



**LIBERTY & LAW**

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# VICTORY!

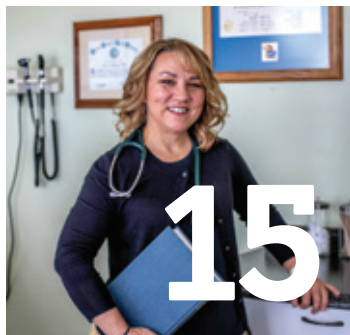
## U.S. SUPREME COURT UNLOCKS EDUCATIONAL OPPORTUNITY

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### About the publication:

*Liberty & Law* is published bimonthly by the Institute for Justice, which, through strategic litigation, training, communication, activism, and research, advances a rule of law under which individuals can control their destinies as free and responsible members of society. IJ litigates to secure economic liberty, educational 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.

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# U.S. Supreme Court VICTORY!

## IJ Buries “Blaine” and Unlocks Educational Opportunities for Hundreds of Thousands of Families

BY TIM KELLER

In June, IJ won our third victory at the U.S. Supreme Court for parents seeking to choose the best education for their children. In a 5–4 ruling in *Espinoza v. Montana Department of Revenue*, the Court stated definitively that the U.S. Constitution does not allow states to exclude religious schools from generally available educational choice programs. As Chief Justice John Roberts writes in the majority opinion:

[The U.S. Constitution] condemns discrimination against religious schools

and the families whose children attend them. . . . [T]heir exclusion from the scholarship program here is “odious to our Constitution” and “cannot stand.”

This decision reinstates the Montana tax-credit scholarship program that is a lifeline to parents like IJ client and single mother Kendra Espinoza. Kendra will again be able to apply for scholarships through the program with the renewed hope of keeping her two daughters in the small Christian school where they are flourishing.

Montana Educational Choice continued on page 22



Students rally in support of educational choice outside the U.S. Supreme Court. In June, IJ scored our third high court victory on behalf of parents seeking a better education for their children.



Montana parents **Jeri Anderson** (left) and **Kendra Espinoza** (center), with their children, joined forces with IJ to ensure that the government remains neutral when administering educational choice programs, neither favoring nor disfavoring religious options. IJ Senior Attorney **Dick Komer** (right), now retired, argued the case.

**“[The U.S. Constitution] condemns discrimination against religious schools and the families whose children attend them. . . . [T]heir exclusion from the scholarship program here is ‘odious to our Constitution’ and ‘cannot stand.’”**

– U.S. Supreme Court  
Chief Justice John Roberts,  
writing for the majority in *Espinoza v. Montana Department of Revenue*



More than a year after **Tyson Timbs'** landmark U.S. Supreme Court victory, a trial judge ordered the state of Indiana to return Tyson's car. The state has appealed that decision, but Tyson and IJ are ready to fight on.



# TYSON TIMBS GETS HIS CAR BACK!

But His Fight to Vindicate His Rights Continues

**BY SAM GEDGE**

Opponents of civil forfeiture know of Tyson Timbs—and the U.S. Supreme Court decision that bears his name. Tyson won a landmark victory against abusive fines, fees, and forfeitures in 2019, but his story didn't end at the Supreme Court.

Let's go back to the beginning. In 2013, Tyson was arrested in his hometown of Marion, Indiana, for a first-time, nonviolent drug crime. The state sued to forfeit his \$35,000 car. The trial court ruled that the forfeiture violated the Eighth Amendment's Excessive Fines Clause. But the Indiana Supreme Court reversed, saying the Excessive Fines Clause didn't apply to the states. IJ brought Tyson's case to the U.S. Supreme Court, which held that the Clause protects against state abuses no less than federal ones.

What's happened since? Fifteen months later, we're still fighting. Unbowed by the Supreme Court's rebuke, the Indiana attorney general forged ahead with his campaign to keep Tyson's car. Back in the Indiana Supreme Court, the state insisted that it could confiscate any property linked to any crime. (In the state's telling, even a car pulled over for speeding would be up for grabs.) Not surprisingly, the Indiana Supreme Court rejected that argument this past October.

**The fight goes on,  
but IJ and Tyson  
are ready for it.**

But rather than rule for Tyson outright, the Indiana Supreme Court sent his case back to Marion for a new trial. This spring, the trial judge ruled again in Tyson's favor. The court noted that, having charged Tyson with a low-level drug crime, the state then "sought forfeiture of his only asset; an asset he purchased using life insurance proceeds rather than drug money, and a tool essential to maintaining employment, obtaining treatment, and reducing the likelihood that he would

ever again commit another criminal offense." That mismatch between crime and punishment meant Tyson could show "by a significant margin" that the forfeiture was excessive.

Victory in hand, Tyson arrived home at the end of May to find his Land Rover in the driveway. The moment was a long time coming. But the story continues: Incredibly, the attorney general has appealed once again to the Indiana Supreme Court, seeking to preserve its ability to financially benefit from forfeiture. The fight goes on, but IJ and Tyson are ready for it. ♦

Sam Gedge is  
an IJ attorney.



