.org* is currently on the fast track to a hearing before all nine active judges on the D.C. Circuit Court of Appeals, the very last stop before the U.S. Supreme Court.

Thirty years of campaign finance “reform” have done serious damage to the First Amendment, but through strategic research, amicus briefs and our own constitutional litigation, IJ is at the forefront of the fight to restore the right to free speech. ♦

Paul Sherman is an IJ staff attorney.



Law Student

By Krissy Keys

This summer, the Institute for Justice continued its work to train the next generation of advocates for freedom.

In July, IJ welcomed 30 law students representing 19 law schools at its 18th annual Law Student Conference, held at George Washington University in Washington, D.C. Joining IJ summer clerks and interns from our headquarters and state chapters were new Institute for Justice attorneys and staff, and an attorney from Sweden's *Centrum för Rättvisa*—Sweden's first public interest law firm, which was modeled on the Institute for Justice.



Conference Inspires & Informs

Conference attendees received intensive instruction in public interest law done The IJ Way through presentations from IJ attorneys, staff and clients. Among the presentations were those by law professors Randy Barnett (Georgetown University Law School), Doug Kmiec (Pepperdine University Law School) and Todd Zywicki (George Mason University Law School), who discussed cutting-edge constitutional law and legal theories rarely examined in most law schools today. The Cato Institute's Roger Pilon provided attendees with an overview of the many career options that await them after law school graduation.

IJ clients Mercedes Clemens, from our Maryland horse massage case, and Mike Tait, from our Philadelphia tour guides case, gave attendees an insider's view of the Institute for Justice's cases during the always popular client roundtable. Texas Supreme Court Justice Don Willett closed the conference with an inspiring keynote address.

Participants in IJ's law student conference become members of the Institute's Human Action Network, which in part is comprised of past IJ clerks, interns and IJ conference alumni. HAN members often assist IJ with researching potential cases,

authoring amicus briefs, serving as local counsel and litigating cases IJ is unable to litigate.

Summer by summer, IJ works to deepen the talent pool of skilled advocates for individual rights. Our law student conference shows aspiring law students how they can play a meaningful part in advancing the cause of liberty. ♦

Krissy Keys is IJ's special projects manager.



IJ President Chip Mellor and Texas Supreme Court Justice Don Willett

Texas Supreme Court Justice Don Willett delivered this year's conference keynote address and encouraged conference attendees to put their future law degrees to good use through public interest law, public service and *pro bono* work. He also provided the students with an engaging multimedia presentation of his tips for success in legal practice.



Our 2009 headquarters summer clerks and interns provided excellent legal research for IJ. They are, from left to right, **Tony Henke**, University of Chicago Law School; **Bridget McNamee**, Duke University School of Law; **Joel Stonedale**, University of Chicago Law School; **Karynna Asao**, Claremont McKenna College; **Jay Schweikert**, Harvard Law School; **Patrick Byrne**, U.C. Hastings College of Law; **Ashley Daly**, University of Michigan Law School; **Ben Massey**, Princeton University; **Melissa-Victoria King**, Columbia Law School; **Ben Burningham**, Southern Virginia University; **Renée Flaherty**, Harvard Law School; **Sharon Yecies**, University of Chicago Law School; **Caleb Kramer**, Grove City College; **Anne-Marie Dao**, U.C. Davis Law School; **Bennett Rawicki**, University of Dallas; **Erin Wilson**, College of William & Mary.



IJ Appeals Two Cases to U.S. Supreme Court

By John E. Kramer

IJ never gives up. Whenever we launch a case, we are committed to pursuing it to the very end. Such tenacity has taken us to the U.S. Supreme Court three times in recent years and to various state supreme courts. In this spirit, we are urging the U.S. Supreme Court to take two cases we have litigated from the trial court through to the highest court in the land that address vital constitutional concerns.

Fighting for Free Speech; Battling Campaign Finance Restrictions

Little by little, America is turning away from free and robust political speech. Politicians are imposing government-enforced restrictions in the guise of so-called campaign finance reforms on vital political discussion. In practice, campaign finance laws silence political speech and make it nearly impossible for anyone except political pros to participate in any meaningful way in the political process. Even the most basic grassroots activists must now register with the government before they speak or else face the wrath of their opponents, who employ campaign finance restrictions and disclosure demands to sap

the resources of those they disagree with and intimidate them into silence.

