TRANSCRIPT
The Fight for Free Speech:
IJ's Role in Defending Our First Amendment Right
August 23, 2017

Megan Cook (MC): Hello everyone and welcome to IJ's Partners Club LIVE call discussing the fight for free speech. I'm Megan Cook, Partners Club coordinator here at the Institute for Justice. If this is your first time joining us, this event is part of a series we designed to provide members of IJ's Partners Club with greater insight into our comprehensive strategy to advance individual liberty.

Now I'm pleased to introduce Greg Reed, who will be hosting our conversation today. Greg is an attorney here at IJ who litigates in multiple case areas and manages our clerk and law student programs. In addition, he meets and talks with Partners across the country. Thanks so much for joining us, Greg.

Greg Reed (GR): Thank you, Megan, and welcome everyone. As many of you know, the Institute for Justice has been litigating free speech cases since 1997. Our first free speech case involved a challenge to federal regulations that required speakers to register before they could publish advice on commodities training; it was a case that led to our cutting-edge occupational-speech practice. Since then, we have expanded our efforts to also include political speech and commercial speech.

IJ's efforts over the last 20 years include 50 completed cases to protect First Amendment speech rights. However, there is still much more work to do and IJ is constantly looking for new opportunities to protect this vital constitutional right. IJ currently has six active cases, and we just launched a new case in North Carolina this morning with the goal of striking down the state's esthetician school licensing scheme that prevents our client, Jasna Bukvic-Bhayani, from teaching makeup artistry, which is IJ's latest case in its groundbreaking occupational speech litigation.

One of the key players in our efforts is our guest today: Paul Sherman, senior attorney here at IJ headquarters. Paul is at the forefront of IJ's free speech efforts and is a leader in our free speech team. He has been litigating these cases at IJ for the past 10 years. Welcome, Paul.

Paul Sherman (PS): Well, thanks so much Greg. It's a pleasure to be here speaking with some of our most dedicated supporters.

GR: So Paul, can you give us a bit of insight on how IJ's efforts fit into the larger free speech debate, and why we have chosen to litigate the free speech cases we have?

PS: Absolutely. One of the things that makes IJ such an exciting and dynamic place to work is that we look at the law differently than a lot of other organizations. For example, when a lot of people think about the First Amendment, the vision that they have in their head is that iconic Norman Rockwell painting, "Freedom of Speech." If you have seen it, you know it shows this man who is standing up in what looks to be a city hall meeting.

If you asked any federal judge, they would tell you that this guy's speech is entitled to the highest level of First Amendment protection. But the problem is, nobody has ever tried to censor that guy's speech. This guy is probably opining on whether there should be a stop sign at the corner of 3rd and Maple. So even though that's exercise of First Amendment free speech right, it tells us very little about the actual protection that the First Amendment offers.

Then, a lot of other people go in the exact opposite direction. They think about the First Amendment, and they immediately think about outrageous, controversial speech. A great example of this is the Westboro Baptist Church, which they just have these vile protests at military funerals. If you asked any federal judge, they would tell you that even that speech is entitled to the highest level of First Amendment protection. And a lot of them would take a great deal of pride in that because even though that speech is totally worthless, the courts are still willing to protect it.

But here's the thing: It's easy for courts and self-proclaimed First Amendment advocates to stand up for worthless speech because, fundamentally, they know that nobody is ever going to be persuaded by it. Courts have a lot harder time standing up for valuable and influential speech that the government wants to regulate.

In fact, the dirty little secret of First Amendment law is that, more often than not, the most valuable, useful forms of speech—whether it be political speech, occupational speech, or commercial advertising—are subject to some of the highest levels of government regulation. And what makes IJ different from other First Amendment advocates is that we focus on defending those valuable categories of speech.

GR: Paul, in just the past few months, IJ launched two occupational speech cases. Can you tell us what occupational speech is and why it is important today?

PS: Certainly, in its most simple terms, occupational speech is just speech that you earn your living from.

