

Sword & Scales

SPRING 2018

Killing the regulatory state

PLF's plan to break the chokehold on constitutional government

WOTUS victory at Supreme Court

A t-shirt will not destroy democracy



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FOUNDATION**

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work that PLF is doing,
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Experience. Sophistication. Perspective. That's what you get after 45 years of working to vindicate individual liberty. And it's what's absolutely required for us to effectively take on our next big target: the eradication of the unconstitutional regulatory state.

For decades, unelected and unaccountable government bureaucrats have influenced—and, in some ways, dictated—nearly every facet of American life. Even still, they're a symptom of a much larger disease called progressivism, whose proponents fallaciously believe the limited government concepts contained in the Constitution could be scuttled in favor of an omniscient and benevolent bureaucracy run by educated experts exerting influence to guide—or control—our lives. It's regulatory tyranny.

This tyranny must stop. And as we celebrate our 45th anniversary, Pacific Legal Foundation is the organization that is perfectly positioned to lead the way.

Fueled by the commitment and conviction that we have refined and enhanced over our past four decades of work, we begin this new year with an audacious goal to put government back in its constitutional box. The Founders of this nation knew quite presciently that human nature would lead us to where we are. As Jefferson wrote, it's the "natural progress of things for liberty to yield, and government to gain ground." That's why the Constitution provides for three coequal branches of government—each of whose powers is separate from and, therefore, serves as a check against the other.

To be sure, taking on the regulatory state is a tall order that will take time. It's one that we don't take on lightly. But we know that the combination of our unmatched record at the Supreme Court, our litigation skill, creativity, and capacity, and our adherence to principle have prepared us precisely for this task and this moment. This issue will highlight the beginning of our work—and we look forward to writing the ending.

Steven D. Anderson

PRESIDENT & CEO

PLF's commitment to end the unconstitutional regulatory state

Todd F. Gaziano

SENIOR FELLOW IN
CONSTITUTIONAL LAW



IN 1876, KUDZU was introduced into the United States as an attractive and seemingly harmless vine; however, the invasive species has strangled vast territories. A similar invasive species has sprawled throughout the United States federal government: the mass of federal regulatory agencies that we refer to as “the regulatory state.” And—through a sophisticated and comprehensive litigation, research, and education plan—PLF is taking proverbial shears to this unconstitutional mass of government entanglement and dismantling the regulatory state.

Although the original purpose of most federal regulatory agencies was well-intentioned—such as ensuring safe food and working conditions—there is a growing public awareness that regulatory bureaucracies became oppressive and democratically unresponsive. The public’s perception is justified: agency operations frequently violate constitutional rules established by the Framers to make government accountable. New scholarship, media attention, and citizen engagement highlight the threats these regulatory agencies pose to our everyday freedoms and to constitutional government itself.

A Mercatus Center study recently estimated that our lives are now

subject to over *one million* regulatory restrictions, vastly more than the laws written by our elected representatives in Congress. Most Americans cannot keep track of more than a tiny fraction of these regulations, yet they can be prosecuted for breaking them. Of greater concern, agency procedures used to enforce these unknowable rules violate basic due process protections. The courts then compound the problem by unconstitutionally deferring to the factual and legal determinations of agency officials—whose principal allegiance is the perpetuation of agency power.

Understanding these regulatory threats and their unconstitutional foundation is only the first step in ending them. The regulatory state gained strength over a century of incremental growth when misplaced faith in “neutral” experts led our governing class to ignore normal constitutional rules. All three branches of government contributed to the problem, either by delegating or deferring to unconstitutional concentrations of regulatory power.

Is it beyond any control? Happily, there is an ideal—a lodestar—to guide our return to constitutional order. The separation of powers in the U.S. Constitution is the greatest

improvement in government since the dawn of democracy. The Framers carefully designed structural barriers and checks on government action to better prevent government oppression and, thus, better preserve individual liberty. Proponents of bureaucratic power intentionally subverted the Constitution’s design. Yet the moral and constitutional high ground is still held by those seeking to restore the original order.

PLF has been the leader in constitutional litigation against regulatory abuse for more than four decades, with an unmatched record of success in the Supreme Court. Formulated over the past year, PLF is now implementing an innovative and strategic battle plan to accelerate the end of the unconstitutional regulatory state.

