

Volume 20 Issue 3

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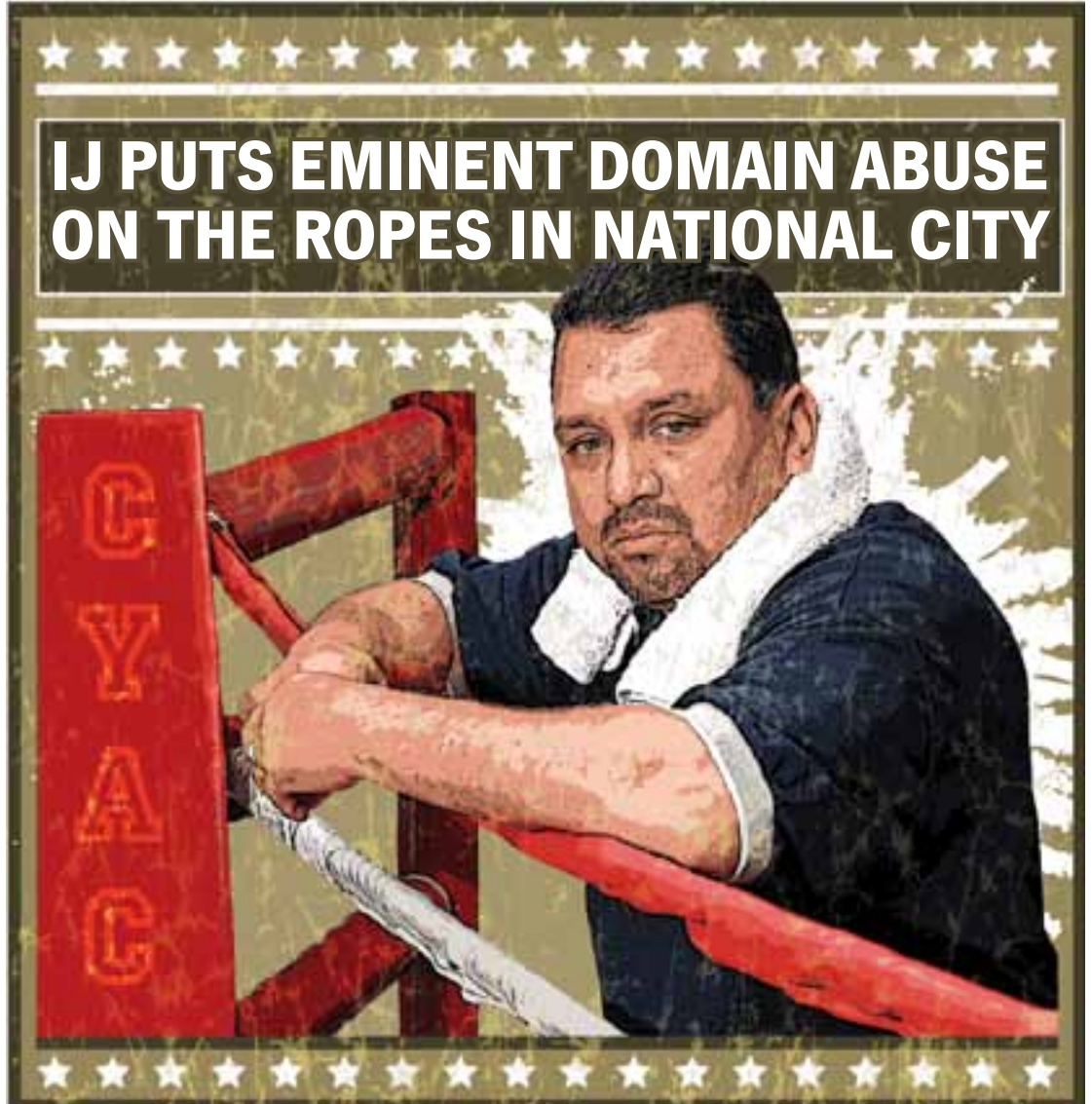
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# Liberty & LAW

## IJ PUTS EMINENT DOMAIN ABUSE ON THE ROPES IN NATIONAL CITY



**By Jeff Rows and Dana Berliner**

As the *Rocky* movies taught us, it doesn't matter where things stand after the first round, it's who's left standing at the final bell that counts. In the three-and-a-half-year slugfest between IJ client Community Youth Athletic Center (CYAC) and National City, Calif., only the underdog was still on his feet when the judge issued his post-trial judgment on April 20, 2011.

As *Liberty & Law* readers know, the CYAC is a nonprofit boxing and mentoring center for at-risk kids in downtown National City just south of San Diego. What started with a punching bag hanging in the backyard of the CYAC's founders—father and son team Carlos Barragan Sr. and Jr.—grew into a flourishing and effective anti-gang program and alternative school that owns its own land.

**National City** continued on **page 8**

# Limousine Lockout:

*New Regulations Threaten to Drive Nashville Transportation Entrepreneurs off the Road*

IJ client **Ali Bokhari**, above, explains, "If this law stays on the books, my customers will be forced to spend twice as much money for exactly the same service, and I risk losing my business."

By Wesley Hottot

Until recently, Nashville, Tenn., was a city with a vibrant transportation network. Robust competition between taxicabs and the Music City's many limousine and sedan services meant you could take a cab from downtown to the airport for just \$25, or you could pay the same price to go in a limo or sedan. As a result, everyday people in Nashville could hire a luxury car to get them to work or to take them out on the town.

But in June 2010, Nashville passed a series of regulations designed to prevent limos, sedans and taxicabs from competing with each other. Today, consumers and transportation entrepreneurs are paying the price. Nashville's new regulations require limo and sedan operators to charge a minimum of \$45 per trip—an 80 percent increase on their average fare. Additionally, car services (as limos and sedans are collectively called) cannot use leased vehicles, but must hold the title; they must dispatch only from their place of business and wait a minimum of 15 minutes before picking up passengers, delaying response times; they cannot park or wait at any place of public accommodation, such as a hotel or bar; and, as of January 2012, they cannot put any vehicle into service if it is more than five years old, no matter how well-maintained it is, and they will have to take cars out of service once they are more than seven years old (or ten years old for a limo).

These regulations have nothing to do with public health or safety; they have everything to do with economic protectionism. The trade group representing Nashville's most expensive limo companies was so closely involved in the genesis of these regulations that its president claims to have *written* them. "Not many organizations get the opportunity to contribute and steer

the actual content and wording of pending legislation," he said. "It's a win-win."

