



CIR

docket report

Fall 2017

We're winning the hard cases and setting the right precedent.

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Your Help Can Make a Difference

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We're so close. A victory in *Janus v. CTA* next June could end compulsory dues across the nation. In no small part, this will be due to CIR supporters who helped get CIR's *Friedrichs v. CTA* to the Supreme Court last year.

Friedrichs was the first case to focus on the one claim that turned out to really matter, namely that public employees have a First Amendment right to decide for themselves where and how to spend their own money.

Friedrichs was an example of strategic litigation, cases that change the way the courts—and the public—think about individual rights. *Friedrichs* did not try to limit the authority of unions to negotiate on behalf of their members. Instead, it strengthened the right of individual members to decide for themselves whether the union's negotiation furthered their interests.

CIR didn't stop with *Friedrichs*. Early this year, we launched *Yohn v. CTA*, a case that attacks the opt-out rules that force members to keep paying dues even after they have left the union. *Yohn* is designed to carry the *Friedrichs-Janus* fight forward.

The union dues fight is only one of CIR's cases this year. With one of our busiest and most successful years to date, we decided to bring back our Docket Report to tell you about some of the other big cases your support is helping to make possible.

In these pages you will meet Ryan Yohn, the California teacher who decided to stand up for teachers' rights and who is now at the center of *Yohn v. CTA*. You will read about our challenge to state laws that ban electric weapons in violation of the right to bear arms—not just firearms. And you will learn about two of our influential victories from the past year, including an important federal court decision that strengthened due process rights for college students.

Your support for the Center for Individual Rights this year will make an outsized difference. The Trump Administration is nominating a record number of first rate judges, which will enhance CIR's ability to bring and win the cases that really matter.

Thank you for your continued support.




-Terence J. Pell, President



Meet Ryan Yohn

Ryan Yohn is the lead plaintiff in CIR's case challenging compulsory union dues, including the opt-out rules that make it difficult for employees to stop paying dues even after they have left the union. Ryan has taught eighth grade social studies for thirteen years. Yohn resigned from the union in 2012, but is forced to pay "agency fees" each year in lieu of dues.

“It might be something that runs in the family. My grandmother, my mother, and my wife are all teachers. I wanted to make a difference, and I was always fascinated by American history. So I put the two together and became a teacher myself.

“I've taught American history for thirteen years. I want my students to have an opportunity to learn our

country's history in a way that is engaging and informative. I want them to learn to love our country and appreciate the freedoms we have in light of the past struggles we fought to achieve them.

“But many people don't realize that ordinary teachers like me have to fund political speech we disagree with when the state takes a portion of our paycheck and gives it to the teacher's union every year. Even non-union teachers like me have to pay 70% of the full dues amount to support the union's collective bargaining efforts.

“Collective bargaining often has far-reaching consequences for our schools and our community. For example, we have to pay the union to promote tenure, even though strict tenure rules often leave students trapped with incompetent teachers. We also have to pay the union to pro-

hibit merit pay, even though merit pay would attract and benefit young bright teachers who are eager to make a difference in the classroom.

“These issues and many more often hurt students and hurt teachers. Nevertheless, I fully support the union's right to lobby for issues they believe in. All I'm asking is that they also respect the rights of teachers like me to make a decision for ourselves regarding whether or not we want to join a union. This case is about giving teachers that choice. I'm grateful to the Center for Individual Rights and supporters like you who make this case possible.”

Ryan Yohn, Plaintiff: *Yohn v. CTA*

Compulsory Dues are back at the Supreme Court

In early October, the Supreme Court agreed to hear *Janus v. AFSCME*, a case that challenges compulsory union dues brought by the National Right to Work Foundation and the Illinois Policy Institute. This was great news for teachers like Ryan Yohn, who have been fighting for years for teacher freedom.

