LIBERTY & LAW
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SUPREME COURT VICTORY FOR PROPERTY RIGHTS

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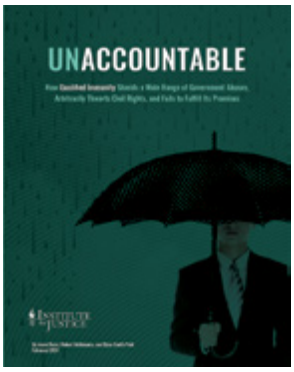
contents



LIBERTY & LAW

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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 illustrates and extends the benefits of freedom to those whose full enjoyment of liberty is denied by government.

Editor:
Kim Norberg

Layout & Design:
Laura Maurice-Apel

General Information:
(703) 682-9320

Donations: Ext. 399

Media: Ext. 206

Website: www.ij.org

Email:
general@ij.org

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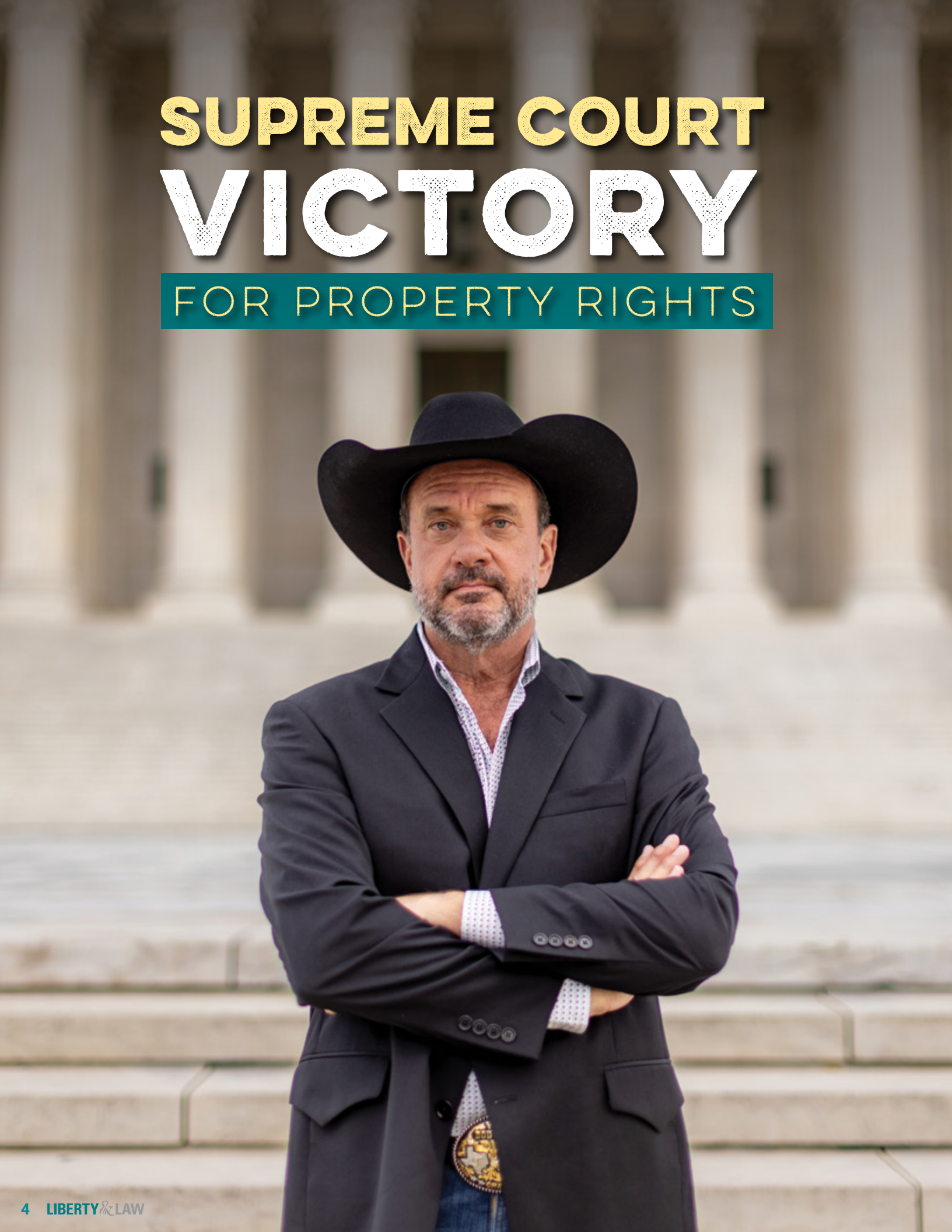
SUPREME COURT VICTORY

FOR PROPERTY RIGHTS



A Texas highway project turned **Richie DeVillier**'s ranch into a lake, killing dozens of his animals.

BY ROBERT MCNAMARA

One of the best things about working at IJ is being able to solve problems caused by government. Instead of reading about things happening in the world and getting angry about them, we read about things happening in the world and then we fix them.

There's no better example of that than Richie DeVillier's case. As featured in the December issue, the rancher's family land was devastated after Texas transportation officials built a dam along a nearby highway median, flooding out Richie and all his neighbors. When Richie sued, claiming that the Fifth Amendment required Texas to pay just compensation if it wanted to turn his land into a lake, Texas persuaded the 5th Circuit to throw his claim out. According to that court, Richie could only sue to enforce the Fifth Amendment if federal civil rights statutes allowed him to sue, and those statutes don't allow for lawsuits against state governments. In other words, Congress was exclusively in charge of whether Richie could enforce the Constitution, and Congress hadn't given him permission.

I'll confess—when we read that opinion, we did get angry about it. Congress doesn't need to order Texas to enforce the Constitution! The Constitution orders Texas to enforce the Constitution! Of course courts have the power to step in when the government shirks its constitutional duties!