But the new regulations are anything but a "win" for affordable car services and their customers. A number of transportation businesses, burdened with these pointless requirements, have simply shut down.

Nashvillians who use limos and sedans are being forced to take taxicabs or spend double for exactly the same service.

Now, with the help of the Institute for Justice, affordable limo and sedan operators are suing Nashville in federal court, seeking an injunction to stop the new regulations. This case will build on IJ's landmark 2002 victory against Tennessee's funeral director cartel, which wanted to keep casket retailing all to itself. That case—which was the first federal appeals court victory for economic liberty since the New Deal—established that economic protectionism is never a legitimate function of government.

Similarly, Nashville cannot put affordable limo and sedan companies out of business just to help out their expensive competitors. There must be a legitimate public health or safety reason for regulations, and, in this case, there are none.

This is another sad example of what happens when public power is used for private gain. But we are going to put a stop to that. Consumers, not the government, should pick winners and losers in the marketplace. The Institute for Justice will continue to work to vindicate that principle. ♦

**Wesley Hottot** is an IJ Texas Chapter staff attorney.



Watch IJ's video, "Nashville's Sedan Drivers Fight City Effort to Run Them Off the Road"





El Paso tried to shut down street vendors like IJ client **Maria Robledo** by making it virtually impossible to sell food on city streets.

# Victory for El Paso Street Vendors

*IJ Scores a Quick and Decisive Win in National Battle to Protect Economic Liberty*

By Matt Miller

IJ's National Street Vending Initiative recently scored its first victory when the city of El Paso repealed its protectionist regulations that had prohibited vendors from operating within 1,000 feet of any restaurant, grocer or convenience store, and also prohibited vendors from stopping and waiting for customers. These now-repealed restrictions made it almost impossible for mobile food vendors to vend legally in El Paso, turning the city into a "no vending" zone. El Paso's reforms were a direct response to the Institute for Justice's federal lawsuit brought on behalf of four mobile vendors.

IJ took up the cause of El Paso's mobile vendors by representing four women who own and operate food trucks in the city. The lawsuit centered on our clients' constitutional right to engage in their occupation free from unreasonable governmental interference. Mobile vendors have traditionally been required to comply with numerous laws and regulations, including traffic rules and food handling requirements. But a recent trend takes regulation a step further, beyond the police power of government and into the realm of naked economic protectionism.

Minimum-distance vending laws like El Paso's do not protect the public—they protect brick-and-mortar restaurants from competition. Unfortunately, such restrictions are increasingly popping up across the nation as restaurant associations lean on the government to help cut out their competitors. Just to take two examples, Chicago bans street vendors from operating within 200 feet of restaurants and Baltimore bans vendors from operating within 300 feet of a business that sells similar food. The result is that it is almost impossible to find a legal spot to vend in popular commercial areas where you can find a restaurant on every block.

The goal of these restrictions is obvious: to make mobile vending—a traditional entry point to entrepreneurship in America—so difficult and so unattractive that people abandon the business entirely. The result is that restaurants have fewer competitors and consumers have fewer—and more expensive—options in the marketplace.

IJ's national vending initiative seeks to vindicate the rights of vendors based on the simple principle that the Constitution does not allow government to pick winners and losers in the marketplace—to deprive people of their

economic liberty merely so that their competitors can prosper.

Our victory in El Paso marks an important first step. The law was changed three months to the day after we filed our lawsuit. At the city council meeting where the restrictions were abolished, El Paso's director of public health was asked about the justification for the 1,000-foot restriction around restaurants. He answered, "[T]here's not a health reason or a Texas food rule that I can find that justifies that."

Now El Paso mobile vendors can operate almost anywhere in the city. They can park at the curb during the lunch rush and stay there while customers come and go. In short, they can engage in the same traditional model of vending that they have been using for decades, and El Paso consumers will continue to enjoy the low prices, varied options and delicious flavors that vendors offer. And, as for IJ, we are already gearing up for our next tasty vending challenge. ♦

**Matt Miller** is the IJ Texas Chapter executive director.





IJ Washington Chapter Executive Director **Bill Maurer** fields questions from reporters following the argument. IJ clients, from left, **Rick Murphy**, **Shane Wikfors**, **Steve Voeller** and **Dean Martin**, hope to one day have truly free political speech.

## Defending the First Amendment at the Supreme Court

By Bill Maurer

On March 28, 2011, I argued *Arizona Freedom Club PAC v. Bennett/McComish v. Bennett* before the U.S. Supreme Court. The consolidated cases brought by the Institute for Justice and the Goldwater Institute concern the constitutionality of the so-called “matching funds” provision of the wildly misnamed Arizona Citizens Clean Elections Act. Under that provision, candidates who run for office using taxpayer funds are entitled to additional subsidies each time their traditionally financed opponents or an independent group opposing them spend above a certain amount. The purpose and effect of the law is to limit the speech of those opposing taxpayer-financed candidates and “level the playing field” among political speak-

ers. The government, in effect, puts a thumb on the scale in favor of its preferred candidates.

Opposing IJ and Goldwater that day were the state of Arizona, the Arizona Clean Elections Institute and the Obama administration. Even though the federal presidential public financing system does not contain “matching funds,” the federal government nonetheless participated in oral argument to urge the Court to uphold Arizona’s system as an essential part of public financing of campaigns.

As the first campaign finance case heard at the Supreme Court since its high-profile decision in *Citizens United v. FEC*, the argument drew considerable media attention, with most commentators concluding that a majority of the Court appeared to be skeptical of our

opponents’ arguments. (I achieved a personal milestone when *The New York Times*—a strong supporter of limiting the political speech of those outside the media—quoted my argument and criticized me by name in an editorial urging the Court to uphold Arizona’s law.)

Delivering an effective Supreme Court argument requires weeks of preparation and tireless teamwork. We spent countless hours in internal practice sessions called “moot courts,” where attorneys ask question after question that anticipate the Court’s areas of inquiry and give us the chance to hone our responses. In addition to our internal moot courts, Georgetown Law School and the Heritage Foundation graciously hosted moots in front of “courts” consisting of a former U.S. Attorney General,

**“The purpose and effect of the law is to limit the speech of those opposing taxpayer-financed candidates and ‘level the playing field’ among political speakers. The government, in effect, puts a thumb on the scale in favor of its preferred candidates.”**



#### DOWNLOADS AVAILABLE:

Read the transcript or listen to the U.S.S.C. audio recording of the argument, available at [www.ij.org/azcleanelections](http://www.ij.org/azcleanelections).

