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Victory for Florida Creamery: Government Can't Force Businesses to Lie

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LIBERTY & LAW

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 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.

Editor: Shira Rawlinson

Layout & Design: Laura Maurice

General Information: (703) 682-9320

Donations: Ext. 233

Media: Ext. 205

Website: www.ij.org

E-mail: general@ij.org

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Victory for Florida Creamery:

Government Can't Force Businesses to LIE

BY JUSTIN PEARSON

In March, IJ won a free speech victory at the 11th U.S. Circuit Court of Appeals with implications that will reverberate around the nation. Government agencies thought they had the power to change the dictionary. The Florida Department of Agriculture certainly believed that to be true. But our client Mary Lou Wesselhoeft disagreed. And with IJ's help, she won her standoff with a regulator run amok.

All Mary Lou wanted to do was tell the truth. Mary Lou is a dairy farmer who subscribes to an all-natural philosophy, which is why her customers love the products she sells. Her business, Ocheesee Creamery, sells pasteurized dairy products without additives. And her products include skim milk. Mary Lou just wanted to call her skim milk what it was.

But Florida tried to change the dictionary. Florida had decided that the product known as "skim milk" actually had

three ingredients, and only the first ingredient was skim milk. The other two ingredients were vitamin additives. Skim milk without the additives was legal to sell, but it could not be called skim milk.

This problem is not unique to Florida. Government agencies all over the nation are constantly redefining terms. Whether it is "organic," "artisanal" or, in this case, "skim milk," the government assumes that is the final authority on our language and can change words when it wants.

As Mary Lou recognized, this makes no sense. When the government told her that she could not call her skim milk "skim milk," she "thought they had fallen and bumped their heads." But the government did not care what Mary Lou thought, even though it admitted that no one had ever been confused, misled or harmed by anything she had ever sold.

The government's arrogance was on full display during the oral argument. One of the federal appellate judges asked the government's lawyer, "Can the state, consistent with the First Amendment, take two words out of the English language and compel its citizens to use those words only as the government says?" The government lawyer's chilling response: "Yes."

Thankfully, we were able to convince the court that the First Amendment does not permit this Orwellian approach. The court adopted our reasoning in its ruling and warned that under the government's analysis,

> All a state would need to do in order to regulate speech would be to redefine the pertinent language in accordance with its regulatory goals. Then, all usage in conflict with the regulatory agenda would be inherently misleading. … Such reasoning is self-evidently circular.

As a result, agencies all over the United States must now take notice before they try to tell us what our own words mean. Unlike the government's labeling laws, the precedent we created is clear: Business owners have a right to tell the truth, and the government does not have the power to change the dictionary. As long as consumers understand what a business is saying, then that business is free to call its product what it is. We are all a little freer now, simply because Mary Lou insisted on telling the truth and IJ was there to help her fight back.◆

Justin Pearson is the managing attorney of IJ's Florida office.

Florida wanted **Mary Lou Wesselhoeft** and her husband, **Paul**, to use a misleading label on her skim milk, but she refused. She stood up for free speech rights and won.

Time for Oregon To Pump the Brakes on An Overzealous Board

BY SAM GEDGE

No matter where you live, running a red light can earn you a ticket. But in Oregon, even talking about traffic lights can get you fined.

Regular *Liberty & Law* readers know IJ has fought—and won—against state licensing agencies that often moonlight as censorship boards. The Kentucky psychology board targeted nationally syndicated columnist John Rosemond for writing about parents and children. North Carolina went after Steve Cooksey for writing about diet and lifestyle tips.

Now Oregon's engineer licensing board has put speech suppression into overdrive. In 2013, Mats Järlström, a Swedish immigrant and longtime Oregon resident, got interested in a question most people do not think much about: How exactly are yellow traffic lights timed? Mats has a math and science background—he has a degree in electrical engineering and decades of experience working in technical fields—and he came up with an idea for how the mathematical formula for timing yellow lights could be improved.

As a private citizen, Mats has no power to alter traffic lights anywhere, just as he has no power to relocate stop signs or repaint pavement markings. Instead, he did what anyone with a new idea does: He talked about it.

Mats shared his ideas with the academic community, with government officials and with the media, and lots of people have been interested in hearing what he has to say. He even presented his theories at a conference on transportation issues.

