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Liberty & LAW

IJ Knocks Internet Licensing Law Offline

By Steve Simpson

In an important victory for Internet entrepreneurs and California consumers, a federal district court granted summary judgment this past November in favor of the Institute for Justice and its client, ForSaleByOwner.com, in its First Amendment challenge to California's real estate licensing law. Finding the licensing requirement "wholly arbitrary," the court ruled that the State could not require classified advertising websites such as ForSaleByOwner.com to obtain a real estate license while allowing newspaper-owned websites to operate without one.

IJ brought suit on behalf of the New York-based company in May 2003 after California began requiring websites that simply advertised properties for sale in the state to obtain a real estate broker's license as a condition of doing business in California. The onerous licensing law required website operators to take years of college-level real estate courses and apprenticeship as a real estate salesperson before even being able to sit for the brokers' exam. Once licensed, websites would have to operate out of an office located in California, thus eliminating the benefits of the World Wide Web for entrepreneurs and consumers alike. Due to an exemption, newspapers are free to publish real estate advertisements in print or online without having to obtain a license. For websites like ForSaleByOwner.com that do not represent clients or give personalized advice, the law was



thus triply bad. The educational requirements were irrelevant to their businesses, the in-state office requirement rendered them unable to compete with newspapers located within the state, and the law was enforced arbitrarily.

IJ mounted a two-pronged First Amendment attack on the law. First, we argued that the license requirement was a prior restraint on publication. Building on our 1999 victory in *Taucher v. Born*, in which the Institute for Justice successfully challenged a federal law requiring publishers of commodity investment newsletters to become registered trading advisors, we argued that California's licensing law required publishers to obtain

ForSaleByOwner continued on page 9

Proof Positive: *School Choice Changes Lives*

By Lisa Knepper

This just in: school choice works.

The latest evidence arrived in September when School Choice Wisconsin published a study by education researcher Jay P. Greene of the Manhattan Institute for Public Policy. Greene found that students in the Milwaukee Parental Choice Program graduate at much higher rates—by one measure, nearly twice the rate—than students in Milwaukee’s public high schools. Choice students even fared better than their peers at Milwaukee’s six academically selective public high schools. (Read the study at www.schoolchoiceinfo.org.)

Given the vital importance of a meaningful high school diploma to every young person’s life prospects and the dismal graduation rates of minorities in urban public schools this is truly outstanding news.

Here’s how some beneficiaries of that good news—our clients in the legal battle to defend school choice in Milwaukee—describe what choice means to them.

Grandmother on an Educational Mission



Zakiya Courtney, top center, is surrounded by her children and grandchildren.

Zakiya Courtney sent her first two children to Milwaukee Public Schools—then vowed never to do it again. So she found a way to put her younger children in Urban Day School, a private school.

Urban Day ignited in Zakiya a passion for urban education reform. In the 1990s, she headed Parents for School Choice to advocate for equal educational opportunities, and today she’s pursuing a doctorate in education at Cardinal Stritch University.

At her urging, every one of her grandchildren has participated in the Milwaukee Parental Choice Program. Seven are in the program now, and Zakiya advises their educational choices and volunteers at their schools.

Her oldest grandson, Jelani Kazmende, was in the first class of voucher students in 1990 at Urban Day. He is now a junior at Johnson C. Smith University in Charlotte, N.C.

Zakiya’s grandchildren love their schools, and she stresses the power in “being able to choose and not being stuck with whatever the public schools offer.” Kurtis Blakes attended Agape Center of Academic Excellence on a voucher through the 8th grade. Now a freshman at a charter school, he returns to Agape to visit every chance he gets.

Dad Makes “All the Right Choices”

Single father Tony Higgins was also inspired by school choice. His daughter, Chironda, began the voucher program in 1994 at Urban Day, later graduating from St. Joan Antida High School.

Chironda is now a junior at University of Wisconsin-Parkside deciding between a degree in business or education. (Tony gives his daughters two choices: “go to college and like it, or go to college and don’t like it.”) After working at M&I Bank, she now works part time at a voucher school and volunteers at a Boys and Girls Club.

His other daughter, Tanya, also attended Urban Day on a voucher, then Marva Collins Preparatory School and now CEO Leadership Academy, a new school founded by eight African-American Milwaukee churches. But she’s no longer on a voucher; now Tony can afford the tuition.

Inspired by his daughters, Tony finished college and is pursuing a master’s degree. He works at the Technical Assistance & Leadership Center (TALC New Vision), a non-profit that helps community leaders create new small public and private high schools—including CEO Leadership Academy.