But at IJ, getting angry is the beginning, not the end. So we stepped in and successfully persuaded the U.S. Supreme Court to take the case. After all, this was outrageous: The appeals court ruling effectively meant that Texas would have to follow the Constitution only when it wanted to—and the state, unsurprisingly, didn't want to.

Once we managed to catch the attention of the high court, though, Texas started to change its tune. After all, it's outrageous to say that Texas can't be forced to obey the Fifth Amendment—and once IJ's briefs made clear exactly how outrageous that was, Texas seemed unwilling to defend that position. Maybe, Texas said, Richie should be allowed to sue under the Fifth Amendment after all.

At IJ, getting angry is the beginning, not the end. So we stepped in and successfully persuaded the U.S. Supreme Court to take the case.

By the time the case got to oral argument, Texas' position had entirely changed. Sure, maybe the appellate court had said the Constitution could only be enforced through federal civil rights statutes, but Texas, at least, could be sued under the Fifth Amendment directly. (This went over about as well as you'd expect. Justice Sotomayor accused Texas' lawyer of a "bait and switch.")

But, bait and switch or not, Texas had given up the game. And in April, we got a unanimous 9-0 decision from the Supreme Court conceding as much. Since Texas now agreed Richie was allowed to sue, the 5th Circuit decision that threw out Richie's case was wrong and his claims had to be revived. Texas would now have to follow the requirements of the Fifth Amendment—and it could be hauled into court if it failed.

That's not, of course, the end of the story. This ruling means that Richie (and every other property owner in Texas) can enforce their property rights against the state, but it tells us nothing about the rest of the country. That is why IJ is continuing the fight to protect property rights nationwide. Because there are still things out there to get angry about—and, most importantly, to fix. ◆

Robert McNamara is IJ's deputy litigation director.

Virginia Keeps Robbing Returning Citizens Of A Fresh Start—

So IJ Keeps Fighting Back

BY MIKE GREENBERG

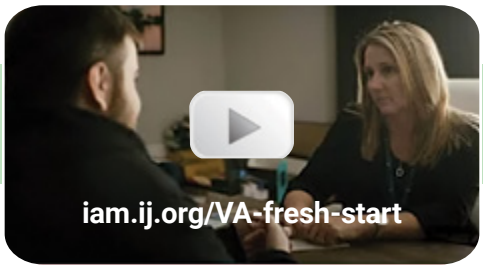
IJ's "fresh start" cases have a simple premise: The government cannot ban people from working for irrational reasons, and laws that shut people out of occupations because of mistakes deep in their past—without looking at who that person is today—fail that standard.

People who have turned their lives around following long-ago criminal convictions should be inspirations, not outcasts. IJ's newest fresh start client, Melissa Brown, perfectly fits that description. But a counterproductive Virginia law forbids her from putting the changes she's made to good use.

Decades ago, Melissa was suffering from drug addiction. Soon she began stealing to fund that addiction. In 2001, at age 27, she hit bottom. Amid a dayslong drug binge, she stole a woman's pocketbook in a desperate quest for more drug money. She pleaded guilty to robbery and served eight years in prison. Before going, she vowed to get sober—and after getting out, she vowed to never go back.

The same state that certified Melissa as fit for substance-abuse counseling now forbids her from working as a substance-abuse counselor.

Watch the case video!



Melissa Brown joined with IJ to challenge Virginia's irrational permanent ban on her working as a substance-abuse counselor.

Melissa more than kept her promises. She also dedicated herself to using her experience overcoming addiction to help others battling those same demons. She began studying for a bachelor's degree in psychology while incarcerated, and she completed it (with honors) after her release. Then she earned state certification as a substance-abuse counselor. The state could have denied her certification based on her felony record, but it didn't.

So she got to work. For five years, Melissa used both her education and firsthand experience to help people struggling with heroin. She even earned a promotion to counseling supervisor.

But in 2018, her hopeful future was derailed. While her employers knew about her criminal record when she was hired, they didn't understand that a Virginia law bans people with convictions for any of 176 crimes from substance-abuse counseling jobs. For most of those crimes—including robbery—the ban is forever.

In other words, the same state that certified Melissa as fit for substance-abuse counseling now forbids her from working as a substance-abuse counselor.

This story may sound familiar. That's because IJ challenged this same ban in 2021 on behalf of Rudy Carey. Rudy is Melissa's former co-worker and another addict-turned-counselor shunned by Virginia's law. Before Rudy's case reached the merits, Gov. Glenn Youngkin pardoned his 2004 conviction (likely because of the publicity the lawsuit generated).

That success allowed Rudy to work again, but it left the ban untouched for everyone else. The law is so draconian, in fact, that not even a pardon could lift Melissa's ban—only one crime on the list allows for that exception.

That's why Melissa joined IJ in this new lawsuit to take down Virginia's irrational scheme. It's taken as gospel in recovery circles that the best people to help others through addiction are those who, like Melissa, have been there before. The state itself admits its law blocks people with "invaluable" experience and worsens the shortage of qualified counselors. It also torpedoes the dreams of people who, like Melissa, have earned a second chance at making an honest living.

Until they get that second chance, IJ will keep fighting. ◆

Mike Greenberg is an IJ attorney.

Cornhusker State Shucks A Barrier To Employment

- In Nebraska, 1 out of 5 workers need an occupational license to legally do their jobs.
- In March, IJ helped pass LB16, which prevents licensing boards from denying an applicant simply for having a criminal record that is not a "direct and substantial risk to public safety."
- Research shows that a good, steady job makes it less likely for a person who's gone through the criminal justice system to reoffend. This is a victory for the people now free to work and for all Nebraskans! ◆

Once IJ overcame legal immunities in their cases, **Mario Rosales** (top), **Waylon Bailey** (middle), and **Matt Gibson** (bottom) quickly received justice.