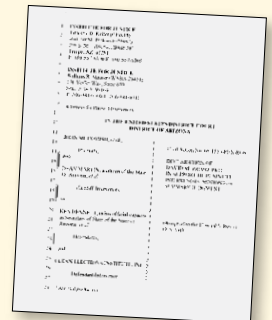
## Research Shows Clean Elections' Harms

In Arizona's so-called "Clean Elections" system—the program at issue in the U.S. Supreme Court case IJ argued in March—each time a privately supported candidate or an independent group spends a buck over a government-set limit, the publicly funded opponent gets another buck. It is not hard to see how these "matching funds" discourage speech by those not on the dole.

Nonetheless, throughout the Institute for Justice's First Amendment challenge to the law, Clean Elections' backers have denied matching funds have any effect on speech. That is why, as part of our strategic research program, we asked University of Rochester political scientist David Primo to examine the law's effect.

Primo found that privately funded candidates, especially in competitive races, delay speaking until late in the campaign so that any matching funds are delivered too late to be of much use to an opponent. That means less time for candidates to speak and less time for voters to consider the message. Surveys of candidates and independent groups by others, including the federal Government Accountability Office, back up Primo's findings.

Although Clean Elections' defenders have tried to ignore or dismiss this evidence, it appears to have made an impact on at least one member of the High Court. Justice Scalia pointed to this research during oral argument as proof of harm to First Amendment rights. Hopefully, Justice Scalia and his colleagues will see fit to put an end to this speech-chilling law once and for all. ♦



Read the report at: [www.ij.org/primo](http://www.ij.org/primo)

former Federal Elections Commissioners, leading law professors and advocates who frequently appear before the Court.

This practice was in addition to the time spent reading the briefs (24 in all, including "friend-of-the-court" briefs), the case law and the massive record in the case. Because there is no limit on what the Justices may ask an advocate before them, a lawyer must be prepared to address whatever issue—on the facts, the law, or the policy implications of a decision—the Court wishes to address.

The ability to effectively advocate before the Court is beyond the capacity of many nonprofit organizations and private law firms. With the support of our donors and the dedication of our staff and attorneys, however, IJ is able to more than hold its own and advocate effectively in the defense of liberty at the highest levels.

The Supreme Court should release its decision sometime in the early summer. In the meantime, if you want to read a transcript or listen to an audio recording of the argument, those are available at [www.ij.org/azcleanelections](http://www.ij.org/azcleanelections).

IJ's litigation against government-imposed limits on our free speech in the guise of campaign finance "reforms" is yet another example of what we do best: We take once-lost legal causes and completely change the terms of the debate, thereby restoring the freedoms we are supposed to enjoy in our constitutional republic. Certainly decades of similar legal battles stand before us, but, as we continue to show, with principled and well-prepared advocacy, we can accomplish anything. ♦

**Bill Maurer** is the IJ Washington Chapter executive director.





# FORFEITING ACCOUNTABILITY

## GEORGIA LAWSUIT TARGETS HIDDEN CIVIL FORFEITURE FUNDS

By Scott Bullock

IJ's nationwide initiative against forfeiture abuse brought us to Georgia in March. There, we filed a lawsuit to shine a light on off-budget law enforcement slush funds that are created with property and cash taken by civil forfeiture.

Under draconian civil forfeiture laws in Georgia and most other states, the police can seize your home, car, cash or other property upon the mere suspicion that it has been used or involved in criminal activity, regardless of whether you have been convicted of a crime or even arrested. Civil forfeiture represents one of the greatest assaults on private property rights in our nation. And Georgia has some of the worst forfeiture laws and practices in the nation, earning a D- in our national forfeiture report released last year. One good aspect of Georgia forfeiture law, however, is that it at least attempts to ensure that civil forfeiture is subject to public scrutiny. Georgia law requires local law enforcement agencies to annually itemize and report all property obtained through forfeiture, and how it is used, to local governing authorities.

But many, perhaps most, local Georgia law enforcement agencies fail to issue these forfeiture reports, thus turning forfeiture proceeds into slush funds shielded from public view. That is a breach of the public trust and a betrayal of taxpayers. Our lawsuit on behalf of five Georgia citizens seeks to force the head law enforcement officers of

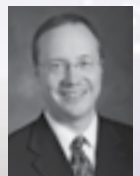
Fulton County and the City of Atlanta to disclose all of the property they have seized under Georgia forfeiture statutes along with how they utilized that property.

IJ's Georgia lawsuit grew directly out of our strategic research program. While assembling our *Policing for Profit* report last year, we discovered that civil forfeiture laws are notoriously opaque. Only 29 states require reporting of property seized through forfeiture, and, even in those states that require reporting, such as Georgia, the laws are not properly enforced.

For instance, we took a random sample of 20 law enforcement agencies in Georgia and found that only two were reporting as required. This research led to the publication of a new report: *Forfeiting Accountability: Georgia's Hidden Civil Forfeiture Funds*. The report also highlights examples of abuse with forfeiture funds, including a Georgia sheriff spending \$90,000 in forfeiture money to purchase a Dodge Viper, and the Fulton County district attorney's office using forfeiture funds to purchase football tickets.

The mission of our case is simple but vitally important: Law enforcement should follow the law. Our latest forfeiture lawsuit will guarantee that Georgia law enforcement agencies are accountable to taxpayers and property owners throughout the state. ♦

**Scott Bullock** is a senior attorney at the Institute for Justice.



Watch the video about how civil forfeiture threatens the property rights of Georgians and of all Americans.



Read the report at:  
[www.ij.org/GAForfReport](http://www.ij.org/GAForfReport)



# Returning to Our Roots

*IJ Returns to Court to Defend Hairbraiders' Right to Earn an Honest Living*

By Paul Avelar

The very first case the Institute for Justice filed 20 years ago was a challenge to Washington, D.C.'s cosmetology licensing law on behalf of African hairbraiders. To lawfully offer hairbraiding services, the District required would-be practitioners to invest thousands of hours and thousands of dollars in a training program that had nothing to do with braiding.

