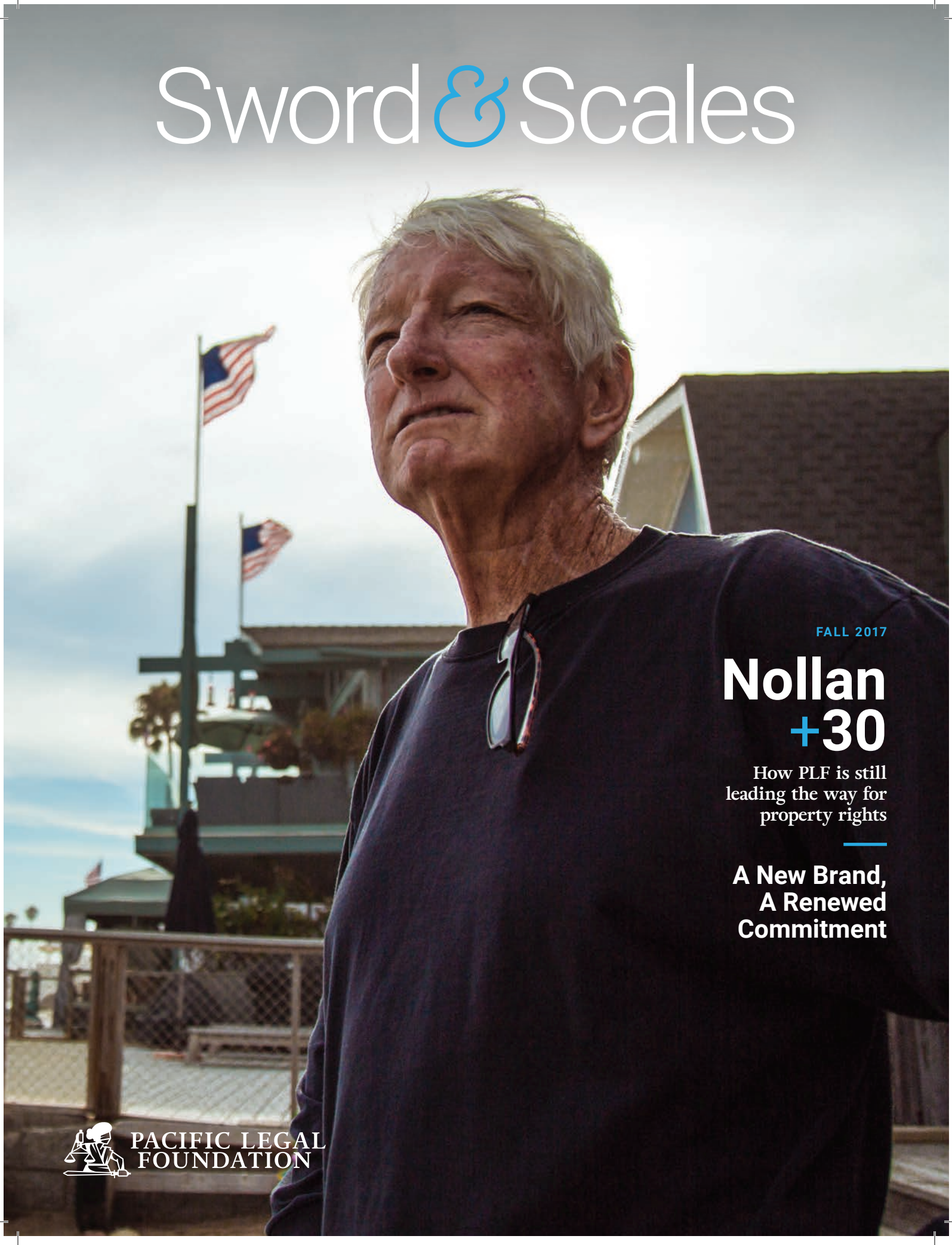
Sword & Scales



FALL 2017

Nollan +30

How PLF is still leading the way for property rights

A New Brand, A Renewed Commitment

PACIFIC LEGAL FOUNDATION

FALL 2017

PACIFIC LEGAL FOUNDATION

One year ago in these pages, we reported on PLF's wholesale review of our operations as we prepare for our 50th anniversary and beyond, based on the realization that to vindicate fully the principles of individual liberty, we couldn't simply rely on the ways of the past.

What you hold in your hand (or are reading online—through our new website) is among the first outward examples of our future. As you'll notice, our visual brand has changed to capture our assertive posture and bold ideas. The new name for our newsletter, *Sword&Scales*, also reflects our internal balance between determination and principle.

Ultimately, a logo or website or color scheme can only do so much. They cannot define us. Instead, we will—through our victories for individuals to pursue happiness—define them so that Pacific Legal Foundation is forever synonymous with defending liberty and justice for all.

And whatever we do during the next several decades to put government in its proper place, we will always remain true to our core purpose—enforcing the Constitution's guarantee of individual liberty to secure the inalienable rights of all Americans to live productively and responsibly.

To that end, this issue celebrates what put PLF on the map, the right that is the foundation of every other right—the right to private property. We look forward to sharing our experiences on this and all our other litigation areas in years to come.

