LIBERTY & LAW
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VICTORY!

SUPREME COURT MAKES IT EASIER TO CHALLENGE GOVERNMENT RETALIATION

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contents

ZONING JUSTICE
A Project Protecting the Freedom to Use Property

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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.

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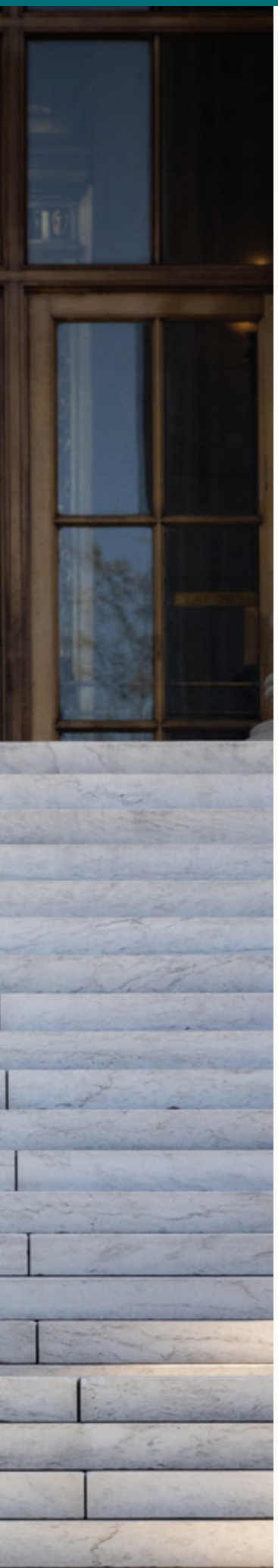
VICTORY!

Supreme Court Makes It Easier To Challenge Government Retaliation

In June, IJ client **Sylvia Gonzalez** (front row, second from left), along with lead attorney **Anya Bidwell** (front row, second from right) and the rest of the case team, secured a U.S. Supreme Court victory after small-town officials arrested Sylvia on bogus charges to silence her criticism.



BY ANYA BIDWELL

In June, the U.S. Supreme Court ruled that people who are retaliated against by government officials don't have to prove impossible things before they can vindicate their First Amendment rights in court—IJ's second victory at the high court this term.

The journey to 1 First Street started five years ago, when I received a phone call from an acquaintance at a law firm. His aunt's friend, Sylvia Gonzalez, had been arrested for supposedly trying to steal her own petition calling for the removal of a city manager. The 72-year-old woman was terrified after spending a day in jail, in an orange jumpsuit, without access to her medications. But his firm's pro bono practice couldn't represent Sylvia because a judge had signed off on a warrant for her arrest, which made the case procedurally complicated. Supreme Court precedent, issued that same year in *Nieves v. Bartlett*, held that as long as there is probable cause, government officials generally cannot be sued for retaliatory arrests.

When I explained Sylvia's plight to my colleagues at IJ, they were outraged—but also excited. The challenges that made the case a dealbreaker for my friend's firm were exactly what made it a must-file lawsuit for us. That's because Sylvia's situation presented a timely and important question about government accountability: Can laundering a First Amendment violation through a warrant really allow officials to arrest their critics with impunity?

So we brought a suit on Sylvia's behalf to find out and to set precedent nationwide. To position the case just right, we did a lot of homework. For example, we went to the Bexar County records office and photocopied 10 years of data about the statute that was used for Sylvia's arrest. Turns out it had primarily been used to charge people accused of forging government identification documents like driver's licenses—and had never once been used in a situation involving a petition or anything remotely similar to the charge against Sylvia. Every piece of evidence we found about the highly unorthodox behavior of city officials suggested they were motivated by a desire to punish their critic and send a message to the rest of the town to not mess with the powers that be.

Sylvia's tormentors invoked qualified immunity, arguing that the presence of a warrant meant that they should escape scrutiny. But a federal judge disagreed. He understood that although *Nieves* is a high bar, Sylvia cleared it because of all the evidence and data we presented. Undeterred, the officials appealed to the 5th Circuit.

Sylvia continued on page 23

Qualified immunity is not just a defense against liability; it is a defense against a lawsuit.

Before IJ stepped in, **Sylvia** struggled to find an attorney who would take her case.

Retaliatory Raid Leads To IJ Lawsuit

BY JARED MCCLAIN

Ruth Herbel was vice mayor of Marion, Kansas, when police searched her home and confiscated her computer and only phone. Now, Ruth and Sylvia Gonzalez share the same nightmare: They were both targeted for their political opposition to the mayor and his allies.

After she retired from a career in state and federal government, Ruth ran for office to make her local government more honest and transparent. She quickly learned, however, that not everyone in government shared her preference for honesty and transparency. Mayor David Mayfield, in particular, resisted Ruth's insistence that he follow the rules—so he tried to silence her. He started small, restricting what issues Ruth could raise at public meetings and threatening criminal charges if she spoke about city business without the City Council's approval.