Demonstrating the power of litigating cases in the court of public opinion, D.C. was forced to relent and repeal its law. And in the years since, IJ has helped braiders take on cosmetology licensing laws—and cosmetology cartels—in six states, posting big wins for economic liberty every time.

In 2005, Jestina realized there was an unmet demand for African hairbraiding in Utah and that she could make money by braiding. Before she started her business, however, she confirmed with the state licensing board that she did not need any special license. She continued her business because it combined the opportunity to provide for her family with the flexibility of being a stay-at-home mother.

But in 2009, a licensed cosmetologist complained that Jestina did not have a cosmetology license. And even though the licensing board had previously said she did not need a license, the board threatened to shut her down. Now, in order to braid hair for money, Jestina must spend as much as \$18,000 to take 2,000 hours of cosmetology classes. Not only is that more class hours than Utah requires of armed security guards, mortgage loan originators, real estate sales agents, EMTs and lawyers—combined—none of those cosmetology classes actually teaches how to braid hair.

Research shows that occupational licensing laws make it more difficult for people—especially poor, minority, immigrant and older workers—to start or change careers, and do nothing more than protect industry insiders from new competition. Government-imposed roadblocks, like cosmetology licensing requirements for braiders, cut off the first rung of the economic ladder for those who need it most. It forces them into the underground economy.

Jestina has already explained to the licensing board and to legislators why Utah's licensing scheme makes no sense, but no one has been willing to change the laws.



IJ client **Jestina Clayton** has been told by the Utah cosmetology board that she can no longer braid hair. Excessive government-imposed licensing on a safe and uncomplicated practice, such as hairbraiding, is both outrageous and unconstitutional.

In her native language, “Jestina” means “justice.” IJ is going to Utah federal court to get justice for Jestina. So it is fitting that she teamed up with IJ to change the unjust law.

Jestina shouldn't need the government's permission to braid hair. Both the federal and Utah constitutions protect every individual's right to earn an honest living in their chosen occupation free from arbitrary and irrational government regulations. But this constitutional right is meaningless unless courts enforce it. ♦

**Paul Avelar** is an IJ Arizona Chapter staff attorney.



Watch IJ's video, “Untangling African Hairbraiders from Utah's Cosmetology Regime.”

IJ has once again taken up the cause of economic liberty for braiders—this time in Utah.

Jestina Clayton grew up in Sierra Leone and has been braiding since she was just six years old. She came to the United States after fleeing from the horrible violence of the Sierra Leone civil war. Since arriving in America, she has graduated from college, married and had two children with a third on the way.

**“Occupational licensing laws make it more difficult for people . . . to start or change careers, and do little more than protect industry insiders from new competition.”**



# EMINENT DOMAIN ON THE ROPES

**National City** continued from page 1

Unfortunately, like most property in National City, the CYAC is in the middle of a massive zone that has been declared blighted. And, in 2005, National City promised the gym's land to a luxury condo developer.

In 2007, National City decided to renew its eminent domain authority for another 10 years. National City has had a series of blight and eminent domain designations since the 1960s. Like many California cities, National City wants to keep itself in a perpetual state of declared "blight" because doing so gives it access to power and money.

There is an entire industry of politicians, bureaucrats, consultants, developers and bankers who feed off of endless blight designations, and they have no incentive to do anything but engage in exactly the sort of arbitrary central planning that perpetuates the social and economic problems they purport to be solving.

IJ teamed up with the CYAC back in the spring of 2007 to oppose the reauthorization of eminent domain. Unsurprisingly, despite being informed by IJ that its proposal violated statutory and constitutional law in literally dozens of ways, and despite enormous public opposition, National City rammed the new eminent domain ordinance through. The city didn't seem to care that what it was doing was illegal because everyone knows that you can't fight City Hall.

For the CYAC, it was time to do what they have been teaching their kids all along: have the courage to fight for what's right, no matter the odds. IJ and the CYAC filed suit in September 2007, and we were knocked down at the opening bell. Exploiting a bizarre technicality in California law, the original judge dismissed the case on the ground that a notice in the back of a newspaper gave a certain date as a Friday when it should have been the following Monday. Not only did the judge toss the suit, he ruled that the CYAC could not correct the error. The case was over, and National City probably thought that it had scored a first-round knockout.

We picked ourselves up, wiped our bloody nose and took National City to the

Court of Appeal for round two, where we not only got the trial court reversed, we secured an important precedent protecting property owners from silly technicalities when trying to protect their land.

Suddenly looking a little worried, National City then tried to dazzle us with a few rounds of fancy footwork, doing everything possible to prevent the truth from coming out. First they tried to get the case dismissed again on the same technicality. Then they refused to turn over any evidence in discovery, raised every possible objection and tried to prevent nonparties from giving documents to the CYAC. As all of this jumping, dancing and swinging away transpired, IJ patiently stood in the center of the ring, waiting for National City to get close enough, and then it was pow, pow, pow in a series of judicial decisions instructing National City to go forward with the lawsuit, turn over documents, and prepare for trial.

As we headed into trial in March, we entered what fighters call the "deep water" of the later rounds, where you find out if you've done the training and got the heart to go the distance. We had to dig really deep. Even though we'd rocked National City badly, and even though we had right on our side, going up against the government in a property rights case is always a long shot.

Trial was nothing short of an ordeal for IJ's five-person crew: the two of us, Staff Attorneys Dan Alban and Doran Arik, and Paralegal Kyndra Griffin. We also had amazing help from our local counsel, Rich Segal, Brian Martin and Nate Smith of Pillsbury Winthrop. We spent weeks in San Diego working virtually around the clock. There were lots of opportunities to quit, to cut corners, to give just enough instead of giving our best, but no one faltered in the face of intense stress, the expectations of our clients, the importance of the rights we were fighting for and the loneliness we all felt for our loved ones back home. We had to solve small problems on the fly and make split-second decisions during trial that could cost

us everything if not correct, but time and again the entire team did what it took to take the CYAC's fight to the city.

With the roar of the crowd behind us (our side of the courtroom was packed every day, while National City had no one), we delivered our closing arguments in a flurry of body blows, upper cuts and crosses that left National City in a heap on the canvas. The judge agreed, ruling that National City violated state redevelopment law, the U.S. Constitution and the California Public



Records Act. The entire 692-property eminent-domain zone was struck down.