Three Recent IJ Victories Show How Immunity Stands Between Rights And Remedies

BY PATRICK JAICOMO

Immunity doctrines shield government officials and workers from accountability by denying victims of constitutional abuse a day in court. This means that many constitutional rights have no remedies. Defenders of immunity doctrines say that this is a price worth paying because immunities weed out futile, insubstantial, or meritless lawsuits that would grind the government to a halt. But three recent IJ victories prove that's not true.

The Supreme Court created immunities—including qualified, prosecutorial, and judicial immunity—with a policy goal of reducing the number of "insubstantial suits." These immunities were needed, the Court believed, to ensure that the government and its workers were not overwhelmed by the costs and burdens of trial. But courts have plenty of other mechanisms to dispose of meritless claims quickly and efficiently. As a result, immunities often bar strong claims, not weak ones.

Nowhere is this more apparent than in a trio of winning IJ cases. In each, a government worker hid behind immunity. But once IJ tore down that immunity, our clients quickly received a favorable settlement or jury verdict.

You will probably recall our case representing Mario Rosales. After legally passing a truck in New Mexico, Mario was chased to his home by a road-raging stranger. That stranger later revealed himself to be an off-duty police officer and pointed a gun at Mario. Although the officer was eventually convicted of two felonies for the incident, a federal trial court invoked qualified immunity to dismiss Mario's case.

What IJ's work in these cases shows is that immunity does not protect officials and officers from frivolous claims. It protects them from meritorious, substantial, and otherwise-winning claims.

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But IJ appealed, and the 10th Circuit tossed the immunity. Soon after, the defendants settled.

Or look to IJ's case with Waylon Bailey. Louisiana police raided Waylon's home and charged him with the crime of terrorism because Waylon made a zombie joke on Facebook. As in Mario's case, a federal trial court shielded the officers with qualified immunity. But IJ again appealed, and the 5th Circuit reversed. With the immunity hurdle out of his way, Waylon took his case to trial, and a jury awarded him damages.

Finally, there is our case on behalf of Matt Gibson. After a West Virginia judge led an unconstitutional search party through Matt's home, he sued. With the help of friend-of-IJ John Bryan (aka The Civil Rights Lawyer on YouTube), Matt defeated judicial immunity in the trial court. But the judge appealed. IJ defended the win in the 4th Circuit, and the appeals court confirmed that the judge could not claim immunity. Just like Mario and Waylon, Matt was able to quickly receive a remedy once immunity was no longer an obstacle, and the judge settled the case.

These settlements and jury awards are relatively modest—for instance, Matt received $200,000—but they are very significant for our clients. Ordinary people who have suffered extraordinary government abuse often wait years for a court to recognize that their rights are meaningful and deserve to be enforced. For them, the resolution of their case is about obtaining a reasonable amount of compensation, yes. But those monetary damages symbolize something even more important: Finally, they are vindicated.

What IJ's work in these cases shows is that immunity does not protect government officials and officers from frivolous claims. It protects them from meritorious, substantial, and otherwise-winning claims. If given a day in court, victims of government abuse like Mario, Waylon, and Matt can and will vindicate their rights.

Many victims of government abuse have been denied that opportunity thanks to immunity doctrines. But, because every constitutional right deserves a remedy, IJ's Project on Immunity and Accountability will see to it that immunity doctrines no longer stand in the way. ◆

Patrick Jaicomo is an IJ senior attorney and a leader of IJ's Project on Immunity and Accountability.

RIGHTING A WRONG-HOUSE RAID

BY JARED MCCLAIN

Everyone knows to check that they're in the right place when arriving somewhere new. Maybe look for the address or distinguishing features of the property. It's just a basic life skill—not something the Supreme Court needs to explain. Still, the 5th Circuit ruled that a SWAT commander couldn't have known that he had to make sure he had the correct house before ordering a raid.

On March 27, 2019, a SWAT team assembled on the porch of the wrong house in Lancaster, Texas. Waxahachie Lieutenant Mike Lewis realized the mistake just in time. He knew the suspected stash house was one door down. He just wasn't sure which direction. The front-porch light on the house to his left obscured his view of its address. So rather than go get a better look, he just guessed.

A chain-link fence should have blocked his team's path to the front porch and the detached garage of the house they planned to raid. But the house they approached didn't have a fence, or a front porch, or a garage. Instead, officers had to climb a truly enormous L-shaped wheelchair ramp that wasn't supposed to be there.

Karen Jimerson and **James Parks**' Lancaster, Texas, home was raided by a SWAT team looking for a different house. Now IJ is asking an appeals court to rehear their case.

Charging past all these red flags, officers smashed the front windows, detonated a flash-bang grenade, and kicked down the front door. The shattered windows rained glass down on Karen Jimerson's children as they slept. Karen had just gotten out of the shower. Officers forced her down onto the bathroom floor at gunpoint. Only then did someone shout, "Wrong house!"

In short, a SWAT team conducting a no-knock, military-style raid while looking for a suspected meth lab in the middle of the night exercised less care in confirming the address than a pizza delivery driver.

Lieutenant Lewis admits that his raid violated the Fourth Amendment rights of Karen and her family. Yet a three-judge panel of the 5th Circuit still held that he's immune from accountability. Even though the Supreme Court ruled in *Maryland v. Garrison* that officers must make a "reasonable effort" to confirm they have the right place before executing a warrant, two judges decided that it wasn't "clearly established" that Lieutenant Lewis had to make sure his SWAT team stormed the right house. His mistakes were excusable, the panel reasoned, because he took "some steps" to review details about the house before he arrived.

The panel's decision departs from prior precedent in the 5th Circuit and four other circuit courts that have ruled that *Garrison* means what it says. The decision also departs from common sense.

It shouldn't take a prior case with identical facts to make clear that a SWAT commander should take a minute to make sure his team is breaking into the right house. It's obvious.

Sometimes courts are cautious when confronted with constitutional violations in fast-moving situations. But what happened to Karen and her family is nothing like that. Lieutenant Lewis had a copy of the warrant with a description of the target house and plenty of time to double-check those details before ordering the raid. His mistake was as preventable as it was egregious.