Steven D. Anderson
PRESIDENT & CEO

COVER PHOTO
Former PLF Client, Patrick Nollan.

On the front lines: PLF Senior Attorney Damien M. Schiff with Mike and Chantell Sackett at the Supreme Court in 2012.

America's individualist Constitution

Larry G. Salzman

SENIOR ATTORNEY

PLF EXISTS TO ESTABLISH a rule of law under which all Americans may live free in their pursuit of happiness. We fight to preserve and advance the American ideals of individualism and liberty, and our mission has never been more vital.

Individualism is the animating moral principle of our Constitution. It is the idea that each person is an end in himself, endowed by nature with rights to think and act according to his own conscience and interests. Government is a servant, on this view, and it is good to the extent that it protects individuals' rights to life, liberty, and property.

That sentiment is reflected in the Declaration of Independence, our nation's founding document, which recognizes our inalienable rights and holds that the purpose of government is "to secure" them. The Constitution states that it is instituted to "establish justice" and "secure the blessings of liberty."

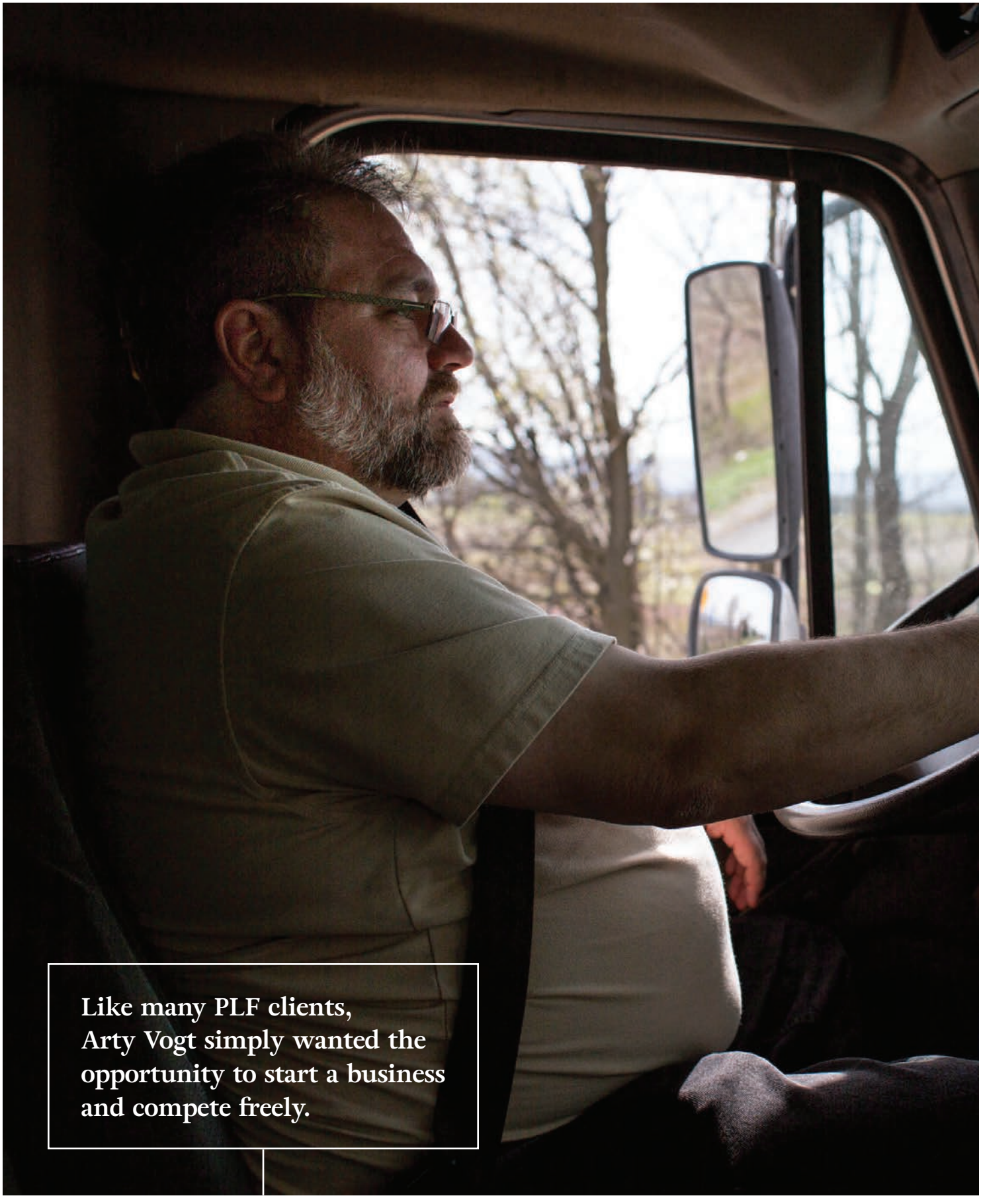
In America, government derives its power by our consent for the purpose of securing liberty and justice for all. Each person is free to live their lives independently, in any way they choose, so long as they do not violate the rights of others; government may do nothing except what it is permitted under our laws and Constitution.