But things came to a screeching halt when Oregon's engineering board got wind that Mats was talking publicly about math. It launched a two-year government investigation against Mats, and last November it fined him $500. According to the board, Mats had broken the law by "critiquing" traffic light timing and by publicly sharing his "special knowledge of the mathematical, physical and engineering sciences" relating to traffic lights.

In other words, unless Mats becomes an Oregon licensed professional engineer, it is quite literally a crime for him to talk publicly about the math behind yellow lights. It is also a crime for him to call himself a "Swedish engineer" in any setting. In Oregon, even the word "engineer" is off limits to everyone who is not an Oregon licensed professional engineer.

This type of government censorship strikes at the heart of the First Amendment. And Mats' experience is far from unique. In recent years, Oregon's

Mats Järlström was fined $500 for calling himself an engineer in an email to the government.

engineering board has launched investigations against people based on speech in voter guides, in a political ad, even at a town hall meeting. In one case, the board fined a retiree for using the wrong words when he complained that city employees had flooded his basement.

Talking about math is not a crime; it is a First Amendment right. That is why IJ has teamed up with Mats in filing a federal lawsuit against Oregon's engineering board. Mats is asking the courts to reaffirm what should be obvious: that the First Amendment guarantees Americans their right to debate anything and everything, from theology to taxes to traffic lights—and no one needs a government permission slip to talk.◆

Sam Gedge is an IJ attorney.

Scott Fisher put up an inflatable Mario to attract customers, but the government made him deflate the Mario.

"IT'S-A ME, FREE SPEECH!"

BY ERICA SMITH

According to one Florida town, anyone can display an inflatable Santa Claus, Easter Bunny or unicorn in front of their home or business. But if a business tries to use an inflatable to advertise its products or services, it is breaking the law. This is the problem for Scott Fisher, who had been displaying a 9-foot inflatable Mario—the classic video game character—outside his video game store. Scott had no choice but to take Mario down after the town threatened him with fines of $100 a day, and Scott is now losing customers as a result. In April, IJ filed a lawsuit on behalf of Scott and his store, Gone Broke Gaming.

Scott rents a small, easy-to-miss storefront in Orange Park, Florida—a small suburb of Jacksonville—and wanted to do something to make his store more visible. So last summer, he had the idea to start displaying an inflatable Mario on his private property during his business hours. It worked: Over the next two months, the inflatable Mario led to three times more foot traffic for the store and quickly became a local attraction for both kids and adults.

But not everyone was a fan of the lovable Italian plumber. According to town officials, inflatable signs like Mario are banned under the town's sign code. It is, however, perfectly legal to display an inflatable if

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IJ TURNING THE TIDE ON THE OUTRAGE THAT IS CIVIL FORFEITURE

BY SCOTT BULLOCK

Most people unfamiliar with civil forfeiture find it hard to believe that such a power exists in a country that is supposed to recognize and hold dear rights to private property and due process of law. How could it be that the government could take your home, business, cash, car or other property without convicting you of or even charging you with a crime?

Modern civil forfeiture laws were enacted in the 1980s. As stories of abuse spread, the issue received some attention in the 1990s, even prompting Congress to modify federal forfeiture laws in 2000 to provide additional protections for property owners. What happened in the wake of those changes, however, is a familiar Washington, D.C., tale. Believing the forfeiture problem was fixed, many in Congress and the media turned their attention elsewhere.

How could it be that the government could take your home, business, cash, car or other property without convicting you of or even charging you with a crime?

But civil forfeiture continued apace. The federal reforms did not change the perverse financial incentive—which allows law enforcement to keep the property and cash it seizes—at the heart of modern laws. Nor did the reforms in 2000 do anything to change the massive growth of civil forfeiture at the state level. After 9/11, with the new powers afforded law enforcement, forfeiture activity and the revenue it generated skyrocketed. And when the recession hit in the late 2000s, and governments faced budgetary shortfalls, law enforcement agencies had even more of an incentive to raise revenue through forfeiture.

When we launched our initiative against civil forfeiture in 2010, we thought that most Americans, regardless of their background or ideology, would be appalled by civil forfeiture—if they knew about it.

The challenge we faced was that even with agencies at the federal, state and local levels raising billions of dollars, not many people knew that civil forfeiture existed, let alone how it might impact them.

So we got to work using all the components of our public interest program: lawsuits, legislation, strategic research, activism and communications. We made civil forfeiture a top priority in our work to restore constitutional protections for private property rights.