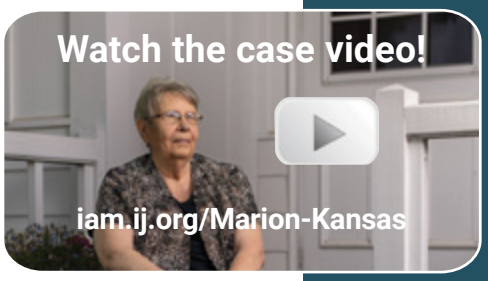
When Ruth successfully campaigned against a public referendum to expand the mayor's powers, Mayfield decided Ruth had to go. He and his wife filed a petition to recall Ruth from office. And when that effort failed, he decided that the only way to remove Ruth was to have her arrested.

It didn't take long for Mayfield to put his plan into action. By chance, Ruth and the *Marion County Record*—a local newspaper that was also critical of the mayor's administration—had each previously received a copy of a letter from

The police seized every cell phone and computer they could find. **Ruth Herbel** begged them to let her get the phone numbers of her children and doctors, but they refused. Her husband suffered from dementia, and the raid sent him into a spiral of anxiety.

After Ruth retired from a career in state and federal government, she ran for office to make her local government more honest and transparent.

Ruth quickly learned, however, that not everyone in government shared her preference for honesty and transparency.



a state agency revealing that a restaurant owner close to the mayor had a DUI conviction, which could have prevented her from getting a liquor license. There was nothing illegal about having the letter; it was publicly available. But the mayor still used the letter as pretext to orchestrate a ham-handed investigation into his political opponents.

The mayor and his police chief contrived a theory that possessing a copy of an official document that contains someone's personally identifiable information (e.g., their address or driver's license number) was, somehow, identity theft. Within two days, they'd drawn up warrants to search Ruth's home, along with the newspaper's office and the home of one of its publishers, and to seize their electronic devices.

Although the warrant said police could seize only those devices that contained evidence of identity theft, they took every cell phone and computer they found. Ruth begged them to at least let her get her children's and doctors' phone numbers; her husband, Ronald, suffered from dementia and several other ailments, and Ruth's phone was their only way to call for help in an emergency. Unsurprisingly, watching the police raid his house and interrogate his wife sent Ronald into a spiral of confusion and anxiety. Still, the police wouldn't let Ruth get the numbers she needed.

Relatively speaking, Ruth was lucky. The paper's 98-year-old co-owner died from a stress-induced heart attack the morning after the raids. The national outcry and lawsuits that followed forced Marion to reverse course: It withdrew the warrants, and the police chief resigned.

But Ruth still wants accountability. So she teamed up with IJ to vindicate her First Amendment rights. And after Sylvia's high court victory, local politicians and bureaucrats are finally getting the message: In America, we don't arrest our political opponents. If you do, you'd better be prepared to defend yourself in court. ◆

Jared McClain is an IJ attorney.

Ruth and a local newspaper were both raided. The co-owner of the newspaper died of a heart attack the following morning from the stress.

Massachusetts law doesn't allow special needs children from families like the **Hellmans** to receive state-funded services at the private schools they attend.

EXPANDING OPTIONS
For Special Needs Students

BY DAVID HODGES

Massachusetts law makes this guarantee to students with special needs: No matter who you are, or where you go to school, you should receive special education and related services. It is part of the commonwealth's efforts to ensure that students with special needs get the services they require.

Two IJ client families—Ariella and David Hellman and Josh Harrison and Miriam Segura-Harrison—are exactly the type of people the law was meant to benefit. Their children require services like academic support and occupational therapy so they can reach their full potential. But for them, Massachusetts' guarantee is an empty promise.

Massachusetts law makes this guarantee to students with special needs: No matter who you are, or where you go to school, you should receive special education and related services. But for two IJ client families, Massachusetts' guarantee is an empty promise.

Because the Hellmans and the Harrisons chose to enroll their children in private schools, the kids can't receive services funded with state and local revenues at their own schools. Instead, they must travel off site to a public or other "neutral" location. Massachusetts regulators imposed this restriction on special needs students even though most private schools are fully capable of hosting the services—and even though the government is exempted from this requirement when *it* enrolls students in private schools. It is only when *parents* enroll their children in private schools that students face this restriction.

As readers may have surmised, this regulation

The **Harrison** family has teamed up with IJ to ensure that special needs children get the same access to resources whether they go to public or private schools.

is not only irrational—it is unconstitutional. Parents like the Hellmans and the Harrisons have a fundamental constitutional right to direct the upbringing of their children, including by sending them to private school. But when Massachusetts effectively bars children from getting needed services simply because their parents enrolled them in private schools, Massachusetts infringes upon that right.

Although this is a new challenge for IJ, it is based on the same principles underlying our previous U.S. Supreme Court victories in *Espinoza v. Montana Department of Revenue* and *Carson v. Makin*. For example, IJ argued in *Espinoza* that it was unconstitutional for Montana's Blaine Amendment to bar public funds from going to students just because they attended religious private schools. And the high court agreed: When the Montana Supreme Court was asked to apply its Blaine Amendment to discriminate based on religious exercise, "it was obligated by the Federal Constitution to reject the invitation."

