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Liberty & LAW

IJ SUES THE IRS



The IRS recently imposed a sweeping new licensing scheme that requires tax preparers to secure permission from the IRS to make a living preparing taxes.

Lawsuit Will Protect Tax Preparers' Economic Liberty

By Dan Alban

Should taxpayers or the IRS decide who prepares their taxes? Under new regulations that represent an unprecedented and unlawful power grab, the IRS now seeks to control whom you may hire to prepare your tax returns.

The IRS recently imposed a sweeping new licensing scheme that requires tax preparers—who have always had the freedom to prepare returns for anyone who sought out their services—to secure permission from the IRS to make a living preparing taxes. This move would not only endanger the abil-

ity of tax preparers to fully serve their clients' best interests (making them beholden to the IRS for their very livelihood), but it may drive many preparers out of business altogether.

These new licensing regulations require every paid tax return preparer—except for attorneys, CPAs and several categories of “enrolled agents” who wield enough political influence to have themselves exempted—to become a “registered tax return preparer” by taking and passing an IRS competency examination and paying fees. Registered tax return preparers must

IRS continued on page 8

IJ Defeats Opponents of Choice Yet Again in Arizona

By Tim Keller

Resilience is a hallmark of The IJ Way. Out in Arizona, IJ's resilience on the school choice battlefield is making a real difference in the lives of special-needs children and their families.

For six years, we have fought on behalf of kids with special needs in both the legislative and judicial arenas. We helped draft multiple pieces of school choice legislation to assist these children and we have defended every program that has been challenged in court by the teachers' unions. We celebrated a significant victory in January when a Maricopa County Superior Court judge upheld the nation's first publicly funded education savings account program.

Most people are familiar with the concept of education savings accounts. At the federal level, both Coverdell and 529 accounts permit families to save a capped amount of their own money in an account that will grow tax-free until the funds are distributed—and distributions that do not exceed qualified educational expense limits are tax-exempt.

But Arizona's education savings account program—known as the Arizona Empowerment Scholarship Account Program—does not rely on private contributions. Participants in Arizona's empowerment account program receive 90 percent of what the state would have spent on the participating students at their public schools. And unlike a voucher program, in which parents use the funds only for private school tuition, the empowerment account program gives parents an a la carte menu of educational options from which to choose.

Parents may hire private tutors, contract with therapists, purchase home school curricula, pay for private online instruction,



IJ clients **Andrea Weck** and her daughter **Lexie**, have once again stood up in a successful fight to advance school choice for special-needs kids in Arizona.

pay for tuition at brick-and-mortar private schools, or any combination of these things. And any money remaining in the account after the child graduates high school may be used for college tuition and textbooks. The empowerment account program thus allows parents to build, from the ground up, an educational program uniquely tailored to meet their child's educational needs while also incentivizing them to save for college.

This particular school choice battle began six years ago when the Arizona Legislature created the Scholarship for Pupils with Disabilities Program, a voucher program that allowed parents who were dissatisfied with their children's progress in public school to enroll them in private school and use a publicly funded scholarship to pay the tuition. That program was struck down by the Arizona Supreme Court in 2009 because, the Court said, parents had "no choice" but to send their kids to a private school. But, the Court also concluded its opinion saying that "there may well be ways" of providing assistance to these children that

do not violate Arizona's Constitution.

IJ believes the empowerment account program is one of those ways because under the program parents have complete freedom to decide how best to educate their children. Nothing about the program requires parents to enroll their children in private school. Maricopa County Superior Court Judge Maria del Mar Verdin agreed. In her ruling she said, "There is a strong showing that [the Empowerment Scholarship Account Program] is constitutional because it allows the parents of qualified students to choose how and when all, or a portion of, the scholarship monies are spent."

Opponents of parental choice in education have already filed their appeal. But IJ is standing firm and is resolved to achieve victory against all odds. ♦

Tim Keller is executive director of the IJ Arizona Chapter.