In August, IJ appealed to the U.S. Supreme Court a Colorado case we began litigating in March 2006 in which the Independence Institute, a free market think tank, was sued by its political opponents for merely airing its opinion on two ballot measures that would raise taxes. The Independence Institute's opponents filed a complaint with the Colorado Secretary of State designed to silence the Institute at a critical time in the campaign. Keep in mind that campaign finance laws are totally irrelevant in the

ballot measure context; the primary justification for campaign finance restrictions is to do away with real or perceived political *quid pro quos*, but with ballot measures like the ones the Independence Institute spoke out on, there is no politician to corrupt or to grant favors. A ballot measure is merely words on a page.

Colorado's vague and overbroad law imposes significant burdens on groups that wish to speak out about ballot issues and prevents contributors from engaging in anonymous speech and association—the kind of political speech and association that dates back to the very founding of our nation.◆

“Campaign finance laws silence political speech and make it nearly impossible for anyone except political pros to participate in any meaningful way in the political process.”



Burying Maryland's Funeral Home Cartel

America was founded as a nation that was to be free from interstate restrictions on commerce. Yet the Fourth U.S. Circuit Court of Appeals recently held that the interstate movement of investment capital and profits—as opposed to physical goods—is not “commerce” within the meaning of the U.S. Constitution’s Commerce Clause. The court held that a Maryland law that restricts funeral home ownership to a politically favored in-state cartel and generally bars interstate investments in funeral homes by corporations, does not impose an undue burden on interstate commerce.

That ruling contradicts U.S. Supreme Court precedent and prior federal appellate court case law, and if this rationale were consistently applied, interstate trade would be brought to a halt. As IJ Senior Attorney Clark Neily announced when appealing this case to the nation’s High Court, “Maryland is clearly and deliberately trying to shield local funeral directors from competition, and it is doing so at the expense of Maryland residents—and the Constitution.”

The influential *SCOTUSblog* recently wrote, “Besides testing the law’s impact on capital and business form, the new petition asks the Court to clarify how far states must go to prove that there are local benefits that outweigh any burden a business-regulating law imposes on commerce among the states—essentially, a plea for the Court to revisit its most important precedent on that issue: *Pike v. Bruce Church*, in 1970. The *Brown* case is part of the long-running campaign to challenge business regulation, particularly as it affects small businesses, by the Institute for Justice, a free-market advocacy group based in Arlington, VA.”

The Supreme Court is expected to decide early in the upcoming term whether it will take up either of these cases.

You can always count on IJ to wage its strategic public interest litigation campaigns tirelessly and for the long haul. From the moment we file a case, we will not rest until every possible avenue for success has been explored. When that leads to the



IJ client **Charles Brown** is seeking to break up Maryland’s government-imposed funeral home cartel.

U.S. Supreme Court, we make sure it is an historic occasion as we did in the fight for school choice, for interstate wine shipments and against eminent domain abuse. We hope the Supreme Court will grant review in these two cases so we can defend two fundamental principles of American liberty: free speech and free trade.◆

John E. Kramer is IJ’s vice president for communications.



IJ Amicus Brief Urges High Court To Rein In “Policing for Profit”

By Robert Frommer

In August, the Institute for Justice filed a friend-of-the-court brief in *Alvarez v. Smith* to urge the U.S. Supreme Court to help protect against “policing for profit.” IJ asked the Court to hold that the government cannot seize and keep property for months, even years, without ever justifying its actions to a neutral court.

The plaintiffs in *Alvarez* had their cars and cash seized by the Chicago Police Department as part of a drug investigation, though none were ever charged with any crime. Although most states and the federal government let people challenge the validity of seizures at a prompt preliminary hearing, Illinois does not. For months, the plaintiffs have had no way to get their cars or money back.

What happened to these plaintiffs, and what happens to countless Americans each year, is known as civil forfeiture. Civil forfeiture lets the government seize and keep people’s property without having to prove that they are guilty of any criminal wrongdoing. This is because civil forfeiture uses a “legal fiction” that treats the property as the accused and allows property owners fewer constitutional protections than criminal defendants. Under civil forfeiture, seized property is guilty until proven innocent.

It gets even worse. Currently, more than 40 states—including Illinois—and the federal government allow law enforcement to keep some or all forfeiture proceeds. Agencies have used proceeds to buy margarita machines, take judges on junkets and even pay out bonuses based on how much officers seized.