The same logic applies here. Although Massachusetts' Blaine Amendment prohibits public monies from going to all private schools, not just religious ones, this regulation is discrimination based on a constitutional right all the same. And just as the government may not discriminate simply because a person exercises her religion, it may not discriminate because a person enrolls her child in a private school.

That's why the Hellmans and the Harrisons have teamed up with IJ (and the Pioneer Public Interest Law Center) to challenge this regulation. If we prevail, it will mean one of the few Blaine Amendments not affected by *Espinoza* or *Carson* will no longer have legal force. And that's a victory for everyone. When the government denies a child a benefit because her parent exercised a constitutional right, that's not just cruel and irrational—it's unconstitutional, too. ◆

David Hodges is an IJ educational choice attorney.

Back To School
—And Back In Court—
To Defend Two Choice Programs

BY ARIF PANJU

Thousands of families in Utah and Arkansas are looking forward to this upcoming school year. For many, it marks the first time they can afford to give their children what matters most: a good education.

The turning tide with K–12 education nationally fueled the reforms in both states. By enacting education savings accounts (ESA), lawmakers delivered a lifeline that empowers families to access educational options that meet their children's needs. As in the dozen states with existing ESA programs on the books, children in Utah and Arkansas now have the means to leave underperforming public schools for learning environments that work. The ESA programs in both states make myriad educational options affordable, including private school tuition, home school curricula, therapies, tutoring, and more.

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How popular are ESAs? Very. Over 27,000 Utah families applied for the first 10,000 ESAs available under the Utah Fits All Scholarship program. IJ clients Maria Ruiz and Tiffany Brown will rely on their ESAs to afford private school tuition for the 2024–25 academic year. As Tiffany put it, "not every child learns the same way and some families,

IJ clients **Tiffany Brown** (left) and **Maria Ruiz** (right) rely on Utah's ESA program to send their children to the schools that best meet their needs.

like mine, have children with special needs, so it is important that parents can afford educational options that best address a child's needs." Utah funds each ESA with nearly $8,000 annually, and every student is eligible.

In Arkansas, the Education Freedom Account program served close to 5,000 students during the 2023–24 academic year, with 44% of ESAs awarded to children with disabilities. For IJ clients Erika Lara, Katie Parrish, and Nikita Glendenning, ESAs are a game changer. The accounts are funded with nearly $7,000 to help students with a disability, those experiencing homelessness, and current or former foster care children, among others. And in the 2025–26 school year, every student in Arkansas will become eligible.

But entrenched public school interests are not happy about ESAs. They seek to deny these options to the thousands of families who need them. To preserve a K–12 education monopoly, Utah's largest teachers' union sued in May 2024 to stop the state's ESA program. The union president claims that families with ESAs "harm public school students and educators." Two weeks later, choice opponents in Arkansas filed a similar suit to stop ESAs there. The legal attack aims to take these funds away from families—and even force private schools that have received tuition payments from parents using the program to give that money to the state.

To defend both ESA programs, the Partnership for Educational Choice—a joint project of the Institute for Justice and EdChoice—moved to intervene in the Utah and Arkansas lawsuits within days. These are the first two cases for the Partnership, under which IJ and EdChoice have joined forces to provide legislative counseling and legal defense of choice programs nationally. The newly founded EdChoice Legal Advocates will eventually take over those responsibilities from IJ as we continue to advance cutting-edge constitutional arguments (as on page 8) and begin to defend innovative alternatives to the education status quo, such as microschools and learning pods.

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IJ was founded at the beginning of a new era of school choice programs. Today, more than 30 years later, choice programs are wildly popular and broadly available because IJ has successfully defended program after program. The Partnership for Educational Choice will continue that legacy in Utah and Arkansas—and beyond. ◆

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

Arkansas' Education Freedom Account program is a game changer for Arkansas families like those of **Katie Parrish** (left) and **Nikita Glendenning** (right), providing nearly $7,000 to disabled, foster, and other children most in need.

TENNESSEE LANDOWNERS DEFEAT WARRANTLESS SPYING—FOR GOOD!

BY JOSHUA WINDHAM

Tennessee landowners' historic 2022 victory against warrantless spying will stand. In May, the Tennessee Court of Appeals unanimously affirmed that the Tennessee Constitution forbids state game wardens from entering land owned by Terry Rainwaters and Hunter Hollingsworth without a warrant. Our victory became final in July when the state decided not to appeal. The appellate court's decision provides a model for how state courts across the country can start to rein in the federal open fields doctrine.

A hundred years ago, the U.S. Supreme Court held that so-called open fields (a term of art that includes all private land except a tiny ring of land around your home) deserve zero Fourth Amendment protection. In a study published earlier this year, IJ found that the federal open fields doctrine exposes about 96% of all private land in the country—or about 1.2 billion acres—to warrantless searches by government officials.

IJ found that the federal open fields doctrine exposes about 96% of all private land in the country—or about 1.2 billion acres—to warrantless searches by government officials.