# Victory

## for Utah Private Investigator Arrives Faster Than Magnum, P.I.'s Ferrari

BY RICHARD HOOVER

If '80s television crime-stopper Thomas Magnum, P.I., had come to Utah earlier this year to crack a case, the state would have told him the same thing it told IJ client and real-life private investigator Jeremy Barnes: Hit the road. That's because Magnum hails from Hawaii, and Jeremy lives three minutes across the Utah border in rural Idaho. And, until this past June, Utah was the only state in the country with a residency requirement for private investigators, hoarding all investigative work for Utah residents and discriminating against outsiders like Jeremy.

After 12 years as a police officer, Jeremy moved to the small town of Franklin, Idaho, with his wife and twin daughters. Wanting an entrepreneurial change, Jeremy opened Mission Investigations Group. But when he tried to expand his business into the nearby city of Logan, Utah, he stumbled upon a crime against economic liberty: Utah refused to give him a P.I. license because he isn't a state resident.

Jeremy didn't need his top-notch investigative skills to track down the culprit. In 2011, the Private Investigators Association of Utah lobbied the Legislature to keep "unqualified out-of-state competitors from

taking Utah jobs." Utah-licensed lawyers who live in Idaho can argue before the state Supreme Court. Utah-licensed doctors who live in Idaho can save lives in Salt Lake City. But the Utah private investigator cartel would have you believe that anyone who's not a Utah resident is unqualified to work there as a private eye.

That's blatant protectionism. And it's unconstitutional. As recently as last summer, in IJ's victory for Tennessee small-business owners Doug and Mary Ketchum, the U.S. Supreme Court ruled that states may not discriminate against out-of-state residents based on "unalloyed protectionism."

That's why Jeremy fought back. In April, he teamed up with IJ to challenge Utah's residency requirement so that he—and others—can earn an honest living without government getting in the way. And just two months later, the governor signed the repeal of the residency requirement—effective immediately. That means that Jeremy and IJ accomplished something that Magnum never managed: knocking out injustice in the real world. ♦

Richard Hoover is an IJ constitutional law fellow.



Idaho-based private investigator **Jeremy Barnes** is free to expand his business into neighboring Utah after the state repealed its unconstitutional residency requirement in response to IJ's lawsuit.



# 4th Circuit Vindicates *Charleston Tour Guides*

BY ARIF PANJU

IJ's strategic approach to building precedent—and our resilience—paid off in a big way this past June when the 4th U.S. Circuit Court of Appeals held that Charleston, South Carolina, violated the First Amendment by making it illegal to give paid tours of the city without obtaining a license to speak. This victory is the latest in our strategic campaign to change the way courts treat licensing requirements that tread on First Amendment rights.

Longtime readers of *Liberty & Law* may remember that IJ took up this case over four years ago on behalf of current and would-be tour guides Kim Billups, Mike Warfield, and Michael Nolan. We first prevailed in 2018, when a district court struck down the tour guide ordinance, which required passing a test based on the

city's 500-page manual full of facts city leaders deemed most important. Charleston appealed, but its rules failed again at the 4th Circuit—and victory was worth the wait.

The 4th Circuit, which covers Maryland, Virginia, West Virginia, North Carolina, and South Carolina, agreed with IJ on a host of issues we face in occupational speech litigation. The court held that the First Amendment applies in these cases, reaffirmed that its protections are not diminished simply because speech is paid for, and made clear that the government bears a real evidentiary burden to prove that its restrictions do not target speech as a first resort. The court also rejected the city's attempt to satisfy its burden using bare assertions from city officials, telling the government it needs to present actual evidence.

The implications of this ruling go well beyond tour guides. The fact that the government labels a regulation "occupational licensing" does not cancel the protection of the First Amendment any more than it cancels

the protection of any other part of the U.S. Constitution. All government power is limited by the Constitution, and courts have a duty to carefully examine evidence, as the appellate court did here, to make sure government is exercising power only within those limits.

In America, we rely on people to decide whom they want to listen to, rather than relying on the government to decide who gets to speak. Charleston's law was unconstitutional

because it got that important principle exactly backward.

The 4th Circuit's decision is an important mark of progress in this area, as yet another federal appellate court has adopted IJ's once-radical legal arguments. It also marks IJ's third occupational speech victory before a federal appellate court just this year—with wins in the 9th Circuit on

behalf of a farrier school (see page 10) and in the 5th Circuit on behalf of an innovative mapping startup (as described in the April issue of *Liberty & Law*). The decision is also more evidence that our strategic approach works. We do not just choose targets of opportunity; we must continue to file cases in sequence to maximize our ability to set important precedent and to ensure that we are able to protect our fundamental freedoms all across the country.

Of course, the fight for occupational speech is not over. But the 4th Circuit's ruling marks a major step forward in our efforts—one that will continue to protect liberty for decades to come. ♦

Arif Panju is managing attorney of IJ's Texas office.