PLF’s multifaceted initiative combines new types of litigation against an array of agencies and programs with expanded education, legislative action, and social science research. PLF is the leader in thought and action to end the regulatory state and restore government to its proper, constitutional limits. Our strategies will produce tangible results over the next several years, and we will not waver until our vision is fully realized. ♦

The forgotten man of the regulatory state

Larry Salzman
SENIOR ATTORNEY



THE REGULATORY STATE began last century during the New Deal, inspired by earlier Progressives who believed that individualism, capitalism, and the Constitution were obstacles to prosperity.

They imagined a future in which government “experts,” *i.e.*, administrative agency bureaucrats, would lead and control the economy, subordinating economic freedom and private property rights to what they perceive to be the needs of the nation. A hydra of federal agencies (and state counterparts) impose that vision, not merely enforcing laws made by Congress, but issuing regulations of their own with power to adjudicate and punish violations. Judges have acquiesced, even abdicated, to this fusion of executive, legislative, and judicial functions—despite its tension with our constitutional separation of powers.

When President Franklin Roosevelt promoted early plans for the regulatory state, he suggested it would benefit “the forgotten man at the bottom of the economic pyramid.” In fact, the system crushes the true forgotten man: those

paying for the centrally planned schemes, particularly the independent, the creative, and the entrepreneurial, who are stifled at every turn by a bureaucracy that values authority and permission over innovation and liberty. Those are the people whom PLF’s programs defend and set free.

Take, for instance, the Pierce family in Marshall County, Minnesota. The U.S. Army Corps of Engineers ordered them to halt their business harvesting peat moss (which they sell for golf course greens and sports fields) unless they got a federal permit under the Clean Water Act. The Pierces objected: the wetland bogs where the peat moss grows had no connection to any waters of the United States, meaning the Corps had no jurisdiction over the property. To their shock, both the agency and lower courts told them they had no right to challenge the jurisdictional grab in court.

The family was faced with a choice: abandon their business, seek a permit that might cost several hundred thousand dollars and take years to get or be denied, or ignore the Corps and face a threatened \$37,500 per day in fines. Instead, the



After being nearly bankrupted with fines, Kevin Pierce and his family took their fight to the Supreme Court in 2016.

Pierces found a fourth option. PLF took their case all the way to the U.S. Supreme Court, winning a unanimous victory and establishing a new rule of law that provides the Pierces and all other property owners the right to prompt judicial review of such unlawful agency orders. But precious few can afford the fight. The lesson is that administrative agencies shielded from challenge are prone to trample private property and the rule of law.

Or consider Arty Vogt, owner of a small moving company in rural Virginia. He tried to expand his business to nearby West Virginia but was ordered to stop by the state's Public Service Commission, a regulatory agency empowered to prohibit the operation of upstart transportation companies it deemed "unnecessary" to satisfy consumer demand.

How did it deem that? The state invited existing moving companies to protest the entry of any new competitor, which must not offer any services unless it proves that the incumbents can't handle all the business

generated within the state. Predictably, this cronyism led to the state vetoing Vogt's application—just as every applicant to start a moving company in the state had been denied for the previous 15 years.

In America, entrepreneurs and consumers—not bureaucrats—should decide what businesses are "necessary." PLF sued, prompting the legislature to repeal the agency's authority to regulate movers. Yet, Vogt's experience shows the extent to which the regulatory state has replaced the independent judgment of private citizens with the say-so of purported government experts.

Finally, think of a recent case involving beleaguered ranchers in New Mexico. Their businesses were threatened when the U.S. Fish and Wildlife Service declared nearly 800,000 acres of arid land, including private property and public lands where the ranchers had grazing permits, as "critical habitat" for the jaguar. The habitat designation seems strange, since the jaguar's primary terrain is the tropical and subtropical moist broadleaf forests, swamps, and wooded regions of Central and South America.

But the agency's experts offered evidence that two jaguars were seen wandering briefly in the state sometime between 1996 and 2006. That minimal contact was enough for a federal judge to defer to the government's decision to place the immense territory under federal control pursuant to the Endangered Species Act. PLF is appealing that case, but unless it is reversed, the ranchers will face greater regulatory hurdles to renew grazing permits or to improve their ranches with corrals or fencing.

In only a few generations, the regulatory state has nearly turned liberty on its head. Constitutionally limited government means that officials may act only as the law permits while citizens are free. Today, however, the law grants discretion to government while ordinary Americans act only with permission.