“Choice has been a blessing,” Tony says. “I see what can happen, and we’ve made great strides in Milwaukee, but a lot of kids are still stuck in bad schools. I want more kids to enjoy the opportunities my daughters have had.”

Looking back, Chironda teases her dad: “I don’t know how this old guy made all the right choices, but he did.”



Tony Higgins with his daughter, **Tanya**.



Pilar Gomez, helps her son, **Tomás**, get a good education through the Milwaukee voucher program.

For Mom, a “Passport out of Poverty”

All three of Pilar Gomez’s children have enjoyed school choice. Andrés began in the 3rd grade at St. Lawrence Catholic School (now Prince of Peace). The private school caught what public schools had missed, diagnosing Andrés with attention deficit disorder. Thanks to professional help and hard work, he is on the honor roll at Loyola Academy, a public high school, and will attend Milwaukee Area Technical College.

Bianca has been in the program since 1st grade, first at St. Lawrence. Now she is an honors student at Pius XI High School, planning to attend the University of Wisconsin and become a lawyer. Tomás, a 6th grader, has attended Prince of Peace since kindergarten. An avid Iron Chef fan, he intends to study Culinary Arts at Milwaukee Area Technical College.

“If low-income children are given a solid, quality education it’s like having a validated passport out of poverty,” says Pilar. “However, we live in a society where that’s not a reality for every child. My children have been blessed to be a part of a program that empowers parents to choose a school that best suits the needs of their children.”◆

Lisa Knepper is IJ’s director of communications.



Two IJ-WA Cases Honored as “Lawsuits of the Year”

By **Jeanette M. Petersen**

Since opening its doors in early 2003, the Institute for Justice Washington Chapter (IJ-WA) has been working tirelessly to make a name for itself in and around the state of Washington. The December/January 2005 issue of *Washington Law & Politics* has just made this job a bit easier.

The cover of the most recent *Law & Politics* issue prominently features the IJ-WA’s bagel case (*Ballen v. City of Redmond*)

and reads, “BAGELS BUSTED! The sandwich-board litigation and other lawsuits of the year.” Inside, the magazine features stories of 12 prominent cases pending in Washington courts, including two IJ-WA cases—its bagel case and its African hairbraiding case, *Diaw v. Washington Department of Licensing*.

The profiles of both the bagel and hairbraiding cases are witty and informative. Entitled “Bagels for Free Speech,” the article discussing IJ-WA’s sandwich-board litigation explains that after Dennis Ballen displayed a 3-by-2-foot sign advertising his bagel shop, Blazing Bagels, “[i]ndigestion soon followed.” Although the City of Redmond informed Ballen that it bans most portable signs, it made exceptions for politics, land use and real estate advertising. As the article notes, two federal judges have ruled that Redmond’s portable sign ban is unconstitutional. Despite these adverse rulings, however, the City of

Redmond has appealed the decision to the 9th U.S. Circuit Court of Appeals.

In “Red-Tape Tangle,” *Law & Politics* reported that IJ-WA client Benta Diaw was “[w]orried about getting busted for braiding with intent to style” when she sued the Washington Department of Licensing and the Washington State Cosmetology, Barbering, Aesthetics and Manicuring Advisory Board. Although the State is seeking to dismiss the lawsuit, IJ-WA is

fighting the dismissal. Quoting an IJ-WA staff attorney, *Law & Politics* explained, “Without the adoption of a formal rule or court ruling excluding African braiders from the cosmetology regime, braiders like Benta remain subject to the whims of government officials”

Law & Politics has been described as a local version of *Mad* magazine mixed with *The Harvard Law Review* and *The New*

Yorker. While many lawyers in the state read the four-color glossy magazine, it also attracts an interesting blend of readers ranging from corporate CEOs to political junkies. In the past three years, it has won several awards for editorial excellence, including many first-place awards from the Society of Professional Journalists. IJ-WA was honored to have its lawsuits featured in the magazine’s pages.◆

Jeanette M. Petersen is an IJ-WA staff attorney.



Freedom vs. FORCE

By John E. Kramer

History is marked by the struggle between those who seek to create through freedom versus those who seek to control through force. It is no different with the Institute for Justice's litigation. (In case you haven't guessed by now, the Institute for Justice is firmly on the side of the creator.)

IJ works to restore our nation's proudest nickname—the Land of Opportunity—by representing those who seek freedom against those who would regulate others (usually to protect their financial self interest) through government force.

“IJ works to restore our nation’s proudest nickname—the Land of Opportunity—by representing those who seek freedom against those who would regulate others through government force.”