The 4th Circuit handed IJ clients **Kim Billups** (left), **Michael Nolan** (top right), and **Mike Warfield** (bottom right) a major win for free speech when it ruled Charleston can't require a government license to give tours.



In America, we rely on people to decide whom they want to listen to, rather than relying on the government to decide who gets to speak. Charleston's law was unconstitutional because it got that important principle exactly backward.

# IJ Forges a Victory for Farriers and the First Amendment

BY KEITH DIGGS

Pop quiz: Is vocational training speech that is protected by the First Amendment? According to the 9th U.S. Circuit Court of Appeals, in yet another IJ victory this summer, it is. As a result, trade schools all over the West Coast now enjoy clear First Amendment protection as they simply try to teach students how to earn an honest living.

Three years ago, IJ teamed up with Pacific Coast Horseshoeing School. PCHS owner Bob Smith spent decades teaching aspiring farriers how to shoe horses. Then a state inspector

told Bob that the California Bureau for Private Postsecondary Education would shut down his award-winning vocational school unless he immediately stopped teaching students without a high school diploma or GED.

Concerned about his school, Bob started rejecting applications from would-be students, including Esteban Narez. Esteban, an equine ranch hand from California's Central Coast, had experience with horses, but he didn't have a high school diploma. He knew that he could make more money as a farrier than as a ranch hand and that a GED course wouldn't teach him anything about horseshoes.



**Bob Smith**, owner of Pacific Coast Horseshoeing School, can enjoy full First Amendment protection for his teaching thanks to yet another IJ victory.

**While it was legal for Esteban—or any of the one in 10 American adults without a high school diploma—to shoe a horse, nobody could legally teach him how to do it.**

Esteban applied to PCHS, but Bob had no choice but to turn him away. That's when IJ stepped in to help would-be student and teacher gallop into federal court, advocating for the First Amendment right to learn and teach.

High school concepts like algebra have nothing to do with shoeing horses. Horseshoeing is an ancient, hands-on skill that was taught centuries before the printing press was invented. No state regulates horseshoeing as a trade, which makes it especially attractive for people who don't have degrees or diplomas. So while it was legal for Esteban—or any of the one in 10 American adults without a high school diploma—to shoe a horse, nobody could legally teach him how to do it.

IJ worked with Bob, Esteban, and PCHS to bring a cutting-edge First Amendment lawsuit. The case encountered its first significant hurdle when the district court dismissed our lawsuit without a hearing in April 2018.



IJ client **Esteban Narez** wanted to learn horseshoeing but couldn't without a high school diploma. A federal appeals court ruled that the First Amendment protects the right to learn as well as the right to teach.

Unfazed by this unexpected setback, the team got back in the saddle and took the case up on appeal.

In June, a 9th Circuit panel voted unanimously to reverse the district court and let IJ's case against the Bureau go forward. The court held that "vocational training is speech protected by the First Amendment." Like IJ's 4th Circuit victory on behalf of Charleston tour guides (see page 8), the 9th Circuit decision vindicates IJ's

long-running campaign to protect occupational speech—and puts paternalistic regulators on notice that teaching is speech and restrictions on it must pass First Amendment scrutiny.

Horseshoes are a symbol of luck, but—just like setting legal precedent—*making* horseshoes requires skill and determination. Fortunately, IJ and our clients have the tools to succeed. ♦

Keith Diggs is an IJ attorney.



# Become a Monthly Donor and Your Gift Goes Even Further

As you can see from this very full issue of *Liberty & Law*, IJ is working through these challenging times without missing a beat. We are able to do that because of the steadfast support of our donors. Now, for donors who want to do more with their support for IJ, we have a special opportunity to make your gifts go further.

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- Call Kenzie Jaicomo directly at (703) 682-9323, ext. 318, and sign up over the phone.

There is no limit to what IJ can achieve with the help of donors who stand shoulder to shoulder with our clients every month of the year. We ask that you join with us by signing up for monthly donations and make your support go even further! ♦



Pennsylvania residents now enjoy greater economic liberty thanks to IJ and **Sally Ladd**, who won a groundbreaking victory at the state Supreme Court this May.

# IJ SCORES A MAJOR VICTORY

## for Economic Liberty

### at the Pennsylvania Supreme Court

BY JOSHUA WINDHAM

Less than 24 hours after IJ's economic liberty victory at the Georgia Supreme Court (see page 16), the Pennsylvania Supreme Court issued its own decision vindicating an IJ client's right to earn a living. The court held—for the first time—that occupational licensing requirements must satisfy a more rigorous test under the Pennsylvania Constitution than under the U.S. Constitution.

In a 5–2 decision, the Pennsylvania Supreme Court held that economic regulations—including the real estate licensing laws at issue in our case—must bear a “real and substantial relation to the public interest they seek to advance” and cannot be “unduly oppressive or patently beyond the necessities of the case.”

