

**Episode 2,357: Silenced Doctors Fight Back**

**Guest: Jacob Huebert**

**WOODS:**  Jacob, can you take a minute to describe, before we get into the specific kind of case we want to talk about today, what precisely the Liberty Justice Center does?

**HUEBERT:** Yeah, we're a public interest law firm. That means we're a nonprofit, we represent all of our clients for free. And we sue the government over all kinds of bad things it does.

First and foremost, I think, we focus on free speech. We've done a lot in that area, but we also litigate on educational freedom, on property rights, and in the Covid era, fighting back against all the nonsense there, including the federal mandates where we've had a lot of success.

And a lot of organizations like ours pick a few topics and, like, a few legal issues within those topics, and they just focus on those for decades and don't really change. And that has worked well for some of them.

But we're a little more flexible in that we're always looking for, sort of, the latest and greatest threats to liberty and thinking about what we can do to jump in and protect people's rights.

**WOODS:** It's really great. I mean, what a great way to combine both something that you love and something that you're really good at, to be able to put that at the service of a cause you believe in. And that's a privilege, really. It's a gift that you've been given that you're able to do that with your life.

So, let's talk about one issue in particular, a very specific one that is coming out of California. And that has to do with – let's see. It's Assembly Bill 2098, that makes life, let's just say, very difficult for doctors who dissent from whatever the existing consensus is.

Now, I don't know if it's – is it exclusively Covid related? Or is it anything where you might disagree with the "medical consensus"?

**HUEBERT:** You know, it's weirdly specific to Covid. Last summer, the California General Assembly passed this law that says that if a doctor gives misinformation to a patient about Covid, that doctor can be disciplined by the state and even have his or her license revoked by the state.

And it is specific to Covid. And you might ask, well, what's misinformation? What counts as misinformation under this law? Well, the law says that's anything that goes against the contemporary scientific consensus.

And that might make you wonder, well, how do you know what that is? And indeed, who does know what that is? Because the official consensus on so many issues related to Covid has changed over and over.

And as a result of this, you have doctors in California who don't know what they can and can't say to their patients if they want to avoid risking their license.

**WOODS:** Yeah. So, they can have their licenses revoked if it's discovered that they gave some medical advice or said something that runs against, as you say, the consensus.

And the “consensus”, as you're indicating, the very concept, the word itself, should almost send a shiver up your spine after what we've been subjected to for the past three years. Because yesterday's misinformation is today's consensus, and vice versa.

I mean, from the very beginning, when we were told that New York City needed 40,000 ventilators, and then one doctor made an amateur video at his house saying: *You know, I actually think that the ventilators are counterproductive.*

And suddenly it turned out that: *Oh, yeah, we don't need 40,000 ventilators because the ventilators are actually causing a lot of the problem*. So that "consensus" went out the window just like that.

So, you would think if we were dealing with reasonable people who were actually dedicated to health and to the well-being of others, that they would take an open-minded approach.

That they would say: *Obviously, with something like this, it's been quite elusive. We expected that harsh non-pharmaceutical interventions like lockdowns and masks would accomplish a lot.*

*They apparently didn't. So, again, we have to be a little bit modest in the kinds of things that we predict will happen or the kinds of authoritative statements we make*.

You would think we would hear something like that rather than: Whatever the fleeting consensus of the moment is, that's what you have to subscribe to, on penalty of losing your license. But here we are.

**HUEBERT:** Yeah, right. You'd think that's what they would say if we were ruled by rational, decent people. But of course, we aren't, and especially people in California aren't. And of course, this law is anti-free speech, of course, because it seeks to control what doctors can and can't say.

And you do have a right to free speech if you're practicing medicine, just like you have it anywhere else. And it's also, of course, inherently anti-science because the state is going to decide what counts as the "right answer" right now, and it's going to impose that on everybody.

And you can't even talk about the alternatives with your patients. And this law is just about talking. It's just about what you say to your patients. It's not like, if you give your patient a treatment and that turns out to harm them, you'd be disciplined. It's just saying the wrong thing.

And this changing consensus is well known to our clients. When we saw that this law was about to be passed, we reached out to people in California to see if they could connect us with some doctors who would be affected by this.

And we very quickly found some. We represent a psychiatrist in California named Mark McDonald, a doctor board certified in family medicine, Jeff Barkey. These two doctors had long and respectable careers. They never got in trouble with the medical board for doing anything wrong.