Institute Challenges Forfeiture Abuse Nationwide

By Scott Bullock

IJ's fight against civil forfeiture—where the government can take private property regardless of whether an owner has been convicted or even arrested for criminal activity—took us to federal court in Boston in February. There, we represent the owners of the family-owned Motel Caswell in Tewksbury, Mass. In a case that exemplifies everything wrong with civil forfeiture, the U.S. Attorney has teamed up with the local police department to take away the life's work of the Caswells because a handful of people over a several-year period engaged in drug sales at the motel. (To be exact, .05 percent of the more than 100,000 rooms rented over 20 years.) The government admits that the Caswells had no knowledge of or involvement in any illegal acts. Still, the Caswells could lose their entire business and property with no compensation whatsoever.

Capitalizing on the U.S. Supreme Court's decision last year in *Bond v. U.S.*—which held that citizens, not just state governments, can make claims under the Tenth Amendment—we challenged the “equitable sharing” program of the federal government, which is behind the Caswell case. The program permits local law enforce-



ment agencies to do an end-run around state law and work directly with the federal government to take property through civil forfeiture. The federal government and the local police department then split the revenue gained. We sought dismissal of the forfeiture of the motel on the ground that it violates the excessive fines clause

IJ's Legislative Director Lee McGrath co-authored model forfeiture reform legislation that restores the fundamental American principle that people should not lose their property unless they have been convicted of a crime.

of the Eighth Amendment. Combining our work on economic liberty and forfeiture, we argued that forfeitures cannot be so severe as to deprive people of their livelihood, which is exactly what would happen to the Caswell family. If we do not get the forfeiture action dismissed now, we will go to trial against the U.S. Attorney's office during the summer. We will do everything in our power to save this property and the rights of the Caswell family.

Last year, we successfully forced Georgia law enforcement agencies to abide by state disclosure laws on forfeiture and we are currently litigating a forfeiture challenge in Texas on behalf of another innocent property owner. In addition to our litigation, IJ's Legislative Director Lee McGrath co-authored model forfeiture reform legislation. It replaces civil forfeiture with criminal forfeiture and

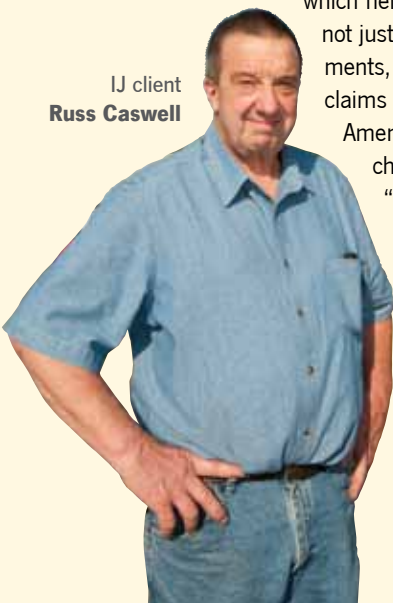
restores the fundamental American principle that people should not lose their property unless they have been convicted of a crime. Our model has been endorsed by groups as diverse as the National Association of Criminal Defense Lawyers and the conservative American Legislative Exchange Council. And IJ's expertise is being called on in various state legislatures even as we pursue similar reforms at the federal level. Already in March of this year, in an effort led by IJ, both houses of the Minnesota legislature passed important state forfeiture reforms and the governor signed the bill into law.

IJ's landmark 2010 forfeiture study, *Policing for Profit*, kicked off our forfeiture campaign and has been cited repeatedly in news stories on forfeiture abuse and an Indiana Supreme Court ruling halting an unjust forfeiture.

Our strategic research team followed up that report with other studies dissecting forfeiture abuse in Texas, the outrageous equitable-sharing/kick-back program of the federal government, and the lack of disclosure by Georgia law enforcement agencies of forfeiture revenue. In a mere two-year period, IJ has become the “go to” source for reporters and others who want to examine these abusive laws.

Look for more lawsuits, legislation, strategic research, activism and media relations against forfeiture abuse in the coming year! ♦

Scott Bullock is an IJ senior attorney.