This victory allows IJ to continue defending entrepreneur Sally Ladd in her challenge to an occupational licensing scheme that is burdensome, outdated, and unconstitutional. It also opens the door for countless other entrepreneurs to leverage Pennsylvania's heightened protections for the “undeniably important” right to earn a living in years to come.

IJ and Sally teamed up back in 2017, when Pennsylvania regulators forced her to shut down her short-term rental management business because she wasn't a licensed real estate broker. To become licensed, Sally would need to spend three years working for a real estate broker, take hundreds of hours of courses on buying and selling property, and open up a brick-and-mortar office. But Sally had no interest in buying or selling property. All she wanted to do

was help people book short-term rentals of their vacation properties through sites like Airbnb.

With IJ's help, Sally sued, arguing that forcing her to spend years learning about work she would never perform—and thousands of dollars opening an office she would never need—imposed excessive burdens on her right to earn a living under the Pennsylvania Constitution. When the trial court upheld the real estate licensing scheme and dismissed Sally's case, we took our arguments up to the Commonwealth Supreme Court.

This decision is not just a triumph for economic liberty in Pennsylvania. It is also a testament to IJ's long-term approach to vindicating economic liberty in court. In ruling for Sally, the court relied heavily on two prior IJ cases: the Texas Supreme Court's 2015 decision in *Patel*, and the U.S. District Court for the Southern District of California's 1999 decision in *Cornwell*, both of which struck down burdensome applications of cosmetology licenses. The strength of these prior decisions gave the court the legal foundation it needed to clarify its own heightened test to defend the economic liberty rights of its citizens.

This incremental strategy—and IJ's commitment to seeing it through over decades—is what makes us so effective in pursuing our mission. We will keep fighting to secure ultimate victory for Sally and for the right of all Pennsylvanians like her to earn an honest living. ♦

Joshua Windham is  
an IJ attorney.



# IJ Clients Fight to Recapture the Pioneer Spirit Out West

BY JEFF ROWES

The iconic American story of seeking opportunity in the West is what IJ clients Joshua and Emily Killeen set out to write for themselves when they left San Diego to homestead 10 empty acres of high desert plateau in Yavapai County, Arizona.

Joshua and Emily built an environmentally conscious tiny home and rustic barn to serve as an event space for Joshua's professional photography and Emily's yoga classes. Not only did these young entrepreneurs want to earn a living, they also wanted to simplify, escape the financial obligations of the big city, and live according to their own lights.

That's when the Yavapai County buzz saw descended. The couple learned their property was ensnared in a tangle of zoning and permitting restrictions in June 2018, when they came home to discover a county official barring the entrance to their land. Surprised but law-abiding, Joshua and Emily immediately began securing permits for the items the county flagged.

But the county wanted to impress on these entrepreneurs—who were newcomers with no history of violating local ordinances—that Yavapai County disfavors the pioneer spirit.

Bureaucracy. Rules. Forms. Permission slips. Deadlines. Hearings. Fees. Those are what the American West is now about, as far as the county is concerned.

So Yavapai County took two extraordinary steps. First, it prohibited the couple from engaging in “coming soon” advertising for their business, Ananda Retreat, until they were code compliant. Second, the county prohibited Joshua and Emily from hosting Wellness Wednesdays, free events in which members of the community would gather to share a vegetarian potluck dinner and do yoga beneath a desert sunset.

Zoning codes often micromanage how Americans can use their property, but they cannot do so in a way that violates the U.S. Constitution. The county cannot use its power to regulate land to restrict the fundamental rights of free speech and using private property to have dinner with friends. Joshua and Emily joined IJ to bring suit in federal court to protect their rights—and make sure at least a little Wild remains in the West. ♦

Jeff Rows is an IJ senior attorney.



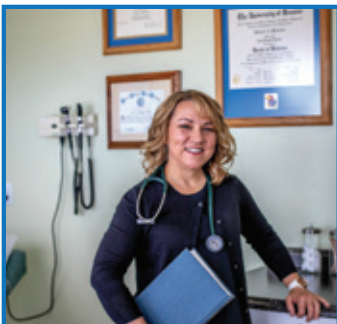
IJ clients **Emily and Joshua Killeen** are defending their right to truthfully advertise their free events and coming business.



# DISPENSING JUSTICE IN MONTANA

IJ Challenges Another Protectionist State Health Care Law

**The truth is that Montana's ban has nothing to do with protecting patients. But it does serve another purpose: protecting pharmacies from competition.**



Montana doctors **Carol Bridges** (top), **Todd Bergland** (center), and **Cara Harrop** (bottom) are fighting to overturn protectionist restrictions on dispensing medicine to their patients.

BY KEITH NEELY

Just over a year ago, IJ launched a groundbreaking case challenging Texas' law banning doctors from dispensing medications to their patients. As we explained then, "doctor dispensing" is a safe and effective way to increase access to routine medications and is already permitted in 44 states and the District of Columbia. Now, IJ is working to bring doctor dispensing to Montana.