Pruning Economic Liberty

Shamille Peters (featured on the back page of this newsletter) would like to create beautiful floral arrangements in Louisiana, but the State continues to dash her dreams. Five times she tried unsuccessfully to pass the subjective government-imposed licensing exam—the only such exam required in the 50 states, and which, by the way, is graded by existing florists who can keep out their competition. As many as two-thirds of the individuals who take the exam fail despite the fact that many of them, like Shamille, have vast amounts of experience creating eye-pleasing arrangements.

Bureaucrats like Bob Odom, the seven-term Louisiana Commissioner of Agriculture

and Forestry who enforces this law, are using government threats and force to keep Peters from her pursuit of a better life. Odom admitted to a local television station, “As long as the industry in this state wants to be licensed,

there’s a law telling me that I need to license the people, then I will give a test and license the people. And the industry has supported that here in Louisiana. And this is some Washington-based firm. Tell them come on, let’s go to court in Louisiana and let’s find out what Louisiana is all about.”

IJ looks forward to fighting this strong-arming of ordinary Louisianans who seek to create through freedom and to free themselves from those who control others through force.

Oh, What a Tangled Wig We Weave

It would be understandable if African hairbraiders Benta Diaw of Seattle and Melony Armstrong of Tupelo, Miss., were tempted to pull out their hair over the frustration they’ve

felt as a result of government regulations. In their home states, the cosmetology cartel has convinced local legislators that consumers need to be protected from a bad hair day—not that either of these master braiders would ever

be a concern along those lines. The cartel-captured regulators in Mississippi, for example, require 3,200 classroom hours to get a license to teach hairbraiding. That would be enough to obtain *all* of the following licenses: emergency medical technician, paramedic, ambulance driver, law enforcement officer, firefighter, real estate appraiser *and* hunt-

ing education instructor and still have 600 hours of training to spare! Rather than allowing Diaw and Armstrong the freedom to create, the State instead uses force to protect existing providers from competition. IJ is working to untangle entrepreneurs nationwide from this kind of government largess.

Want Milk with that Bagel?

Sometimes government force quashes; sometimes it compels. Such are the cases when it comes to government interference with commercial speech. The IJ Washington Chapter vindicated the free speech rights of a bagel vendor in Redmond who merely wanted to tell consumers where his place of business was located when the government told him

he couldn't. As noted in our cover story, the Institute also recently struck down California's licensing requirement of an Internet website that advertised homes being sold by the owners; the State tried to require the site's operators to become licensed real estate brokers to provide their service when no such requirement was imposed on newspapers that offered essentially the same service. Now, California consumers can save tens of thousands of dollars selling their properties themselves rather than being forced to work with government-imposed middlemen. Finally, working to compel speech, the federal government swiped milk money from dairy farmers by forcing them to pay for those "Got Milk" ads you see all over the place. The government did this with impunity until IJ successfully struck down the program in the 3rd U.S. Circuit Court of Appeals. The government is now seeking review of the case by the U.S. Supreme Court.

Give Me Land, Lots of Land

Even when the government supports the creation of something new, it can't help but muck it up by abusing its power. In February, the Institute for Justice will argue its case against eminent domain abuse before the U.S. Supreme Court. Here, the City of New London, Conn., is using its power to force rightful property owners off of their land so someone with more political influence and financial clout can make more money off those properties. It is *the* most-watched case of the current U.S. Supreme Court term and could set an important precedent to restore the notion that the freedom to own and enjoy one's land deserves more constitutional deference than the power of government to take land in the hope of some other private party creating more jobs and taxes with that property.

Through IJ's work in court and in the court of public opinion, we will continue to free those individuals who seek nothing more from the government than to be left alone to create opportunity for themselves and for others. We will fight those who seek to impose by government force their grand vision of how the world should be. ♦

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



2004 Election Cycle Demonstrated Dirty Secret Behind "Clean Elections Act"

By Jennifer Barnett

In January 2004, IJ-AZ filed a lawsuit to expose the dirty secret underlying Arizona's scheme of financing political campaigns with taxpayers' money, the so-called "Clean Elections Act." While our litigation continues, the 2004 election demonstrated exactly the chilling effect we warned about.

When an independent organization makes an expenditure on behalf of a privately funded candidate or in opposition to a taxpayer-funded candidate, the government doles out money to the taxpayer-funded candidate in a dollar-for-dollar matching plan—that amounted to more than \$19 million since 2000, the system's first year. This system chills speech and punishes—with taxpayer money—independent political organizations and privately funded candidates for their political speech.