And then when Covid came along, they just started saying what they think, not just to their patients, but in public. So, they were very early on saying that it doesn't make any sense to force kids to wear masks. And they questioned whether it makes sense for anybody to wear a mask.

And they looked at the evidence about treatments like ivermectin and hydroxychloroquine, and they said: *Yeah, those look like they could be effective, and we shouldn't take those off the table*. And of course, all those things were against the scientific consensus, at least at some time when they were saying them.

But now, of course, many people recognize that they were right all along. And so, they could have got in trouble if this law had been in place back then. Would they get in trouble if they said the same things now?

Well, it's hard to say. Doctor McDonald has been investigated by the medical board in the meantime for his Twitter and Facebook posts, for supposedly spreading misinformation about Covid.

And that, of course, was just saying the same kind of stuff we were just talking about, questioning masks and that sort of thing. And so, these doctors are in a really difficult position now if they want to be able to give patients their honest advice.

And of course, it's not just these two who we represent in these lawsuits. We've heard from many, many doctors across California who are very concerned about this.

Some of them thinking about just picking up and moving to another state, because it's essentially impossible right now for them to practice medicine the way that they believe they should in California.

And of course, patients in California are harmed by this, too, because they can't go to their doctor and get their doctor's best honest advice.

**WOODS:** Well, obviously, there is an array of opinions on the Covid shots. But there seems to be a consensus among a lot of reasonable people that the costs outweigh whatever the benefits might be for children, without a doubt.

Which is why they had very, very pathetic uptake among children. And then certainly when they said the six months to five years old can get it, there is just no interest in that. And there's been no interest in boosters.

Again, there's no evidence that boosters are doing any good or would be a net benefit. But yet, in spite of that, I wonder if this law means that your doctor needs to tell you that it's urgent for your seven year old to get this shot.

**HUEBERT:** Yeah, it wouldn't surprise me, given what we see from official entities even now, saying that it's important for young children to get vaccines and boosters. And I should add to these doctors credits, they, at the outset, also were questioning whether these vaccines would be either safe or effective at all.

**WOODS:** So, first of all, when is the court date for this?

**HUEBERT:** So, a federal court, a trial court in California first heard this case and it rejected our First Amendment claim. And it's hard for me to even explain why, because, of course, it makes no sense to say that this doesn't affect doctors' free speech rights.

But the federal trial court judge, relatively recently appointed to the bench, said: There's no speech issue here. You can regulate how doctors treat their patients, and that's fine. So, now we've appealed that to the US Court of Appeals for the Ninth Circuit, and they're going to hear arguments in this case on July 17th.

So, I will argue to them that this obviously, flagrantly violates doctors' free speech rights by controlling what they can and can't say on controversial issues. And of course, if the First Amendment protects anything, it's supposed to be your right to say what you think about controversial issues.

And so, the claim is really strong. And you never know what judges you're going to get in the Ninth Circuit or anywhere else, but I think there's cause to be optimistic here because this law is just so obviously wrong.

**WOODS:** Well, here's a probably dumb question about lawyers and courts and cases like this. If I were having a debate, let's say, at Gene Epstein's Soho Forum, I wouldn't really want the other side to have, let's say, my opening statement in advance.

I would want to surprise them a little bit with my opening statement. But here you are on a podcast and potentially laying out the exact kind of arguments you're going to make. Is that common? Like, does the other side more or less know what you're likely to say?

And it's just a matter of which side is going to persuade the judge, so it doesn't really matter if the other side knows what your line of argument is, given that they've probably anticipated it already?

**HUEBERT:** Well, yeah. I mean, they've seen what we have to say in the lower court already. And then when you have an appeal, the parties file briefs first.

So, if you're the one who appeals, you go first and file your brief. And then the other side, which would be the government here, gets to file its response. And then you get to file a reply to that.

So, you've already seen, essentially, the back and forth through the written briefs that are filed with the court. And then when you go argue in person, that's more about giving the judges an opportunity to ask questions that they have about what they've seen in the written arguments.

You're really not supposed to surprise anybody with anything new there because you were supposed to lay it out in what you wrote in the first place. And yeah, I don't mind going on podcasts or the media and talking about all this because I think we're right.

It's very straightforward, the First Amendment argument here. It shouldn't be surprising to anybody. I have found (not just in this case, but across the board) our opponents generally are much more reluctant to go out and try to defend their positions.