In Montana, unlike all those other states, doctors are banned from dispensing unless they work more than 10 miles from a pharmacy. There are a few exceptions: for example, if they are dispensing "occasionally" or "in an emergency." But these exceptions are so vague or narrow that the practical result of the system is that doctors do not offer medication to their patients.

This is a travesty because doctor dispensing benefits patients. Up to 30% of prescriptions go unfilled due to factors like cost and inconvenience, resulting in complications for patients and billions of dollars in avoidable expenses for the broader health care system. Dispensing offers doctors a way to help alleviate these problems by providing patients with immediate access to the medications they need—often at a fraction of the price pharmacies offer.

Not only that, but research shows that it's just as safe for doctors to dispense medications as it is for pharmacies. There's no reason to think it would be any different in Montana. Doctors there are just as qualified as their peers across the country to dispense safely and ethically. And doctors who work near pharmacies are just as qualified as their more rural peers to provide this service.

The truth is that Montana's ban has nothing to do with protecting patients. But it does serve another purpose: protecting pharmacies from competition. Under the law, pharmacies enjoy a 10-mile zone of protection from competition by the nearest doctor, which explains why the Montana Pharmacy Association and Montana Board of Pharmacy worked to get the ban passed in the first place—and have lobbied to keep it in place ever since.

Montana's protectionist ban does not sit well with Dr. Carol Bridges, Dr. Todd Bergland, or Dr. Cara Harrop, each of whom would like to dispense routine medications, at cost, to their patients. All three are family doctors who regularly prescribe medications for common issues like high cholesterol, stomach bugs, and seasonal allergies. And all three feel their patients would benefit if they could offer direct access to the medications they prescribe, right when they prescribe them.

That's why they are taking their cause to court. In June, the doctors and IJ filed a constitutional lawsuit to strike down Montana's protectionist ban. We believe Montana's Constitution, like Texas', provides strong protections for economic liberty. And we look forward to showing that these protections apply to licensed medical professionals in Montana, too. ♦

Keith Neely is an IJ attorney.



# *A Peach of a Victory* for Georgia's Lactation Consultants

BY RENÉE FLAHERTY

Mary Jackson has been working hard keeping Georgia's new mothers and babies healthy and happy while the nation's families face unique challenges. And now, thanks to IJ, she can keep up the good work. In a decisive victory for economic liberty, the Georgia Supreme Court ruled in Mary's favor in IJ's case challenging the state's lactation consultant licensing law.

*Liberty & Law* readers will remember that in 2016, Georgia's legislature adopted a first-of-its-kind law requiring that lactation consultants obtain the equivalent of an advanced degree before continuing to work in the field. The law would force some 800 professionals like Mary to quit their jobs and spend several years and thousands of dollars earning the qualifications necessary to obtain a state-issued license. There is zero evidence that unlicensed lactation care has ever harmed anyone, anywhere—but dramatically limiting the number of lactation consultants in Georgia would cause real harm to the thousands of mothers and babies left without their help.

IJ's lawsuit began in June 2018, when Mary—a lactation counselor at Grady

Memorial Hospital in Atlanta—and Reaching Our Sisters Everywhere—the nonprofit Mary helped found to educate families of color about breastfeeding—challenged Georgia's law.

In 2019, the trial court dismissed the case. Incredibly, the court ruled that there is no right to economic liberty in Georgia—a mistake the state's high court was eager to correct. The Georgia Supreme Court affirmed this summer that it has “long interpreted the Georgia Constitution as protecting a right to work in one's chosen profession free from unreasonable government interference.”

Women have been teaching other women how to breastfeed for millennia. They don't need a license to do it safely or to do it well. IJ's watershed victory reminds government officials that everyone who earns a living in the Peach State has a constitutional right to do so and that IJ stands ready to defend that right.

The case now returns to the trial court, where IJ will continue to fight on behalf of Mary, ROSE, and the families they help. ♦

Renée Flaherty is an IJ attorney.



Lactation counselor **Mary Jackson** and IJ won a resounding victory for economic liberty at the Georgia Supreme Court, one of IJ's two state supreme court victories in May.

# IJ Schools Government Lawyers on Behalf of D.C. Day Care Providers

BY ROBERT MCNAMARA

Sometimes the hardest part of winning a constitutional lawsuit is getting into the courtroom in the first place. When IJ sues over an unconstitutional regulation, the government's first response is frequently not to defend the regulation but to say that we shouldn't be allowed to sue at all. They say our clients haven't been harmed by the regulation, or that we sued too soon, before the regulation went into effect, or that we sued too late, after the regulation already caused its harms.

That is exactly what happened in IJ's lawsuit challenging Washington, D.C.'s new requirement that all day care providers in the city obtain college degrees. IJ sued on behalf of a group of workers with years of experience in child care who could not afford to return to school in order to keep doing the work they were already doing. But no sooner had we sued than D.C. changed the regulations in response to the lawsuit. Its new regulations made some of our clients eligible for renewable waivers of the college requirement—and, for the others, it pushed the rules' effective date all the way out to 2023.