There were two notable firsts in our victory. This was the first decision applying the reforms that California passed as part of the property rights reform movement that IJ spearheaded following the infamous *Kelo* decision. Our win confirmed that California property owners have heightened protection against bogus blight designations. This was also the first decision clearly holding that documents produced by government contractors—in this case, private blight consultants—were public records subject to disclosure under the Public Records Act.

So IJ and the CYAC are excited to give a big "Yo Adrian" to property owners across California. And if National City wants a rematch in the Court of Appeal, we have only three words for them: Bring it on. ♦

**Jeff Rows and Dana Berliner**  
are IJ senior attorneys.





## Behind the Scenes at the CYAC Trial

By Jeff Rowes

Going to trial is about the hardest thing a lawyer does. The nights are sleepless. There are thousands of documents. Witnesses say unexpected, even crazy, things. You have to write entire briefs in one day and be prepared to argue any legal issue on the spot. The judge could do anything at any minute to sink the case. You go down into the trenches, get shelled around the clock and stagger out weeks later in a daze.

In March, a team from IJ manned the frontlines in the fight against eminent domain abuse in a trial involving our CYAC boxing gym case. Here's a glimpse into what you don't see on shows like *Law & Order*.

**The IJ Gypsy Caravan:** Private practice lawyers often live like kings on their corporate clients' dime. But an IJ public interest lawyer is more Motel 6 than Four Seasons. So when our judge had to bump the trial back one week after all five members of our IJ team (Senior Attorneys Dana Berliner and me, Staff Attorneys Dan Alban and Doran Arik, and Paralegal Kyndra Griffin), arrived in San Diego we needed to economize fast. Although we had initially negotiated a reasonable rate at a reasonable hotel, we finagled an even better deal at a different hotel from the one we initially booked (saving \$14,000!), and spent an entire morning wheeling bazillions of documents, supplies, suitcases and electronics down the street on hand dollies.

**Chivalry Dies, But Kyndra Survives:** As our paralegal, Kyndra, needed to copy, organize and be able to instantly identify mountains of documents. To do this, she constantly shuttled between the "war room" (a converted hotel suite) and the offices of our local counsel a few blocks away. The first time she announced that she was going to the local counsel's office at night, I chivalrously said I would escort her, protecting her from the evildoers of downtown San Diego. Over the next few days, it dawned on me that Kyndra was faster and tougher than I, and that she was going to go over at all hours with or without me, so I meekly accepted my own wimpiness and stopped trying to follow her around.

**Doran Does 2,000 Pages in Two Days:** Doran started at IJ in January and was immediately tossed into the CYAC woodchipper, working hours that would terrify the most highly paid Wall Street lawyer. And we piled on even more during trial. She bore this with the endurance of Lance Armstrong, but had to dig even deeper



IJ's trial successfully defending the property rights of our clients required not only strong minds and strong spirits, but also strong backs as our team moved IJ's litigation "war room" to a different hotel, thereby saving the Institute \$14,000.

when it fell to her to go through 2,000 pages of environmental and redevelopment reports in two days, flagging everything important. Given her general state of exhaustion and the mind-numbing content of these documents, Dana and I would have felt less guilty asking her to juggle flaming chainsaws blindfolded. For two days, like a Zen monk, Doran sat cross-legged on the floor of the war room immersed in reams of bureaucratese, preparing to lead us from ignorance to enlightenment. Her diligence paid off in spades when those moments arose, again and again, in which we needed to know something that was in those documents, and every time Doran came through.

**Dan Steps Up Big Time:** Dana was doing the work of three people getting our expert examinations ready and I was writing a brief to prevent a bunch of confusing and irrelevant evidence from coming in. It became obvious that neither of us would be ready to do the questioning of a key hostile witness at trial. Dan, who had only been at IJ since this past summer, and who had been helping Dana prepare for this witness, volunteered to work through the night to be ready to do the examination. Dan and I skipped trial that morning to hone his outline and relentlessly drill different scenarios in which the questioning could go haywire. When the time came, he stepped up to the podium and delivered an outstanding examination of the witness, eliciting testimony that turned out to be crucial to our victory.

Behind the Scenes continued on page 13

# Buzzing By The Constitution

Reprinted from  
**Forbes**  
■.com

By Chip Mellor

During a recent argument before the U.S. Supreme Court, Justice Elena Kagan sought to minimize the importance of an attorney's statement with which she disagreed by saying "some people may use certain buzz words and other people don't use those buzz words." Sadly, the problem with "buzz words" in constitutional cases stems not from the advocates before the Court, but from the Court itself. Since the New Deal, the Court

has continually based its constitutional interpretation on terms and tests that redefine the actual constitutional text and effectively predetermine most outcomes.

Two of the most egregious examples of such constitutional buzz words are "heightened scrutiny" and "rational basis." Neither term appears in the Constitution. But both have become enshrined in constitutional analysis and are routinely employed by federal and state courts to uphold laws and governmental actions. Despite such ubiquity and the fact that these buzz words profoundly affect the lives of every American, most people have never heard them uttered. Their prevalence and influence offer an important lesson in what happens when courts abdicate their responsibility by improperly deferring to the legislative branch.

The Supreme Court struck down early New Deal programs because it found that Congress did not have the power to enact them. Simply put, the

Court found that there were no enumerated powers in the Constitution that authorized violating the rights of Americans whose property and livelihoods were being drastically regulated.

After intense political pressure, including a threat to add additional justices to the Court to obtain a majority, President Franklin Roosevelt induced the Court to change its position on the New Deal and the Constitution. In order to uphold New Deal programs from constitu-

**"The Constitution was crafted painstakingly to establish a government of limited and enumerated powers. The Supreme Court has the vital and challenging job of interpreting the Constitution consistent with the Founders' goal of maintaining such a liberty-oriented institution."**

## READ MORE:

Chip Mellor is a regular contributor to [Forbes.com](http://Forbes.com). His articles are available at [iam.ij.org/ChipOnForbes](http://iam.ij.org/ChipOnForbes)

tional challenge, the Court had to relegate certain rights—notably property rights and economic liberty—to second-class status. This was accomplished by creating a hierarchy of rights with those at the top (like the First Amendment) receiving relatively strong protection and those at the bottom (property rights and economic liberty) receiving very little.