We took on a series of high-profile, high-impact cases challenging civil forfeiture at the federal and

From left to right: **Russ Caswell**, **Eh Wah**, **Terry Dehko** and **Sandy Thomas**, **Carole Hinders** and **Jeff Hirsch** were all caught in the web of civil forfeiture until IJ stepped in.

state levels. Our litigation saved a Massachusetts motel from forfeiture at the hands of a U.S. Attorney's Office and won back cash that was wrongfully seized from a Burmese Christian rock band in Oklahoma. We forced the IRS to return cash it had unjustly seized from a grocery store owner in Michigan, a restaurant owner in Iowa and a distribution company on Long Island, among others. All in all, IJ has filed 17 civil forfeiture lawsuits, winning 11 of them. Another five are currently pending, and we have more in the pipeline to be filed this year.

But our fight against civil forfeiture goes well beyond the courtroom. Working closely with a diverse coalition, our legislative team has analyzed, testified for and lobbied for important bipartisan reforms that have curtailed civil forfeiture in over a dozen states, while our model bill was the key inspiration for landmark legislation that abolished civil forfeiture outright in New Mexico and Nebraska. Notably, the national party platforms for both the Democrats and Republicans endorsed reforming civil forfeiture last year. (Not surprisingly, the Libertarian Party also backed reform.)

Crucial to both our litigation and legislative work is IJ's strategic research team, which has produced cutting-edge reports scrutinizing civil forfeiture. Congressional testimony, major media outlets like *The Washington Post* and *The Wall Street Journal* and none other than U.S. Supreme Court Justice Clarence Thomas have all cited IJ's seminal report *Policing for Profit*. In a March 2017 concurrence, Justice Thomas criticized civil forfeiture as "egregious" and referenced IJ's research to show how civil forfeiture has "become widespread and highly profitable" for law enforcement, due to "strong incentives to pursue forfeiture."

Later in March, *Policing for Profit* was cited in a bombshell report by the U.S. Department of Justice Office of the Inspector General (OIG). Among its many findings, the OIG reported that, over a 10 year-period, the DEA had taken over $3.2 billion in cash without judicial oversight. The OIG also found that the Justice Department does not ensure that its forfeiture activities advance criminal investigations—or even measure the extent to which they do. The report noted that IJ, along with members of Congress and high-profile newspapers, have all "expressed concerns" about the financial incentive behind civil forfeiture as well as the lack of due process protections for property owners.

Less than a week later, another federal auditor, the Treasury Inspector General for Tax Administration (TIGTA), released a scathing review of forfeitures by the IRS, which "compromised the rights of some individuals and businesses." In its report, TIGTA cited IJ's research report *Seize First, Question Later*, which shined a light on the IRS's seizures and forfeiture activity. TIGTA also referred to IJ client Ken Quran, who had over $150,000 taken from his convenience store's bank account but ultimately recovered it all thanks to IJ. As TIGTA noted, Ken's case was an example of government agents displaying "coercive tactics with property owners during interviews." The fact that even some at the highest echelons in the federal government have recognized forfeiture abuses and favorably cited IJ's work speaks to the integrity of our research and the sweep of our impact.

The momentum around civil forfeiture is undeniable and the progress is very encouraging. Much work remains, however. We will not rest until civil forfeiture is either radically reformed or—even better—abolished entirely.◆

IJ has released 12 reports shining a spotlight on civil forfeiture, many of which have been cited in the media, by government officials and even by Justice Clarence Thomas.

IJ President **Scott Bullock** represented **Russ Caswell** in IJ's fight to stop the feds from seizing Russ' family-owned motel.

Scott Bullock is IJ's president and general counsel.

Uncorking Economic Opportunity In Minnesota and Beyond

BY MEAGAN FORBES

The U.S. Constitution guarantees free trade among the states, and free trade has been a hallmark of American economic freedom ever since our nation's founding. Now—more than 200 years later—Minnesota is violating this founding ideal at the expense of local farm wineries by limiting the grapes from other states that Minnesota winemakers can use to make their wines.

I know what you are thinking: wine from Minnesota? How? Most drinkable wines are made from grapes that struggle in the state's extremely cold and harsh climate. Winemaking grapes grown in the region are a recent and promising phenomenon but they are often too acidic for most wine drinkers. So to make delicious wines, winemakers blend Minnesota-grown grapes with grapes grown elsewhere to create an essentially Minnesotan wine that is also drinkable.