There is great confusion today, however, about these most basic premises of our legal system. Many hold a familiar and competing view that individuals' lives, liberty, and property are mere legal privileges, which government may take or diminish as it sees fit in the service of some alleged greater good.

This is the fundamental issue at stake in all of PLF's work: whether government will be held to account as our servant or whether it will become our master; whether government exists, as the Declaration promises, to secure our liberty, or whether each of us exists to serve the goals of the state.

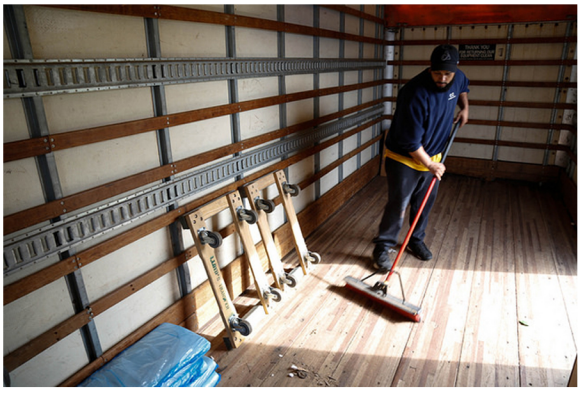
Each day we are on the front lines in court and the court of public opinion defending the Constitution and the principles of limited government, whether the issue be free speech, property rights, economic liberty, or the abuses of an out-of-control administrative state.

At PLF, we are proud to be on the side of individualism and liberty, defending those whose individual rights and property are threatened by overreaching government. ♦



Like many PLF clients, Arty Vogt simply wanted the opportunity to start a business and compete freely.

Arty Vogt discusses his case with PLF Senior Attorney Larry G. Salzman.



Tearing down a roadblock to liberty

Anastasia P. Boden
ATTORNEY

LIKE MANY PLF CLIENTS, Arty Vogt simply wanted the opportunity to start a business and compete freely.

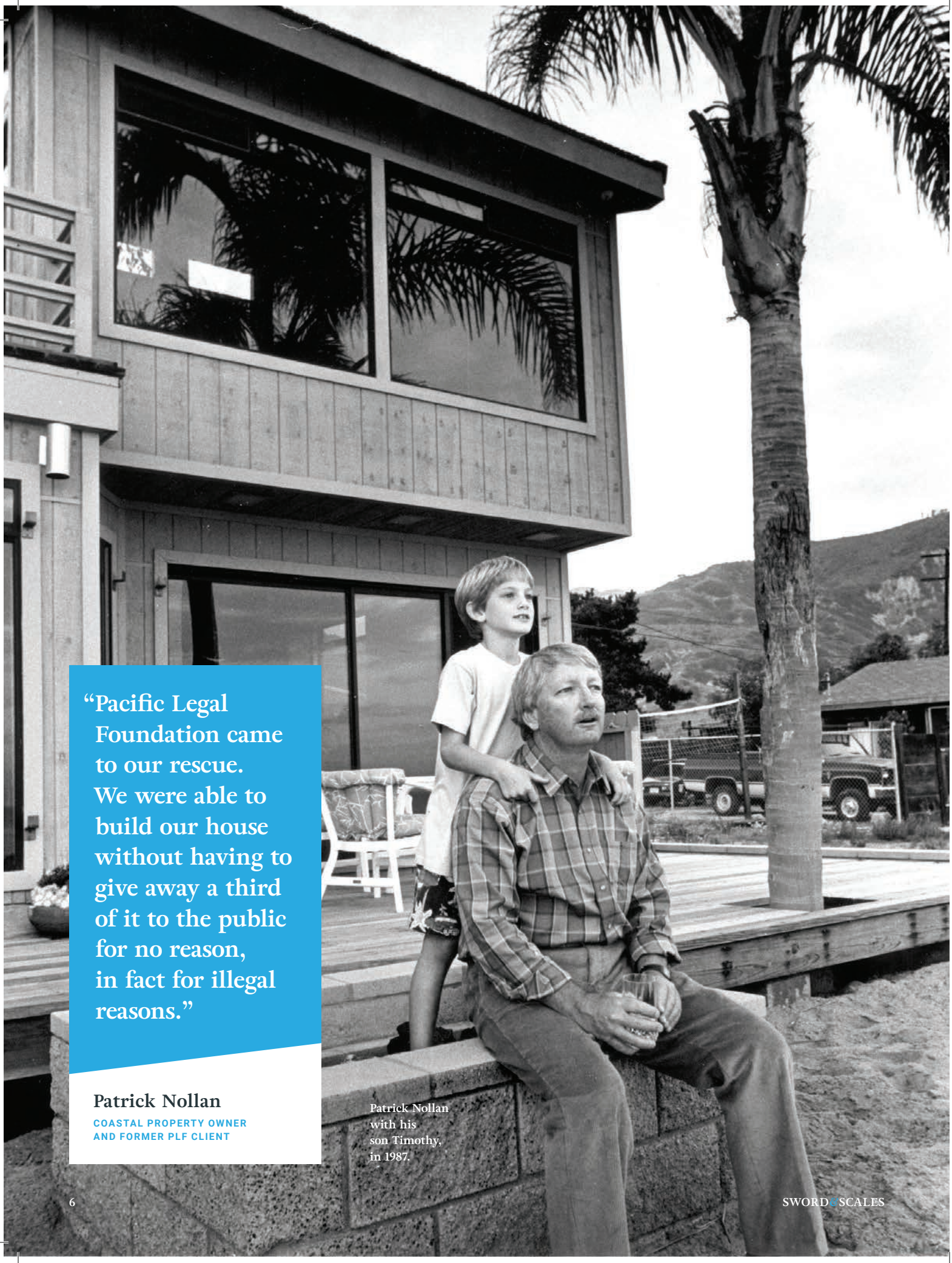
He had used his life savings to purchase a moving company in West Virginia only to encounter one of the most anti-competitive laws in the nation: a Certificate of Need requirement. Those laws, sometimes called "Competitor's Veto" laws, essentially allow existing businesses to shut down new competition.