Throughout most of history, people have earned their living by selling goods or by performing services. But today, in our modern information-driven economy, many people—from vocational teachers to interior designers to tour guides—earn their living by speaking. These people are paid for their advice or for the information they can provide. And as our economy keeps moving in this information-driven direction, the number of people working in those sorts of jobs, can only be expected to increase.

A couple great, recent examples of this come from two of IJ's most recent cases, and they're Jasna Bukvic-Bhayani and Mats Järlström. Jasna is a licensed esthetician and makeup artist who lives in North Carolina. She wants to teach other people how to do makeup artistry, and teaching is a form of speech. The state of North Carolina won't let her teach make-up artistry unless she also teaches the entire cosmetology curriculum, which is something she doesn't want to do and is something her students have no interest in.

Then, in Oregon, we have this great case challenging overreach by the state's engineering board. In that case, we represent a gentleman named Mats Järlström, who was cited for emailing advice to his town about ways to improve the timing of traffic lights. According to the state's engineering board, only licensed engineers are allowed to express an opinion on topics like that, even though Mats is an engineer, he's just not the sort that's covered by the state's licensing law.

So in both of these cases, you have people who want to express technical knowledge drawn from their experience, and the state is preventing them from doing so.

GR: Well, I imagine that this might strike our Partners as particularly ridiculous, particularly in light of the First Amendment because the right articulated in the First Amendment is so straightforward and unconditional. It says, "Congress shall make no law… abridging the freedom of speech." The Supreme Court has long held that states are also prohibited from abridging speech. So why are people like Mats and Jasna having their right to free speech infringed upon?

PS: One of the most interesting things about the First Amendment is how late the case law started to develop. In fact, it wasn't until the 1960s that a federal regulation was struck down for violating the First Amendment. The courts started out with an extremely narrow view of what the First Amendment protected. It has taken decades of work to get to the point we're at now, where the First Amendment is viewed as being a pretty broad protection for a lot of different types of speech. But there are still plenty of areas that the Supreme Court simply hasn't weighed in on, and occupational speech is one of them.

Surprisingly, even though there are all of these people who earn their living by speaking, the Supreme Court has said basically nothing about whether occupational speech is protected by the First Amendment, and that silence has had serious

implications. Because, as occupational licensing has expanded, an increasing number of people work in these "speaking occupations," and they've had their speech swept up by regulation.

What we have experienced is courts are being faced with this challenge where they know they are supposed to take First Amendment rights seriously, but they typically haven't taken economic liberty rights seriously, and there's a conflict there. They don't know what to do with these occupational speech cases. So all too often, they simply throw up their hands, and they just decide that this speech shouldn't be protected.

The major goal of our occupational speech practice is to push back against that trend and to convince the court that occupational speech is absolutely deserving of full First Amendment protection.

GR: Paul, while we are talking about IJ's occupational speech work, one of IJ's most important victories occurred in our case challenging Washington, D.C.'s licensing requirement for tour guides. Could you tell us a little bit more about why this case is so important to the future of occupational speech cases?

PS: Absolutely, as I'm sure many of our listeners know, we successfully challenged Washington D.C.'s license for tour guides, which required people to take a test and get a license before they could talk about things like the Washington Monument and the Capitol building. This victory was important for a couple of reasons.

First, it was our first federal appellate victory in an occupational speech case, and that laid the groundwork for new challenges to tour guide licensing laws in Savannah and Charleston. This is something we always try to do with our cases is build on previous victories, so that we can export them to different jurisdictions.

Second, our victory established a circuit split with the 5th Circuit, which had previously upheld New Orleans's similar tour-guide licensing law. Those kinds of splits are vitally important to the work they do, because they attract the attention of the U.S. Supreme Court, and our ultimate goal is to get the Supreme Court to weigh in on this issue.

GR: Our occupational speech cases have garnered IJ a tremendous amount of media attention, including from *The New York Times*, *The Wall Street Journal*, and *The Washington Post*. But I would like to shift gears here a little bit because IJ has also received a lot of attention from our work defending political speech. Paul, can you tell us about how we got involved in defending political speech, and what political speech is?