For years, Tennessee game wardens have relied on this doctrine to invade just about all land in the state. Terry and Hunter own farms that they have protected with gates and "no trespassing" signs to preserve their privacy. Yet they saw game wardens roaming their farms in full camo without a warrant several times. After finding spy cameras that game wardens had installed in their trees, Terry and Hunter finally had enough.

With IJ's help, they sued under the Tennessee Constitution to stop these intrusions. And that's exactly what the recent Court of Appeals decision did. It held

Hunter Hollingsworth joined with IJ to challenge warrantless surveillance of his land in rural Tennessee, where he hunts, fishes, and grows crops.

that the Tennessee Constitution's textual protection for "possessions" secures all land put to "actual use"—whether by fencing, farming, posting, or otherwise—from warrantless searches. In other words, the court held that state officials can't use the open fields doctrine because the Tennessee Constitution provides more protection.

This decision doesn't just help Terry and Hunter. It doesn't even just help landowners in Tennessee (though millions in the state will benefit from it). Instead, the decision has the potential to help countless more folks across the country. For example, 15 other states—including Pennsylvania, where IJ currently has a nearly identical case before the Pennsylvania Supreme Court—have constitutions that similarly protect "possessions."

The decision also provides a solid building block for IJ's long-term goal of challenging the open fields doctrine in federal court. While the Fourth Amendment doesn't use the same "possessions" language, history makes clear that it was inspired by customs officers' use of so-called general warrants—broad grants of power that allowed them to search homes and other property at their complete discretion. And the Tennessee Court of Appeals' decision speaks directly to that problem. Warrantless searches under the open fields doctrine, the court explains, "bear a marked resemblance to the arbitrary discretionary entries of customs officials more than two centuries ago in colonial Boston."

Reining in the open fields doctrine will be a long battle. But state courts now have an excellent model for how they can use their independent constitutional text to reject the federal rule.

Reining in the open fields doctrine will be a long battle. But state courts now have an excellent model for how they can use their independent constitutional text to reject the federal rule. And when enough state dominos have fallen, IJ will stand ready to take this issue into federal court—where we can end the open fields doctrine once and for all. ◆

Joshua Windham is an IJ attorney and IJ's Elfie Gallun Fellow in Freedom and the Constitution.

IJ client **Terry Rainwaters**, along with Hunter and other Tennessee landowners, can now enjoy their property in peace after a state appeals court ruled the Tennessee Constitution protects all private land put to use.

New IJ Project Restores Justice In ZONING

BY ARI BARGIL

Why do we live where we live? And work where we work? And if you own property, why are you restricted in how you can use it? If you're like most Americans, the answer to these questions is the same: Because the government said so. That is bizarre in a society supposedly built on property rights. And yet zoning is everywhere—a modern patchwork of arbitrary lines that govern virtually every aspect of property use. IJ has launched the Zoning Justice Project to do something about it.

Zoning is everywhere–a modern patchwork of arbitrary lines that govern virtually every aspect of property use. IJ has launched the Zoning Justice Project to do something about it.

It wasn't always this way. At the time of the Founding and for many years after, the free use of property was the norm. That principle meant that property use was subject only to the limitations of basic nuisance law. In other words, people were free to use their properties as they saw fit, so long as their use did not cause harm or interfere with another's ability to do the same. To regulate beyond that, it was widely (and correctly) believed, would amount to an unconstitutional taking.

All of that changed about a hundred years ago—with the Supreme Court's decision in *Village of Euclid v. Ambler Realty*. In *Euclid*, for the first time, the Supreme Court blessed the concept of zoning as a legitimate exercise of police power. And from that point on, zoning laws exploded nationwide.

The results have been catastrophic. Economists now agree that zoning has made Americans less free and less prosperous. The current housing crisis is a perfect example. Unnecessary restrictions micromanage construction, imposing arbitrary regulations like minimum square footage requirements for new units. And they further drive up costs by creating lengthy and costly permitting processes that make it near-impossible to build. The outcome is predictable: Fewer units of housing get built. At the same time, while governments drive up the cost of construction, they also make it harder for Americans to seek more affordable options, passing laws criminalizing alternatives like mother-in-law suites and tiny homes. So the cost of housing in America continues to skyrocket.

Similar problems arise in other areas where IJ is active. For example, zoning makes it more difficult to open a business in a desired location—including in one's home—and often makes it flatly illegal to engage in basic acts of kindness, like feeding or housing those in need.

IJ is uniquely suited to address these problems. Unlike many activists who advocate for more and more government intervention, IJ is a respected advocate for free-market, property-rights oriented solutions—the types of solutions necessary to effectively combat glaring market manipulation and government abuse.

To that end, we designed the Zoning Justice Project to protect and promote the freedom to use property. Zoning makes it harder to find and provide housing, start a business, and help those in need. Through strategic litigation, legislative advocacy, and targeted activism, we aim to change that. All Americans have the right to use their property, peacefully and productively, to benefit themselves and their communities. ◆

Ari Bargil is an IJ senior attorney.