What can be done? Many judges today are unwilling, or even think it improper, to engage in meaningful review of regulatory agency actions—reflexive deference to agency decisions is entrenched in the law. To reverse course, bad precedent must be overturned and the judiciary must reassert its role as a coequal branch of government. PLF will take the lead in that fight through strategic litigation and public education that brings attention to the forgotten man of the regulatory state.

We are building on our past success by litigating the kinds of cases that invite judges to enforce constitutional limits on regulatory agency powers. Of course, the agencies will resist—but PLF is persistent, and powerfully motivated by the commitment of our supporters and what is at stake for our clients and all Americans. ♦

Administrative corruption in a free society

James S. Burling

VICE PRESIDENT
FOR LITIGATION

THE ENGLISH HISTORIAN Lord Acton told us that “power tends to corrupt, and absolute power corrupts absolutely.” As those who have been battling government agencies for many years know, it can be added that administrative power corrupts both the governing and the governed just the same. As bureaucracies grow, so too does their reach. As their reach grows, freedoms diminish. And as freedoms wither, people are tempted to compromise their rights in order to survive.

There is very little that can be done today without first obtaining multiple permissions from an army of bureaucrats. From trimming trees, to driving a moving truck, to giving advice over the phone, Americans need licenses to work, and those licenses are often nearly impossible to obtain. If Americans forget to seek the proper permissions in advance, or proceed in ignorance, they can suffer fines large enough to bankrupt a small nation and prison sentences long enough to read *War and Peace* many times over.

When a bureaucracy has the unfettered power to tell people what they can do or not do with their property, landowners will be in thrall to their government. When a regulatory board holds power over one's ability to earn a living, then an individual's very sense of identity can be at the mercy of the state. If the power to regulate is married to an arbitrary



Chantell Sackett stands in front of her empty lot, where the EPA prevented her from building a home.

When a bureaucracy has the unfettered power to tell people what they can do or not do with their property, landowners will be in thrall to their government.

set of guidelines—or no guidelines at all—it is the very definition of arbitrary power. And from arbitrary power corruption is born.

This isn't the obvious corruption of outright bribery—but a more insidious kind: corruption where power is yielded for the sake of power, and demands are made simply because there is nothing to stop government from being unreasonable.

Take, for example, these PLF clients. Raleigh Bruner was told he couldn't operate a moving company without first getting permission from the state's existing moving companies. Most people would have driven their business elsewhere. And when

the Nollans were told to give up one-third of their property in order to build a family home, most people would have given up and given away what was rightfully theirs. When the EPA came knocking at the Sacketts' door, demanding that they give up on their plans to build a home, the EPA counted on the Sacketts to give up their home rather than face millions of dollars in fines, especially because no one alive today can understand what is a protected wetland and what is ordinary dry land. Likewise, when the Army Corps of Engineers told John Duarte that his plowing had created “mini-mountains” in a protected wetland, the Corps was hoping to get tens of millions of dollars in fines, plus some wetlands. Why? Because they thought they could.

But PLF won't let this happen without a fight. America cannot succumb to the temptation to give into the corruption and let its rights disappear. Not only is PLF taking on and winning these individual cases of abuse, it is also working to establish the legal precedents that will take down the power of a regulatory state run amok. A free society cannot tolerate corruption if it expects to remain free. ♦

Due process: Criminals vs. property owners

Jeremy Talcott

ATTORNEY

ONE OF AMERICA'S most cherished constitutional guarantees is the promise that no one may be deprived of life, liberty, or property without due process of law. Many people know of the due process protections for people accused of a crime, such as the presumption of innocence and the right to counsel. But adjudication processes by regulatory agencies are different, and sometimes result in property owners being treated worse than criminals.

In criminal law, due process works to ensure that innocent people are not convicted of crimes. Violations of due process may lead to evidence being thrown out, or convictions overturned

on appeal. Though no one likes to see guilty defendants walk free on “technicalities,” when it happens we can take comfort in the constitutional protections that demand we sacrifice convictions in some instances to ensure a just criminal justice system for the country as a whole.

But property owners don't enjoy those same protections when regulatory agencies begin enforcement actions against them. As seen in the table below, property owners operate at a serious disadvantage when their conduct is challenged by agencies.

PLF client John Duarte knows firsthand just how little due process property owners are afforded.