IJ client
Russ Caswell

SpeechNow.org and the Birth of Super PACs

By Steve Simpson

March 26 marked the second anniversary of *SpeechNow.org v. FEC*, a watershed campaign finance case that IJ litigated along with the Center for Competitive Politics. *SpeechNow*, which freed groups to do what individuals could always do—raise and spend unlimited amounts of money for political speech—gave birth to the controversial “Super PACs” that have become so instrumental in this year’s elections. But along with this unique new way for Americans to express themselves during elections came a relentless campaign of misinformation waged by supporters of campaign finance laws and many in the media. This campaign appears to have had some impact. In a recent poll, 69 percent of respondents said they think super PACs should be outlawed. So it seems a good time to shed some light on what Super PACs are and why they are a boon to free speech in America.

Simply put, Super PACs are groups that can raise funds free of the contribution limits that apply to other Political Action Committees as long as they do not make contributions to candidates. Normal PACs are allowed to make contributions to candidates or to spend their money on political advertisements, but they can accept no more than \$5,000 from any one person per year. Super PACs, by contrast, can accept donations in unlimited amounts, but they must spend that money on their own political advocacy and cannot give any of it to candidates. Their spending is known as “independent expenditures” because they cannot work or “coordinate” with candidates in devising or disseminating their ads.

IJ client David Keating created *SpeechNow.org* for exactly that purpose—to give Americans a more effective way to express their views during elections. Before *SpeechNow*

was decided, individuals were permitted to spend unlimited amounts of their own money on independent ads that supported or opposed candidates, but individuals who joined with others were limited to \$5,000 apiece. That was fine for someone like George Soros or Warren Buffet, who could afford to finance their own ad campaigns, but anyone of more limited means was out of luck. If they weren’t satisfied with contributing small amounts to candidates or existing PACs, they had no way to impact an election.

SpeechNow and the Super PACs it created changed that. They have made it far easier for Americans to impact political debates by giving them the ability to quickly raise funds to express themselves in particular elections or about particular candidates or issues. The results have been dramatic. Super PACs have made the Republican primaries extremely competitive and forced the frontrunners to pay more attention to the concerns of constituencies they otherwise could have ignored. As David Keating and fellow IJ client Ed Crane wrote in *The Wall Street Journal*, Super PACs have arguably made the Republican primaries “a horse race, not a coronation.”

Even so, so-called campaign finance reform groups and many in the media have waged a relentless campaign of misinformation against Super PACs, falsely claiming that they are giving millions in “secret donations” to candidates and “buying” elections. But a long list of wealthy political losers like Ross Perot, Michael

Huffington, Meg Whitman, Jon Corzine and Mitt Romney himself shows that the “money-buys-elections” canard is false. Money buys the opportunity to present one’s views to voters, but it is the voters who ultimately decide whether those views are persuasive. Nor are Super PACs pumping millions into campaign coffers. They can only spend their money on their own independent speech; they cannot contribute to candidates.

It shouldn’t surprise us that some Super PACs are run by people with connections to candidates. Anyone with the knowledge and experience to run an expensive political ad campaign is likely to have connections to at least one candidate. They must still comply with the law, which prohibits coordination and requires independence.

As for the claims that wealthy donors and corporations are funneling millions in secret donations to Super PACs, it is false. Super PACs must disclose their donations just like other PACs. And a recent study by the left-leaning groups Demos and U.S. PIRG found that almost 94 percent of donations to Super PACs could be traced back to their original source. If there are any other government programs with a 94 percent success rate, we’d like to know about them.

There has rarely been a time in American history when large portions of the public have not been opposed to someone’s speech—from war protestors, to writers of racy literature, talk radio hosts, flag burners, and many more. That’s a good reason to take this occasion to celebrate not only *SpeechNow* and Super PACs, but the Framers for having the foresight to give us the First Amendment. ♦

Steve Simpson is an IJ senior attorney.