ZONING JUSTICE

A Project Protecting the Freedom to Use Property

Learn more at **ij.org/issues/zoning-justice**

Keeping The Pressure On City Hall

It's been more than two years since the city of Pasadena, Texas, agreed to allow our client, Azael "Oz" Sepulveda, to open his one-man auto shop. But the city hasn't kept its word and is now deploying delay tactics to evade Oz's legal fight. We're keeping the pressure on.

IJ first sued in December 2021, after the city told Oz he couldn't open until he added 23 parking spaces he did not need and could not afford—and which would not physically fit on the property. We won a temporary injunction and, in April 2022, reached a binding agreement with the city allowing Oz to open with just a handful of parking spaces.

But the city went back on its word and still refuses to let Oz open. In response, we filed a second lawsuit seeking to enforce the settlement agreement in September 2023. Rather than face the music, the city claimed it was immune—an argument the district court rejected while deeming the city's actions "bad public policy."

Pasadena's latest delay tactic is appealing that ruling, which halts the trial-court proceedings. In response, IJ launched a series of video ads showing how the city has wasted time and taxpayer money fighting against a settlement it agreed to. The ads have been seen by more than half of the city's residents, and two city councilmembers admitted publicly the city's attorney has kept them in the dark about the lawsuit.

The wheels of justice may sometimes turn slowly, but IJ will do whatever it takes to keep them moving and to ensure that our clients' rights are protected. ◆

Scan to learn more!

Cutting Red Tape From Coast To Coast

BY JENNIFER MCDONALD

IJ is always happy to sue the government to defend an entrepreneur's right to earn an honest living. But as any small-business owner knows, there are countless government policies that may be technically constitutional yet still inflict death by a thousand cuts and make it difficult—if not impossible—for entrepreneurs to truly thrive.

That's where IJ's Cities Work grassroots activism initiative comes in.

Launched in early 2022, Cities Work partners with cities across the country to identify and rectify the regulatory barriers that make it too expensive, time-consuming, and complicated to start a small business. Two years into the initiative, we have engaged with more than 425 entrepreneurs and provided custom policy recommendations to 15 cities—and counting!

When we first partnered with Fort Worth, Texas, the city's website provided little guidance to residents trying to start a business, meeting just one out of the five criteria on which we graded cities' online services in our *Barriers to Business* report. Within a matter of weeks, the city took our advice and revamped its entire website, turning it into one of the best one-stop shops in the country and improving its score to four out of five.

CITIES WORK

www.citieswork.org

In June 2023, we were invited by St. Louis' Board of Aldermen to partner with their new Special Committee on Reducing Red Tape to help get the Gateway City's government out of the way of small-business owners. We helped the board pass an ordinance to make it much easier for small restaurants to obtain a liquor license—something crucial for most restaurants' success—and are currently helping it repeal a prohibition on food trucks operating within 150 feet of brick-and-mortar establishments.

Our largest project, also in Missouri, is a partnership with Kansas City's Small Business Task Force. In March 2024, we launched a report detailing the city's

"I never went into business thinking I was going to be a millionaire. … I want to be able to take care of my husband who is in a nursing home, maintain my home, and be of service to my community."

–Mama Gina, Fort Worth, TX

regulatory processes, feedback from entrepreneurs on their struggles to get their businesses going, and eight groups of policy recommendations. Our celebratory launch event drew over 75 attendees, including members of the City Council, entrepreneurs, and the Ewing Marion Kauffman Foundation's CEO.* We are working with the task force to turn our policy recommendations into draft ordinances to put before the City Council.

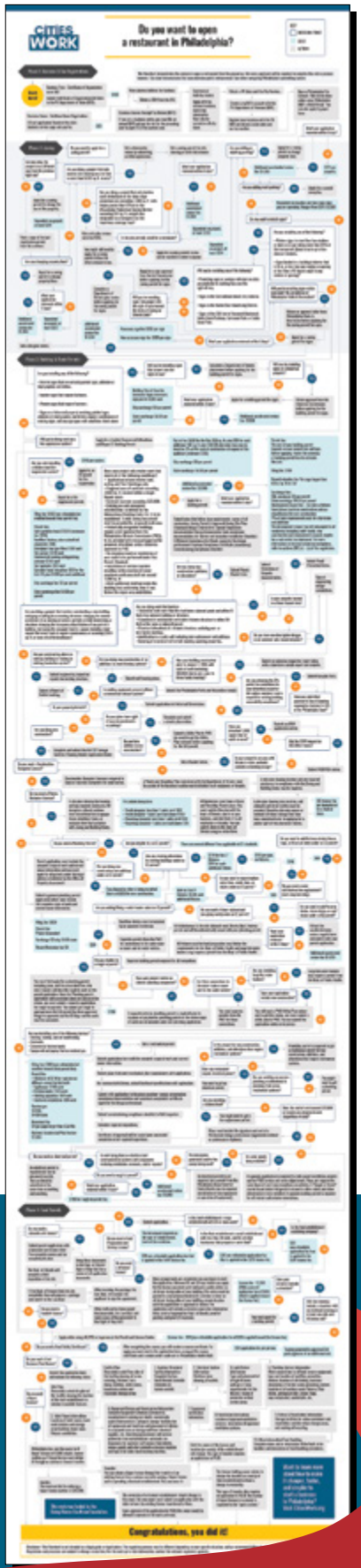
The Philadelphia Mayor's Office has partnered with us to streamline the process for starting a food business (see our flowchart mapping out the cumbersome process of opening a restaurant in the City of Brotherly Love at right). And we're working with Shreveport, Louisiana, to simplify the city's development process.