Other than a single brief phone call from the Army Corps of Engineers, the federal government gave Duarte no warning of the cease and desist action for tilling his field to plant wheat, allegedly in violation of the Clean Water Act. The agency pursued Duarte without giving him access to the evidence against him or an opportunity to present any favorable evidence in his own defense. When he requested a hearing, they ignored him. Agents intentionally destroyed portions of the record, meaning that some evidence used against John Duarte has never been seen by anyone outside the agency that found him guilty. The cease and desist order deprived John of the use of his company's land and threatened a potentially devastating penalty against him, placing hundreds of jobs at risk.

Property rights is one of the cornerstones of American freedom and liberty. The Founders thought it sufficiently important that they extended due process protections to three things: life, liberty, *and property*. The courts should take these protections as seriously for property owners as they do for accused criminals. ♦

DEFENDANTS IN CRIMINAL PROCEEDINGS	PROPERTY OWNERS IN AGENCY ACTIONS
are presumed innocent ✓	✗ are presumed in violation by the time they are contacted by the agency
are provided counsel if they cannot afford it ✓	✗ must hire their own lawyers
are informed of the charges against them ✓	✗ are investigated in secret
review all evidence collected against them ✓	✗ do not have access to all the evidence collected against them
confront their accusers in a court of law ✓	✗ may not be granted a hearing by the agency
have a right to be tried by a jury of their peers ✓	✗ may be heard by an administrative judge, not a jury

PROCEDURAL GUARANTEES

Vaporizing the Constitution

Public health and free speech threatened by vaping regulation

Thomas Berry

ATTORNEY

AFTER HER HUSBAND passed away from lung cancer, Kimberly Manor decided that she wanted to help other long-time smokers quit and hoped to prevent others from going through the pain she experienced. Kimberly owns and operates Moose Jooce in Lake, Michigan, a store that sells vaping products. These devices, sometimes known more generally as “electronic nicotine delivery” products, provide Kimberly’s customers with a real alternative to smoking, one that many studies and testimonials have suggested could be a much safer alternative.

Kimberly’s business has been a success, and she can testify to having helped more than 500 people in her small town quit smoking, most of them longtime smokers aged 50 and older. Yet in 2016, the federal Food and Drug Administration (FDA) dealt Kimberly’s business a terrible blow when it created a rule that deemed vaping products to be subject to the same restrictions placed on cigarettes, even though most vaping products do not contain tobacco.

That means Kimberly must now go through a prohibitively expensive approval process for every new “product” she creates. That applies not just to every new flavor of “juice” she invents, but even the act of assembling product kits for her customers! In addition, Kimberly can’t label the products she creates with accurate descriptions about their ingredients without FDA approval—even to say a substance is *not* in her product. As a result, Kimberly is muzzled at her own job, unable to tell her customers what she knows to be true.



Vaporizers (vapes) deliver nicotine to users in a mist of water vapor, without toxins found in cigarettes. Users can fill vapes with different flavored liquids, including custom flavors sold by Kimberly Manor and Skip Murray.

Hundreds of small business owners across the country have had the same experience.

Jen Hoban of Masterpiece Vapors in Detroit Lakes, Minnesota, has to let her customers assemble their own equipment, even though she knows it would be safer for her to do it for them. She likewise had to stop innovating, because she can’t afford the approval process to create any new flavors.

Eric Curtis of Rustic Vapors in Marquette, Michigan, has listened to customers he knows are misinformed, but whom he can’t correct without risking an FDA violation.



Kevin Price is a board member for Tobacco Harm Reduction 4 Life, a nonprofit that helps smokers ditch cigarettes. Price turned to vaping to help him quit smoking cigarettes, which he credits with saving his life. Now Kevin and THR4Life encourage others to do the same.

Skip Murray of JHT Vape in Brainerd, Minnesota, is afraid to even tell her customers her own life story—how she suffered a heart attack at age 59 after smoking two packs of cigarettes a day, and then turned her health around after switching to vaping.

PLF represents these and other small business owners in three new lawsuits challenging the FDA's burdensome and unconstitutional vaping regulations. These simultaneous cases mark the beginning of a new era for PLF, as the first wave of litigation under a new initiative to overturn the regulatory state.

These cases are based on a novel and innovative constitutional theory.

The FDA's rule was issued by a career FDA bureaucrat, who was hired for her position outside the procedures established by the Constitution's Appointments Clause. When career government employees (of which there are more than one million) are allowed to issue binding rules that can have such a profound effect on the lives of individuals, this removes an important check on executive power.