The way the Competitor's Veto works is that when someone applies for permission to run their business, the existing businesses can protest for any reason—including the fact that they simply don't want to compete. A protest subjects the applicant to a hearing where they must persuade a bureaucrat that their business is necessary. When Arty realized he needed a Certificate, he applied for one. But he was denied after a competitor protested and the government deemed his business unnecessary.

Represented by PLF, Arty sued, arguing that the government shouldn't be in the business of picking winners and losers. As we discovered from litigation, in practice the government had simply deferred to the existing businesses' assertion of whether a new business was necessary. Every application that had been protested in the past ten years had been denied. The last time a business had been able to obtain a Certificate was in 2005.

After PLF sued, the legislature passed a bill repealing the Competitor's Veto requirement for movers—freeing Arty to compete legally. While this was a major achievement for economic liberty in West Virginia, work still remains. Similar laws persist in over half of the states, and PLF won't stop challenging them until we set precedent that they are not only unfair, but unconstitutional.

PLF's victory in challenging West Virginia's Competitor's Veto law follows up on the Foundation's successful litigation against similar anticompetitive schemes for the moving or transportation businesses in Oregon, Missouri, Montana, and Kentucky. ♦



"Pacific Legal Foundation came to our rescue. We were able to build our house without having to give away a third of it to the public for no reason, in fact for illegal reasons."

Patrick Nollan

COASTAL PROPERTY OWNER AND FORMER PLF CLIENT

Patrick Nollan with his son Timothy, in 1987.

Nollan+30

How PLF is still leading the way for property rights

James S. Burling
VICE PRESIDENT FOR LITIGATION

GOVERNMENT CANNOT STEAL. That was the essence of Justice Scalia's majority opinion in *Nollan v. California Coastal Commission*. If government demands someone's property in exchange for a permit, then the taking of the property must reduce a serious harm caused by the permitted development. It's not enough that the government might want the property for "the public good." Instead, the taking must directly reverse a harm that would otherwise be caused by the development.

But even this modest limitation on government power has been fought tooth and nail by avaricious government agencies that believe that there is such a thing as a free lunch—for them. A free lunch, a free hiking or bicycle path, or a free check with lots of zeros; whatever government wants it will try to take.

In the 30 years since *Nollan*, we have been fighting back to defend the bedrock constitutional principle that government cannot take private property unless it is willing to pay for it. For every holding we've won at the U.S. Supreme Court, government lawyers have dreamed up new loopholes. For every loophole, we've marshalled our forces with the goal of getting back to the Supreme Court. Fortunately, in this game of whack-a-mole with government, we're winning. But we'd be naive to think we've won.

After we won *Nollan*, some local governments began to get creative. The City of Tigard, Oregon, told a store owner that she had to build a bike path if she wanted to add store space and extra parking. After all, the City claimed, the parking spaces might add traffic that could be eased by the bike path. Thus in *Dolan v. City of Tigard*, a case where we were a friend of the court, the Court ruled the demand for property had to be "roughly proportional" to the impact. Clearly, a new bike path wasn't proportional to a few parking spaces.

But government was undeterred. After losing in land and bike-path grabs, governments started to demand *money*, saying that cases like *Nollan* were about demands of real estate and that a demand for money was somehow different. But isn't money property? After many years fighting governments across the nation on their money-doesn't-count theory, we finally went back to the Supreme Court in *Koontz v. St. Johns River Water Management District*. There, the district demanded more than $150,000 in improvements on *government* land in exchange for a building permit. It said *Nollan* didn't apply because it was only asking for money. The Supreme Court didn't buy it and called the scheme an unconstitutional extortion.

Lately, government agencies have taken to arguing that if an exaction for land or money is established not by a permitting agency but by a legislative body, like a city council, then *Nollan* doesn't apply. We're seeing that gambit now when cities demand that home builders set aside homes for below-cost sale to low-income residents or pay a fat check in lieu of the set-aside. Since these schemes are ginned up by city councils, rather than a planning department, the cities claim immunity from *Nollan*. We're working very hard to ride this horse for our next trip to the Supreme Court.