The reforms we fight for make a real difference in an entrepreneur's life. As Fort Worth restaurant owner Mama Gina told us, "I never went into business thinking I was going to be a millionaire. … I want to be able to take care of my husband who is in a nursing home, maintain my home, and be of service to my community."

IJ has always fought for the little guy. Cities Work is proud to do just that in city halls around the country. ◆

Jennifer McDonald is IJ's assistant director of activism special projects and leads the Cities Work initiative.

Learn about the cumbersome process for opening a restaurant in Philadelphia at **iam.ij.org/philly-flowchart**.



"Starting a business takes a lot of resources, and the resources needed to untangle the red tape can force entrepreneurs to shut their business down before they can even open their doors."

–James Thomas, Kansas City, MO

*Cities Work is supported through a grant from the Ewing Marion Kauffman Foundation.

TURNING LOSSES INTO OPPORTUNITIES FOR HIGH COURT REVIEW

Vicki Baker (left) is seeking just compensation after a SWAT team destroyed her home while pursuing an unrelated fugitive. The **Brinkmann** family (below) is fighting a bogus eminent domain claim that would see the site of their proposed hardware store turned into an empty field. IJ is seeking Supreme Court review of both cases.

BY ROBERT MCNAMARA

Supreme Court victories are important—and, as our cover story shows, IJ just had our second one this year. But victories like that don't just happen. Instead, they're the product of long-term dedication to seizing opportunities whenever they arise.

And one way to create opportunities is to lose. At IJ, we deliberately view every loss as an opportunity to achieve a bigger victory. It is tempting to view a bad decision from a court as a defeat, as an excuse to rest your head on your desk and have a good cry. But it's not that. A bad decision from a trial court is an opportunity to get a big win from an appeals court. And a bad decision from an appeals court is an opportunity to put the issue squarely before the Supreme Court.

Often this magazine covers only the end of that process—the triumphant victory. But much is happening behind the scenes. Take our current Takings Clause work: Longtime readers of *Liberty & Law* will remember Vicki Baker, the retiree whose Texas home was destroyed by a SWAT team pursuing an unrelated criminal. IJ's theory is that this sort of destruction is a taking. The government has to pay compensation if it destroys an innocent person's home to catch a criminal, just as it does if it destroys a home to build a road. We won on that theory at trial—the first victory of its kind nationwide—only to see it reversed on appeal.

Or you may recall the Brinkmann family, who saw their plans to open a hardware store on Long Island thwarted by the town's sudden decision to condemn their land to build a

AT IJ, WE DELIBERATELY VIEW EVERY LOSS AS AN OPPORTUNITY TO ACHIEVE A BIGGER VICTORY.

A BAD DECISION FROM AN APPEALS COURT IS AN OPPORTUNITY TO PUT THE ISSUE SQUARELY BEFORE THE SUPREME COURT.

"passive park" (that is, an empty field). IJ sued (because eminent domain is for "public uses," not for no use at all), and there, too, an appellate court ruled against us.

But both of those are opportunities. Both cases drew powerful dissents from judges who agreed with IJ's position, and both now give us a chance to ask the Supreme Court to take up the case.

And similar opportunities arise in other areas, such as our free-speech work. You may, again, recall recent articles about our victories for the First Amendment rights of North Carolina engineer Wayne Nutt or the "death doulas" of Indiana—but amidst those victories, two different appeals courts in the past year have ruled that the simple act of taking or even drawing pictures can be prohibited as unlicensed "surveying."

Those losses, too, present an opportunity—one born of the combination of success and failure. Lower courts sharply disagree with one another about how the First Amendment interacts with occupational licensing laws. The cases on each side of that disagreement are overwhelmingly IJ cases, which is a sure sign we're in the driver's seat of a truly cutting-edge constitutional debate.

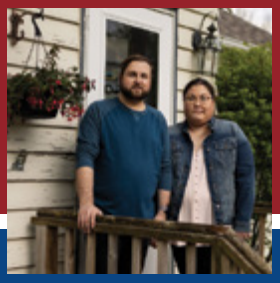
Of course, asking the Supreme Court to take any case is a longshot; the Court accepts fewer than 1% of the petitions it receives. But that is why IJ's goals are long term. Even if a specific petition is unsuccessful, it is an opportunity to educate the Justices that there is an ongoing constitutional debate—something that lower-court judges are actively fighting about and that the Court will eventually have to resolve. And IJ will continue seizing opportunities to make sure that we're on the front lines when it finally does. ◆

Robert McNamara is IJ's deputy litigation director.

Engineer **Wayne Nutt** (top) and death doula **Lauren Richwine** (bottom) are fighting appeals court decisions that curtail the right to speak to others without irrelevant government licensing.