PLF developed this case to establish the precedent that rulemaking power must be carefully limited to those who have been presidentially appointed as officers of the United States, and who retain political accountability. And just to show how confident PLF is, we've challenged this rule in three district courts at the same time.

In addition to this core separation of powers argument, PLF also is challenging the rule under the First Amendment. No one should have to prove in advance that their speech will benefit all of mankind before the government will allow them to speak—yet that is exactly the test the FDA currently imposes. Business owners and advocates like Kimberly should be able to make their case as best as they can to as many people as they can, which is the best way to allow consumers to make their own informed choices.

With this new case and new moment, PLF is working to establish an important precedent in the fight to rein in the regulatory state. By striking down the FDA's unconstitutional rule, the courts can free Kimberly and other business owners from these crushing regulations, so they may once again innovate and speak as they did before. ♦

PROPERTY RIGHTS

WOTUS victory strikes a blow to the regulatory state

Tony Francois

SENIOR ATTORNEY

A UNANIMOUS DECISION by the U.S. Supreme Court on January 22 vindicated 11 PLF clients like John Duarte and Kevin Pierce who simply wanted to challenge the Environmental Protection Agency in federal court. PLF's victory ensures that future challengers to the Clean Water Act and regulatory malfeasance will have plenty of time to take the EPA to court.

At issue is the EPA's controversial 2015 "Waters of the United States" (WOTUS) rule under the Clean Water Act, which redefines vast areas of privately owned dry land as water subject to federal control. PLF represented clients from six states who filed in federal district court in Minnesota. The EPA, however, persuaded the judge that our clients could not sue in that court, so the judge dismissed the case.

The EPA claimed that the only way to dispute its unprecedented land grab was by filing a special petition in the federal appeals court, under an obscure and technical Clean Water Act provision that allows only 120 days to challenge the EPA permits for sewage plants. While the WOTUS rule is not a wastewater permit of any kind, the EPA argued the rule is "related" to permits, and must follow the special procedure.

WOTUS would
subject farmers to
more burdensome,
federal regulation.



“The Supreme Court’s unanimous decision limits the government to the actual text of the Clean Water Act, repudiating bureaucratic overreach based on vague purpose statements.”

Justice Sonia Sotomayor

WRITING FOR A UNANIMOUS COURT IN *NATIONAL ASSOCIATION OF MANUFACTURERS V. DEPARTMENT OF DEFENSE*

This fine print provision would lock millions of ordinary Americans out of the courthouse and essentially insulate the EPA's blatant overreach from judicial scrutiny.

We disagreed, and argued in the federal appeals court, followed by the U.S. Supreme Court, that our case could rightly proceed in district court, allowing five years—not four months—to challenge an overly burdensome and unconstitutional regulation. As with our other Clean Water Act victories in *Sackett* and *Hawkes*, the Supreme Court agreed that all federal trial courthouse

doors are open to citizens who wish to challenge the EPA and Army Corps overreach under the Clean Water Act.

The Supreme Court's decision is *National Association of Manufacturers v. Department of Defense*. NAM was one of roughly 100 parties alongside PLF's clients who sued to invalidate the WOTUS rule in federal district court.

PLF will now get on with the real courtroom work: overturning the illegal 2015 WOTUS rule itself—and we're hopeful that our next report will be on yet another victory. ♦

Remembering our friend and colleague

James S. Burling

VICE PRESIDENT
FOR LITIGATION



ON CHRISTMAS EVE I lost a friend, PLF lost a star attorney, and the nation lost a great advocate for freedom. With the passing of Reed Hopper, we have much to mourn but at the same time much to celebrate in having been blessed to share Reed's passion for the law and liberty. But even more than that, Reed had an unerring sense of right and wrong, and the innate ability to choose the higher path in everything he did.

Reed's commitment to doing the right thing was nurtured when he was young, growing up in a family life marked by dysfunction, foster care, and all those things that can drag down individuals not made of sterner stuff. Looking around, he told himself, "There has to be a better way." Fortunately for all of us, he found that better way.

Dedicated to serving his church, family, and ideals, Reed was a great example of a man who lived out his values in all that he did. After graduating from the University of California, Davis, Reed began his journey of service by joining the Coast Guard, where he worked as an environmental protection officer and a hearing officer. That was followed by work in Sacramento on environmental compliance issues at the Aerojet rocket company by day, while attending McGeorge School of Law at night. He did all that while raising his family with his wife, Cathy, whom he met in college.