PS: Our political speech cases, more or less, started right around 2003, which was when the Supreme Court considered the constitutionality of the Bipartisan Campaign Reform Act, which is popularly known as the McCain-Feingold law. When this was passed, it was the most significant expansion of government regulation of political speech in 30 years and, very regrettably, when it went to the Supreme Court, the court upheld almost all of it. And even worse, the court indicated that this was likely just the first step in what was going to be a pattern of ever-greater regulation of political speech.

When that happened, we knew that we had to fight back, and we started looking for ways to get involved in the debate over these campaign finance laws. I was actually very lucky because this was right around the time that I came to clerk at IJ as a law student. I had a strong interest in campaign finance for several years, and I got to work on some of those earliest cases.

A couple years later, when I came to IJ as an attorney, we had developed serious expertise in this area, which is not easy to do. Campaign finance rivals the tax code when it comes to complexity. We started looking for cases that could have a major, nationwide impact. And that's when we met with a gentleman named David Keating, who was then the executive director of a group called the Club for Growth. In that capacity, he was extremely familiar with campaign finance laws. He reached out to IJ to talk with us about one of the most unusual features of federal campaign finance law.

Under the law, as it existed in 2008, there were no limits on what individuals could spend on political speech, but if two or more people pooled their money to speak, they were limited to putting in $5,000 apiece. So Bill Gates or George Soros could spend a billion dollars on political speech, but if Greg and I wanted to do the same thing, we'd be limited to spending $10,000 total. In the course of our discussions, he simply asked, "If one person can do this, why not two or more?" The First Amendment doesn't just protect the right to speak, but it also protects the right to associate with others to make your speech more effective.

We thought that was a great question, and so we filed a lawsuit in federal court to force the government to justify that arbitrary distinction. And after a couple years of litigation, we won a unanimous victory in the D.C. Circuit Court of Appeals, and the federal government didn't take that ruling any further. That was in a case called *Speechnow.org v. FEC*. Now, the funny thing is, when the media talks about campaign finance, they talk almost exclusively about the Supreme Court's much misunderstood and wrongly maligned decision in *Citizens United v. FEC*. They rarely talk about *SpeechNow*. The funny thing is that *SpeechNow* had a much more significant effect on American elections. I would wager that everyone on this call has heard of the effect—because the group SpeechNow was, effectively, the very first "super PAC." And since our victory in that case, groups like SpeechNow have gone on to spend billions of dollars

on political speech in elections. They receive a lot of criticism, but really they're just another voice providing a different perspective to voters. So I'm extremely proud of the work that IJ did on that case and the impact it's had.

GR: IJ's victory in the Speechnow.org case is obviously significant, but it wouldn't be fair for us not to acknowledge the other parts of IJ's that are contributing to its political speech work. IJ's strategic research team has published empirical studies on campaign finance laws, finding that these regulations stifle debate and burden citizens who want to express themselves. Our strategic research regarding these burdens was even cited by the United States Supreme Court in the 2011 case titled *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*.

Paul, transitioning to another aspect of IJ's free speech work, let's talk about commercial speech. One of our latest cases took us to Florida, where the city was attacking, of all things—you can't make this up—an inflatable Super Mario sign.

PS: Yep, that's right. Super Mario, the famous Nintendo character. This case comes from Orange Park, Florida, and it's one of a number of cases that we have brought challenging the regulation of signs. For instance, as any of our Partners who are entrepreneurs know, getting the word out is crucial for any business, and consumers benefit from hearing about the products and services. One of the lowest-cost ways for businesses to get the word out is through the use of signage. Now, in this case, a gentleman named Scott Fisher was trying to bring attention to his small video-gaming shop in Orange Park, Florida.

Mario is an extremely recognizable gaming character, and he thought that having this 9-foot tall inflatable Mario outside of his business would attract customers, and, in fact, it was a huge success. As soon as he put it up, he started to get a lot more customers. But, the next thing he knew, he was contacted by the city, which informed him that it was illegal for him to put up that kind of inflatable because it was related to his business. The really ridiculous part about this law is that he could have had an equally large inflatable outside of his business as long as it was either a holiday decoration, or a seasonal decoration, or a "creative idea" that lacked a "commercial message."