Fifty-One Supreme Courts

BY LISA BERGSTROM

As this issue of *Liberty & Law* shows, IJ is more active than ever at the nation's highest court. But the U.S. Supreme Court isn't the only place where we're able to secure transformative, far-reaching precedent, so we're also appearing in a record number of state supreme courts.

We leverage unique provisions in state constitutions that provide even greater protections for individual freedom than the federal Constitution. With three state supreme court victories already and more on the way, we're gaining momentum in our efforts to pare back judicial deference to economic regulation—and we're applying that successful model to our newer campaign against the open fields doctrine (see page 12).

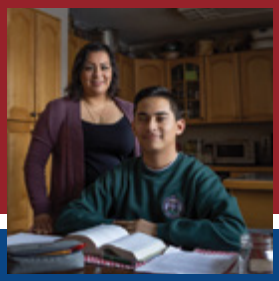
Here are a few highlights from our current state supreme court docket:

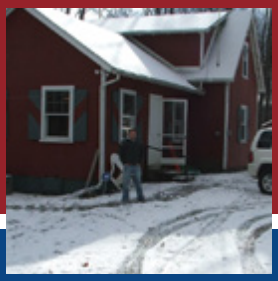
In North Carolina, Dr. Jay Singleton wants to provide low-cost eye surgeries in his own clinic. But the state's certificate of need law uses a formula to decide how many medical providers are "needed" in an area. In Jay's area, that number is one: a large hospital that charges much more than Jay would. IJ and Jay are challenging this state-imposed monopoly under the state constitution, which includes a clause explicitly banning monopolies. We argued the case before the North Carolina Supreme Court in April and are awaiting a decision.

In Nebraska, Marc N'Da runs a home health agency and wants to expand into giving his clients rides to doctor appointments and pharmacies. But a certificate of need law requires Marc to get permission from the very businesses he'd be competing against. Unsurprisingly, they said no. Marc and IJ teamed up to challenge this irrational law. A trial court ruled against us, and we recently finished briefing at the state Supreme Court.

In Louisiana, to braid hair legally requires 500 hours of unnecessary training offered at only one cosmetology school in the entire state. The licensing requirement wasn't passed by the Legislature but was instead imposed by a cosmetology board that includes the school's owners. IJ and two Louisiana braiders teamed up to challenge the regulation. In June, an appellate court upheld the dismissal of the challenge. We are now appealing to the state's high court.

In Pennsylvania's Allegheny Mountains, the Punxsutawney and Pitch Pine hunting clubs own thousands of acres of private land. Despite posted "no trespassing" signs, the open fields doctrine means game wardens can enter the land without consent, warrants, or suspicion of wrongdoing. Only the Pennsylvania





From a government-mandated healthcare monopoly in North Carolina to warrantless surveillance in Pennsylvania, IJ has six active cases before state supreme courts.

Supreme Court can overturn its own precedent embracing the open fields doctrine, so following our unsurprising loss in the lower courts last October, the case is perfectly teed up for an appeal to the commonwealth's highest court.

We're also fighting civil forfeiture at the Michigan Supreme Court and gearing up to build on a lower court win that struck down a mandatory rental inspection scheme at the Iowa Supreme Court. Success in any of these cases would expand freedom for everyone in the state—and send a strong signal to other states on our path to setting precedent nationwide. ◆

Lisa Bergstrom is IJ's digital communications manager.

IJ is more active than ever at the nation's highest court. But the U.S. Supreme Court isn't the only place where we're able to secure transformative, far-reaching precedent, so we're also appearing in a record number of state supreme courts.

LIVE From The U.S. Supreme Court

As we gear up for the next Supreme Court term—and celebrate our two recent victories—we have also kept an eye on other cases at the high court, especially where IJ amicus ("friend of the court") briefs informed outcomes with important implications for the areas we litigate.

In *Culley v. Marshall*, the Court determined that due process does not require a preliminary post-seizure hearing to decide whether the government can hold onto property while forfeiture cases proceed. But five Justices wrote separately expressing deep skepticism of civil forfeiture and explicitly calling for more challenges to this power, citing IJ's recent 6th Circuit forfeiture win and our research detailing the perverse financial incentives inherent in civil forfeiture. We are ready and eager to accept the invitation.

In *SEC v. Jarkesy*, the Court affirmed that the government must prove its case in an independent court with a real jury before it can impose a fine. This is a step toward restoring justice in federal administrative proceedings, where a single agency can create, adjudicate, and enforce its own rules. IJ is currently challenging fines imposed by in-house administrative judges at several federal agencies, including the Department of Labor.

We explored these rulings—and many more!—in greater depth during a recent IJ LIVE webinar. This periodic online event series gives a behind-the-scenes look at IJ's cases, litigation strategy, and long-term vision. It's available exclusively to members of IJ's Partners Club, Guardians Circle, and Four Pillars Society.