IJ clients **Verlin** and **Lisa Stoll** are challenging Minnesota's requirement that every funeral home be outfitted with an embalming room, even if it will never be used.

Minnesota Entrepreneur Challenges Stupid Law That Wastes His Money

By **Katelynn McBride**

Twenty-seven-year-old funeral entrepreneur Verlin Stoll poured all of his savings into opening his first funeral home, Crescent Tide, in April 2011. He offers the lowest funeral prices in the Twin Cities and would like to expand his thriving low-cost funeral home business, but a ridiculous Minnesota law makes that expansion impossible.

Minnesota requires every funeral home to have an embalming room. The embalming room does not have to be functional; it just has to be there—a frivolous government-imposed requirement that costs entrepreneurs like Verlin as much as \$30,000 for each new funeral home they build.

But, if the rights enshrined in our federal and state constitutions mean anything, the government cannot require citizens to do useless things just because the government says so. The government can't force loggers to buy 100 unneeded chainsaws, cabbies to drive six wheeled taxis, or fast food joints to have crystal chandeliers. And yet, that is exactly what Minnesota is doing to funeral industry entrepreneurs like Verlin—forcing them to needlessly gold-plate their businesses with costly extravagances.

The embalming room requirement makes no sense. Embalming is never legally required in Minnesota when someone passes away and there is no legal requirement that funeral homes do their own embalming. Minnesota's

businesses want to protect themselves from competition. These established funeral homes benefit from a law that drives up prices for consumers and drives up operating expenses for competitors, such as Verlin.

It is not only silly to force entrepreneurs to waste money on things they don't want, don't need, won't use and can't afford, but it is also unconstitutional. The Minnesota Constitution protects every Minnesotan's economic liberty, which means that it protects entrepreneurs from being burdened by useless legal requirements.

That is why Verlin, a funeral consumer advocate and a funeral consumer advocacy organization have joined with the Institute for Justice Minnesota Chapter to put this irrational regulation to rest. Minnesota cannot require its citizens to do useless things just to get into business. Victory here will not only free Verlin from an unconstitutional restraint on his economic liberty, but also protect entrepreneurs across the state from pointless laws and bureaucracy. ♦



Can the government make entrepreneurs do useless things for no reason? Watch at www.ij.org/Verlin.

largest funeral chain has 17 locations and 17 embalming rooms, but actually uses only one. Many embalming rooms across Minnesota and the nation sit idle because more consumers are opting for cremation. Minnesota's law does nothing but crush the aspirations of entrepreneurs like Verlin.

The embalming room requirement exists only because big, full-amenity funeral home

Katelynn McBride is an IJ Minnesota Chapter attorney.



ARRESTED REDEVELOPMENT

In California

By Christina Walsh

On February 1, after years of terrorizing property owners with the threat of condemnation for private development, redevelopment agencies were officially dissolved in California. Home and small business owners across the state are finally free from the very real daily fear that their property would be next on the chopping block.

Redevelopment in California has been a billion-dollar boondoggle that used eminent domain as its development tool of choice. These agencies routinely took from those of modest means to give to rich developers for pipe-dream projects that rarely generated promised tax revenues or jobs.

The Institute for Justice catalogued more than 200 projects that abused eminent domain across the Golden State during the past 10 years alone. The elimination of redevelopment agencies is a

historic victory for property owners, and we applaud the courageous, relentless local activists who stood steadfast on the frontlines against these avaricious and abusive institutions.

In an effort to offset the state's debt, Governor Jerry Brown proposed eliminating the nearly 400 redevelopment agencies, which, in addition to habitually abusing eminent domain, siphoned billions of dollars away from local public infrastructure, directing that money into redevelopment coffers instead. In response to a lawsuit filed by the well-funded redevelopment lobby (funded, ironically, by taxpayers), the California Supreme Court upheld the agencies' dissolution.