That's why IJ teamed up with Karen to ask the full 5th Circuit to rehear her case. Twice in recent years, the Supreme Court has reversed the 5th Circuit's grants of qualified immunity for obvious constitutional violations. Unless the full appellate court corrects the panel's decision, Karen's case might make it a hat trick. ◆

Jared McClain is an IJ attorney.

Clemene Bastien and **Theslet Benoir** run a small store catering to the needs of Haitian immigrants. When they opened a food truck on their lot, a town councilmember began harassing them.

Small-Town Food Truck Owners Suffer Big-Time Constitutional Violations

BY DYLAN MOORE

Like many immigrants, Theslet Benoir and his wife, Clemene Bastien, came to the United States to escape violence and oppression—and to control their own destiny. But unfortunately, as has happened to many IJ clients, their American Dream was cut short by petty bureaucrats who undermine the very laws they're elected to uphold. Now, with IJ's help, Theslet and Clemene are fighting back.

The couple immigrated to America from Haiti with nothing. While working at a poultry processing plant on Virginia's Eastern Shore, the couple aspired to start their own business. After years of hard work, they eventually opened a small store that caters to the needs of other Haitian immigrants in the nearby town of Parksley. Hoping to expand their operation in May 2023, they received a one-year business license to open a food truck on the same lot as their brick-and-mortar store.

That's when their troubles began. Just days after Theslet and Clemene opened the food truck, town councilmember Henry Nicholson showed up irate. He launched into a tirade about how competition from the food truck would harm local restaurants and falsely accused the couple of illegally dumping grease. Then Nicholson went a step further—he physically cut one of the food truck's pipes, severing its connection to Parksley's sewer system. He later claimed that his position as a councilmember gave him the authority to do so.

> Theslet and Clemene's American Dream was cut short by petty bureaucrats who undermine the very laws they're elected to uphold.

Without access to this necessary utility, Theslet and Clemene couldn't operate their food truck until they could hire someone to repair the damage Nicholson caused.

But Nicholson was not through. The very next day, he returned to the food truck to prevent it from receiving a grocery delivery. When Clemene confronted him, he screamed: "Go back to your own country!"

After Nicholson's individual efforts to shut down the couple's food truck failed, Parksley stepped

iam.ij.org/VA-retaliation

The town gave **Theslet** and **Clemene** permission to operate a food truck, then threatened them with fines and jail time for doing so.

in to pick up where its councilmember had left off. The Town Council passed a sweeping ban that made Theslet and Clemene's new business—the only food truck in town—illegal.

IJ sent a letter urging Parksley to repeal the ban. Instead, the town immediately threatened Theslet and Clemene with years in jail and thousands of dollars in fines. Why? According to the town's new position, food trucks have always been illegal under Parksley's zoning code, and the couple had committed criminal misdemeanors each day their food truck was open—never mind that the town gave them permission to operate in the first place.

None of this makes sense. So when Parksley doubled down, IJ did, too. We filed a federal lawsuit on behalf of Theslet and Clemene to reopen their business and hold the town and Nicholson accountable for unconstitutionally retaliating against the entrepreneurs. Victory in Parksley will mean victory for Americans everywhere who face arbitrary and vindictive punishment simply for exercising their right to earn a living and their right to question the government. ◆

Dylan Moore is an IJ attorney.

IJ'S NEWEST PODCAST GOES *BEYOND THE BRIEF*

Want to go beyond *Liberty & Law* articles to get to the heart of IJ's cases? Then *Beyond The Brief,* IJ's newest podcast, is for you!

Co-hosts Kim Norberg and Keith Neely sit down with guests—IJ attorneys, clients, and external specialists—as they explore the law, history, and tactics in IJ's fight for liberty and justice. *Beyond The Brief* now joins IJ's podcast family alongside our legal history podcast, *Bound By Oath*, and our weekly discussion of federal appeals court decisions, *Short Circuit*.

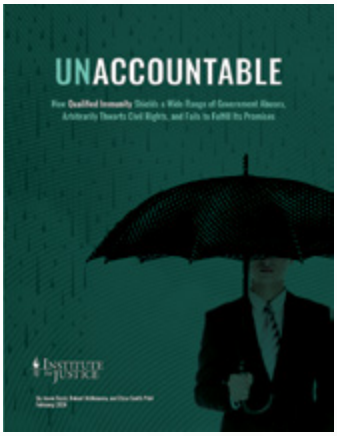
Longtime IJ fans may remember *Deep Dive*, which had its last episode in 2022. *Beyond The Brief* revives that in-depth focus with a new format designed to engage our video audience—now more than 378,000 subscribers strong. The series features both planned and spontaneous questions, fun facts, and an audience response segment.

The first episode dropped in early April and examines New Jersey's program to retain blood samples from every baby born in the state—with no limits on how the samples are used or how long they can be retained. Subsequent episodes have discussed new research on qualified immunity, why almost all private land in America receives no protection from warrantless searches, government retaliation run amok, and more.

You can listen to *Beyond The Brief* on IJ's YouTube channel or wherever you get your podcasts. New episodes will drop about every two weeks. And if you have suggestions for topics or improvements, email Kim Norberg at knorberg@ij.org or comment on the latest episode—we might read your comment on the air! ◆

ij.org/podcast/beyond-the-brief

GROUNDBREAKING STUDY REVEALS LEGAL DOCTRINE RUN AMOK



Read the report at
ij.org/report/unaccountable

IJ works to overcome government immunity doctrines and seek justice for our clients, such as **Sylvia Gonzalez** (top), **William Fambrough** (middle), and **Anthony Novak** (bottom).

BY ELYSE POHL

What do police officers, social workers, and mayors all have in common? All are government officials who can claim qualified immunity to escape accountability when they violate our constitutional rights.

This will come as no surprise to *Liberty & Law* readers, who know we have taken on qualified immunity cases involving all these types of government officials—and more. Yet, in most people's minds, the doctrine is about police and excessive force, and cases like ours that don't fit that mold are outliers.