One of the things IJ has argued for years is that municipalities can't pick and choose which speech they allow in this way. And, in fact, the U.S. Supreme Court has agreed with us. Around two years ago, the court struck down a sign code that similarly played favorites with certain types of messages in a case called *Reed v. Town of Gilbert*. One of the things we are trying to do is strengthen that decision and make sure that municipalities across the country continue to abide it. Scott hopes that with IJ's support, we can get his sign back up and he can start drawing in business again.

GR: While we have the Super Mario sign case and six other active cases in full swing, we are still looking to expand our efforts. Paul, can you give us a bit of insight on what IJ's free speech efforts are going to look like over the next five years?

PS: Sure, I'll start with our existing case areas, and then offer some thoughts on new areas that we're looking into.

I'll start off with occupational speech since IJ is the only organization in the country that is litigating these cases in a principled, strategic way. Our goal here is to continue filing cases that will refine and deepen the circuit split that was created by our victory in the D.C. Tour Guide case. That includes the case in North Carolina that we filed today and a couple more cases that we're filing in the next couple of months. We want to keep a lot of irons in the fire on this issue so that we can present the U.S. Supreme Court with multiple opportunities to weigh in on it. Where IJ is going to be representing the plaintiffs, we can make sure that our well-developed theories are presented as clearly as they can be to the court.

In the area of political speech, we're continuing to focus on the effect that political regulation has on grassroots political speakers. But we're also interested in moving beyond just campaign finance regulation. One of the areas that we're looking at more closely is lobbying regulation. When people think about lobbyists they usually think about guys in expensive suits buying steak dinners for congressmen, but lobbying laws have gotten so broad that they often sweep in ordinary citizens, and the requirements can be extremely onerous.

We recently successfully challenged a law in Alabama, for example, that required every registered lobbyist to travel to Montgomery, Alabama, to take a mandatory ethics class, even if they do all their lobbying from out of state by email or phone. In that case, we represented a lobbyist for the Marijuana Policy Project who simply wanted to make phone calls to Alabama legislators, but she wasn't allowed to do so unless she first traveled to the state. We were able to get the state to back down, and we're on the lookout for more cases along those lines so that we can get the courts to take a harder look at the regulation of lobbying.

In the realm of commercial speech, we're continuing to develop cases like our recent victory against a Florida law that prohibited a woman who sold all-natural skim milk from labeling her product as skim milk unless she artificially injected it with vitamins. What these challenges really get to is government efforts to police the language that people use to describe their products. I can tell you that this is a target-rich environment, particularly at the federal level. Our ultimate goal in this area is to

convince the courts to end the second-class status of commercial speech and afford it the full protection that it affords to most political speech.

Beyond that, we're always on the lookout for case areas. One of the areas that I'm most excited about exploring is the regulation of speech related to health and technology. We're seeing really exciting breakthroughs in the ability of science to tell us things about our genes and our health, but we are stuck with a regulatory model that treats this information—which is pure speech—as if it were a drug, or a cardiac stent, or an artificial heart. That's a huge and growing problem.

We're also seeing new technologies that allow people to do things like 3-D print prosthetics, and these technologies are sure to bump into both bureaucracies and the interest groups that want to clamp down on innovation. Those are some things that we're actively exploring and monitoring, and I'm really hoping that within the next year or so we'll have some exciting new cases to show our donors.

MC: Thank you so much for that great overview, Paul and Greg. We do have a lot of questions coming in from Partners, so we want to start turning to those. If you have a question you would like to ask, please press * on your telephone now and we'll add you to our queue.

But first, I wanted to start with a question from Roger in Massachusetts. He asked: "Looking forward, do you see IJ looking for opportunities to get involved in free association cases, such as those involving being forced to serve customers with whom one has ideological disagreements?"