To rationalize this, the Court came up with the notion that when courts examine governmental action that affects top-tier rights, they should employ "heightened scrutiny" effectively placing the burden on the government to justify its action. Often laws subject to heightened scrutiny are struck down.

The flip side was that laws affecting rights in the bottom tier would be upheld if the court could find any "rational basis" for the law. That term came to mean that any "reasonably conceivable" set of facts will suffice to justify a law even if the facts did not exist at the time the law was passed. In practice, courts often make up reasons and find hypothetical facts sufficient. This means that almost all laws governing economic liberty or property rights are upheld with

only perfunctory analysis. Indeed, the application of these buzz words has evolved to the point that today courts routinely

defer to legislatures on economic and property matters and rubberstamp laws that regulate everything from lemonade stands to the color of one's house.

The Constitution was crafted painstakingly to establish a government of limited and enumerated powers. The Supreme Court has the vital and challenging job of interpreting the Constitution consistent with the Founders' goal of maintaining such a liberty-oriented institution. Anytime buzz words like "heightened scrutiny" or "rational basis" serve to replace the words of the Founders, the Court is effectively amending the Constitution. ♦

**Chip Mellor** is president and general counsel of the Institute for Justice.





## Your Investment in IJ Remains True After 20 Years

By Melanie Hildreth

If you invested in gold in 1991, you're probably pretty happy today. (In fact, maybe you retired early and are reading this on the beach.) What about if you began donating to IJ in 1991? What do you have to show for it today?

To start, you would have helped save more than 16,000 properties from eminent domain abuse, improved property rights laws in 43 states, helped 810,000 children get into school choice programs, earned 20 awards for public relations that share the message of liberty and had five cases heard before the U.S. Supreme Court—two cases this year alone.

More than that, though, you would have been part of building an entirely new way of litigating public interest cases that results in success for individual liberty, against steep odds, 70 percent of the time.

After 20 remarkably successful years, IJ has a lot to look forward to, and our donors can rest assured that the funds they give to IJ will be used wisely and effectively in the next 20 years and beyond.

Here are a few ways we take care of your investment in IJ:

**We are principled.** We are guided by the principles of liberty laid out in the Constitution and articulated by thinkers like

Jefferson, Hayek, Friedman and Rand. We never succumb to political expediency or jump on the bandwagon of popular causes to earn extra attention or money. This dedication to principle allows us to have an impact that far exceeds our size.

We maintain the same **open and honest** relationship with our supporters that we have among our staff and with our clients and the media. We want you to know the organization you are investing in, whether it is with year-to-year support, a multi-year pledge or a gift through your will or trust. You are always welcome to stop by our offices to see in person what you are helping make possible.

**Our board of directors ensures that candidates for membership on the board demonstrate the highest dedication to our mission.** Board membership has remained select and consistent, and attendance at board meetings is exceptional—it is rare for a member to miss a meeting. In addition, every member is active in IJ's governance, approving each case we file in addition to overseeing our growth and finances.

**We hire staff who internalize our mission and culture;** this is particularly true of our senior staff. As a result, people who come to IJ tend to stay and make a

career here. For example, the average tenure of our vice presidents and senior attorneys, to date, is 12.2 years. This continuity helps ensure consistency in the way we pursue all aspects of our strategic litigation.

**We are accountable.** We strive to answer donors' questions and always report on the expenditures of funds (including here in *Liberty & Law*). Each year, IJ is audited by an independent auditing firm. Our Form 990 and audited financial statements are available on our website. And we have earned nine consecutive 4-star ratings from Charity Navigator; this puts us in the top one percent of charities evaluated, and indicates that we consistently execute our mission in a fiscally responsible way that, according to Charity Navigator, "outperforms most other charities in America."

Your investment in IJ is secure, and it is paying dividends. Our first 20 years have demonstrated that you can feel confident that the organization you support today is going to be here and advancing individual liberty for years to come. Thank you for being part of our success. ♦

**Melanie Hildreth** is the Institute's director of donor relations.





# School Choice Takes Off

By Dick Komer

What a difference a year makes! Or perhaps more accurately, what a difference an election makes.

The 2010 elections brought in a new Republican majority in the U.S. House of Representatives, where the new Speaker of the House John Boehner threw his considerable influence behind efforts to revive the D.C. Opportunity Scholarship Program, which President Obama and the previous Democrat-dominated Congress had

condemned to death by attrition. Speaker Boehner made reauthorization of the program a demand in the

budget negotiations that nearly resulted in a government shut-down, and when the President signed the budget compromise, it renewed the program for five years.

Even more importantly for school choice, because education is primarily a state responsibility, the changes wrought by the 2010 elections at the state level have catalyzed efforts to provide parents with greater educational freedom. Combined with the increasing willingness of Democrats—particularly minority Democrats—to buck the teachers' unions, the ascendancy of new legislators committed to education reform through empowering parents has resulted in the most intense legislative season for school choice ever.

Already this year, three remarkable programs have broken new ground for the school choice movement. Arizona has created a program of educational savings

accounts for Arizona families with children with special needs that provides them with the ability to control the education their children receive. The local school board for Douglas County, Colo., has created a scholarship program that enables up to 500 families to select a non-district school for their children's educations, including private schools. And Indiana enacted what could grow into the largest school choice scholarship program in the nation. IJ expects all three programs to be challenged in court

Many of these new efforts involve tax credit scholarship programs, in which the state allows taxpayers to take tax credits for contributions they make to organizations awarding scholarships to students for use at private schools. IJ's April 4 victory in the U.S. Supreme Court, in which the Court held that taxpayers cannot challenge Arizona's personal income tax credit, renders more difficult the usual suspects' ability to challenge such programs. IJ expects that additional state programs

will join the existing ones in Arizona, Florida, Georgia, Indiana, Iowa,

**“With school choice providing a cost-effective means of educating children while states nationwide face widespread budget difficulties, choice is advancing more rapidly than ever before.”**

and is preparing to intervene in those lawsuits to defend parents' right to choose the best available education for their children.

More state legislatures are considering school choice programs than ever before, and IJ's legislative counseling efforts have extended to more states than ever before. In just the past few months, we have helped more than 20 states carefully examine their choice options. Among those, Ohio, Pennsylvania and Wisconsin are considering major new programs or expansions of existing programs, with a good chance of enactment thanks in part to the election of pro-school choice governors. States like Alaska and Tennessee, which have never introduced school choice legislation, have gotten on the bandwagon, and more serious efforts than ever have occurred in other states like New Mexico and Montana.