Now a new IJ strategic research report, *Unaccountable*, challenges this common myth by providing fresh evidence that qualified immunity enables government abuse far beyond police misconduct. And it's already drawing attention. UCLA law professor and preeminent qualified immunity scholar Joanna Schwartz has called the study "incredibly important" and "a must read."

We analyzed the largest-ever collection of qualified immunity cases—over 5,500 federal appeals from 2010 through 2020—to find out how the doctrine works in practice. We found that only 23% of cases involved allegations of excessive force by police.

In fact, a wide array of government officials claimed qualified immunity, including university officials, prosecutors, state ethics commissioners, zoning board members, septic system regulators, and many others. And the allegations they faced were similarly diverse: Excessive force and false arrest were most common, but close behind were First Amendment violations, which appeared in nearly 1 in 5 cases.

When we looked more closely at these First Amendment cases, we found that nearly 60% alleged premeditated retaliation for speech or other protected activity that government officials didn't like. Most frequently, victims of retaliation were government workers (including, often, police officers!) or private citizens.

IJ clients like Sylvia Gonzalez, William Fambrough, and Anthony Novak all suffered premeditated retaliation for speaking critically of local officials, so this finding wasn't surprising to us. However, it does challenge another part of the prevailing narrative about qualified immunity—that the doctrine is needed to protect officials who make honest mistakes in fast-moving situations. By definition, premeditated retaliation doesn't fit that bill, and yet qualified immunity remains as a defense.

We analyzed the largest-ever collection of qualified immunity cases—over 5,500 federal appeals from 2010 through 2020—to find out how the doctrine works in practice.

We found that only 23% of cases involved allegations of excessive force by police.

Unaccountable also shows how difficult it is to get justice when government officials violate our rights. Victims generally must identify a published opinion in a similar case from the U.S. Supreme Court or the federal circuit where they live holding what was done to them unconstitutional. But we found the availability of such precedent depends on a circuit's population (smaller circuits hear fewer appeals) and publication rate. This means victims' odds of winning depend, to no small extent, on where they live.

And whether or not victims can find precedent, their government abusers often use special appeal rights to drag out litigation and wear them down. It's little wonder that our data show government officials usually win.

It shouldn't be so hard for victims of government abuse to vindicate their rights.

Alongside our strategic litigation, research like *Unaccountable* is one way IJ fights to change that. *Unaccountable* gives us a vital new tool to convince judges, legal scholars, journalists, and lawmakers of the case against qualified immunity and the pressing need for change. ◆

Elyse Pohl is IJ's legal research and policy attorney.

Sowing The Seeds For Government Accountability

Supported in part by our groundbreaking research, we have already made progress on the ambitious goal of reining in qualified immunity in the courts.

But IJ's work is most effective when it gains community support. That means we also had to take on the huge challenge of helping the public understand what qualified immunity is (and what it isn't).

So in 2021, IJ launched our Americans Against Qualified Immunity activism initiative. AAQI is a nationwide grassroots effort to educate Americans from all walks of life about qualified immunity and mobilize them around a simple idea: If we the people have to obey the law, then government officials have to obey the Constitution.

This spring, we celebrated a major landmark in that effort by welcoming our 10,000th member. And we're just getting started.

Over the past few months, AAQI has been busy holding public education and activist recruiting events in five different states, hosting more than 500 attendees on a listening tour that helps us home in on the best ways to reach and expand our audience.

IJ knows that if one person's rights aren't protected, then no one's rights are safe, so we don't just work with traditional activists. Our AAQI members include truck drivers, like Carl from Pennsylvania; factory workers, like Marty from Oklahoma; and Army veterans, like Tim from Tennessee.

Alongside IJ's litigation, research, and legislative outreach, we're working at the grassroots every day to end qualified immunity at the local, state, and federal levels—and to make sure that when someone's rights are violated, there's a path to justice. ◆

AMERICANS AGAINST QUALIFIED IMMUNITY

Tom Manuel joined with IJ to challenge the open fields doctrine, which allows game wardens and other government officials to trespass on his land without a warrant or evidence of wrongdoing.

TRAINED TO TRESPASS:

Louisiana Game Wardens Snoop Around Private Land

BY JAMES T. KNIGHT II

Private land is a sanctuary for millions of Americans—a haven from the hustle and bustle of daily life and a place we can make and call our own. And Tom Manuel knows that better than most. As a forester by trade, Tom has made his living managing, cultivating, and protecting his clients' lands throughout Louisiana.

iam.ij.org/LA-open-fields

Tom's own sanctuary is a large parcel of timberland near his home in East Feliciana Parish, Louisiana. He and his wife bought the property in 2003 to grow timber, spend time in nature with their children, and hunt. Tom's experience and passion for forestry and wildlife has allowed him to manage the land sustainably for more than 20 years. Tom values privacy on his land; he's clearly marked the boundaries of his property, locks the gates, and has a "no trespassing" sign at the entrance.

But late last year, Tom found out that Louisiana doesn't think much of his privacy. Exploiting a Prohibition-era U.S. Supreme Court rule called the "open fields doctrine," game wardens with the Louisiana Department of Wildlife and Fisheries believe they have the right to enter and look around Tom's property whenever they please—all without Tom's permission, a warrant, or any suspicion of a crime.

Game wardens entered Tom's land twice last December, each time entering without a warrant

and leaving without issuing a citation. Both times Tom calmly made his position clear: The wardens didn't have his permission to be on his land, and they didn't have any legal right to be there. This didn't faze the wardens—as they told Tom, the state trains them to walk through people's gates and right onto private property, no permission or warrant needed.

But Tom knows his rights. Although the open fields doctrine has stripped down the U.S. Constitution's protections for private land, Louisiana's own constitution is different: It protects *all* property from unreasonable searches and invasions of privacy.

Land is property. That's why Tom teamed up with IJ to sue the department in state court and establish clear precedent: If wardens want to enter Tom's land, the Louisiana Constitution says they need a warrant to do so.