Unfortunately, after opening their wineries, winemakers face a major obstacle to growth: The state bans farm wineries from making their wine with a majority of grapes grown outside Minnesota. This restriction forces farm wineries to buy a majority of their grapes from Minnesota growers, even when these grapes do not suit their winemaking needs. This trade restriction therefore prevents farm wineries from expanding their offerings to the broad variety of wines that their customers want. The law does not apply to the state's thriving craft breweries that use hops grown in the Pacific Northwest, where the climate is much more suitable than the Upper Midwest. In other words, breweries can decide what is best for their customers, but farm wineries cannot.

The government should not be bottling up opportunity with this kind of protectionist law. That is why IJ has filed a lawsuit in federal court challenging Minnesota's restriction on farm wineries' right to free trade.

IJ represents Alexis Bailly Vineyard, the oldest farm winery in Minnesota. Alexis Bailly Vineyard has suffered under this restriction for decades. Its owner, Nan Bailly, has been making award-

Timothy Tulloch owns Next Chapter Winery with his wife. Timothy wants to expand the winery, but Minnesota's law threatens to stop him.

winning Minnesota wines for years. Her customers enjoy these wines, but they also value diversity in the flavors and varieties of her wines—which she cannot offer under the state's restriction.

IJ also represents Next Chapter Winery, a small Minnesota winery owned by Timothy and Therese Tulloch. After Timothy built a successful coffee-roasting business, the Tullochs decided to pursue their lifelong dream of opening a vineyard. Yet they have been unable to fully realize their dream because the state is blocking their ability to access the grapes they need to make the wines that their customers want.

We are challenging this trade restriction under the Commerce Clause of the U.S. Constitution, which guarantees the right to trade freely across state lines.

This case continues IJ's long tradition of protecting the right to earn a living when it is threatened by economic protectionism. It further builds on the important precedent we set in *Swedenburg v. Kelly*, where the U.S. Supreme Court protected the rights of wineries to sell wine across state lines. Minnesota farm wineries and Americans (drinkers and otherwise) nationwide, have a right to benefit from our Constitution's promise of free trade between the states. A victory here will help protect this right—and economic opportunity—for everyone.◆

Meagan Forbes is an IJ attorney.

Nan Bailly's father opened Minnesota's oldest operating farm winery in 1973. Nan is now fighting for her right to economic liberty.

Maggie Ellinger-Locke is now free to talk to Alabama legislators on the phone without taking an in-person class.

VICTORY
For the Freedom to Petition in Alabama

Great news out of the Deep South! Readers of *Liberty & Law* may recall the case of Maggie Ellinger-Locke and the Marijuana Policy Project, who joined with IJ to challenge Alabama's requirement that all lobbyists physically travel to Montgomery to take an in-person ethics class before they speak to elected representatives. We are pleased to announce that, in response to IJ's lawsuit, the Alabama Ethics Commission has dropped its in-person training requirement, meaning that Maggie and others like her can resume exercising their First Amendment right to talk with elected officials.

Under the previous policy, if Maggie made even a single phone call to an Alabama legislator to discuss marijuana policy, she would have been required to register as a lobbyist and attend an in-person ethics class held only four times a year—and only in Montgomery, Alabama. For Maggie, who lives 800 miles away in Arlington, Virginia, this was an insurmountable burden. And Maggie was not alone—more than 15 percent of lobbyists registered in Alabama in 2016 were from outside the state, and about half are from outside Montgomery. On average, lobbyists had to travel over 130 miles to attend the mandatory ethics training.