And of course, when you're litigating against the government, they feel like they don't really need to defend themselves.

They generally take a posture of: *Well, look, we're the government. Of course, what we did was right. Of course, we know what we're doing. Of course, it's ridiculous that anyone would challenge us.*

And that's kind of generally their attitude in court. And they don't really feel a need to go justify themselves to anybody publicly beyond the propaganda the government already does to bolster what it does.

**WOODS:** All right. I was just wondering about that. So, are they going to be arguing something like: *The First Amendment isn't absolute*. Or: *If there's an emergency, we have to do we have to do.*

Or are they going to find some other way of interpreting the First Amendment? I mean, it does seem like – now, leaving aside the issue of the incorporation doctrine.

Let's just assume that everybody takes for granted the incorporation doctrine that the First Amendment applies to California. What's likely to be – or I suppose, what do you now know their line of argument is going to be?

**HUEBERT:** The line of argument essentially is that the state can regulate how doctors treat their patients. They can regulate the kinds of things doctors can do to treat different illnesses and conditions.

And so, this is just that. It's just normal regulation of the medical profession, and it's not really about speech. But that's wrong. I mean, just on the surface it's wrong, because we are just talking about what doctors can say to their patients totally apart from the question of what treatments they can prescribe.

And also, the courts lately have been pretty clear and pretty good on this. The US Supreme Court not that long ago made clear that professional speech is speech like any other. It gets the same First Amendment protection as other kinds of speech.

And even this Ninth Circuit Court of Appeals has recognized that, because it's been forced to by the Supreme Court. But it came up in the Ninth Circuit before. Marijuana is illegal under federal law. So, can they tell doctors that they can't advise patients that it could be helpful for them to use marijuana?

And the court rightly said: *No, you can't stop doctors from saying that. You might be able to, under the current legal framework, stop them from actually prescribing it, but you can't stop them from talking about it.*

And so, this situation is just like that one. It's only about what doctors can talk about. And I'm hopeful that the court will recognize that.

**WOODS:**  Let's go back to the issue of the mandates, the vaccine mandates that were imposed on companies with 100 employees at least.

Now, that has been overturned. But it did a lot of damage, even in the short time it was in effect, to an awful lot of people who were displaced, who suffered financial insecurity, and mental distress and everything else.

You had some hand in fighting against those, as I understand. So, tell me about that.

**HUEBERT:** That's right. The Liberty Justice Center actually was the first organization, the first group, to challenge that OSHA vaccine mandate. We saw it coming and we looked for someone who would be willing to stand up to this.

We were fortunate to connect with a man who owns some grocery stores in Louisiana named Brandon Trosclair. And so, as soon as that mandate went into effect, we were filing in court at 6am or something like that, to get that challenge on file with the US Court of Appeals for the Fifth Circuit.

When you do that sort of thing, it goes straight to the appeals court and immediately, essentially the Fifth Circuit issued a stay against that mandate nationwide, so that nobody had to comply with it.

Ultimately, there were a bunch of other people who challenged this, and the Supreme Court agreed that this was unlawful, that OSHA has no authority to prescribe a vaccine mandate for employees.

And so, fortunately, it never went into effect, although, of course, lots of people had to scramble and think about what other job they were going to take when they assumed it was going to go into effect.

**WOODS:** And of course, no doubt there are a great many companies, especially larger ones, that prefer to be in the good graces of the government. And if they know this is a policy the government wants enforced, they might just carry it out anyway.

So, even with the official coercive mandate gone, you still had employers saying: Well, we need to do it. And it didn't matter to them what the science behind it was.

You could argue all day long to them that this had no health effects whatsoever, and that all you're doing is disrupting people's lives and it just didn't seem to do anything.

**HUEBERT:** Yeah, that's right. And this current situation where you have the federal government pressuring private entities so much, even when there isn't an official formal rule, creates something of a problem for a libertarian lawyer like me.

Because as a general matter, I don't want to go to court and tell a private business what kind of rules it can prescribe for its employees. Even rules that I think are outrageous, I think a private employer should be allowed to have, as a general matter.

And so, then you have these things that you see companies doing. You see companies imposing vaccine mandates. You see the social media platforms censoring people. And you know if it wasn't for federal government pressure, they wouldn't be doing it.

But if you can't prove that the government effectively made them do it, then you're going to court and just trying to stop a private business from doing something. And I don't want case law on the books saying it's okay to tell private employers what kinds of rules they can have.