I had been an attorney for only a few years when Reed came to Pacific Legal Foundation in 1987. We all recognized immediately what we had in Reed: an individual whose hard work, native intelligence, and strong beliefs would carry him far. Reed was committed both to protecting the environment and those people who were adversely and unreasonably affected by government overreach. As he developed his expertise in environmental law, he was motivated by helping those ordinary Americans whose lives were often upended by bureaucratic injustice. Reed was especially talented in

cutting through layers of legal obfuscation to get to the heart of an issue and figure out how to deal with it.

When global warming first became an issue in the early 1990s, he recognized immediately how an overreaching regulatory response could adversely affect people in all parts of the nation. He understood how the protection of endangered species without protections for ranchers and farmers who earned their living from the land could lead to misery for both the species and people. And he most famously identified and explained how the government's wetlands regulations violated the law.

After years of laying the groundwork, he achieved his first Supreme Court victory in 2006 in *Rapanos v. United States*, a case where the Court rejected the government's expansive attempt to regulate land well beyond the legitimate reach of the federal Clean Water Act. In 2016, he achieved his second victory in *U.S. Army Corps of Engineers v. Hawkes Co.*, a unanimous decision that vindicated the right of landowners to have their day in court when the government deems their property to be regulated wetlands. And as he passed, he was waiting on the Court to issue a decision on the right to appeal the Obama Administration's infamous "Waters of the United States" regulations. In a fitting tribute to his years of dedication to the greater cause of liberty, this unanimous decision came just days later. His expertise and these victories propelled him to testify frequently before congressional committees on what was wrong with our laws and how to fix them.

But more than any of those victories and his great accomplishments, Reed was a consummate professional, always willing to help a colleague. His love for his family, church, and nation was boundless and showed in everything he did. At age 66, he wasn't ready to retire, telling us that he had much yet to accomplish for us. We will miss him profoundly. ♦

PERSONAL LIBERTIES

A t-shirt will not destroy democracy

But government censorship could

Collin Callahan

MEDIA ASSOCIATE

WHEN ANDY CILEK, executive director of Minnesota Voters Alliance, went to the polls in 2010, he was kept from voting for five hours because a poll worker decided that his clothing violated Minnesota's "voting dress code." Eventually, he was allowed to cast his vote, but poll workers took down his name for possible prosecution. All because of a t-shirt.

Recognizing this as a clear violation of his rights, he did what everyone should do: he sued. After lower courts refused to vindicate his rights, Cilek contacted PLF and took his case to the U.S. Supreme Court.

"Minnesota's law requires election workers to ask voters wearing political badges, buttons, and other insignia to take off the apparel or cover it up," senior attorney J. David Breemer explained. "If the voter refuses, the election worker writes down the voter's name and address for potential criminal prosecution and civil penalties up to \$5,000."

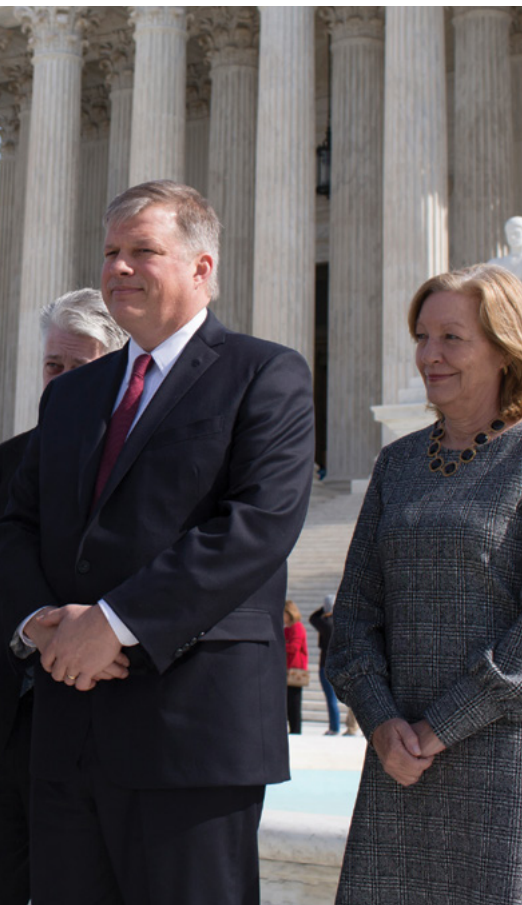
Cilek's t-shirt had an image of the Gadsden flag—featuring a coiled rattlesnake and the slogan "don't tread on me"—a design countless Americans have used to express themselves since the American Revolution. Since the t-shirt also contained a small logo of the local Tea Party, it ran afoul of Minnesota's policy.