PS: For those kinds of associational claims, that is not on the immediate horizon for us, mainly because—under current legal doctrine—those are not actually considered First Amendment cases. What the courts have held is that the right of association considered in the First Amendment covers two things: it covers the right of what is called "expressive association," which is the right to associate for purposes of conveying a message, and it covers what is called "intimate association," which is the right to maintain certain private, intimate relationships.

If we were to challenge something in the business context like the question contemplates, that would be treated as an ordinary rational-basis case, and we've got a very long way to go before a claim like what you've described could likely succeed.

All that said, there are still situations where the First Amendment might apply to business relationships, and one of them is presented in the Masterpiece Cakes case that is going before the U.S. Supreme Court next term. As some of our listeners may know, we're doing so much work in occupational speech, and the Masterpiece Cakes decision could have profound implications for that field. At the furthest extreme, the Court could

issue a ruling that says that people who speak for a living have no First Amendment rights in what they say, which would mean, for example, that lawyers could be compelled to speak on behalf of clients that they do not want to represent. That would be, I think, a bad and incorrect ruling. We plan on filing an amicus brief in the case to make sure the Court avoids doing anything in that case that could damage our ongoing occupational speech project.

MC: Remember, if you would like to ask a question, please press * on your phone now and we will add your question to the queue. I am going to have another question from Patrick from California. He wanted to know if we coordinate with other groups that have a focus in free speech, including CATO, the Foundation for Individual Rights in Education, and the Competitive Enterprise Institute.

PS: So there are a lot of groups that we work with in the area of free speech, and we coordinate actively with some. There are others that we don't coordinate as actively with. A lot of this depends on the nature of the work they do. So, for example, the Foundation for Individual Rights in Education does great work on campus free speech, but we don't do any work in that area. We would rarely have an opportunity to coordinate with them.

But there are other groups, like the Center for Competitive Politics, that do campaign finance cases, and we regularly talk with one another about the cases we're working on so that we can help each other out where appropriate, and so that we can avoid unnecessarily duplicating each other's efforts. And then there are groups like the Cato Institute, which don't litigate, but with whom we've often worked on friend-of-the-court briefs in high-profile cases.

GR: I would like to add a few thoughts there in regarding that question. One of the exciting aspects of IJ is that we are a part of a movement to defend individual liberty. We do have the opportunity to work with allies like the ones that Paul mentioned. One of the ways in which we do this is through our law student clerkship program.

Through this program, law students dedicated to advancing liberty have the opportunity to work closely with IJ attorneys to develop prospective cases and advance active litigation. The program runs year-long and students have the opportunity to work in any of IJ's offices around the country. Approximately 40-or-so exceptional students do so each year. They get a chance to join our network of allies across the country and they do so in multiple different ways.

Some go on to work in private practice, take pro bono cases that IJ doesn't have the ability to take, and advance our mission through their own work. Others will serve as local counsel in cases that IJ is directly involved in. Others go on to work for the

organizations that Paul identified that we work closely with in advancing our free speech work.

Perhaps most excitingly, is that many come back here to work at IJ as attorneys. Both Paul and I were former summer clerks. We really think that this program is a great way that IJ finds a way to connect with like-minded people in the advancement of individual liberty across the county.

PS: It really is such a great program. I actually did not clerk during the summer. I clerked during the school semester, which if you know liberty-minded law students in the D.C. area, that is another option for them. Really, if you know any liberty-minded law students, you should encourage them to check it out IJ's clerkship program. The students invariably learn a lot, and they do really important substantive work while they're here. As Greg mentioned, it is one of the most important ways that we identify talented and handsome attorneys such as Greg and me (laughing).

MC: Thank you so much for answering that question. We actually have our first live question. It is going to be from Steve in Texas. Steve, you are live!

Steve: I am a physician in Texas, and when you, Paul, that was you talking about telemedicine and I was actually going to ask that before you brought it up. The engineer case, I thought was a great example where he was an engineer by trade, so he is an engineer. There was no one questioning whether or not he's an engineer, but he did not have the government's permission to be an engineer, and that is what started the case.