The lesson here is that when it comes to beating back government on constitutional violations, our work will never be done. For every victory we achieve, governments will try evasion, obfuscation, and massive resistance. Eternal vigilance, backed by eternal litigation, is the price of liberty. That's why PLF goes to court. ♦

NOLLAN
Drawing a line in the sand for private property rights

Robert K. Best
TRUSTEE &
LEAD ATTORNEY
IN *NOLLAN*

Bob Best (center), who successfully argued the *Nollan* case, discusses strategy with other PLF attorneys in 1979.

IN THE 1980'S the California Coastal Commission forced landowners to pay a price to obtain a coastal development permit. When permits were approved, they included an exaction requiring the owners to dedicate a portion of their property to the state to provide public access across their land. Even when the development did not interfere in any way with existing public access, the Commission demanded its tribute. You want a permit? Pay up with some of your property.

Some frustrated landowners challenged these property exactions for being unconstitutional takings of property without payment of just compensation. The appellate courts consistently supported the Commission no matter how outrageous its actions appeared to be. Over the years the Commission gained a reputation that it could do no wrong in the eyes of the California courts. In an ironic twist of fate this reputation led to the Commission's most significant set-back, when Pacific Legal Foundation took the agency to the United States Supreme Court.

An attorney working in the Los Angeles City Attorney's Office had applied for a coastal development permit to convert his family's vacation cabin into a permanent residence. The permit had been approved with the condition that he dedicate the entire beach area of the property for public access. He felt the requirement was illegal and unfair, but he decided not to appeal to the courts. He knew of the Commission's no-lose reputation. As part of his work that day he read a new appellate court decision, *Pacific Legal Foundation v. California Coastal Commission*. For the first time he knew of, the Commission had lost! Patrick Nollan called PLF.

The California courts had not changed. The decision which triggered the call to PLF was later reversed by the California Supreme Court. While PLF obtained a favorable decision for Nollan in the trial court, the appellate court bowed to the Commission and upheld the dedication requirement. This perfunctory decision by the appellate court provided the basis for Nollan and PLF to go the U.S. Supreme Court.

Presenting the *Nollan* case to the Supreme Court was a major challenge. There was no controlling precedent. We were asking the Court to make new law. Because the Court had recognized the states to have broad powers to regulate land use, we had to establish that the Commission was confiscating Nollan's property right to exclude others from his land. It was not regulating the use of his land.

We stressed during oral argument that the distinguishing factor between lawful dedications and unlawful exactions is "whether the property owner is creating a burden or not, and the exaction is solely for the purpose of relieving that burden." Justice Stevens, who authored a dissent, repeatedly pushed the idea that there is no real difference between a regulation prohibiting the placement of a no trespassing sign and the property dedication required of Nollan. My response thankfully carried the day with the majority on the Court. "Justice Stevens, I want to emphasize, the Nollans feel there is a big difference between being told not to do something on their property, and being told to allow somebody else to do something on their property."

In the end we made new law, benefiting property owners across the land. The Court's opinion held the exaction demanded by the Commission was unconstitutional because Nollan had created no burden on the public that the exaction would relieve. In the Court's words, requiring a property dedication in this circumstance would amount to "extortion." ♦

LEFT
Donna Murr with other members of the Murr family and Executive Vice President, John Groen (right), at the U.S. Supreme Court.

BELOW
Donna Murr on family property.

MURR
Defeat inspires renewed effort to defend property rights nationwide

John M. Groen
EXECUTIVE VICE PRESIDENT & LEAD ATTORNEY IN *MURR*

WHEN YOU'RE IN a long-term fight for freedom, you must treat any setbacks as challenges to keep advancing.

That is how property rights advocates must respond to a recent defeat at the U.S. Supreme Court.

In late June, by a 5-3 majority, the justices undermined the Constitution's protections against "takings"—i.e., the Fifth Amendment's mandate that government may not take private property without "just compensation." In *Murr v. Wisconsin*, the Court allowed officials in St. Croix County to evade this mandate by using a regulatory maneuver to strip a family of the use of a parcel they own on the St. Croix River without paying them a penny.

For the Murr family, the struggle is about a legacy from their late parents, William Murr and his wife Dorothy. Decades ago they bought a vacant riverfront parcel and built a small recreational cabin. A few years later, they also bought the lot next door as an investment.

The old cabin needs repairs, so the Murr siblings decided to fund the repairs by selling their vacant investment parcel. Citing regulations that were enacted after both parcels were purchased, the government labeled the investment parcel "substandard" even though it has a half acre of developable land, meets all environmental regulations and setbacks, and is surrounded by development on the same size parcels. Nevertheless, the county said they couldn't sell or develop the investment parcel.

To avoid paying for a "taking" of the vacant parcel, officials employed the fiction of treating both lots as if they were one—even though they are legally distinct and have always been taxed separately.

The Murrs hoped the Supreme Court would reject this abuse of the Takings Clause. Unfortunately, Justice Anthony Kennedy's opinion created new impediments to understanding takings law. Now, to determine what land might have been taken, the hazy factors include the "surrounding human and ecological environment" and "the effect of the burdened land on other parcels."