Two examples of chilled speech in this last election cycle stand out. Mainstream Arizona, an independent organization, sent out mailers regarding the voting records of nine incumbent legislators. The mailers triggered the matching funds provision, and the nine legislators, all taxpayer-funded candidates, received matching funds to counter the mailers. Mainstream thereafter chose not to make any further political speech so that it could avoid triggering the matching funds and thus aid the very candidates Mainstream hoped would be defeated.

Similarly, the Arizona Democratic Party sent out mailers in October to

highlight the voting records of Republican candidates. The Citizens Clean Election Commission determined that the mailers went beyond "merely reporting voting records" to advocating against the candidates. It then awarded matching funds to the Republican candidates. The result for the Arizona Democratic Party? A decision to avoid future mailers seeking to educate the voting public that might trigger the matching funds provision.

The Act thus had the direct effect of chilling political speech in the 2004 election cycle. If it remains in force, Arizonans can only anticipate more chilled speech resulting in less information available to educate voters.

Even more dangerous are the national implications as other states consider following Arizona's example. Maine already has such a system in place, while New Jersey, New Mexico, North Carolina and Vermont have limited versions in place. Advocates are mobilizing to pass similar laws in California, Connecticut, Hawaii, Minnesota, Massachusetts, Washington and West Virginia.

The Institute for Justice Arizona Chapter will continue its litigation to vindicate Arizonans' right to political free speech and demonstrate that the misguided national trend should likewise be stopped. ♦

Jennifer Barnett is an IJ-AZ staff attorney.



The 25 Best Friends

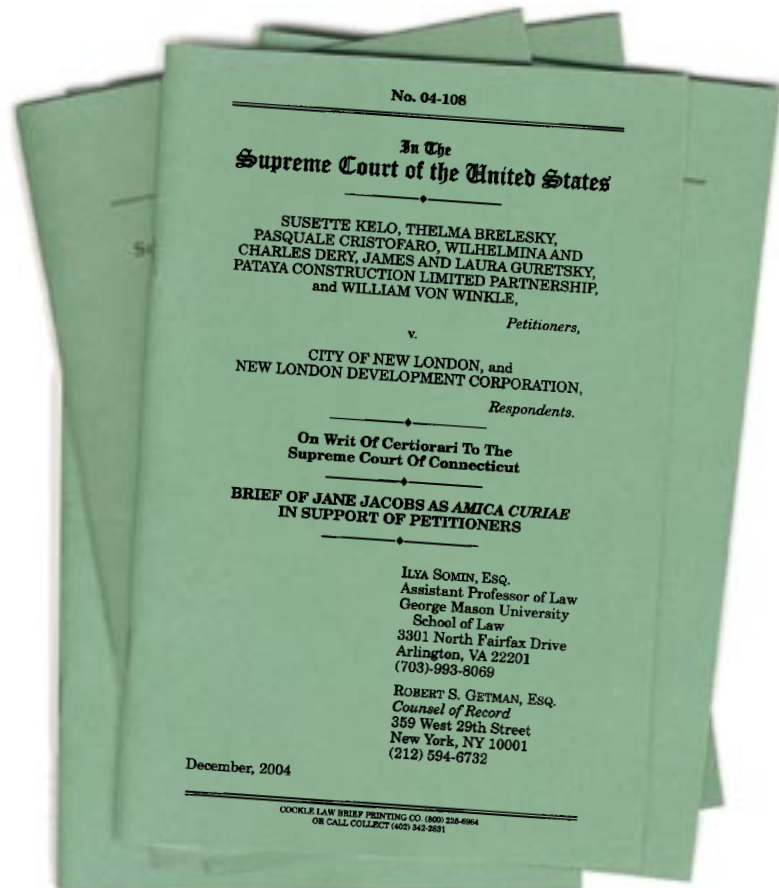
25 Amicus Briefs Filed at Supreme Court

By Chip Mellor

We would like to thank the diverse array of individuals and organizations that filed 25 amicus curiae (or “friend of the court”) briefs in *Kelo v. New London*. Each brief, in its own way, helps to underscore the tragic consequences and dire implications of eminent domain abuse. The following are just a few highlights to provide a glimpse of the outstanding contributions made by all of the briefs.

Jane Jacobs, grand dame of new urbanism and author of *The Death and Life of Great American Cities*, submitted a brief that stated, “The costs of development takings are disproportionately inflicted on poor and minority communities, because these groups are disadvantaged in the political process, especially relative to the powerful corporate and private interests that benefit from economic development condemnations.” Jacobs underscored to the Court her argument in *Death and Life* that the replacement of diverse neighborhoods with counterfeit development projects “destroys neighborhoods where constructive and improving communities exist and where the situation calls for encouragement rather than destruction.” She added, “people who get marked with the planners’ hex signs are pushed about, expropriated, and uprooted much as if they were the subjects of a conquering power. Thousands upon thousands of small businesses are destroyed. . . . Whole communities are torn apart and sown to the winds with a reaping of cynicism, resentment and despair that must be seen to be believed.”