Janus is a stripped-down version of CIR's *Friedrichs v. CTA*—it includes a free speech claim but does not challenge the union opt-out rules that CIR (and Chief Justice Roberts) believe must be ended to fully protect the free speech rights of public employees.

So it is important to move for-

ward as quickly as we can in *Yohn v. CTA*—CIR's case that challenges both compulsory dues and the opt-out rules that are designed to keep public employee paying dues even after they have left the union. *Yohn* will play two important roles in the fight to end compulsory dues and opt-out rules.

First, we will submit an amicus brief in *Janus*. Since *Janus* moved through the lower courts without discovery, our brief could play an important role in addressing factual claims the unions are likely to make in *Janus*.

Second, if the Supreme Court does not address the opt-out issue in *Janus*, that issue will be ripe for

adjudication in *Yohn*, which we intend to get to the Court in the term beginning October, 2019. We will argue that the unions should be required to *ask* teachers to *join* a union rather than automatically enrolling them in perpetuity.

The unions know what is at stake. Their lawyers are doing everything they can to block progress in *Yohn*. We will continue to press hard to move the case forward.

Between *Janus* and *Yohn*, we can dismantle the compulsory union dues regime in the next two years. And teachers like Ryan Yohn will finally enjoy the First Amendment freedoms that are the right of everyone.

VICTORY!

CIR Wins Major Case Against One-Sided Campus Sex Investigations

Cooperating Counsel: Gentry Locke, Roanoke, VA

Earlier this year, CIR won an important victory for fair procedures in campus sexual misconduct investigations.

There's no shortage of stories about how bad things are on our nation's campuses, but this story from James Madison University takes the cake. Our client—a male student—was charged with sexual misconduct. Yet after hearing testimony from all sides, a hearing panel found him “not responsible” due to lack of evidence and serious gaps in the allegations.

The accuser nonetheless was able to appeal

her case to a secret panel where she introduced new evidence, consisting, in part, of a claim that one witness in the first hearing had lied.

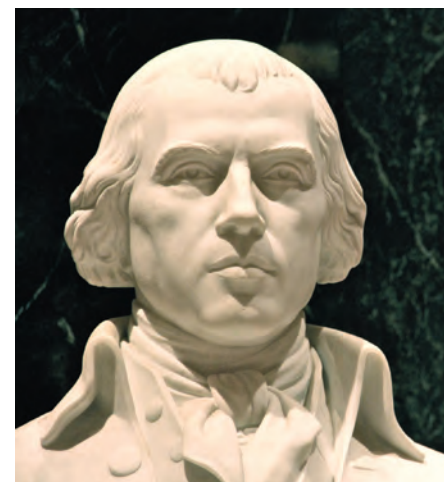
The panel accepted the new claim on its face without hearing testimony from the original witness or anyone else. Because our client was forbidden to contact the witness, he could not investigate the claim himself. On the basis of mere allegation, the school effectively expelled him.

The procedural irregularities were too much for federal judge Elizabeth Dillon. She unequivocally

condemned James Madison University for depriving the accused student of due process and ordered that his conviction be vacated.

James Madison University provides a perfect example of a campus administration that should have known better. JMU President Jonathan Alger is an experienced constitutional lawyer. He has worked as counsel for the University of Michigan and Rutgers, and written widely on student rights.

Even more unsettling is that the namesake of Alger's university—James Madison—proposed and drafted the due process



clause in the Fifth Amendment (later made binding on the states by the Fourteenth Amendment) that JMU now seems willing to set aside when expedient.

It's troubling that schools like James Madison University put themselves above the Constitution. That makes the importance of cases like this all the greater. Judicial opinions like Judge Dillon's help us set the record straight and hold universities accountable.



Follow the Center for Individual Rights Online

Website: www.cir-usa.org

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CIR's Director of Legal and Public Affairs, Brian Miller, is a contributor at *Forbes* where he regularly writes about our cases and current legal events.