So, it's a little bit of a conundrum for the libertarian lawyer right now. And I think the trick is to find those instances where you can show that the government played a critical role in making the private business do what it did.

And so, that's occurring right now in a case against not only the Biden administration, but also Facebook and Twitter.

**WOODS:** Well, I was just going to say that. That as more and more documents come out, it's very obvious that even if Facebook and Twitter might have been inclined to do X, Y, and Z, they were obviously pressured into doing X, Y, and Z.

And particularly more in the case of Twitter than Facebook. Because in the case of Twitter, you see case after case of even pre Elon Musk Twitter executives corresponding with government officials and saying: *We don't see that Twitter member X violated our rules or did anything wrong, so we're not going to suppress that person or that person's material*.

But then that suddenly changed. As you see, the pressure just seemed insurmountable and they just began to go along with it. And I don't say that to exonerate Twitter, but rather just to emphasize that the institution that holds the monopoly on violence very, very often holds the upper hand.

**HUEBERT:** Yeah, that's right. Absolutely they do. And we know that especially these social media platforms, there's always this sort of antitrust threat in the background. Sometimes they even invoke it explicitly in talking about how they have to be responsible and that sort of thing.

And so, you do have these companies being pressured into doing this. And you do have better and better evidence of that coming out. Sort of, the pressure really mounted in July of 2021 where you had this press conference with Jen Psaki and Surgeon General Murthy.

And they were saying, essentially, in that press conference: Yeah, these social media platforms need to get in line. They need to stop this misinformation. And they didn't say "or else" exactly, but we know very much what they meant.

They said they're communicating with them and they said: *We're telling them, essentially, what they need to do.* And, of course, these companies take that as more than just a suggestion.

There is an email that came out a while back, a series of emails between the White House's digital media director, Rob Flaherty (who recently was in the news for resigning) where he was pushing Facebook officials, telling them they need to do better.

And unfortunately, the Facebook officials just sort of groveled in response, like: *Oh, yes, please tell us. We want to be accountable. Let us know what we can do.* And there was perhaps more eager cooperation there than at Twitter.

And so, we have a client who was censored right at that time. His name is Justin Hart. I suspect a lot of your users are familiar with him from Twitter. He's been very outspoken on Covid issues.

**WOODS:** Oh yeah, I follow him.

**HUEBERT:** And he was censored. He was censored for a Facebook post that said, *"Masking children is impractical and not backed by research and real-world data."* and had a little graphic to illustrate that.

He was suspended from Facebook for posting that. He was locked out of his Twitter account for saying, *"We know that masks don't protect you."* So, in response to that, we sued the platforms and the Biden administration, saying that they had conspired to violate his First Amendment rights.

And the court in Northern California where we had to go for this, judge Charles Breyer (actually the brother of former Supreme Court Justice Stephen Breyer) rejected this out of hand.

He said: *Well, you don't really have any proof that they made the platform censor your client, so there's not a First Amendment problem here.*

But the case was allowed to go on a little bit, for a small slice of it. In the meantime, all this great evidence came out through the Twitter files and other things showing what's been going on.

And so, recently we went back and asked the court to amend our complaint that we filed to add all these details, to show the things that the judge had said we were missing.

And normally you're allowed to do that. If the judge says your first complaint isn't good enough, it's pretty standard to be able to go back and revise it. And so, we did, and we put in all this evidence.

And then Judge Breyer again recently said: *Nah, you still don't have it. Yeah, you've got all these documents, but there's not one that says, "We'll censor Justin Hart for these posts." So, there's no government action here. There's no First Amendment problem here, and you're dismissed*.

So, now that case needs to go to the Ninth Circuit Court of Appeals and we'll see what happens there. But the way that was handled was totally different from the way a case would normally be handled when the defendant is asking to dismiss it.

Normally the courts are supposed to assume what you're alleging is true. They're supposed to draw all the inferences in your favor when you're a plaintiff coming to court. But nothing was good enough for this judge.

And unfortunately, the courts so far aren't too eager to do much about the social media censorship. Except, there's one that was brought by the state of Missouri and some other states in a federal court in Louisiana before a judge who's known to be very good (from our perspective) on a variety of issues.

And he's actually let them go forward. He's letting them get discovery. They're allowed to depose Jen Psaki. They're allowed to depose these other officials. And they're getting lots of documents.