The **National Association for the Advancement of Colored People** (the



Download copies of more than two dozen amicus briefs in support of the New London, Conn., homeowners in *Kelo v. City of New London* at www.ij.org/kelo.

nation’s oldest civil rights organization), **AARP** (the nonpartisan group whose 35 million members address the needs and interests of older Americans) and the **Southern Christian Leadership Conference** (founded by Dr. Martin Luther King, Jr.) joined with other organizations to roundly criticize the practice of eminent domain abuse that they demonstrate “has and will continue to fall disproportionately upon racial and

ethnic minorities, the elderly, and the economically disadvantaged.”

University of Chicago Law School professor **Richard Epstein**, one of the nation’s leading property scholars, co-authored a brief on behalf of the **Cato Institute**. Among other points, Epstein criticized flimsy justifications given by legislators and developers for eminent domain use. Epstein points out that “governments can simply gin up pro forma

of Property Rights

Supreme Court In IJ's Kelo Case

findings that some benefits are expected from the project in question. Indeed, that's exactly what happened in this case."

The **American Farm Bureau** and the **Farm Bureau Federations** of 18 states and one county warned the Court that "[j]udicial review of whether property is being taken for public use must be real review" because "deference to legislative decision-making that is so abject as to accept at face value whatever justification a municipality puts forth is no judicial review at all. It is the antithesis." Too often, the Farm Bureau warned, eminent domain is not used for a truly "public use" but instead for "speculative real estate ventures."

The **Becket Fund for Religious Liberty** reminded the Court in its brief that if "economic development"—the creation of jobs and taxes—can be a justification for taking private property by the government, then religious institutions will be put at great risk. The Becket brief stated, "Religious institutions will *always* be targets for eminent domain actions under a scheme that disfavors non-profit, tax-exempt property owners and replaces them with for-profit, tax-generating businesses. Such a result is particularly ironic, because religious institutions are generally exempted from taxes *precisely because* they are deemed to be 'beneficial and stabilizing influences in community life.'" The brief states that affirming the Connecticut Supreme Court's decision that permitted the taking would "declare open season on the taking of religious institutions of all faiths and functions."

Former mayor of Milwaukee and current President of the Congress for New Urbanism **John Norquist** also filed a brief in favor of the homeowners. As a former public official, Norquist assured the Court that "prohibiting the exercise of eminent domain for purely economic development purposes will not prevent redevelopment, given the array of other incentives

available to government authorities interested in stimulating economic development."

More than a dozen prominent law professors who teach and write on property and land use issues asked the Court to apply a greater level of judicial scrutiny in deciding eminent domain cases for private development purposes. The brief, authored by Notre Dame Law School associate professor **Nicole Garnett** and William S. Richardson School of Law professor **David Callies**, warned that "under current federal standards, courts could approve virtually every exercise of eminent domain."

The **National Association of Home Builders**, whose 215,000 members constructed more than 1.77 million new housing units in 2004, and the **National Association of Realtors**, with more than one million members, recognized in their brief "that housing will almost never afford a community with the economic development benefits that a commercial application will. If economic development as a sole justification for public use is decided using a rational basis test with deference to local legislative bodies, then the door is left open for local governments to abuse their eminent domain powers."

All of the amicus briefs are available on our website, including the great work by old friends like **Pacific Legal Foundation, Reason Foundation, Claremont Institute Center for Constitutional Jurisprudence, New England Legal Foundation, Mountain States Legal Foundation, the Property Rights Foundation** and a host of state think tanks.

On behalf of the property owners of New London and across the nation, we say a heartfelt thanks to all who so tirelessly came to their aid at this crucial time. ♦

Chip Mellor is IJ's president and general counsel.