Armed with its new regulations, D.C.'s lawyers marched into court to ask the judge to march us out. After all, what did we have to worry about? Sure, our clients might be kicked out of a job, but not for at least a few more years.

It's the kind of tactic that works all too often for the government. But not here: This May, we obtained a ruling from the U.S. Court of Appeals for the D.C. Circuit. The court held that having to spend any time at all complying with a regulation is an injury that allows you to sue now and that government cannot kick people out of federal court by giving them an "exemption" that can be taken away at any time.

A ruling like this seems like common sense—because it is. But it is common sense that has frequently eluded government attorneys. A major appellate opinion rejecting these arguments will help not only day care providers in D.C. but also people nationwide who want to defend their most basic rights in court. ♦

Robert McNamara is an  
IJ senior attorney.



Parent **Jill Homan** (left) and day care providers **Ilumi Sanchez** (center) and **Dale Sorcher** (right) can press forward with their challenge to D.C.'s unnecessary new day care regulations thanks to another IJ appellate court victory.



# Little Free Pantry ★ ★ ★ ★

## Fights Big Government Intrusion

BY DARYL JAMES

Kathy Hay and her husband work hard to provide for their three children, but their pantry sometimes runs low. Many families face the same challenge in their rural Washington community near the Idaho state line, and aid organizations struggle to keep pace with demand.

One day, when Kathy saw empty shelves at a food bank near her home, she decided to do something to help. She had read online about little free pantries, a grassroots movement that invites people to replicate its model in their own neighborhoods, and she determined to set one up in her backyard in 2019.

She installed shelves for canned goods and other nonperishables, and she plugged in an outdoor refrigerator for milk, eggs, cheese, and fresh

produce. Then she spread the word: Neighbors could take or leave as much food as they wanted.

The concept, inspired by little free libraries, started in Arkansas in 2016 and quickly spread to more than 700 locations nationwide. Even before the COVID-19 pandemic, which has raised unemployment nearly everywhere, a free food exchange made sense in Kathy's community due to a poverty rate that hovers around 20%. And the urgency has only grown: In fact, many little lending librarians began converting their library boxes to pantries when the pandemic hit.

Neighbors quickly embraced Kathy's foresight, but local regulators were not pleased. As word spread about the pantry, Asotin County officials showed up to inspect the operation. Kathy had been vigilant about cleanliness: All the food was safe and unspoiled, and

Kathy Hay wants to share food with neighbors in need without going through a burdensome bureaucratic process. So she teamed up with IJ.



no one ever got sick. Despite no demonstrated risks to health or safety, inspectors demanded changes.

In response, Kathy spent nearly 40 hours building a new pantry on poles to address county concerns about pest control. And she removed the fridge, cutting off donations of fresh fruits and vegetables—something the inspectors demanded she do unless she installed a commercial-grade kitchen.

None of these modifications satisfied the inspectors. Citing laws designed to regulate nonprofit food banks and soup kitchens, they asked Kathy to submit still more plans to the county and go through the burdensome process of obtaining 501(c)(3) status.

**Little Free Pantry** continued on page 22

**The concept, inspired by little free libraries, started in Arkansas in 2016 and quickly spread to more than 700 locations nationwide. Many little lending librarians began converting their library boxes to pantries when the pandemic hit.**



Cindy Harper of Nebraska (left) and Danielle Mickelson of North Dakota (right) have joined with IJ to defend their home-based food businesses.

## Overreaching Regulators Try to Can Food Freedom

IJ has worked with state legislators across the nation to expand the sale of foods made in home kitchens, helping pass nine bills in eight states and the District of Columbia in recent years. These lawmakers recognize that homemade food sales are low risk, give consumers greater choice, and expand economic opportunity.

Now, regulators in two Great Plains states are trying to do an end run around the legislatures—and IJ is fighting back with two new cases.

When North Dakota passed its Cottage Foods Act in 2017, legislators intended it to be one of the strongest in the country, legalizing the sale of nearly all homemade foods. Although there were no reported illnesses from the new law, the North Dakota Department of Health issued new regulations late last year that would arbitrarily allow only a few types of foods to be sold. The new regulations issued by bureaucrats blatantly violate state law.

In Nebraska, IJ successfully advocated for a cottage food law in 2019 that greatly expanded opportunities for home bakers. But that didn't stop a health board in Lincoln from drafting—and persuading the City Council to adopt—new rules that subject home bakers to many of the same regulations the Legislature exempted them from, including an intrusive inspection regime.

So IJ has teamed up with home cooks in both states to challenge these illegal restrictions. With these two cases, IJ is sending a message to overreaching regulators nationwide: When the state legislature expands food freedom, you cannot stand in the way. ♦

# How to Litigate Through a Shutdown—and Keep Winning

**BY MELISSA LOPRESTI**

At the Institute for Justice, we deal with unique challenges and uphill battles every day. In fact, the bigger the challenge, the more palpable our energy and determination to take it on. This spirit has been on full display over the past few months as IJers have responded to the COVID-19 pandemic. The result has been a time of unprecedented activity.