Civil forfeiture is one of the greatest threats to private property in our nation. The Institute for Justice has been attacking the practice from both a property rights and public choice perspective since we first opened our doors in 1991. In the 1990s, IJ filed amicus briefs in two key civil forfeiture cases before the U.S. Supreme Court. And

in recent years, IJ has both filed lawsuits and spoken out about how the pecuniary interest that civil forfeiture gives to law enforcement violates the Constitution.

IJ continues that fight in this brief. Using history, economic theory and real-world examples, IJ shows how the potential for millions of dollars has caused many agencies to enforce the laws with an eye towards the bottom line, rather than on justice or serious crimes. Many law enforcement agencies have strategically decided to enforce certain laws—laws that carry the promise of forfeiture proceeds—to the exclusion of others. In addition, police and prosecutors will often enforce the laws in ways designed to maximize forfeiture income rather than to minimize crime.

IJ’s brief also discusses horrible abuses where innocent people’s property was seized without any suspicion of illegal activity whatsoever. In one case, police took almost \$20,000 from a woman who was on her way to buy the supplies she needed to repair her hurricane-damaged home. And in another case, a couple was forced to sign away their rights to \$6,000 after police threatened to take away their children.

Agencies use these strong-arm tactics because they know that, due to the time and cost of challenging a seizure, many innocent owners will give up or settle rather than fight. But our nation’s strong tradition of property rights deserves better. IJ calls on the Supreme Court to rule that property owners have a right to a hearing before a neutral judge, not months in the future, but right away. By so ruling, the Court can help better protect property owners and their rights. ♦

Robert Frommer is an Institute staff attorney.



“Civil forfeiture is one of the greatest threats to private property in our nation.”



IJ attorneys **Paul Sherman** and **Scott Bullock** meet with IJ client **Mercedes Clemens** and her trusty steed, Chanty.

Maryland Entrepreneur continued from **page 1**

clear: Unless Mercedes stopped practicing animal massage, she would face immediate revocation of her license to practice massage therapy for people, which is her main source of income. With no other choice, Mercedes stopped performing animal massage and stopped advertising the service on her website.

Initially, the Chiropractic Board was working hand-in-glove with the Maryland Board of Veterinary Examiners. The Vet Board issued a directive that it considered animal massage to be the practice of veterinary medicine. Therefore, in order to practice animal massage, Mercedes would have to attend four years of veterinary school at a cost of about \$150,000 in order to become a fully licensed vet. The Vet Board's position was as absurd as requiring massage therapists who work on people to become medical doctors.

With her animal massage business shut down, Mercedes contacted IJ and we agreed to represent her to challenge this assault on her ability to perform her chosen occupation. Perhaps recognizing how indefensible its position was, the Vet Board relented a couple of months after we filed suit and issued a public statement declaring that animal massage was not, in fact, the practice of veterinary medicine and that folks like Mercedes were free to engage in the practice without being licensed.

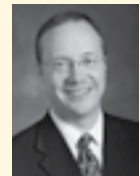
One would think that would have been the end of the matter. But we then saw what we have witnessed over and over again in our fights against regulatory and licensing boards: The unwillingness of most boards to relinquish any degree of their supposed authority.

The Chiropractic Board continued to make the argument that people who are licensed massage therapists cannot also practice massage on animals. We also saw in this case a tactic used repeatedly by regulatory boards: invoking procedural roadblocks to avoid having a court rule on the substantive issues in the case. The Chiropractic Board filed three separate motions to dismiss Mercedes' case, all in an attempt to vest total control and discretion in the board without ever having to answer for its decisions in court.

Thankfully, a Montgomery County trial judge would have none of this. In July, he ruled that the Chiropractic Board had no authority to regulate animal massage and that it was illegal for the Board to force Mercedes to stop her practice.

Mercedes is now back in business, doing what she knows and loves best. But the Institute's campaign for economic liberty continues. Economic liberty is under assault throughout the nation. And Mercedes' case provides a prime example of the mindset and tactics many licensing boards use to trample on the right to engage in an honest occupation. IJ is committed to fighting injustice by ensuring that licensing and other boards are held accountable for their actions and forbidden from engaging in unconstitutional and illegal actions. ♦

Scott Bullock is an IJ senior attorney.



“Mercedes is now back in business, doing what she knows and loves best. But the Institute’s campaign for economic liberty continues. Economic liberty is under assault throughout the nation. And Mercedes’ case provides a prime example of the mindset and tactics many licensing boards use to trample on the right to engage in an honest occupation.”