This problem isn't limited to Tom or to Louisiana. Around the country, game wardens and other law enforcement routinely trespass on private land without a warrant to fish for crimes and hunt for evidence. IJ's Project on the Fourth Amendment aims to stop these warrantless intrusions on private land. Along with Tom's case, we've filed lawsuits fighting warrantless searches of open fields under the Tennessee, Pennsylvania, and Virginia Constitutions.

Several states have already rejected the open fields doctrine. These include Mississippi, just 20 minutes up the road from Tom's land. Game wardens there, for instance, can enforce hunting laws while still respecting private property. That goes for other officials, too. And as more states reject the open fields doctrine, IJ hopes to eventually persuade the U.S. Supreme Court to abandon the misguided doctrine as well. But whether in federal or state court, IJ will continue to fight to protect Americans' private land from warrantless searches by all agents and officers. ◆

James T. Knight II is an IJ attorney.


Good Fences?
Good Luck

IJ Attorney **Josh Windham** and Senior Research Analyst **David Warren** co-wrote the first study quantifying the amount of land without protection from warrantless searches under the open fields doctrine.

As IJ continues pushing back against abuses enabled by the open fields doctrine, one of our attorneys came to the strategic research team with an ambitious question: Is there a way to measure just how much private land the doctrine exposes to warrantless searches? The answer: Yes! And the results were stunning.

By using mapping software and three publicly available datasets, we were able to estimate—for all 50 states and D.C.—the amount of private land unprotected by the Fourth Amendment. The numbers are eye-popping. Across the country, only about 4% of private land is eligible for protection from warrantless searches by federal officials, leaving over a billion acres open to the sorts of intrusions experienced by Tom Manuel.

These first-of-their-kind numbers, included in "Good Fences? Good Luck," our recent article in the Cato Institute's *Regulation* magazine, reveal the vast scale of private property open to warrantless snooping. But there is a solution. Courts in Mississippi, Montana, New York, Oregon, Vermont, Washington, and—thanks to IJ—Tennessee have rejected the open fields doctrine, increasing the amount of land that property owners in those states can protect from *state* officials from 4.2% to 100%, a difference of 160 million acres. And states don't have to wait for litigation to turn the tide. In fact, IJ has a model bill for state legislators who want to act—the Protecting Real Property from Warrantless Searches Act.

Whether through courts or legislatures, IJ is here to help empower people to prevent warrantless intrusions on their land, because a billion unprotected private acres is a billion too many. ◆

Read the article published by the Cato Institute at the QR code or at
iam.ij.org/GoodFences

BRUSHING AWAY BARRIERS

in Georgia's Beauty Industry

Georgia beauty professionals like **Angela Mackey** teamed up with IJ to expand opportunity in their industry.

Photo by Tatyanna Chamere

BY RACHEL GONZALEZ AND LAURA KELLY

In Georgia, the beauty industry is rife with opportunity—and red tape. Until recently, beauty professionals had to complete 1,140 hours of cosmetology school, at an average cost of more than $16,000, just to legally perform a blowout. Makeup artists had to fulfill 1,000 hours. These are safe services performed by Georgians every day. But the state's barriers, among the highest in the nation, forced many to work under the table or kept them from working altogether.

That's why Angela Mackey and Diamond Cherry, two Atlanta-area beauty professionals, teamed up with IJ last year. These local entrepreneurs played a key role in expanding opportunity in Georgia's beauty industry—culminating in new legislation that eliminates burdensome licensure requirements for makeup application and blow-dry hairstyling.

After multiple visits to the state Capitol to share their stories with policymakers, Angela and Diamond's tireless work led to the passage of SB 354. When Gov. Brian Kemp signed the bill on May 2, Georgia became the 14th state to exempt makeup application and the seventh to exempt blow-dry hairstyling from licensure.

Angela, a master cosmetologist and owner of Anjel Hair and Beauty Studios, sees the need for change

Testimony from **Diamond Cherry** and others led to the passage of a bill exempting makeup application and blow-dry styling from licensure.

firsthand. Consider one of her employees, Jalynn. A single mother and skilled blow-dry stylist, Jalynn can't afford to attend cosmetology school—but under SB 354, she would be able to earn a living using her skills in Angela's salon.

And though retail workers can apply makeup without a license, the successful freelance business Diamond runs as a self-taught makeup artist technically violates Georgia law. She dreams of finally being able to operate legally and in the open, saying, "This bill would free me up to do the art I love to do. I know that a license doesn't make a professional—skills and experience do."

SB 354 represents a significant step forward for the beauty industry, showcasing a path that other states can follow to create opportunities for beauty professionals. But above all, this reform means that Georgia's talented, hardworking stylists, most of whom are women, can finally support their families and earn an honest living doing what they love.

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Learn more about IJ's campaign to break down barriers in the beauty industry at BeautyNotBarriers.com. ◆

Rachel Gonzalez is an IJ activism associate and Laura Kelly is an IJ activism assistant.

Beauty NOT BARRIERS

WHEN DOES A SIGN BECOME A CRIME?

Will Cramer ran afoul of a Nazareth, Pennsylvania, ordinance banning for-sale signs on cars. So he and IJ are challenging the ban.

BY BOBBI TAYLOR AND JEFF ROWES

Here's a riddle for you:

It's legal to park your car in the street. It's legal to have a sign on your car. Why might doing both make you a criminal?

That's the question we're asking in Nazareth, Pennsylvania. Will Cramer found himself at the center of this baffling scenario—and to untangle it, he joined with IJ to file a First Amendment lawsuit.

It all started last year, when Will decided to sell his truck. After online ads went nowhere, he purchased a for-sale sign and placed it on the truck's window while it was parked outside his house. Will doesn't have a driveway, so he parks on the street—completely legally.

It's also perfectly legal to place a sign in a car. Will's sign could have said "Go Phillies" or "Vote Mary" without issue. If the sign advertised Will's teaching services or a local business, he'd be fine.