Through community trainings, conferences, public demonstrations and media campaigns, the Institute for Justice worked with property owners across the state to fight illegitimate land grabs. Among many other successes, San Pablo property owners defeated a proposal to re-establish eminent domain authority over 90 percent of the entire city, and Baldwin Park property owners drove a developer out of town who wanted to replace 100 homes and 300 locally owned businesses with a ridiculously out-of-touch "urban village"—premised on bringing in chain restaurants like Applebee's to take the place of community-based Hispanic businesses.

“Redevelopment in California has been a billion-dollar boondoggle that used eminent domain as its development tool of choice. These agencies routinely took from those of modest means to give to rich developers for pipe-dream projects that rarely generated promised tax revenues or jobs.”



“‘Redevelopment’ destroyed lives in its wake, and those stories should never be forgotten.”

The Gran Havana Cigar & Coffee Lounge in San Diego, above, was acquired by a California redevelopment agency in order to give it to a developer for a Marriott hotel. Today, eight years later, the land is an empty parking lot.

Others fell victim to the redevelopment machine before the machine itself could be smashed into oblivion. John Revelli lost his entire retirement savings when the city of Oakland took his second-generation tire shop to replace it with upscale residential development. After his family’s home was seized by Communists, Ahmad Mesdaq fled the war in Afghanistan, came to the United States, and built the stylish and successful Gran Havana Cigar & Coffee Lounge that attracted celebrities and politicians. The redevelopment agency took it from him for a Marriott that was never built; today, the lot that once housed his thriving business is a parking lot. He can never get back what’s been taken from him—but to this day, he wants to rebuild. His indomitable spirit is an inspiration.

“Redevelopment” destroyed lives in its wake, and those stories should never be forgotten.

Despite the absence of any proof that redevelopment agencies accomplished anything good, the beneficiaries of eminent domain abuse will undoubtedly try to resurrect some form of redevelopment. IJ will remain vigilant in its commitment to ensuring that Californians will no longer



Watch the video, “California Redevelopment Agencies Abused Their Powers & Should Never Return.”

be subject to the abuse of government power that comes in the form of bogus blight designations, land grabs for ill-conceived projects, or perverse incentives that put private property rights in the crosshairs of tax-hungry politicians and their well-connected developer friends.◆

Christina Walsh is the Institute’s director of activism and coalitions.





Elmer Kilian, left, and **Sabina Loving** are tax preparation entrepreneurs who just want to work without government red tape.

IRS continued from **page 1** renew their registration each year by completing 15 hours of annual continuing education credits and paying renewal fees. They must also submit to any written or oral examination demanded by the IRS, as well as a “tax compliance check and suitability check” at the IRS’s discretion.

This new licensing scheme disproportionately burdens independent tax return preparers. Large tax preparation firms supported these regulations, and powerful interest groups like the American Institute of CPAs successfully lobbied for a special exemption that excludes preparers who are “supervised” by a CPA, attorney or enrolled agent. As the editorial board of *The Wall Street Journal* explained: “Cheering the new regulations are big tax preparers like H&R Block, who are only too happy to see the feds swoop in to put their mom-and-pop seasonal competitors out of business.”

Congress never gave the IRS the authority to license tax preparers, and the IRS cannot give itself that power. That is why the Institute for Justice has joined with three independent tax preparers to bring a lawsuit in federal court challenging the IRS’s statutory authority to impose these regulations on them and other entrepreneurial tax preparers across the nation.

IJ represents Sabina Loving, who worked for a decade as an accountant for banks and financial service companies. With the assistance of the IJ Clinic on Entrepreneurship at

the University of Chicago Law School, she recently opened Loving Tax Services to serve the residents of an impoverished neighborhood on the South Side of Chicago, many of whom are low-income.

IJ also represents Elmer Kilian, a retiree and Korean War veteran who has prepared taxes for more than 30 years on his kitchen table in the small town of Eagle, Wisc. Like so many other independent tax preparers nation-

“Congress never gave the IRS the authority to license tax preparers and the IRS cannot give itself that power.”



Watch the video, “IRS Protectionism: New licensing scheme challenged in major federal lawsuit.”

wide, Elmer offers an affordable, personal alternative to larger tax preparation companies.