Thankfully, the effort to undo the Murr's damage is bearing fruit. In Wisconsin, a measure responding to the *Murr* decision has been introduced by state Sen. Tom Tiffany and Rep. Adam Jarchow. It would protect property owners when they buy a buildable parcel, by ensuring that if rules about lot sizes later change, their own right to build will not be affected.

Pacific Legal Foundation, which represented the Murrs before the Supreme Court, has launched a nationwide campaign to seek state rulings and legal changes to ensure that people can't be denied property rights simply because they own more than one parcel. ♦

BENEDETTI

Forced farming mandate needs to be put out to pasture

Jeremy B. Talcott
ATTORNEY

LAUDED FOR THEIR TASTE and quality, Willie Bird Turkeys are sold by the tens of thousands each Thanksgiving in grocery stores and Williams-Sonoma catalogs. Willie has spent five and a half decades building his brand by combining traditional, free-range farming with sophisticated monitoring technology, and now he'd like to spend some time relaxing with his grandkids on his beloved Marin County property.

But a new law adopted by Marin County is putting that dream in jeopardy. The new law conditions all new dwellings in the agricultural zone on a promise that the landowner will remain "actively and directly engaged in agricultural use of the property." If Willie builds a home for his son and grandkids, he will trigger the active farming requirement, and Willie will be forced to give up ownership of his property if he wishes to retire.

PLF has stepped in to challenge the provision as an unconstitutional condition, alleging that it coerces Marin County farmers into giving up the constitutionally protected right to their liberty to choose if, when, and how they work.

The U.S. Supreme Court has also held that any time government demands a property right in exchange for granting a permit, the demand must be closely related and proportional to some impact of the permitted action. Since the Marin County law asks landowners to convey an easement—a valuable property right—it is subject to those requirements. We have alleged that requiring landowners to engage in farming forever is unrelated and disproportionate to the small impact of using a few thousand square feet of land to build a home—especially in the agricultural zone, where most legal lots are hundreds or thousands of acres in size.

"I want to be able to build a house for my son, and spend time with my grandkids, but the county is making me choose between those two options," Willie said. "I don't see why the county thinks they can tell me I have to keep working just because I want to do something farming families have done for as long as there has been farming: build a home for the next generation."

PLF is representing Willie free of charge in his case against Marin County. In July, we filed our petition asking the Marin County Superior Court to invalidate this forced farming provision. ♦

Willie Benedetti on his family farm property.

Vero Beach High School student, J.P. Krause.

POWERFUL LESSON IN LIBERTY

Vero Beach High School, a public high school on the east coast of Florida, had a First Amendment problem.

The school failed to obey it.

Mark Miller
SENIOR ATTORNEY

AFTER A RISING SENIOR, J.P. Krause, won his senior class presidency election in a landslide, the Vero Beach school administration punished J.P. for a humorous campaign speech he offered the day before the election. They removed him from the presidency and gave him detention.

The school contended J.P. "harassed" the candidate who came in second by way of J.P.'s 90-second impromptu campaign speech, a speech given in class with his A.P. U.S. History teacher's permission. Thanks to a student who recorded the speech and shared it with J.P., PLF knew he did no such thing. The video reflected nothing more than good-natured, all-American campaigning for office. With a twinkle in his eye, J.P. promised to build a wall between his school and the nearby rival school—and make the rival school pay for it!

We liked J.P.'s moxie, and thus offered to represent J.P. in a challenge to the school's actions—in order to reinstate J.P. to the class presidency and remove any disciplinary record.

The world then saw J.P.'s campaign speech via YouTube. After PLF became involved, the video shot around the globe. Within 48 hours of PLF taking the case on, the local NBC affiliate in West Palm Beach covered the story. Then *Fox & Friends* interviewed J.P. on its national morning show. Next, Whoopi Goldberg, Joy Behar, and the women of *The View* spoke about the dispute. The story even made the *London Daily Mail*, Univision, and the *New York Daily News*. From all points of the globe, and from left to right, all agreed: this high school's administrators wronged our client.

Without PLF even setting foot in a courtroom, the public opprobrium forced the school to reinstate J.P. to the class presidency and remove any discipline from his record. We took on the matter and won it *within thirteen days*.

Thanks to PLF's enforcement of the Constitution, Vero Beach High School, and the entire world, just received a lesson in free speech. And our client J.P. Krause has quite a story to share for the rest of his life about how he became class president. ♦

LEAVING PRIVATE PRACTICE
TO REJOIN PLF

Sometimes life takes you to some unexpected places

Members of the Murr family on their beach at the St. Croix River.