But because Will's sign said "for sale," it was a crime.

Why? Nazareth's law prohibits parking a vehicle "for the purpose of selling" it. But the police don't ask whether you've parked for the purpose of selling a car. They just give a ticket whenever they see a sign. Nazareth's law effectively bans for-sale signs in cars—based on their content.

This isn't just absurd, it's unconstitutional. Governments can't ban specific messages. The First Amendment protects all forms of speech, including the time-honored ability to put a for-sale sign on your truck.

IJ has always been at the forefront of defending speech that is common in everyday life, including commercial speech (advertising) and occupational speech (of people who speak for a living, like tour guides and diet coaches). These are categories of speech the Supreme Court has traditionally under-protected, giving the government a freer hand when speech intersects with economic activity. But IJ has steadily persuaded courts to give commercial and occupational speech full First Amendment protections.

And this isn't IJ's first foray into car-for-sale signs. In 2007, we won an 8-7 decision in front of the entire 6th Circuit (which covers Kentucky, Michigan, Ohio, and Tennessee). Because of that close decision, the outcome of Will's case in a different circuit could mean a confrontation at the Supreme Court over local government power to regulate traditional low-cost forms of commercial speech.

Writing "for sale" on a sign shouldn't make you a criminal. Our new suit will make that the constitutional law in even more jurisdictions throughout the country. ◆

Bobbi Taylor is an IJ attorney and Jeff Rowes is an IJ senior attorney.

WHEN A *Strongly Worded Letter* DOES THE JOB

BY DANIEL NELSON AND MATTHEW PRENSKY

Kelly Phillips' cake pop business, KP's Kake Pops & Treats, is a "labor of love." Through a decade of long hours and extraordinary levels of detail, Kelly's enthusiasm for baking blossomed into a bustling business that she runs in her spare time—until last November, when Virginia food regulators destroyed all that hard work.

Officials informed Kelly that she couldn't use her website or social media to advertise her cake pops. They cited a regulation that prohibited certain cottage foods from being sold online. But Kelly doesn't sell her cake pops online. She, like many other small businesses, only uses social media to attract customers for in-person sales. Crushed by the news, Kelly reached out to IJ.

So we sent a letter calling on state regulators to lift their ban on home bakers advertising online. Ultimately, IJ's letter not only forced Virginia regulators to relent but also produced legislative change. Because of Kelly's story, Virginia enacted the "Cake Pop Bill," which solidifies home bakers' constitutional right to advertise their products online.

Ultimately, IJ's letter not only forced Virginia regulators to relent but also produced legislative change.

A similar story unfolded in Honolulu. There, brothers Stewart and Andy Chung opened a modest restaurant, EbiNomi, to invest for their retirement. Nestled in a private courtyard, EbiNomi is invisible from the public sidewalk or street. So for years, the brothers placed a small, portable menu board near the public sidewalk to attract tourists—EbiNomi's primary customers.

But last September, a code inspector told Stewart and Andy that their small sign was banned under Honolulu's sign regulations. Without the sign, EbiNomi's sales plummeted. The brothers feared the prospect of giving up on their award-winning restaurant and retirement dreams. Like Kelly, they reached out to IJ for help.

And again we sent a letter, this time calling on Honolulu to lift its sign ban, which violated the First Amendment by stopping EbiNomi and other restaurants from setting out signs while allowing signs from politicians, realtors, and event planners. In response, Honolulu agreed to suspend enforcement of its sign ban and take steps toward reform. The result? EbiNomi's sales soared *over 200%*. Other once-struggling Honolulu businesses are now booming, too.

IJ exists to set far-reaching precedent—but not every instance of government overreach is a good target for IJ's full litigation arsenal. In those circumstances, we're able to act quickly and efficiently to roll back bad policies and expand freedom. ◆

Daniel Nelson is IJ's research attorney and Matthew Prensky is IJ's communications coordinator.

IJ Enjoys Exceptional Injunction

BY ANDREW WARD

Score one for the good guys! A recent early win for IJ meant persuading a judge to issue a ruling almost unheard of in the federal courts.

IJ client Jay Fink just wants to make an honest living while cleaning up the internet. His business, which sorts through unwanted emails, helps his fellow Californians prepare for lawsuits under a state anti-spam act. Or at least it used to. You know where this is going: When state bureaucrats got word that Jay was reading other people's emails without the government's permission, it shut him down, claiming that Jay couldn't "investigate" spam without a license as a private investigator. Which means *six thousand hours* of training before Jay can click through emails.

We teamed up with Jay to challenge the law—and in March, a federal judge agreed that we were likely to win. She issued a preliminary injunction preventing the state from enforcing the law while the case proceeds.

Here's the rub. The judge issued this ruling under a legal standard called the "rational basis test." Longtime *Liberty & Law* readers know that this test is an IJ nemesis. Because the test is often laughably weak, many regulations survive—no matter how unfair or protectionist. We do win economic liberty cases under this standard. But it's only because we have the ability and resources to compile impressive records about compelling clients.

This ruling goes a step further. We convinced a judge that we were likely to win on a rational basis claim before discovery even started. That's beyond rare. Indeed, it may be the first time a federal court has ever enjoined a licensing law under this test. But when you're right, you're right. Shuttering a business until the owner undergoes 6,000 hours of irrelevant training does look irrational. And we're delighted a court said so *before* years of litigation.

Of course, a preliminary injunction is not a final ruling. But we'll keep fighting for our client every step of the way to final judgment. And, as the case goes on, Jay is free to get back to work thanks to this IJ victory. ◆

Andrew Ward is an IJ attorney.

A Private Eye License To Search A Public Database?

Just as California requires a private investigator license to read emails, Illinois requires a PI license to search government databases—and IJ has a case challenging that requirement, too.