IJ’s third client is John Gambino, an MIT-educated Certified Financial Planner and investment advisor from Hoboken, N.J., who offers tax preparation services as a convenience for his clients and has done so since 2004.

Sabina, Elmer and John are all standing up to the IRS for their economic liberty—their right to earn an honest living free from unreasonable and irrational government intrusion. Each will be harmed by the time and cost of complying with this new licensing scheme. Elmer and John will be forced to shut down, while Sabina will have to raise her prices, making it more difficult for her to compete with large tax preparation companies. She would also like to hire and supervise other tax preparers at her business so that she can serve more low-income customers, but she is not a CPA, an attorney or an enrolled agent, so she does not qualify for the supervisory exemption lobbied for by special interest groups.

This lawsuit continues IJ’s long tradition of fighting for the economic liberty of entrepreneurs against regulations that do little more than expand government power and protect politically powerful groups from competition. Tax preparers like Sabina, Elmer and John have a right to earn a living without getting permission from the IRS. A win for them will be a win for the estimated 350,000 tax return preparers nationwide who will be subject to these regulations and to the tens of millions of taxpayer customers they serve each year. ♦

Dan Alban is an IJ attorney.



The IJ Clinic Transforms Law Students Into Champions of Freedom

By Elizabeth Milnikel

When IJ Clinic students help real-world entrepreneurs who seek to open or expand their businesses, our students take those dreams personally. And when the government—for no good reason—interferes with those dreams of a better life, the students not only gain a deeper understanding of the law, but they have a transformative experience that changes their view of the role of government and the importance of freedom for entrepreneurs.

If you want to introduce a student to libertarian ideas, don't just give him a reading list or a lecture; have the student place a phone call to the local government, trying to get an answer to a simple question a small business owner might ask. No amount of study or discussion or analysis can educate a student about the perils of excessive regulation by overreaching governments as well as a single phone call to a confusing and clueless bureaucrat.

Take, for example, the experience of Katy Welter, a recent IJ Clinic student. Katy wrote:

I had always been sympathetic to entrepreneurs, having been raised by one. But working in the IJ Clinic put me in an entrepreneur's shoes. I saw firsthand the Byzantine and often counterintuitive laws, licensing requirements, regulations, and inspections faced by barbers, shoe store owners, children's activity providers and shared workspace innovators.

I saw the extraordinary risks inner-city entrepreneurs took to make their dreams a reality. It's not easy and never certain. Vague and patchwork legislation often exacerbates these challenges without protecting the public interest. Sign permits and parking requirements come to mind.

I also saw the mechanics of failure. Sometimes our clients' dreams weren't realistic. It's fair to fail because you lack capital or skill or because your competitors best you. But some of our clients closed their doors—or never opened them—because they couldn't cope with the licensing fees and rules, unex-

pected zoning conflicts, or recalcitrant local officials. What struck me most was how the process let them down. The success of their business should not depend as much upon lawyers (or law students) as the quality of or demand for their product or service. But it does.

The IJ Clinic trains students to become activists on behalf of entrepreneurs, and many continue their activism after graduation. Dan Johnson, a member of the IJ Clinic's first class, became a lobbyist and has convinced legislators to adopt amendments recommended by the IJ Clinic's city study that examined regulatory barriers on Chicago-area entrepreneurs. Jacob Huebert, Class of 2002, is one of the founding attorneys of the Liberty Justice Center, litigating for entrepreneurs in Illinois. Alex Grelli, Class of 2009, has advocated for reforms to zoning laws on behalf of urban agriculture entrepreneurs and helped change laws in Pennsylvania that constrained entrepreneurs with craft distilleries—all this on top of his law firm responsibilities.

Indeed, most of our alums actively apply the lessons they learned about entrepreneurship, dedicated advocacy for clients and the complexity of excessive regulation in their careers. IJ Clinic graduates practice law with acute sensitivity and compassion for clients who are trying to create jobs in spite of countless regulatory barriers. They tell us they use the skills and perspective they learned here every day.