Amicus Briefs Filed In Support Of Petitioners In New London

Urban Sociologist Jane Jacobs

NAACP, AARP, Hispanic Alliance of Atlantic Co., Inc., Citizens In Action, Cramer Hill Resident Association, Inc., and the SCLC

American Farm Bureau Federation, and the Farm Bureau Federations of the following: California, Connecticut, Florida, Indiana, Iowa, Kansas, Louisiana, Michigan, New Haven County, New Jersey, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, Texas, Utah, and Virginia

National Association of Homebuilders and National Association of Realtors

John Norquist, President, Congress for New Urbanism
Becket Fund for Religious Liberty

13 Noted Property Law Professors: Professors David L. Callies, James T. Ely, Paula A. Franzese, Nicole Stelle Garnett, James E. Krier, Daniel R. Mandelker, John Copeland Nagle, John Nolon, J.B. Ruhl, Shelley Ross Saxer, A. Dan Tarlock, Laura Underkuffler and Edward F. Ziegler

Property Rights Foundation of America

Richard Epstein and the Cato Institute

Better Government Association, Citizen Advocacy Center, DKT Liberty Project, National Institute for Urban Entrepreneurship, and Office of the Community Lawyer
Claremont Institute Center for Constitutional Jurisprudence

Pacific Legal Foundation with Mary Bugryn Dudko, Frank Bugryn, Jr., Michael J. Dudko, Harry Pappas, Curtis Blanc, and Center for Individual Freedom

Goldwater Institute, Bluegrass Institute for Public Policy Solutions, Center of the American Experiment, Commonwealth Foundation for Public Policy Alternatives, Ethan Allen Institute, Evergreen Freedom Foundation, Georgia Public Policy Foundation, Mackinac Center for Public Policy and National Taxpayers Union

Cascade Policy Institute, American Association of Small Property Owners, Grassroot Institute of Hawaii, James Madison Institute, John Locke Foundation, Illinois Policy Institute, Indiana Policy Review Foundation, Oregonians In Action Legal Center, Pioneer Institute, Sutherland Institute, and Tennessee Center for Policy Research

Reason Foundation

New London Landmarks, Inc., Coalition to Save Fort Trumbull, and New England Legal Foundation

Develop Don't Destroy (Brooklyn), Inc., and The West Harlem Business Group

America's Future Inc. and Somerset Transmission & Repair Center

King Ranch, Inc.

Laura B. Kohr and Leon P. Haller, Esquire, Trustee, Owners of Lauxmont Farms

Mountain States Legal Foundation and Defenders of Property Rights

New London R.R. Co., Inc.

Robert Nigel Richards, Charles William Coupe, Joan Elizabeth Coupe, and Joan Coupe

Tidewater Libertarian Party

Rutherford Institute



IJ's Strategic Litigation Counsel **Clint Bolick** and client **Juanita Swedenburg** answer questions from the media following IJ's argument before the U.S. Supreme Court.

Courting Freedom for Vintners

By Steve Simpson

After years of litigation, Institute for Justice clients Juanita Swedenburg and David Lucas finally had their day in court. On December 7, 2004, IJ presented its case to the U.S. Supreme Court on behalf of the award-winning vintners in *Swedenburg v. Kelly*. The constitutional issue in question was whether the States' power to regulate alcohol under the 21st Amendment permits them to discriminate against out-of-state wineries by allowing only in-state wineries to ship directly to consumers. The basic moral issues were those of fundamental fairness and equal treatment under law.

Clint Bolick, IJ's strategic litigation counsel, who divided argument with former Stanford Law School dean Kathleen Sullivan representing the Michigan wineries and consumers, captured the essence of the case succinctly in his opening remarks: "For 124 years, as State power over alcohol has ebbed and flowed, one principle has remained virtually constant: that States may regulate alcohol by one set of rules, not by two. New York and Michigan consigned out-of-state wine, and only out-of-state wine, to the three tier system, foreclosing the market to thousands of small, family-run wineries and their customers for the benefit of a liquor distributor oligopoly. Discrimination is the core concern of the Commerce Clause, and it sends a powerful signal that the State is engaged, not in legitimate regulation, but in economic protectionism."

While the Justices vigorously questioned both sides, they seemed particularly skeptical of the States'

claim that section two of the 21st Amendment abolished the principle of non-discrimination on which the Commerce Clause was based, allowing the States to engage in blatant protectionism. They also seemed dubious that the States need to discriminate against out-of-state wineries—by, for instance, requiring an in-state warehouse and business office as a condition of doing business there—in order to regulate wine effectively.

Summing up, Clint once again crystallized the issue before the Court:

"Only one group was there because of what they believed in, not what they were being paid for, that's the Institute for Justice. And it showed."

—Lew Parker, Virginia vintner
Loudon (VA) Times-Mirror

"Our clients cannot compete with the liquor distributors in the political marketplace. They can, however, compete in the economic marketplace. The Commerce Clause protects that right, that level playing field. The

21st Amendment was never intended to take it away."