Pennsylvania and Rhode Island, all of which will continue to grow and serve ever greater numbers of families. In fact, since this article was first drafted, Oklahoma has passed a tax credit program.

In short, although the year is not even half over, 2011 is proving a banner year for school choice. And with school choice providing a cost-effective means of educating children while states nationwide face severe budget difficulties, choice is advancing more rapidly than ever before. It is no wonder the Institute for Justice's school choice team is busier than ever, celebrating victories, preparing for litigation and helping additional states harness parental choice to reform American education. ♦

**Dick Komer** is an IJ senior attorney.



## Taking the Message of Freedom To Legislatures



Photo by Alicia Wagner Calzada

In March, IJ client and journalist **Carla Main**, above, testified before the Texas House Judiciary and Civil Jurisprudence Committee in support of the Citizen Participation Act, a bill that would curb frivolous defamation lawsuits, also known as “strategic lawsuit against public participation,” or SLAPP suits. Main discussed how she was sued for defamation by Dallas developer H. Walker Royall over her book, “Bulldozed: *Kelo*, Eminent Domain, and the American Lust for Land,” which chronicles eminent domain abuse in Freeport, Texas. Royall was the lead developer on the project. Some form of anti-SLAPP legislation has been adopted by 27 states. The Institute is defending Main and her publisher in court.



Photo by Craig Millward

**Dana Berliner**, above, and IJ client **Lori Ann Vendetti** (not pictured) testified before the U.S. House of Representatives Subcommittee on the Constitution in favor of the Private Property Rights Protection Act, which would withdraw federal funding from state and local governments that use eminent domain for economic development. The bill, sponsored by Reps. Sensenbrenner (R) and Waters (D) passed the House by 386-43 in 2005 but stalled in the Senate. Congress is gearing up for another attempt to pass the bill in 2011.

Behind the Scenes continued from page 9

### Dana Handles the Experts Like an Expert: A

major part of our case was the testimony of two experts. Einstein would have been baffled by Dana’s ability to cram 48 hours worth of work into every 24-hour day, but that is what Dana had to do to prepare them. In the middle of our first expert’s testimony, the judge unexpectedly ruled that huge areas of his testimony were inadmissible, and her detailed outline of questions to ask had to be rewritten, in her head, on the spot, to stay within the judge’s ruling and still get what we needed. And all of this had to be done without betraying any sense of frustration or loss of confidence. The next day with our other expert, after Dana wrote a new line of testimony overnight to fit under the judge’s ruling, the expert stepped onto the witness stand and promptly spilled a pitcher of ice water all over the court reporter. Dana and I looked at each other and shrugged. This seemed like one of the least insane things that had happened so far.

**I Go Charlie Sheen:** I work out a lot and was theoretically “in training” for an ironman triathlon while the trial was going on. I called IJ President Chip Mellor at one point to update him and whined that not only hadn’t I worked out for three days, I couldn’t remember going three days without physical activity since 1994. I then had to go five more days without working out. This radical lifestyle shift took place just as the nation was gripped with Charlie Sheen fever. I found myself constantly peppering the trial team with inspirational Charlie Sheen quotes such as “you can work all night, you’ve got tiger blood and Adonis DNA.” As the CYAC trial seemed ready to sap my last drop of sanity, I wondered how I had gone from swashbuckling freedom fighter to Charlie Sheen groupie. Luckily, at about that time, my wife showed up with our nine-month-old son, Will, for a brief visit. We dubbed him “Little Will,” made him the Team CYAC mascot, and this snapped me back to reality.

When the trial finally ended, we packed up the war room in a fog, knowing that we had been through something extraordinary. The last thing to come down was a fortune cookie message taped to the TV that said, “Functioning superbly comes automatically to you.”

I guess that cookie was onto something. One month later, the judge handed down a sweeping victory for the CYAC and property owners across California. All I could do was harness my inner-Charlie Sheen and think, “Winning!” ♦

**Jeff Rowes** is an IJ senior attorney.



# Political Privacy Should Be a Civil Right



The Institute for Justice has led the way in changing the terms of the debate on campaign finance laws by publishing multiple studies that examine the burdens disclosure places on grassroots political activists, including: *Disclosure Costs: Unintended Consequences of Campaign Finance Reform*, *Campaign Finance Red Tape: Strangling Free Speech & Political Debate*, *Locking Up Political Speech: How Electioneering Communications Laws Stifle Free Speech and Civic Engagement*, *Mowing Down the Grassroots: How Grassroots Lobbying Disclosure Suppresses Political Participation*, and *Keep Out! How Campaign Finance Laws Erect Barriers to Entry to Political Entrepreneurs*.

By Paul Sherman

Attorney David Marston and former Bush-administration official John Yoo wrote a recent op-ed in *The Wall Street Journal* making the case against the White House's efforts to force federal contractors to disclose contributions, not just to candidates, but to any group that might run political advertisements. As readers of IJ's *Make No Law* blog ([www.makenolaw.org](http://www.makenolaw.org)) are aware, this is a

backdoor effort by the White House to achieve by fiat what it was unable to achieve in Congress, namely, passage of the so-called DISCLOSE Act.

Marston and Yoo's op-ed is notable not just because it makes a strong case for the unconstitutionality of the Obama administration's actions, but also as a mark of how much the debate over regulation of political speech has shifted in the past decade. When the now half-dead McCain-Feingold law was enacted in 2002, a major talking point among conservative elites was "no limits, full disclosure." But increasingly—and quite correctly—opinion makers are beginning to recognize the significant costs that disclosure can impose on political participation.

So what has changed?

Unquestionably, part of this change in elite opinion has been driven by high-profile incidents of political retaliation made possible by disclosure laws. But those incidents have received much more attention due to IJ's effort to

**"Opinion makers are beginning to recognize the significant costs that disclosure can impose on political participation."**

shed light on the burdens of disclosure laws. Indeed, when we first published *Disclosure Costs: Unintended Consequences of Campaign Finance Reform* in 2007, almost no one had bothered to study the impact of the laws on real people. We followed that study with many more, including: *Campaign Finance Red Tape: Strangling Free Speech & Political Debate*, *Locking Up Political Speech: How Electioneering Communications Laws Stifle Free Speech and Civic Engagement*, *Mowing Down the Grassroots: How Grassroots Lobbying Disclosure Suppresses Political Participation*, and *Keep Out! How Campaign Finance Laws Erect Barriers to Entry to Political Entrepreneurs*.