IJ is packing the courts of law, the halls of legislatures and the court of public opinion with trained advocates for economic liberty. And each day we continue our mission to help one Chicago entrepreneur after another create private sector businesses that will transform not only the lives of the entrepreneur and those they employ, but entire communities across our region. ♦

Elizabeth Milnikel directs the IJ Clinic on Entrepreneurship.



9th Circuit Upholds Injunction Protecting Free Speech in Recall Campaigns

The 9th U.S. Circuit Court of Appeals upheld an injunction preventing the government from restricting how much money people may give to recall campaigns in Washington state.



Robin Farris

Robin Farris led the effort to recall a county official with volunteer help from attorneys Tom Oldfield and Jeff Helsdon. Washington, however, called this help an in-kind campaign contribution, and Washington law imposes an \$800 limit on contributions to recall campaigns. Represented by IJ, they challenged the limit in court. The district court preliminarily enjoined the law and the 9th Circuit affirmed that ruling.

Although the campaign did not collect enough signatures to qualify for the ballot, the injunction preventing the government from enforcing the law against the campaign is important because it ensures the campaign can now raise funds to retire its debts without a government-enforced cap on how much individuals may contribute.

The case now returns to the district court for trial. ♦

IJ Obamacare Amicus Brief Extols History of Voluntary Contracts, Defines “Proper” Use of Federal Power

By Elizabeth Price Foley

For literally hundreds of years, Anglo-American law has recognized that, to be legally binding, contracts must be based on the voluntary, mutual assent of the parties. In a “friend of the court” brief submitted to the U.S. Supreme Court in the constitutional challenge to the health care reform law, the Institute for Justice asserts that the law’s individual mandate—a provision that forces individuals to buy health insurance or face a hefty penalty—violates this fundamental principle of voluntary, mutual assent.

The individual mandate marks the first time in more than 220 years of the Constitution’s existence that the federal government has asserted the power to eviscerate the principle of voluntary, mutual assent. In so doing, it creates a law from which citizens cannot escape: We must purchase a qualifying health insurance policy, or face punishment. There is no choice for individuals to make—and thus no ability to avoid the mandate.

The federal government defends the individual mandate by asserting that it is an appropriate exercise of Congress’ power to “regulate commerce” under Article I, section 8 of the Constitution. It further contends that the mandate is constitutional under the Necessary and Proper Clause, which gives Congress the power to “make all Laws which shall be necessary and proper for carrying into Execution” Congress’ enumerated powers, including the power to regulate commerce.

IJ’s brief asserts that the power to regulate commerce should not be construed so broadly as to include the power to compel contractual relations among the unwilling. It points out to the Court that, for hundreds of years prior to the ratification of the Constitution (and continuing to today), the principle of voluntary, mutual assent was understood to be a necessary prerequisite to a legally binding contract. Indeed, the doctrine of mutual assent was so fundamental to contract law that virtually every major contract doctrine at the time of the Founding—such as incapacity, mistake, fraud, undue influence and, most notably, duress—was grounded in the principle that contracts not freely assented to were not

binding. The Founding generation that drafted and ratified the Constitution would never have given to Congress, and in fact did not give, under the guise of the Commerce Clause, the power to force individuals to enter contracts and thereby gut the foundation upon which the entirety of contract law rests.

Equally important, IJ’s brief illustrates that granting Congress the power to eviscerate the doctrine of mutual assent cannot be a “proper” exercise of power under the Necessary and Proper Clause. Giving Congress the breathtaking power to compel contractual arrangements, under the pretext of reforming or saving the health insurance market from collapse, would endorse using the Necessary and Proper Clause as a means to expand government authority beyond those powers enumerated in the Constitution—something the Supreme Court has long condemned.