Here are just a few examples:

Since the beginning of April, we have filed 12 new cases. That is twice the number we filed during the same time last year and more than we've filed in any single quarter in IJ's history.

Each case required the same top-notch legal work as always, but we've done it while navigating courts that are operating with varied emergency procedures and without being able to see our clients or hold media events in person. Despite those challenges, we have gone to battle for 25 new clients, and we have found creative ways to tell their stories.

Although a few courts granted extensions or delayed arguments at the beginning of the shutdown,

most have now settled in and continue their work remotely. Since April, IJ attorneys have argued 15 times by phone or video conference—including in front of four federal appellate courts.

In other cases, courts have responded with decisive victories for our clients. Our cases often take years, and the timing of decisions is completely unpredictable. We can go without a decision in any case for months, and then we can get several decisions all at once. Still, being able to share such good news during this time has made the victories even sweeter.

Meanwhile, as law schools transitioned to remote learning this spring, we reimagined how IJ could offer substantive student programming and training opportunities in the new environment. Attorneys and clients have presented via video conference to law school classes, and in May we hosted 40 students for IJ's first virtual Law Student Conference. Many of those students are continuing at IJ as law clerks through the Dave Kennedy Fellowship program. Putting technology to work, they are seamlessly collaborating

Since the beginning of April, IJ has filed 12 new cases on behalf of 25 new clients.



*There's a special energy in the air at IJ when we are working together to meet a challenge—and we can't wait to share more results.*

with IJ attorneys and one another on legal research to fuel the current rush of litigation and lay the groundwork for future cases.

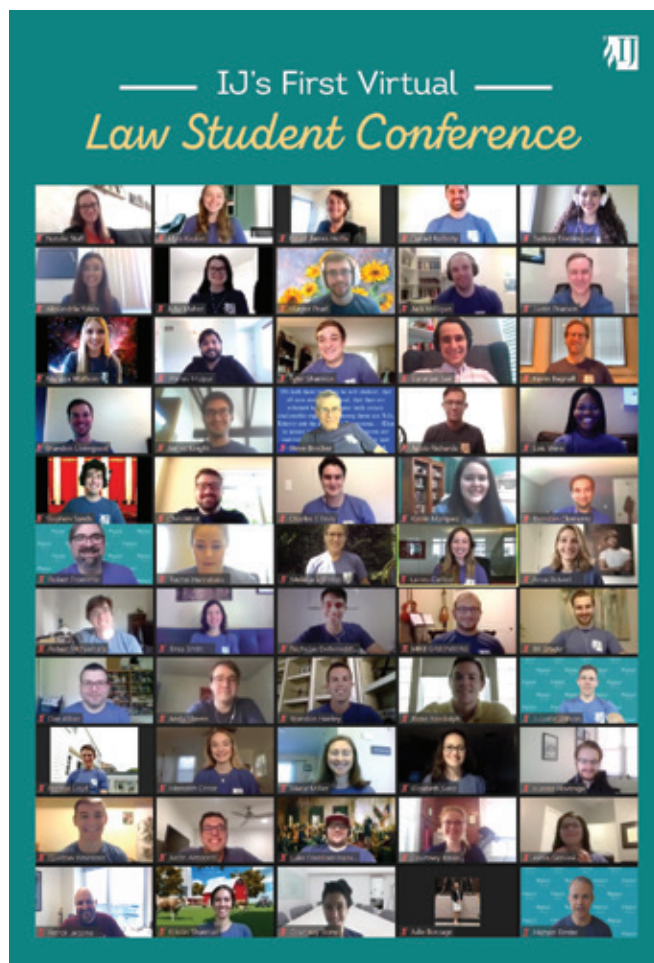
Finally, we are looking forward to welcoming a whole new batch of litigators for liberty at the end of the summer. We have even more cases to launch and litigate, including *King v. Brownback* at the U.S. Supreme Court—the first case in our Project on Immunity and Accountability to reach the high court. And we're keeping up the momentum from our initial COVID response efforts with a new national legislative campaign that will take us into 2021.

There's a special energy in the air at IJ when we are working together to meet a challenge—and we can't wait to share more results. ♦

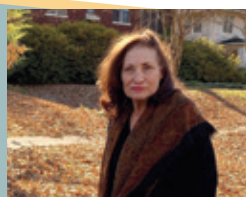
Melissa LoPresti is IJ's litigation projects & training programs manager.



Forty students attended IJ's first virtual Law Student Conference, where they learned about litigating public interest cases the IJ way.



Below are a few of our new clients, who aren't letting the pandemic stop them from challenging government abuse.



Montana Educational Choice continued from page 4

But the implications of this ruling go far beyond Montana. Through *Espinoza*, the Supreme Court dismantled the biggest legal obstacle preventing the spread of educational choice nationwide: state Blaine Amendments.