From a medical standpoint, obviously as a physician, I directly benefit from medical licensing. The AMA and the government are in bed with one another, and it benefits me because it artificially restricts the supply. As a libertarian, I am adamantly opposed to it, but before we can get rid of all medical licensing by the state and just have a referral and review system, or give five stars on Yelp or what have you. I think telemedicine is probably the way for us to get our foot in the door, and when you brought that up, it sounds like you guys are already looking at that.

The question is: What is your approach? What are your thoughts on how to attack that best? Even if we just start on a speech standpoint, like you said, by looking at someone over the computer you could argue that a cursory physical exam by sight, and that's about it. It certainly could not be done over the phone. If you are just talking about medicine, why do you need a license and how do you go about doing that?

PS: Well, that's an excellent question and I am happy to confirm your intuition that this is something that we are actively working on. In fact, we litigated a case in Texas involving veterinary telemedicine. We represented a gentleman named Ron Hines who answered the pet owners' questions about their pets, typically via email. Texas had a law

that said you are not allowed to do that unless you have physically examined the animal. Now, one of the crazy things about his case was that he lived in Texas and he was licensed by the Texas veterinary board, but many of the people he spoke with didn't live in Texas. They didn't even live in the United States! Yet, a Texas veterinary board still went after him.

Now, unfortunately, we got a bad ruling out of the 5th Circuit Court of Appeals in that case, which said that in the occupational licensing context, you just don't have the level of First Amendment protection that you would have outside of that context. We think that is wrong, so we are actively looking for cases in other jurisdictions so that we can challenge that, try to deepen the circuit split, and get this issue up to the Supreme Court that can ultimately resolve it.

I think you are right though that attacking these things through the First Amendment is a good first step for trying to pare back some of these occupational licensing laws. You could never take a First Amendment challenge to all of medical licensing, because there are lots of things doctors do that is not speech. Doctors perform surgery, and surgery is not protected by the First Amendment. But the mere rendering of advice to someone, that is speech. If the government wants to regulate it, at a minimum, it should have to come forward with some sort of substantial evidence that its regulations are actually necessary and that they don't burden more speech than is required to accomplish the government's goals.

MC: Okay, we actually have a question from Andy in California. Andy, you are live!

Andy: I think you just answered my question. My question was concerning the level of scrutiny that courts are applying in commercial speech cases, particularly as compared to the strict scrutiny, which generally, I understand, applies to political speech.

PS: So that is correct. In the commercial speech context, since the 1970s, the courts have developed the standard that's called the Central Hudson standard, or sometimes it is just called intermediate scrutiny. It is not the most robust level of judicial review for speech, but it is a pretty meaningful level of review. People routinely win commercial speech challenges because, unlike in rational basis cases, the government has to come forward with actual evidence to justify what they're doing.

Now, in the realm of occupational speech, it's very unsettled what the standard of review should be. If you read the case law from the Supreme Court, I think the best argument is that it should be strict scrutiny.

In fact, I wrote an article. If you Google "Occupational Speech and the First Amendment," you'll find an article that I wrote for the *Harvard Law Review* where I lay out the case for this. No court has yet gone that far, but there are courts that have said at

a minimum, occupational speech restrictions have to be reviewed with the same level of intermediate scrutiny that commercial speech gets. This is something that the 3rd Circuit recently did, and it's something that is maybe not the best reading of the doctrine, but it is much better than what many circuits have done, which is to hold that there is no meaningful level of scrutiny.

MC: Well with that, we are actually out of time today. Thank you so much, Paul and Greg, for being with us and for providing such a great, comprehensive look at our work to preserve Americans' First Amendment rights.

Thanks to all of you Partners for joining us as well. If you missed any part of this conversation, we will have links to the audio recording and transcript of the call available on our Partners Club LIVE web page later this week. If you have any questions that we weren't able to get to, please just stay on the line to leave us a message, or you are welcome to email me directly at mcook@ij.org, and we will be sure to get back to you.

We look forward to keeping you updated on the many exciting developments in all areas of IJ's work. Thank you again for the important role you play in making our progress possible. We hope you have a great evening, and thank you for your support of IJ.