Illinois, like most states, takes custody of "unclaimed" property—things like uncashed checks, misplaced savings, or forgotten accounts. The state is supposed to return the property if its owner comes forward to claim it. But, of course, owners can't file a claim unless they know the property is in the government's possession.

Enter David Knott. David searches through state databases of unclaimed property to identify owners of assets, and he helps the owners file claims.

In 2021, Illinois sent David a cease-and-desist letter accusing him of working as a PI without a license. To become licensed, David would have to take an exam on topics like firearms handling, crime scene investigation, and electronic surveillance.

It makes no sense to require testing on firearms and surveillance to search a database. But it's logical enough from Illinois' perspective: If David cannot help people recover their unclaimed property, then Illinois gets to keep it. And starting next year, Illinois can use unclaimed property to fund its pension obligations.

So David joined with IJ to challenge Illinois' unconstitutional licensing requirement. His case raises the same basic claims as in California: David talks for a living. He tells people about their unclaimed property, and he helps them file claims. David should not need a license to talk, and he shouldn't have to become a private eye to help people access public information. ◆

IJ MAKES HEADLINES

These articles and editorials are just a sample of recent favorable local and national coverage IJ has secured. By getting our message out in media, we show the real-world consequences of government restrictions on individual liberty—and make the case for change.

reason

Rudy Carey Was Pardoned, But The Unjust Law That Kept Him From Working Is Still On The Books

By Sofia Hamilton | March 4, 2024

In 2018, after five years of working diligently as an addiction counselor in Virginia, Rudy Carey received devastating news: He could no longer legally work. The reason? His criminal record included a barrier crime. Barrier crimes are convictions typically involving abuse or neglect that can impede an individual from later employment. Many states have such laws in place. Virginia's barrier crime law prohibits individuals with a conviction for any of the law's 176 enumerated crimes from working in a "direct care" position.

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THE WALL STREET JOURNAL.

When Local Officials Gag Dissenters With Handcuffs

March 18, 2024

THE MORNING CALL

How A Vehicle-For-Sale Sign Has Launched A Free Speech Battle In One Lehigh Valley Community

April 10, 2024

The Dallas Morning News

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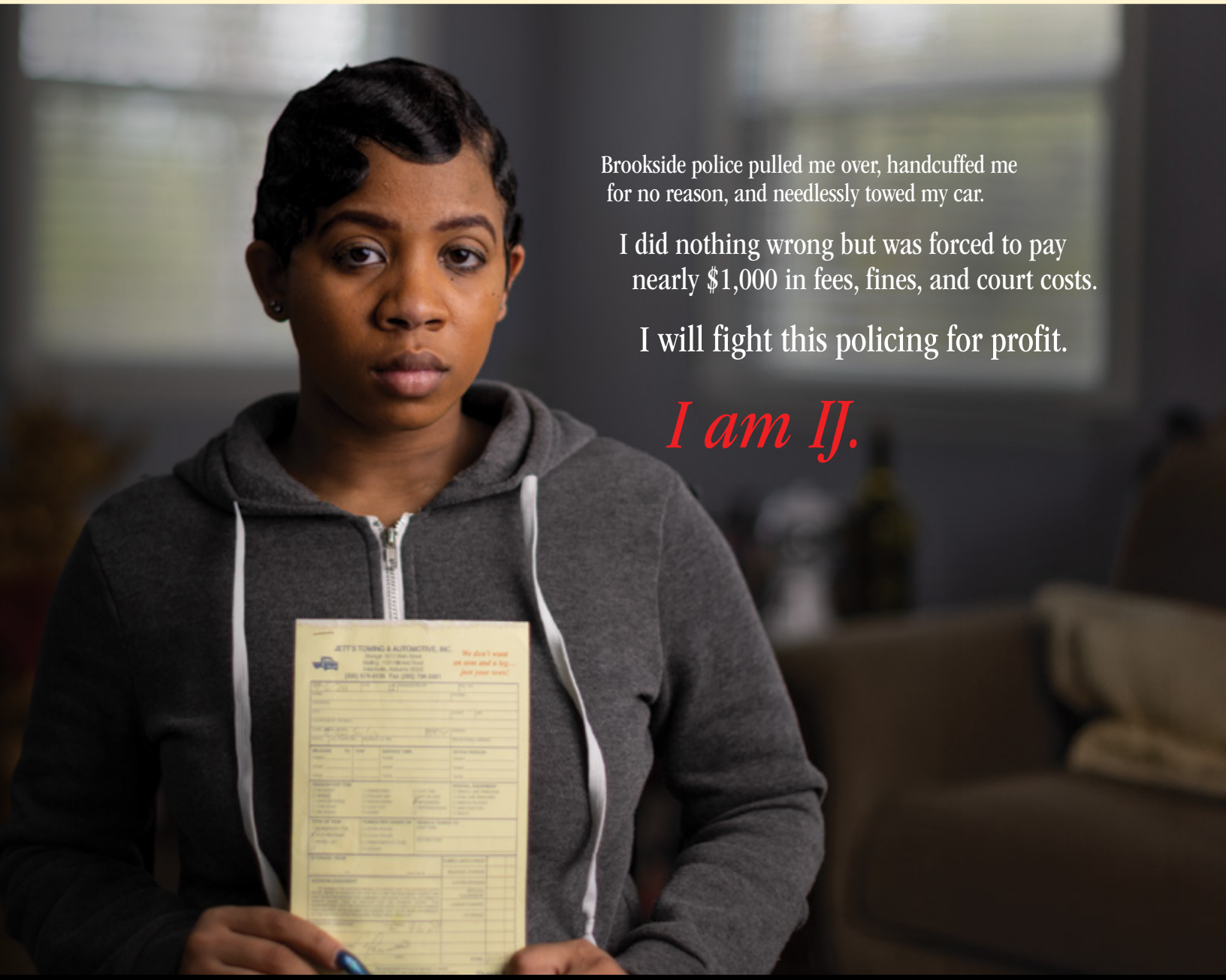

Brittany Coleman
Brookside, Alabama

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