Join the Fight for Freedom: Join IJ's Human Action Network

Help us change the world and have fun doing it!

Join the Human Action Network, the Institute for Justice's nationwide grassroots activism project. Originally serving as a portal for IJ-trained lawyers to learn about pro bono litigation opportunities, HAN now welcomes any and all activists who want to make a difference in their communities in the fight for free speech, property rights, educational choice and economic liberty. Applying the same strategies we have used successfully for years with the Castle Coalition, the Human Action Network will educate, organize and empower citizens to fight at the grassroots level for the constitutional rights that tax-hungry and power-hungry government officials are so eager to thwart.

Members receive legislative action alerts, updates on IJ litigation, invitations to free training workshops, rallies and press conferences, and access to exclusive content.

Join the Human Action Network today by e-mailing Christina Walsh, IJ's director of activism and coalitions, at cwalsh@ij.org. ♦

Support the Merry Band Through Monthly Giving

Looking for a rewarding and consistent way to support IJ's work? Consider joining our Merry Band of Monthly Donors. Monthly giving is:

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Here at IJ, we work to change the world through long-term strategic litigation, communications, activism and research. Monthly givers allow us to focus on the future by providing a reliable source of income.

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Visit our website at www.ij.org/donate, or contact Mary McPherson at 703-682-9320 x239 for more information.

The greatest threat to liberty today is not from any particular government official or action. The greatest threat is the despair they create.

IJ is an antidote to that despair.

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79% Programs

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11% Administration

Contributions to the Institute for Justice pack a real bang for the buck! Seventy-nine cents of every dollar you invest in IJ go directly into our strategic litigation programs. Fund-raising costs account for 10 cents, with only 11 cents spent on administration. The more IJ donors participate in the monthly giving program, the more cost-effective we can be. ♦

Source: IJ audited financial statements

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About the publication

Liberty & Law is published bimonthly by the Institute for Justice, which, through strategic litigation, training, communication and outreach, advances a rule of law under which individuals can control their destinies as free and responsible members of society. IJ litigates to secure economic liberty, school choice, private property rights, freedom of speech and other vital individual liberties, and to restore constitutional limits on the power of government. In addition, IJ trains law students, lawyers and policy activists in the tactics of public interest litigation.

Through these activities, IJ challenges the ideology of the welfare state and illustrates and extends the benefits of freedom to those whose full enjoyment of liberty is denied by government.

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Quotable Quotes

New York Daily News

IJ Senior Attorney Dana Berliner: "Instead of parroting the infamous *Kelo* decision, the New York Court of Appeals should look to New York's own unique state constitutional protections—and rule that eminent domain may not be used for private gain."

Fortune Small Business

"Erroll Tyler doesn't give up easily. For six years the Melrose, Mass., entrepreneur has been battling the cities of Cambridge and Boston to get his amphibious-vehicle sightseeing company, Nautical Tours, off the ground and into the water. His case is pending in federal court . . . 'Giving up never crossed my mind,' says Tyler. 'I simply want to start a business.' If Tyler wins, his case may set a legal precedent and limit other cities' rights to deny licensing requests."

Chicago Tribune

IJ Clinic Director Beth Milnikel: "If Chicago remains so hostile to start-up businesses and self-employed people when the region has now lost nearly 170,000 jobs in the last year alone, we have no hope of recovering. Instead of fining small businesses at every turn and enforcing confusing regulations that have nothing to do with protecting the public's health and safety, the government should get out of the way of industrious people who want nothing more than to pursue their American dream. It is time that Mayor Richard Daley and the City Council support entrepreneurs so we can truly become 'the city that works.'"

Minnesota Public Radio

IJ-MN Executive Director Lee McGrath: "The Eighth Circuit U.S. Court of Appeals this week upheld the constitutionality of Minneapolis' effort to open its taxi industry to competition. . . . In any economic climate, the proper role of government is to protect our rights, not merely to look after the monopoly profits of a chosen few. Now is the time to expand that lesson, reinforced by this week's opinion, and create openings for entrepreneurs in other occupations who seek no government bailout, but merely the opportunity to compete."

“Over the years, the Institute for Justice, a libertarian public interest law firm, has not only shined a light on laws and licensure cabals established to eliminate competition in certain fields, it has fought to kill them in court.”

—Las Vegas Review-Journal



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