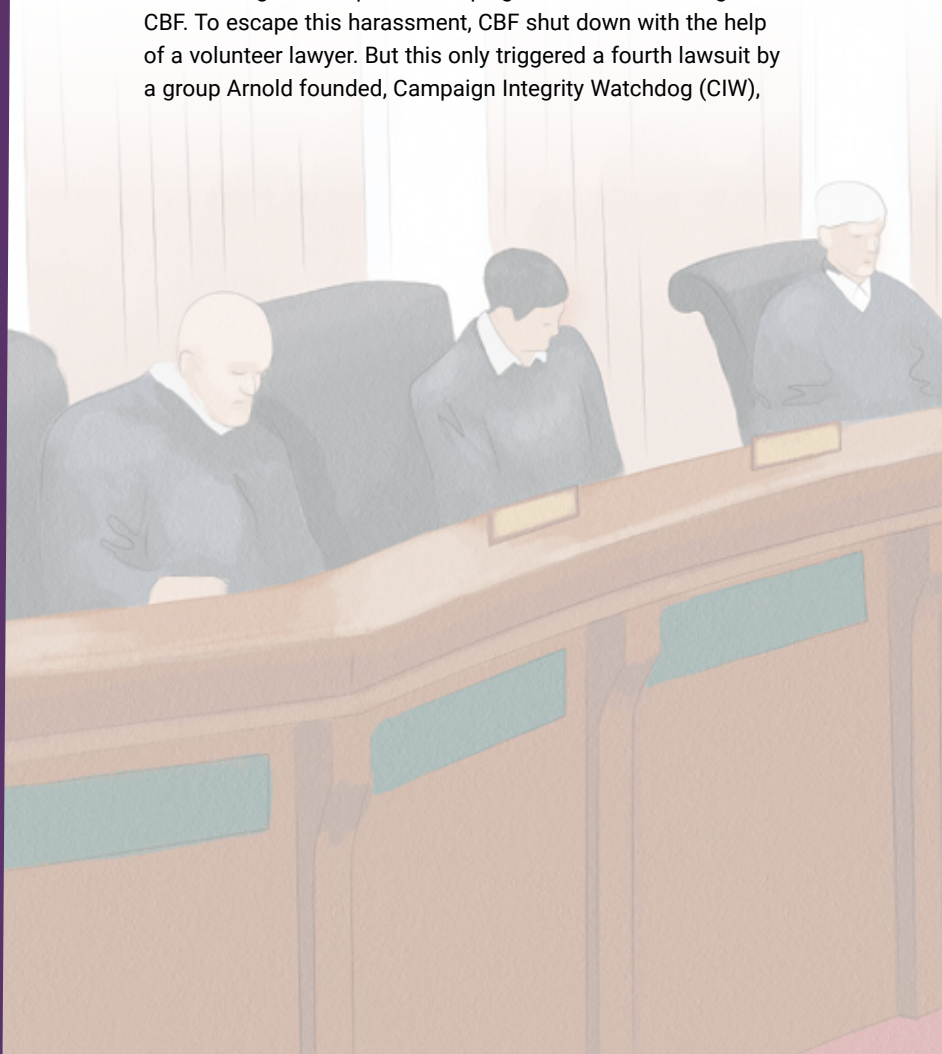
No longer. In response to IJ's lawsuit, the Alabama Ethics Commission has agreed to make its training available online—a victory for free speech and for common sense.◆

IJ Fights for GRASSROOTS ACTIVISTS at the COLORADO SUPREME COURT

BY PAUL SHERMAN

The Colorado Supreme Court has an opportunity to make life a lot easier for political speakers in the Centennial State. On May 2, the court heard argument from the Institute for Justice in *Coloradans for a Better Future v. Campaign Integrity Watchdog*, a case that will have profound implications for hundreds of political groups throughout the state.

The story begins in 2012, when a group called Coloradans for a Better Future (CBF) ran political ads criticizing Matthew Arnold, a Republican candidate for the University of Colorado Board of Regents. After Arnold lost the election, he turned to the courts, filing three separate campaign finance lawsuits against CBF. To escape this harassment, CBF shut down with the help of a volunteer lawyer. But this only triggered a fourth lawsuit by a group Arnold founded, Campaign Integrity Watchdog (CIW),



alleging that the volunteer lawyer's services should have been reported as a campaign contribution.

Unfortunately, in April 2016, the Colorado Court of Appeals agreed and its ruling threatens hundreds or even thousands of political speakers throughout Colorado. Grassroots political speakers often rely on pro bono legal services to avoid the many pitfalls in Colorado's complicated campaign finance system. But under the Court of Appeals ruling, seeking out low-cost legal help could expose these speakers to abusive lawsuits filed by their political opponents.