Secure your invitation to our next IJ LIVE webinar by joining today with a gift of $1,000 or more ($84/month), or by including IJ in your will or other financial plans. Contact Sarah Grassilli at sgrassilli@ij.org for more information. ◆

Thirty-five law students joined IJ for a two-day conference on the ins and outs of public interest law (above). A few weeks later, IJers got together with our friends at the Centrum för Rättvisa to talk about our latest cases (below).

IJ Builds A Legal Network Across America—And Around The Globe

BY KATHRYN WRENCH

IJ is proud to celebrate another Law Student Conference, an event that has attracted aspiring legal advocates from across the country for three decades.

This summer, 35 law students participated in a series of informative and interactive sessions led by IJ's dedicated attorneys. Over two days, students delved into topics they aren't exposed to through law school curricula, such as the differences between public interest law and private practice; effective litigation strategies; and the intricacies of precedent-setting case development—including how we advance cases to the U.S. Supreme Court.

One highlight was a new session focused on a developing area within IJ's property rights pillar: how we use the Takings Clause of the Fifth Amendment to challenge the destruction of innocent people's property in SWAT raids. We used a mock case to explore the boundaries of government takings and the police power. This session provided students with a hands-on learning experience, allowing them to actively engage in case design and trial strategy. This practical approach deepens their understanding of public interest law and the litigation process, simulating the work of an IJ attorney.

The conference also underscored the relationships we maintain with program alumni through IJ's Human Action Network. This program fosters connections with legal professionals who might not do public interest law full time but who are still dedicated to defending individual liberty. Student attendees are now poised to become either future IJ attorneys or future IJ allies, ready to support us with pro bono work and expand our network of dedicated advocates.

IJ's network of legal friends extends not just from coast to coast—it goes around the globe.

Public interest law firms are a venerable American tradition, but they are rare in Europe. In 2001, Gunnar Strömmer—a young Swedish lawyer—came to IJ as an intern to learn how American-style public interest law works. With that knowledge, he went back to Sweden and founded the Centrum för Rättvisa (Center for Justice), a nonprofit law firm dedicated to protecting individual rights.

The Centrum follows the IJ model and addresses issues that significantly overlap with our work, including government accountability, freedom of expression, and economic liberty. It has litigated over 100 cases and secured victories at the highest courts in Sweden and Europe.

Decades later, IJ's friendship with the Centrum remains strong, and we are thrilled to host one of their attorneys at our law student conference each summer. As for Gunnar, he is no longer at the Centrum, but IJ hosted him recently for a lunch talk and mini-reunion when he visited the D.C. area as part of his current job—as Sweden's minister for justice!

Looking forward, we invite aspiring legal advocates to join us at future conferences as we continue to inspire, educate, and shape the future of public interest law in both the United States and abroad. ◆

Kathryn Wrench is IJ's litigation operations manager.

Sylvia continued from page 5

Let's pause here. In a normal case not involving government officials, there would be no appeal. The case would proceed to discovery, and the defendants would have to wait until final judgment to challenge the decision in a circuit court. But qualified immunity is not just a defense against liability; it is a defense against a lawsuit. The doctrine turns standard legal procedure on its head—which is one reason lawyers are often reluctant to represent victims of government abuse. But Sylvia had IJ and our thousands of generous supporters behind her, so she was prepared for a long, hard fight.

On appeal, the 5th Circuit turned *Nieves* into an impossible standard, demanding evidence of someone who took their own petition, exactly as Sylvia was accused of doing, but was not arrested. Because no such person existed (nor do unicorns), we were out of luck.

So we asked the Supreme Court whether *Nieves* immunized retaliatory arrests unless a plaintiff could point to specific evidence of non-arrests. On June 20, 2024, the Court's answer was "no." Eight Justices agreed that the 5th Circuit's reading of *Nieves* was too restrictive. Instead, they articulated a more flexible evidentiary standard that will make it much easier for plaintiffs like Sylvia to carry their burden at the beginning of a lawsuit.

It is true that Sylvia's experience was hurtful and humiliating. But it was not in vain. As her case heads back to the 5th Circuit to reevaluate the officials' plea for immunity—one more step on the long road to finally presenting the facts of her case to a jury—the law is now a safer place for the First Amendment and everyone who enjoys its protection. ◆

Anya Bidwell is an IJ senior attorney and co-leader of IJ's Project on Immunity and Accountability.

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.

CNN

Texas Councilwoman Can Sue Over Arrest She Claims Was Politically Motivated, Supreme Court Rules

June 20, 2024

The New York Times

Supreme Court Allows Suit Over Arrest Said To Be Politically Motivated

June 20, 2024

NBC NEWS

Supreme Court Rules For Ex-Council Member In Texas Arrested After Criticizing City Official

June 20, 2024

FOX NEWS

Texas Grandmother Jailed In Alleged Political Retaliation Wins At Supreme Court

June 20, 2024

iam.ij.org/august-2024-headlines

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I was feeding the hungry at a park in Bullhead City, Arizona.

Police arrested me and threatened me with jail time because the city has all but banned people from sharing food with the hungry in public.

I will never stop feeding those in need.

I am IJ.

Norma Thornton
Bullhead City, Arizona

www.IJ.org

Institute for Justice
National Law Firm for Liberty