But the ban doesn't just apply to the Tea Party. Minnesota bans shirts bearing the logo of any group that has recognizable beliefs about government—the American Civil Liberties Union, union organizations, the National Rifle Association, or Pacific Legal Foundation. Minnesota's



policy is so broad, the government even admitted Minnesota Vikings fans couldn't sport their team's logo in the voting place if there was a ballot item affecting the team, such as stadium construction. Poll workers have unreviewable authority to decide what is "political" and may be banned, with obvious implications for viewpoint discrimination and abuse.

While the government can regulate disruptive campaigning in a polling place, people have a First Amendment right to express their affiliations and beliefs in a peaceful, passive way.



I

After oral argument, J. David Breemer told reporters, “It was a very active and interested Court, as they should be in an important issue like this regarding the First Amendment right to express yourself through a peaceful means.” He added, “We are looking forward to a positive decision.”

II

Former Attorney General Ed Meese hosted PLF staff, clients, and supporters to celebrate the oral argument at a joint event held by PLF and The Heritage Foundation.

III

Andy Cilek thanked PLF for defending his rights. “It’s great as an American, an average citizen, to be able to go all the way to the Supreme Court,” Cilek said.

IV

Wen Fa displayed a t-shirt that could run afoul of Minnesota’s law while speaking at the Cato Institute February 22.

As PLF wrote in its opening brief, “A t-shirt will not destroy democracy.” Americans’ strongly held convictions will not be swayed by a logo on a hat or an emblem on a shirt.

At a press conference after the Court’s November 13 announcement to hear the case, attorney Wen Fa told reporters, “We’re not just fighting for voters in Minnesota who want to wear Tea Party shirts that say ‘liberty’ or ‘don’t tread on me.’ We’re fighting for small business owners in Tennessee who want to wear Chamber of Commerce shirts. We’re fighting for union members in New York who want to wear AFL-CIO shirts. We’re fighting for sportsmen in Texas who want to wear NRA shirts. And we’re fighting for civil rights advocates in Vermont who want to wear shirts that say NAACP. We’re fighting for you, no matter what your views, no matter where you live, for your First Amendment right to free speech.”

Led by Breemer, the litigation team includes Fa, Deborah La Fetra, and Oliver Dunford. Immediately after the Court took the case, the group began preparing for oral argument and soliciting support from other organizations across the political spectrum.

In late December, the ACLU, Cato Institute, Goldwater Institute, James Madison Center, and others filed friend-of-the-court briefs supporting PLF.

The litigation team arrived in Washington more than a week before the February 28 argument. They participated in two special moot courts on February 21 and 23, in which several distinguished Supreme Court advocates served as sparring partners. Standing in for the justices, the moot court judges grilled Breemer on every aspect of the case.

“We do moot courts before oral argument in all of our cases, regardless of which court we are arguing before,” Jim Burling, vice president for litigation said. “But when the stakes are this high, we want our attorneys to have the best preparation possible. Dave did a fantastic job answering the questions that he got in his moots, and he was well prepared for the real thing.”

During the hour-long argument, the Court asked many tough questions of both sides. Justice Samuel Alito raised questions about whether the broad statute could lead to viewpoint-based discrimination.

“The problem is that so many things have political connotations, and the connotations are in the eye of the beholder,” Alito said. “And on Election Day, you’re going to have hundreds, maybe thousands of officials in Minnesota, and every one of them probably thinks that he or she is the reasonable observer, and they’re making a determination about whether something has political connotations.”

The Court is expected to release its opinion by the end of June. ♦

PERSONAL LIBERTIES

Families struggle with government-forced, race-based education

Joshua Thompson

SENIOR ATTORNEY



At a news conference February 15, LaShawn Robinson explained that for 16 years she tried to get her son into a magnet school without success.

LASHAWN ROBINSON'S oldest son, Jarod, has missed out on Hartford, Connecticut's public magnet school lottery year after year, even though the school has the space to take him. Once a student who loved school and excelled at it, years of bullying and poor education at his neighborhood school have slowly drained the boy's academic vigor. The reason? He's black.