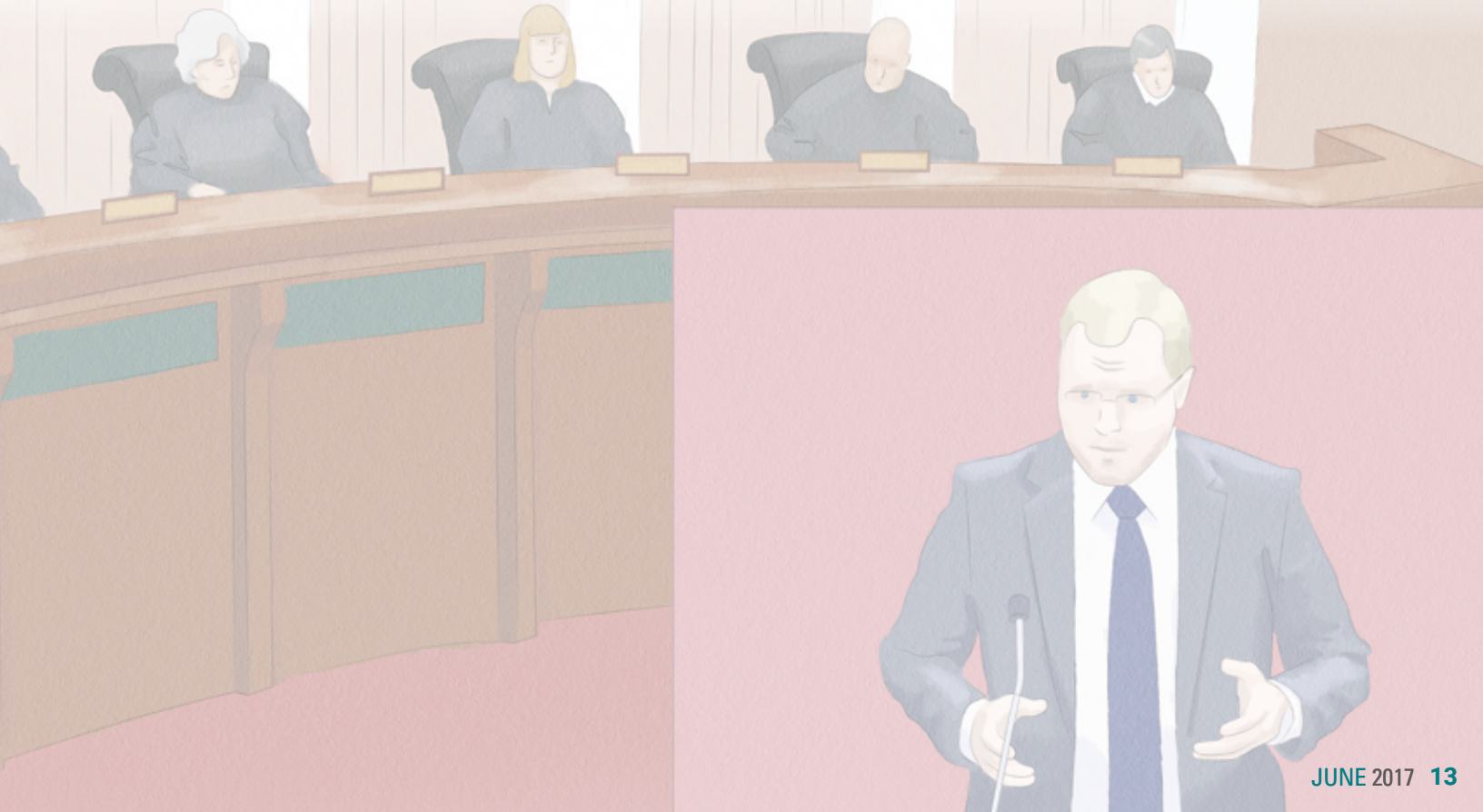
If pro bono legal services are "contributions," they must be assigned a value and disclosed in campaign finance reports. But this is a lot harder than it sounds, because lawyers routinely charge different rates to different clients based on factors such as their ability to pay. That means that even if a political speaker tries to comply with this requirement, a group like CIW can still haul that speaker into court based on the mere allegation that the legal services were worth more than reported. Such lawsuits are common—in recent years, CIW alone has filed dozens of lawsuits, often seeking tens of thousands of dollars in fines for trivial reporting errors.

For groups that are subject to contribution limits, the problems are even worse. Political committees in Colorado, for example, cannot accept contributions of more than $575. At regular billing rates for attorneys, that means that political committees could never accept more than a couple of hours of legal help, far less than is needed to navigate Colorado's complex laws. These limits would also make it illegal for IJ and other nonprofits to represent these groups in public interest lawsuits, which require hundreds of hours of attorney time.

Luckily, the Court of Appeals will not have the final word. After the court issued its decision, IJ came to the rescue. Taking over the case, we not only convinced the Colorado Supreme Court to review the Court of Appeals decision, we also convinced the court to grant a rare order preventing that decision from going into effect while the case moves forward.