John M. Groen
EXECUTIVE VICE PRESIDENT

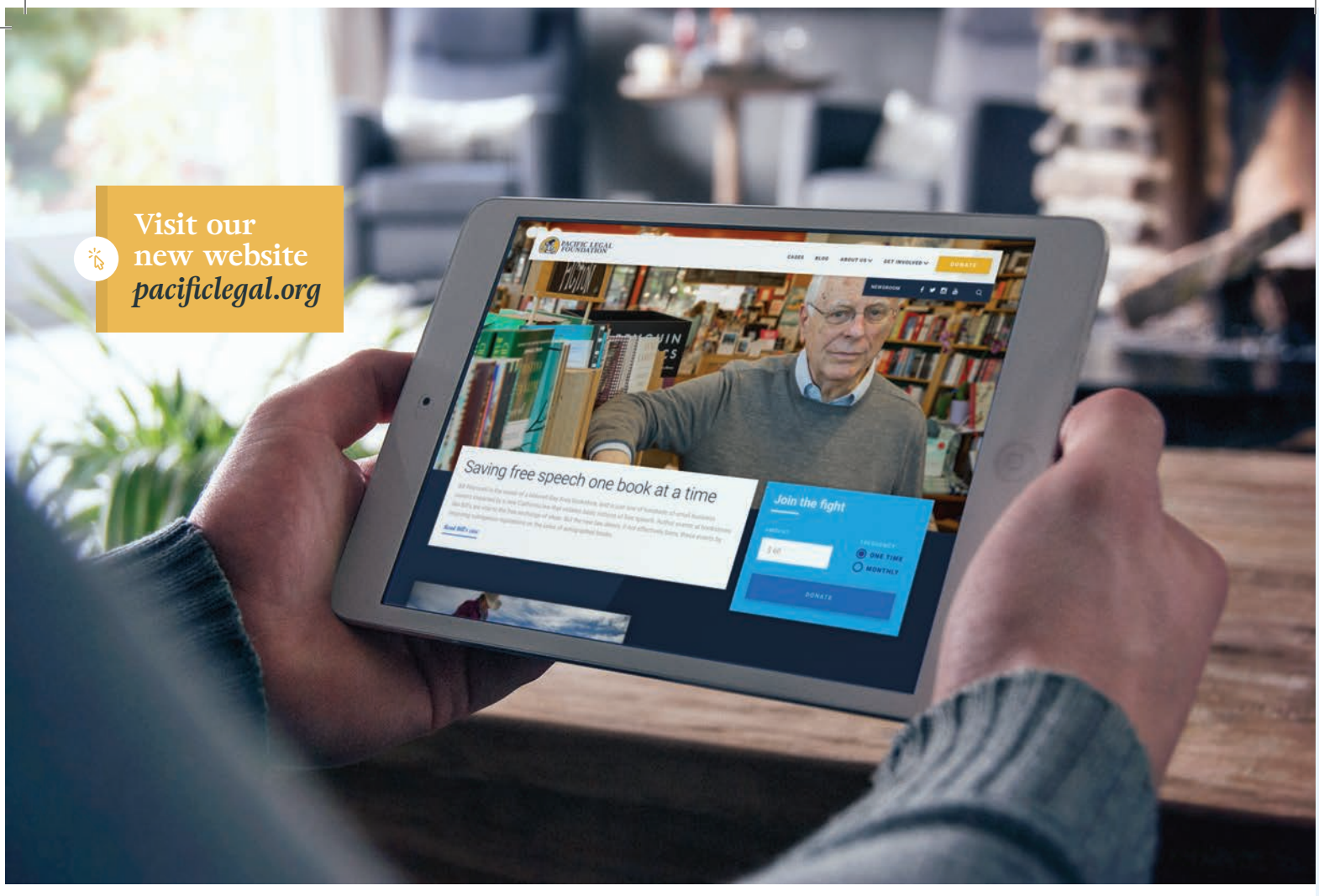
ON DECEMBER 8, 2014, I was on the PLF Board of Trustees and was attending our annual meeting in Sacramento. We were discussing the challenges of retaining young and exceptional attorneys who feel the pull to leave the nonprofit world to reap the financial benefits of private practice. Then, as clear as the waters of Lake Tahoe, part of the answer was apparent. It was time for me to leave private practice and return to my first love of litigating public interest cases for PLF.

I knew what I was getting into. I began my legal career as a law clerk at PLF doing research for Bob Best as he prepared for oral argument in *Nollan v. California Coastal Commission*. That was 1987. A couple months later I was a brand new PLF attorney, fighting the good fight for private property rights.

After nine years with PLF, and having successfully launched the Bellevue office, I found myself with a wife, three kids, and a mortgage. I was an experienced but still young attorney, and I felt the same pull to leave the nonprofit world. An opportunity soon arose, and I made the decision to enter private practice.

But my passion for PLF and its mission never waned. That is why almost two decades later I was in that Board meeting in Sacramento. And that is why I knew it was time to take my name off the door at my law firm and return to PLF. It was time to give back.

Sometimes life takes you *back* to some unexpected places. And when you return, you discover it is even better than you remembered. It is truly an honor to be working with the dedicated and talented people who are the PLF team. ♦



A new brand, a renewed commitment

Robert L. Krauter
CHIEF COMMUNICATIONS OFFICER

This inaugural issue of *Sword&Scales*, our flagship publication, coincides with the launch of our rebranding efforts which include a new website, our new logo and tagline, an expanded communications team, and our renewed commitment to tell our story across diverse communications channels.