It is always difficult to predict the outcome of a U.S. Supreme Court case based on oral argument, but we think Linda Greenhouse's article in *The New York Times* described very well the feeling in the courtroom when the argument was over. She wrote, "If the Supreme Court argument Tuesday on interstate wine sales proves to be a reliable roadmap to the eventual decision, consumers who want to order wine directly from out-of-state wineries will soon be able to do so with the court's blessing."

We certainly hope she is right. ♦

Steve Simpson is an IJ senior attorney.





IJ clients and entrepreneurs, **Colby Sambrotto** and **Damon Giglio**, founders of ForSaleByOwner.com, a New York internet advertising and information service, are now free to publish without strict government licensing regulations.

IJ Victory Improves Protection for Commercial Speech

ForSaleByOwner continued from **page 1** the government's permission in order to publish. The U.S. Supreme Court has stated in a number of cases that while the government can license professionals who represent clients and provide personalized advice, it may not require a license for those who simply publish general advice or information. Unfortunately, the line between professional advice and general information is often murky, especially in the Internet age, so the Institute for Justice is trying to shore up this important protection for free speech.

Second, IJ argued that the State may not discriminate against certain speakers based on the content of their message or the media they use to publish it. California's licensing scheme singled out independently owned real estate websites for licensure, but did not require a license for newspaper-owned websites or for anyone who published classified advertising for goods or property other than real estate. As the U.S. Supreme Court has recognized, government favoritism of certain speakers over others raises the specter of censorship. Indeed, in defending its laws, the State contended that newspapers should be permitted to publish without a license because they are more trustworthy than inde-

pendently owned websites, and even went as far as to characterize some of the information ForSaleByOwner.com published—the notion that individuals can buy and sell homes without using a broker, for instance—as “harmful” to consumers. This was censorship, pure and simple.

Although the court denied our prior restraint claim—reasoning, incorrectly in our view, that the licensing law on its face concerned conduct rather than speech—it agreed with us that the State could not require a license for websites while exempting newspapers. Calling the State's attempt to justify this distinction “totally unpersuasive,” the court stated: “[T]here appears to be no justification whatsoever for any distinction between the two mediums. Even if a distinction was warranted in 1959, when the [newspaper exemption was passed], that does not mean that the same rationale for exempting newspapers remains viable in 2004, given the vast advances in technology that have occurred in the meantime.”

Significantly, in coming to this conclusion, the court rejected the State's argument that ForSaleByOwner.com published only commercial speech, which would have justified lesser protections for the website under the First

Amendment. As noted, the court based its conclusion in part on the reasoning in *Taucher v. Born*, IJ's previous First Amendment victory on behalf of publishers, demonstrating that IJ's strategy of building on its victories works.

The State of California opted not to appeal so now ForSaleByOwner.com is free to provide its valuable service to property owners across California, and homeowners can save lots of money by selling their homes themselves rather than being forced to work with a realtor or broker.

The Institute for Justice's victory in the ForSaleByOwner.com case is an important one for free speech and for e-commerce. The efforts of Internet entrepreneurs can too easily be stifled by ham-handed regulators or, worse, laws that attempt to protect local businesses from national competition. The victory is another step in IJ's efforts to ensure that e-commerce is not smothered before it has a chance to flourish. It won't be our last. ♦

Steve Simpson is an IJ senior attorney.



Hail to the Human Action Network

By Chip Mellor

Who ever thought IJ could change the world with such a small group of lawyers? We did.

But thanks to the Institute's Human Action Network—the graduates of our training programs for law students, undergrads and practicing attorneys—we don't have to do it alone. Our success in the past year and cases fought in the U.S. Supreme Court have been born from a partnership with our many friends in the freedom movement and IJ's active pro bono network.

From the outset, we believed that equipping others with the tools to practice IJ-style public interest law was essential to securing the transformation of American jurisprudence. That's why in the summer of 1992 we convened our first summer law

“From the outset, we believed that equipping others with the tools to practice IJ-style public interest law was essential to securing the transformation of American jurisprudence.”

student conference at Georgetown University, a tradition that continues today.

Every year since then a new class of advocates for liberty has graduated from our seminars and become part of our Human Action Network. And every year we have been inspired by the passion and talent of our students. As one journalist who studied our model noted years ago, “With money, media contacts, a heartfelt ideology and long-term strategy, [IJ is] poised to remain in the spotlight. . . . And they are building their army. They currently conduct an annual training session for . . . law students and lawyers on their litigation and public relations tactics.”

Just a few summers later, our “army” of HAN members now tops 700 and is increasing every year.

Many HAN members have already achieved extraordinary professional success as lawyers, professors, law clerks, and, yes, even in government. A growing number are making time to bring IJ-style lawsuits, help with IJ's cases, and write articles and organize events furthering IJ's mission.