Now we await a ruling. In the meantime, IJ is also moving forward with another lawsuit in federal court that seeks to entirely dismantle Colorado's abuse-prone system of private campaign finance enforcement. We will press forward until all Coloradans—and, eventually, all Americans—can speak freely, without fear of retaliation from campaign finance bullies.◆

Paul Sherman is an IJ senior attorney.



While courts historically have allowed the government more leeway in restricting commercial speech, recent decisions by the U.S. Supreme Court have suggested that change is afoot and that the days of treating commercial speech like a second-class right are coming to an end.

Florida Signs continued from page 7

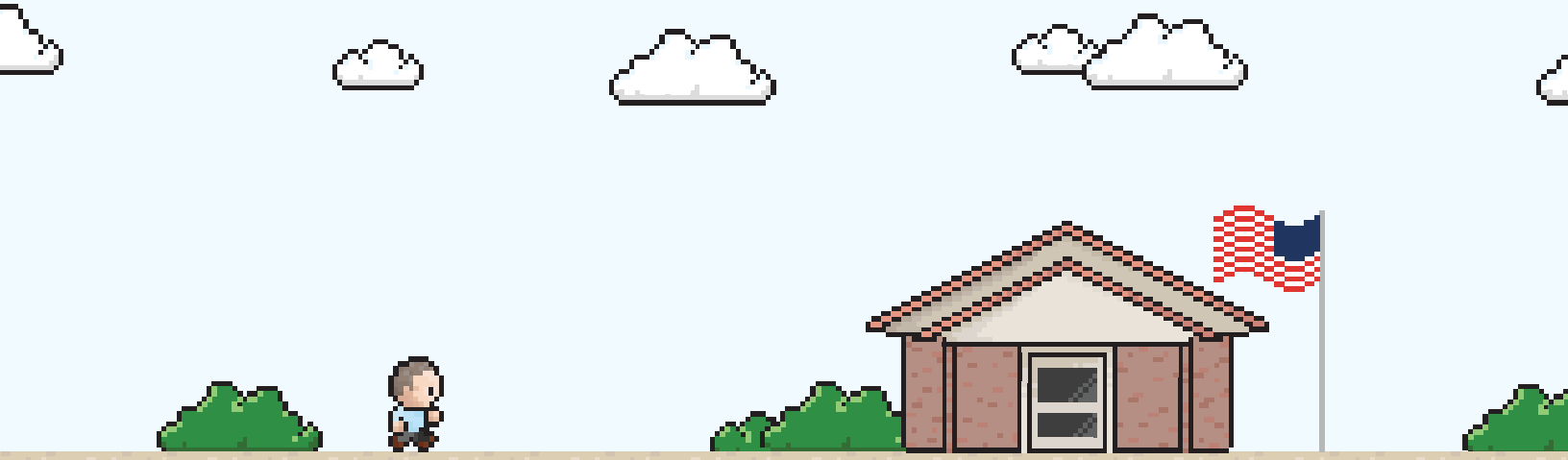
it falls into one of three categories: (1) holiday decorations, (2) seasonal decorations, and (3) "creative ideas" that lack a "commercial message." Under the last category, the town told Scott he is perfectly free to put up the Mario in his front yard, as the Mario would not be conveying a commercial message in a residential neighborhood. Scott just cannot put up Mario in front of his business, where it would actually be useful.

The case is an important part of IJ's mission to protect the rights of businesses to communicate with their customers. The ability to let customers know of a sale or even of a store's existence is often the lifeblood of small, family-owned businesses. Courts have long held that inflatables and other signs are free speech protected by the First Amendment. That means that while the government can impose some restrictions on signs and inflatables, it needs to prove it has a good reason to do so. Here, if the town has long allowed noncommercial inflatables, without any problems, there is no good reason to ban commercial inflatables.

While courts historically have allowed the government more leeway in restricting commercial speech, recent decisions by the U.S. Supreme Court have suggested that change is afoot and that the days of treating commercial speech like a second-class right are coming to an end. This case presents the courts with a perfect opportunity to help decide this issue.

All businesses should have the right to speak to their customers on their own property, and they should not be discriminated against just because their speech may have a business motive. We are confident the courts will agree.◆

Erica Smith is an IJ attorney.



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INSTITUTE for JUSTICE
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Suite 900
Arlington, VA 22203

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