For as long as educational choice programs have given families an alternative to failing government schools, teachers' unions and their allies have invoked Blaine provisions to limit that choice and to preserve their monopoly. They claim that allowing parents who participate in choice programs to choose religious options for their children constitutes state funding of religious institutions—which Blaine provisions forbid. The Montana Supreme Court adopted similar logic when, in December 2018, it struck down the state's entire choice program simply because parents could choose religious schools for their children.

Not only did this decision discriminate against religious schools and the families who choose them, it ignored the role that parental choice plays in the program. As the Supreme Court majority put it in *Espinoza*, "[G]overnment support makes its way to religious schools only as a result of Montanans independently choosing to spend their scholarships at such schools." With this victory, the Montana Supreme Court's flawed reasoning is now permanently overruled.

*Espinoza* is the successful culmination of three decades of strategic litigation by IJ. Now comes the exciting work of leveraging this ruling to ensure it has the maximum positive impact for parents and children. IJ is moving quickly to provide recommendations and legal guidance to help state policymakers expand educational opportunities in the post-*Espinoza* world—especially in states where Blaine Amendments have previously made choice programs a nonstarter. Our goal is to foster competition and innovation in the educational marketplace and improve the quality of education for all students in schools that their families—not the government—choose.

The opportunity to get a decent education is often the difference between a life of tragedy and a life of hope. With three ongoing cases and momentum from *Espinoza*, IJ plans to extend this life-changing opportunity to hundreds of thousands of students in the years ahead. ♦

Tim Keller is an IJ  
senior attorney.



## Rather than helping the poor, the county is restricting their access to food at a time they desperately need it.

Little Free Pantry continued from page 19

Kathy could not afford any of that. But instead of giving up her vision, in April she partnered with IJ and filed a lawsuit in federal court against Asotin County. Kathy's case hinges on the principle that communities should be able to take care of their own through private charity without heavy-handed government interference. Families around the world have done that for centuries.

Americans are very familiar with food exchanges, and they are used to making decisions about what they are comfortable eating. Neighbors routinely carry meals to shut-ins, new neighbors, new parents, and survivors coping with death. Workplace parties and church potlucks also involve sharing items from residential kitchens. The only difference with Kathy's Little Free Pantry was the invitation to share year-round—not just during special events.

Regulators should encourage rather than shut down this type of can-do approach to helping the less fortunate. The county claimed—without evidence—that it was protecting the poor from foodborne illness. But the opposite is closer to the truth. Rather than helping the poor, the county is restricting their access to food at a time they desperately need it.

At IJ, we know social entrepreneurs don't need government interference. We will fight to make sure no one needs to hire a team of lawyers just to give a meal to a neighbor in need. ♦

Daryl James is  
an IJ writer.



# IJ MAKES HEADLINES

These articles and editorials are just a sample of recent favorable local and national pieces IJ has secured. By getting our message out in print, radio, broadcast, and online media, we show the real-world consequences of government restrictions on individual liberty—and make the case for change to judges, legislators and regulators, and the general public.

Read the articles at  
[iam.ij.org/  
august-2020-headlines](http://iam.ij.org/august-2020-headlines)



**Supreme Court: Montana Can't  
Exclude Religious Schools  
From Scholarship Program**

June 30, 2020

**The Washington Post**

**Low-Income Families Are The True  
Winners Of The Supreme Court's  
Religious Schools Ruling**

June 30, 2020

**THE WALL STREET JOURNAL**

**A School Choice Landmark**

June 30, 2020

**The Philadelphia Inquirer**

**Poconos Property Manager Is  
Getting A Second Chance To  
Fight For Her Job**

May 20, 2020

**The Salt Lake Tribune**

**Lawsuit Challenges Utah's Unique Rule —  
Private Investigators Must Live In The State**

May 6, 2020

**IndyStar.**

**'A Victory': Indiana Returns  
Land Rover After 6 Years —  
With Strings Attached**

May 28, 2020

**LINCOLN  
JOURNAL & STAR**

**Lincoln Woman Seeks  
To Overturn City's New  
Regulations For Home Bakers**

May 12, 2020



**Want To Wax Eyebrows In  
Pennsylvania? You Have To Be A Good  
Person. This 'Oppressive' Law Says So.**

June 22, 2020

**The Post and Courier**

**Charleston Loses Tour Guide  
Appeal; Judges Rule Required  
Testing Is Unconstitutional**

June 11, 2020

**Bismarck  
Tribune**


**North Dakota Department Of Health  
Sued Over Controversial  
Cottage Food Rules**

May 12, 2020

**Missoulian**

**Montana Should Get With The Times  
On Doctor Dispensing**

June 28, 2020



The FDA said I couldn't call pure skim milk "skim milk"  
because I didn't inject it with additives.

Business owners have the right to tell the truth,  
so I fought for my First Amendment rights.

And I won.

*I am IJ.*