We have just raised the curtain on our new website, *pacificlegal.org*, which presents news and information about PLF, our cases, legal projects, and our PLF team. The site emphasizes high-impact visuals to tell the story of our clients, links to videos, podcasts, and other useful information. If you'd like to thumb through this issue of *Sword&Scales* on your favorite mobile device, you will find a digital version on our website.

New members of our communications team are boosting our social media engagement across a variety of platforms to instantly reach and communicate with new audiences. Our digital strategy focuses on significantly raising our national visibility and prominence.

Video storytelling is a powerful communications tool. We're committing resources to produce videos that transport audiences to the front lines of our battles for liberty to hear the personal accounts of our brave clients.

Through a growing list of communications channels, PLF is engaging with audiences far and wide. ♦

Leaving a Legacy of Liberty

PLF Legacy Partners

James G. Katzinski
GIFT PLANNING OFFICER

As the stories in this issue of *Sword&Scales* illustrate, PLF is in the fight to defend our liberties for the long term. Our adversaries are well funded and quite determined to tread on our basic liberties. We can't, for a second, stop pushing back in the courts to stop them.

Thankfully, a growing number of our supporters—our Legacy Partners—are making gifts to PLF from their estates to ensure that the battles for liberty will live long after they are gone.

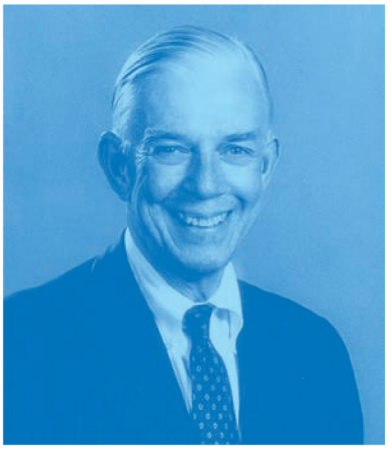
The addition of new Legacy Partners—supporters who are leveraging gifts from their estate to advance our vital mission in the courts and vindicate the rights and liberties of their fellow Americans—is more important than ever.

You'll hear more about our Legacy Partners program in the coming weeks, but we encourage you to visit our website at PACIFICLEGAL.ORG/LEGACYPARTNERS or contact Jim Katzinski, Gift Planning Officer, at (425) 576-0484 or JKATZINSKI@PACIFICLEGAL.ORG.

If you have already included PLF in your will or trust, thank you. There's no better affirmation of your passion for PLF's work than a gift that keeps our litigation program going strong for the future. We encourage you to share your reasons for enlisting in our enduring pursuit of liberty, which hopefully will inspire others to do the same.

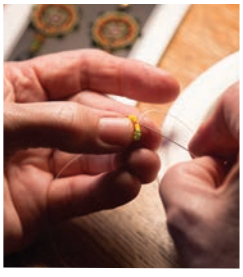
We invite you to become a Legacy Partner today!

pacificlegal.org/legacypartners



"Many famous Americans have noted that liberty must be defended every day. We are blessed that my beloved Jim helped create PLF to lead in this defense, but we citizens must keep PLF strong with our financial support."

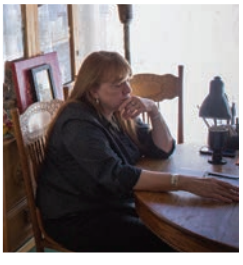
Legacy Partner
Barbara Williams Wanvig
WIDOW OF THE LATE JIM WANVIG, WHO HELPED FOUND PLF

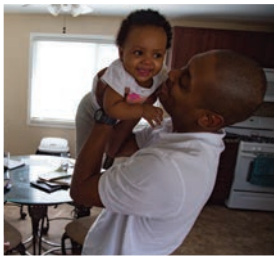
DEFENDING LIBERTY AND JUSTICE FOR ALL

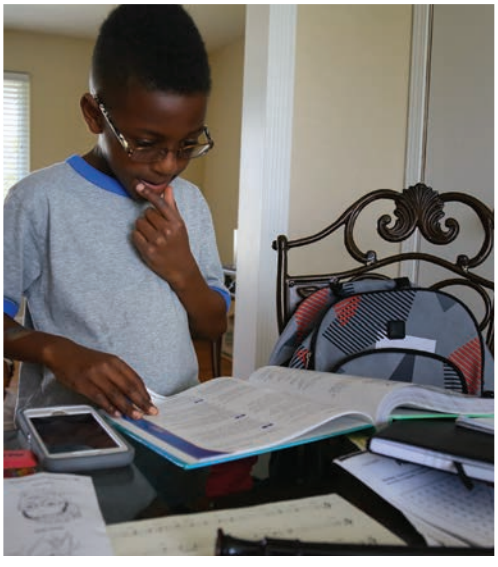
SINCE 1973



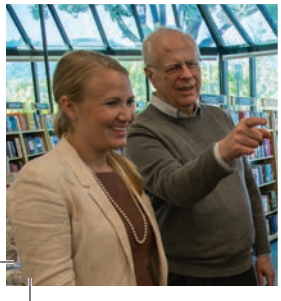









AND WE'RE JUST GETTING STARTED

PACIFIC LEGAL FOUNDATION