Other political scientists have now joined this debate. Professor

Raymond La Raja of the University of Massachusetts, Amherst, recently released a working paper titled *Does Transparency of Political Activity Have a Chilling Effect on Participation?* His study measured "how individuals respond differently to making campaign

contributions or signing petitions when provided with a subtle cue that the information will be made public." His findings? Not only does disclosure have

a chilling effect on participation, but the result is particularly pronounced for small donors and women.

La Raja concludes that his findings "should spur policymakers to reconsider the cost-benefit tradeoffs for disclosure policy, particularly for campaign finance." Based on the growing number of voices questioning the conventional wisdom that more disclosure is always better, it seems that they might be. Here's hoping that judges will follow suit. ♦

Paul Sherman is an IJ staff attorney.





### 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 Hannity Show (FOX News)

**IJ Senior Attorney Dana Berliner discusses the Institute for Justice's litigation on behalf of the Community Youth Athletic Center:** "In this case, the proposal was to take the gym's property and give it to a private developer for upscale condominiums."



## The Atlantic

"The Institute for Justice combines the right's focus on economic liberty with the left's willingness to effect change through the courts . . . . In the estimation of its 'merry band of libertarian litigators,' candidates on the right and left should put their differences aside and agree on this much: everyone ought to enjoy an array of economic liberties, and the judiciary is a vital tool for securing them."

## EconLog

"Can government force transportation businesses to charge a minimum price to protect politically connected companies from competition? That is the question the Institute for Justice (IJ) and its clients seek to answer in federal court with a challenge to Nashville's new limousine and sedan regulations. . . . Anyone want to make odds on the outcome of the trial?"

## The New York Times

**IJ Washington Chapter Executive Director Bill Maurer discusses the Institute for Justice's challenge to Arizona's "Clean Elections" scheme:** "[T]he government shouldn't be deciding who is speaking too much and who is speaking too little."

**“The Institute for  
Justice is at it  
again—trying to  
keep government  
from reducing the  
competitiveness of  
markets.”**

—Café Hayek



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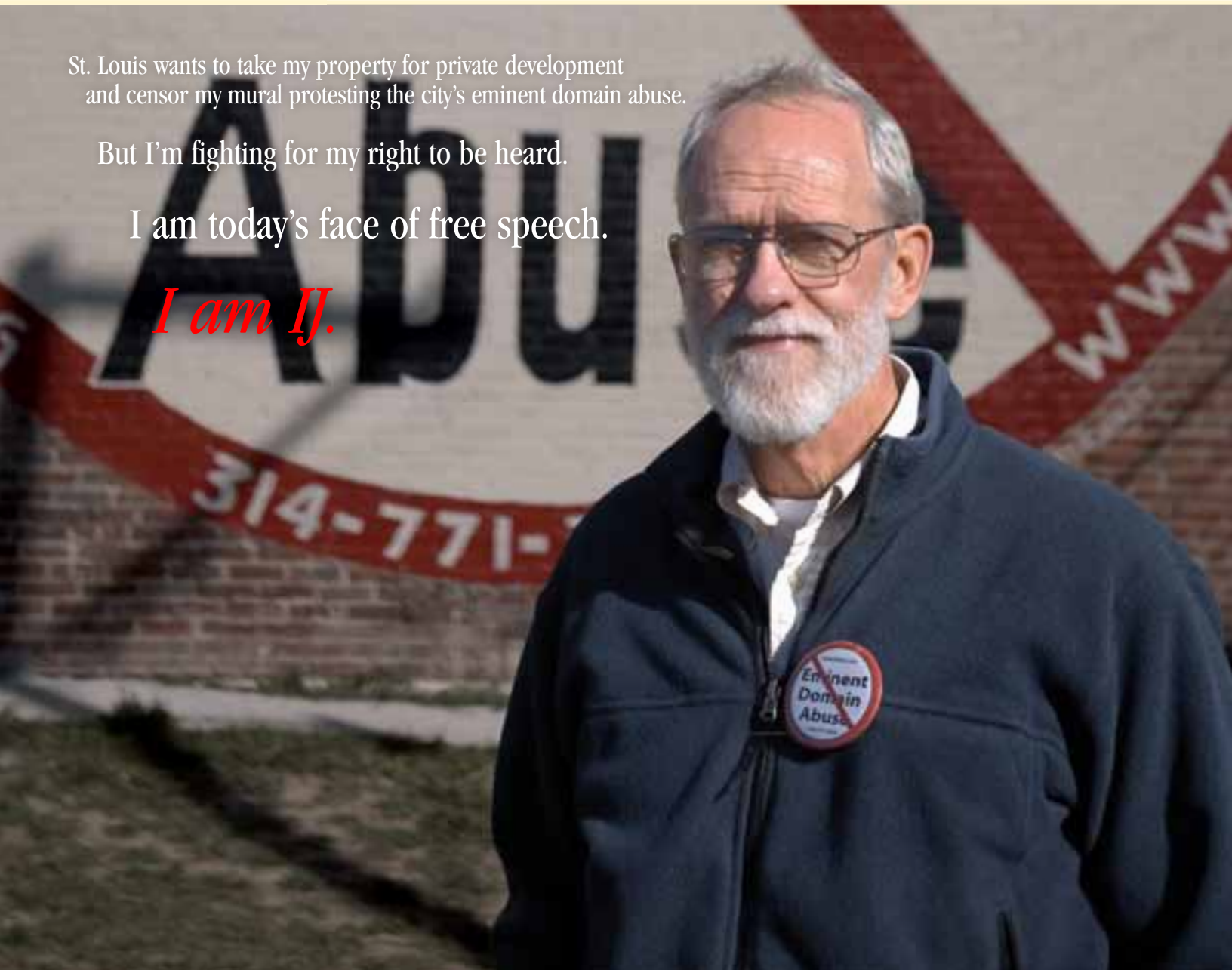
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J U S T I C E

St. Louis wants to take my property for private development  
and censor my mural protesting the city's eminent domain abuse.

But I'm fighting for my right to be heard.

I am today's face of free speech.

*I am IJ.*



*Jim Roos  
St. Louis, MO*

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