From Robin Brooks-Rigolosi's recent victory for free speech in New York, Michael D. Dean's work defending 4th Amendment rights in Wisconsin, and Heath Weisberg's battle against eminent domain abuse in New York City to the many HAN members (see sidebar) who have helped with amicus briefs, legal research, and grassroots support, their efforts demonstrate that talent plus a passion for

liberty—properly channeled—can make a real impact.

That's exactly what we envisioned 13 years ago when we launched the Institute for Justice, and it is even more true today as we embark on a year of U.S. and state supreme court battles, new cases and the continued fight for freedom.

To all our fellow litigators for liberty, in our HAN network and beyond, we offer a sincere thank you and look forward to many more battles fought together. ♦

Chip Mellor is IJ's president and general counsel.



Thank You, HAN Members!

Thank you to those who helped on recent projects:

- Adam Mossoff, law professor at Michigan State College of Law, co-authored an amicus brief and op-eds written on IJ's wine case
- Rachel Clark at Gibson, Dunn & Crutcher drafted amicus briefs for IJ's Oklahoma casket case and a recent eminent domain case

We also want to offer a special word of thanks to all those who helped with our *Kelo v. New London* efforts to end eminent domain abuse:

- Dan Muino worked on the Reason Foundation amicus brief
- Tim Sandefur authored amicus briefs on behalf of Pacific Legal Foundation in both the *Kelo* case and in IJ's Oklahoma casket case
- Mark Brnovich of the Goldwater Institute coordinated and drafted an amicus brief for various State Policy Network groups and authored an amicus brief in IJ's wine case
- Jim Huffman of Cascade Policy Institute authored an amicus brief
- Chris Bartolomucci and David Michnal, both with Hogan & Hartson, authored a brief on behalf of the Property Rights Foundation
- Eric Claeys, law professor at Saint Louis University School of Law, and John Eastman, law professor at Chapman University School of Law authored a brief on behalf of the Claremont Institute
- Nicole Garnett, law professor at the University of Notre Dame Law School, and David Callies, law professor at the William S. Richardson School of Law, authored a brief on behalf of various law professors
- Ilya Somin, law professor at George Mason University School of Law, authored a brief on behalf of Jane Jacobs, with attorney Bob Getman serving as counsel of record
- Attorney Jason Freier authored a brief on behalf of the NAACP, SCLC, AARP and other organizations
- IJ HAN members and 2004 law clerks Dan Alban, Tamara Carty, Jessie Deering, David Foster, Brian Frye, Kathy Hunt, Mandy Eckhoff, Dan Knepper, Bob McNamara, Damian Najman, Hayley Reynolds, Rob Scharff, Emily Schleicher, Jason Specht, Arpan Sura and Clare Wang, for their research help

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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 own destinies as free and responsible members of society. It 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, it trains law students, lawyers and policy activists in the tactics of public interest litigation to advance individual rights.

Through these activities, it 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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Freedom's New Face On the Web



After nearly a year of careful planning, writing and redesigning, the Institute for Justice has completely revamped its homepage, **www.ij.org**.

Visitors to the site will find even more content than ever before right up front on the homepage. Those seeking information about specific cases will find it on case pages, which include detailed timelines for each case, backgrounders, press releases, client photos and more. The entire site is designed in the most intuitive way possible, giving visitors easy access to the information they seek.

“We emphasized ease of navigability and a one-stop-shopping approach to the layout so people can find what they’re looking for without having to hunt for it,” said Institute for Justice Production & Design Director Don Wilson, who oversaw the redesign. “We also added links on our homepage to some of the latest news stories written about IJ so visitors can see the impact we’re having in the court of public opinion. This will give daily visitors something new to read each time they return.”

Peppered throughout the site are quotes from Milton Friedman, George F. Will, *The Wall Street Journal* and others praising the Institute for Justice and its work.

Visit **www.ij.org** today and send a link to a friend!♦

www.ij.org

The State of Louisiana requires me to have a license
to arrange and sell flowers.

The test to get the license is judged by existing florists,
and they routinely fail two-thirds of all applicants.

I'm fighting this blooming nonsense, and I'm fighting
for everyone's right to earn an honest living.

I am IJ.

*Shamille Peters
New Orleans, Louisiana*

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Economic liberty litigation*

**“A band of warriors
for liberty, IJ has
recently helped open
markets for cab driv-
ers, hair-braiders, book
vendors, casket sellers
and vintners. May the
florists of Louisiana
be next, in a blow for
commonsense and
Flower Power.”**

*—Rich Lowry
Townhall.com*



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