From the perspective of individual liberty, a power to compel contractual relations would have no logical stopping point. Presumably, it would include the power to compel any other sort of contractual relation, including contracts to buy or sell other goods or services, enter into lifelong union or employment relationships, or finance one’s housing in a certain manner. This massive new federal power would soon overtake the entirety of the states’ and people’s residual powers under the Tenth Amendment, creating the very Leviathan government the Founders spilled their blood to resist. As the U.S. Supreme Court unanimously recognized last summer in *Bond v. United States*, the purpose of the Constitution’s scheme of enumerated powers and federalism is to protect individual liberty. The principle of consent—whether in the context of contract law, property rights, First Amendment, school choice or economic liberty—is critical to individual liberty. And IJ’s amicus brief in the health care reform case is the only brief—among more than 60 briefs—that defends this essential principle. ♦

Elizabeth Price Foley is executive director of the IJ Florida Chapter.



To read our brief, visit:
www.ij.org/PPACAbrief



A Free Speech Victory for a St. Louis, Mo., Housing Activist

Jim Roos’ mural urging the city of St. Louis to “End Eminent Domain Abuse” drew the city’s ire—and enforcement proceedings. But his right to display this powerful protest was vindicated on February 21, when the U.S. Supreme Court refused to review last summer’s 8th U.S. Circuit Court of Appeals decision, which struck down the sign code provisions the city used to order Jim to remove his mural. The mural stands as the perfect illustration of just how interconnected our constitutional rights are—how vibrant free speech protections are essential to the preservation of our other rights and liberties, including property rights. ♦

“Although Jim Roos and his fellow citizens in the 8th Circuit are now protected, we will not rest until it is clear that no municipality may restrict speech because of disagreement with the subject or message it conveys.”

—Chip Mellor

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About the publication

Liberty & Law is published bimonthly by the Institute for Justice, which, through strategic litigation, training, communication, activism and research, 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

**The Wall Street Journal
(Editorial)**

“Enter the Institute for Justice, which in 2009 filed suit on behalf of a group of patients, including Lewiston, Maine, mother Doreen Flynn, three of whose children are afflicted with a blood disease called Fanconi anemia. Without marrow transplants in their teens, few with the disease are likely to survive. In *Doreen Flynn et al. v. Holder*, the Institute challenged the ban on equal protection grounds for its irrational treatment of marrow donation relative to blood donation, as well as due process grounds for the government’s interference in an otherwise legal medical procedure. The three-judge panel unanimously agreed.”

**Washington Post
(Editorial)**

“The Motel Caswell, a modest motel just outside of Boston, has been owned by proprietor Russell H. Caswell’s family for 60 years. Now he may lose it, if the Justice Department gets its way. . . . According to the Institute for Justice, which is representing Mr. Caswell . . . ‘equitable sharing’ payments from the federal government to states have increased dramatically in recent years, from \$200 million in 2000 to roughly \$400 million in 2008.”

Financial Times

“[Institute for Justice client] Ghaleb Ibrahim, a grizzled Jordanian immigrant with a mane of wavy grey hair, holds to a modest vision of the American dream. He wants to own and drive a taxicab in Milwaukee, Wisconsin, the city in which the television show *Happy Days* was set. The trouble is that he does not have \$150,000. . . . Licenses are so expensive because the limit on competition makes each of Milwaukee’s taxis unusually profitable.”

Slate.com

“City governments across the country are threatening to kill the food truck revolution with dumb regulations. . . . A recent report on street vending for the Institute for Justice emphasizes that many anti-truck politicians don’t even bother with [a non-protectionist] pretext. . . . Municipal authorities need to learn to welcome the explosion of innovation happening around them and stop trying to choke it off.”

**“The Institute for
Justice advocates
for fairness and
economic liberty;
what it really seeks
to protect is the
American Dream.”**

—Jeff Jacoby
Boston Globe



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J U S T I C E

For twenty years, my vending business has created jobs and saved baseball fans money.

But now Atlanta says I need to pay \$20,000 to work for its monopoly or not work at all.

I'm going to bat for economic liberty.

I am IJ.



*Stanley Hambrick
Atlanta, Georgia*

www.IJ.org

*Institute for Justice
Economic liberty litigation*