Despite the dismantling of state-sponsored segregation decades ago, many cities in America, including Hartford, remain racially segregated. In fact, more than 75% of Hartford's population is black or Hispanic, whereas the suburban Hartford metropolitan area is nearly 70% white. Not surprisingly, the Hartford school system reflects the segregation of the families it serves: The suburban schools are largely white, and the city schools are largely black and Hispanic.

To combat this racial segregation, some parents sued in 1989, asking the state courts to declare the *de facto* racial segregation unconstitutional under the Connecticut state constitution. And they won. In 1996, the Connecticut Supreme Court held that the racial segregation in the Hartford school system violated the state constitution and that all Hartford children have the right to a "substantially equal" education.

In the wake of this decision, Connecticut enacted a number of laws designed to end Hartford's educational segregation. One new law established "magnet schools" in areas with the worst educational track records, which disproportionately affected black students.

These magnet schools have proven to be highly successful at educating Hartford's kids. Especially when contrasted with the failing inner-city neighborhood schools, magnet

schools offer a ray of hope to parents who want to ensure their kids get a quality education. But, there's one major problem with the magnet schools—the law limits the number of black and Hispanic students who can attend.

Connecticut law mandates that 25% of the seats must remain "reduced-isolated," which is government double-speak for "white." Because most of the white kids live in the suburbs—and the suburban neighborhood schools are just fine—few suburban parents have any reason to send their kids to the inner-city magnet schools, even though they are excellent schools.

As a result, magnet schools are forced to turn away deserving black and Hispanic families who live down the street. If the schools cannot find enough white kids to meet their quota, the law prohibits the schools from filling the empty seats with students of color. They have to leave those seats empty!

So even if the magnet school wants the kids, has space for the kids, and no white kids are applying to the school to keep it "in balance," the magnet school still has to turn away every black or Hispanic child who would push the overall demographics to less than 25% white.

That's why Pacific Legal Foundation is representing eight Hartford parents of inner-city students, including LaShawn. We are fighting for their right to get their children the best education possible, and their race shouldn't deny them the opportunity to attend an excellent school.

Each of these kids deserves a quality education, and they shouldn't be shut out of the best schools simply because they have the "wrong" skin color. PLF will make sure this injustice gets corrected. ♦

Reflection from the inside

Kathy Hoekstra

DEVELOPMENT
COMMUNICATIONS OFFICER

“What makes me such a fan of PLF is not only do you take on the important, tough cases, you just never give up.”

PLF DONOR

“I give to PLF because you actually do something. I gave to a number of causes and, quite frankly, many of them are lost causes. I keep telling everyone about the wonderful work you do and thought I should increase my donation this year.”

PLF DONOR

When I think about why donors choose to give to Pacific Legal Foundation, I think about my backyard.

I can see it through the window of my home office in Michigan. It's a lovely backyard—the towering old firs, oaks, and maples that filter summer sunshine, drip fall color, and don winter white—and it's one of the main reasons I bought my house.

My early work in local news didn't prepare me for the possibility that the government could take my own backyard from me. Without warning and without payment.

But PLF knew. From 2016–2017, I was the national regulatory reporter for the Franklin Center for Government and Public Integrity. While writing tales of bad government regulations hurting good people, I kept bumping into PLF and its work on behalf of these good people.



From Wisconsin bureaucrats' land grab of the Murr family's property to the federal government's targeting of Wyoming rancher Andy Johnson with \$37,500 per-day fines for his private stock pond, I learned what our donors already know—that these folks could one day be them. Or me.

Working for PLF, I've seen firsthand our team's devotion to the cause of liberty—even in my home state of Michigan where we're fighting an unconstitutional law that lets local governments not only seize property when owners owe back taxes, but then sell the land and pocket all surplus proceeds.

We're also fighting the EPA over its refusal to allow a new road in Michigan's Upper Peninsula over alleged wetland concerns.

If my backyard has a puddle, or is uninhabitable for the three-toed sloth but one day could be (my teenage boys notwithstanding), or if I owe eight dollars in back taxes, my own property could become an expensive tug-of-war with government bureaucrats.

It's one thing to write about government abuse. It's another to work alongside a team dedicated to getting justice for these victims, and holding government accountable to the rule of law.

Our donors are right—PLF never gives up. Neither will I. ♦



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Pacific Legal Foundation is humbled to have an extraordinary group of supporters who have felt so strongly about defending liberty and justice for all, they enshrined their legacies with us through their estate planning.

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