And so, I'm hopeful that case will have so much evidence and then go through relatively favorable courts on the way that if our case doesn't get to the Supreme Court, that one will. And we'll have a court decision that will say that this kind of censorship, this kind of pressure to censor, can't happen again.

**WOODS:** Jacob, what were you doing legally before the current center that you run?

**HUEBERT:** Well, out of law school I clerked for a US Court of Appeals judge for a year. Then I went and worked for an ordinary sort of large law firm for a few years, doing the kinds of things that are typically done there, commercial disputes between businesses, that sort of thing.

But then I moved to Chicago, where our headquarters has been – although we're all over the country. I'm in Austin, Texas. Our lawyers are all over the place. But I moved there, and I happened to hear one of the founders of our organization saying they were going to start it.

And it sounded really good to me. So, I talked to him and was there starting in 2011. And I've been doing this sort of work ever since. I went and worked for another organization that does similar stuff, called the Goldwater Institute, for a few years before coming back to the Liberty Justice Center to be its president last year.

And you made a great point at the beginning about how lucky I am to be doing this, because that other work that I did was boring. Like, who cares between two businesses who gets a bunch of money? You don't inherently care about that.

If you're a lawyer, you're supposed to be zealous for your client and kind of buy in to what you're doing. But of course, you don't inherently care about this. But this kind of work, I would care about whether I was a lawyer on it or not.

So, it's much more fun and much more rewarding than any other kind of legal work that I know. And we're very lucky to have generous supporters who make it all possible.

**WOODS:** Well, I was going to get to that in just a minute. But I was asking because I wanted to know if you were with, as you say, one of these big firms at the time the mandates came out and whether you were subject to them.

**HUEBERT:** No, fortunately, that was a long time ago. It was before mandates. It was before the big law firms were making people put pronouns in their signatures. I missed a lot of the bad stuff that people have had to deal with in recent years at the major law firms.

**WOODS:** Well, so here's the other thing. To start a public interest law firm, obviously you need money. You have to be paid by somebody.

I mean, I'm wondering, how do you overcome the obstacle of starting from zero and getting to a point where you can fund the salaries and expenses that your attorneys have?

**HUEBERT:** Well, we're fortunate that our founders were already involved in some other nonprofit matters, had connections to donors, connections to foundations that like to support this kind of work. So, we got some money early on.

And it didn't cost too much early on. There was a time when I was the only lawyer at the Liberty Justice Center, and now we're about to be up to ten lawyers spread all over the country. And as you succeed, you attract more money, and we were really able to take off and expand.

In 2018, we won a Supreme Court case called Janus versus AFSCME, where the Supreme Court said that governments can't force their employees to pay fees to a government union. That violates the First Amendment.

And when we did that, our profile was much elevated, and we were in a position to go enforce and expand that decision across the country. And then once we were all over the place, just jump into whatever we wanted all over the country.

And so, we've been fortunate that we've attracted more money and great talent to go along with it.

**WOODS:** Well, that's tremendous. So, what's the website?

**HUEBERT:** The website is LibertyJusticeCenter.org. You can also check us out on Twitter and you could also check me out on Twitter to see the latest about all that we're doing.

**WOODS:** I'll put the Twitter accounts that you mentioned. I'll put them up at TomWoods.com/2357 along with your website where I assume there's an opportunity for people if they believe in your mission to make a contribution.

**HUEBERT:** Absolutely. You can make a contribution. It would be much appreciated. Been very pleased to see, when we jumped into this case about the doctors in particular, you just had a flood of support from people, doctors and patients in California, who wanted to see that happen.

And so, yes, if you would like to help us continue this work, you can do that there. And we greatly appreciate it.

**WOODS:** Excellent. Okay. Well, best of luck. I'll be following this very closely and with a great deal of interest. So, maybe there'd be a possibility you could come back on and talk about how it went.

**HUEBERT:** Yeah, Hopefully I can come back and tell you we won.

**WOODS:** Yeah, we really want to hear that. Come on back and tell us that you won. All right. That's just wonderful that you're out there doing this. We've known each other for a while in this movement here and there.

And to see you involved in such high profile cases, it's really a thrill for me. I'm really, really glad for you and for everybody that somebody of your talents is engaged in this kind of work. So, thank you very much.

**HUEBERT:** Oh, thank you, Tom, for saying it. I appreciate it. And I appreciate you having me on.