You can follow him at forbes.com/sites/briankmiller

Safe Spaces Creep into the Real World

CIR Targets Emerging Threat to Free Speech with Two Cases

You've probably heard of "safe spaces" on college campuses. The idea is to punish speech that might be controversial or upsetting to students steeped in a progressive world view. What you may not know is that some are trying to bring "safe spaces" to the real world. Apparently, even some adults want a "safe space."

CIR has brought two cases designed to prevent the anti-free speech movement from gaining a foothold outside of college campuses.



Davi v. Roberts: Fired for Conservative Speech

Salvatore Davi was perfectly suited in his role as a Hearing Officer in New York's Office of Temporary and Disability Assistance. Davi's job was to make recommendations on the appeals of welfare applicants who had been denied benefits. Davi worked in this role for five years and received good reviews. By all accounts, he performed his job admirably and impartially.

But in 2015, the government charged Davi with seven counts of professional misconduct, suspended him without pay, and tried to fire him. Officials claimed he expressed bias against welfare recipients.

Why? Because in October of 2015, Davi engaged in a private Facebook exchange about welfare policy. Davi wrote that he believed welfare programs should be judged by measur-

ing "how many people or families they get back on their feet" instead of measuring how many people are on government assistance. Davi suggested that ideally the government would maintain a social safety net "of limited duration and designed to get people back to self-sufficiency."

Davi's views were hardly novel—conservatives have articulated similar critiques of social welfare policy going back thirty years. The position is even similar to "conservative" welfare critic Bill Clinton. But New York officials decided it was a critique that welfare recipients might find offensive coming from a hearing officer.

One of Davi's former law school classmates, who had participated in the exchange, promptly fired off an anonymous letter to Davi's superiors complaining that someone with Davi's views shouldn't be allowed to adju-

dicate welfare disputes. Even though Davi mentioned no specific welfare program or case, and even though none of the actual individuals whose cases Davi adjudicated complained, he was suspended without pay for his speech on the grounds that it showed bias.

CIR filed a federal lawsuit against New York in September of 2016 on the grounds that Davi's off-the-job expression of hardly controversial views was protected by the First Amendment. We think it's absurd that the government can fire an employee for expressing political opinions.

CIR attorneys have recently completed discovery and expect to file a motion for summary judgment shortly. Hopefully a rebuke from the court will remind New York that it can't create a safe space from the First Amendment.

Desmond v. Harris: Burying the Confederate Flag

Cooperating Counsel: Stammer, McKnight, Barnum & Bailey LLP, Fresno, CA



Timothy Desmond, a retired high-school teacher and painter, sometimes enters his paintings in a county art competition held at the Big Fresno Fair every year. All that came to a screeching halt in 2015, when fair officials called him and told him it was against state law for a county fair to display his painting.

Little did fair officials know that their phone call would provoke a statewide uproar that would result in the California Attorney General agreeing that the law in question did not apply in Desmond's case or in any future, similar case.

Desmond's painting, *The Attack*, depicted the Siege of Atlanta and—true to history—depicted soldiers carrying a Confederate Flag.

Unbeknownst to Desmond, in August of 2014 California passed a bill banning the state from displaying the Confederate flag, or any likeness of it.

Fortunately for Desmond, that was just the beginning of the story. The First Amendment prohibits a state from categorically banning speech based solely on the point of view it expresses in public forums like the Fresno Fair.

But that's exactly what the Fresno Fair tried to do when it tried to make a "safe space" where people would never encounter the Confederate flag. While the Confederate flag is offensive to many, the First Amendment doesn't allow state officials to pick and choose what we can hear.

CIR filed suit against California on behalf of Desmond. We expected the case to be long and hard fought, but a curious thing happened.

Though CIR is used to controversy and were prepared to take a beating in the left-leaning California newspapers, we were astounded when news outlets from the *Los Angeles Times* to the San Francisco *NPR* affiliate ran stories

supporting Desmond's right to show his painting. Even the *Washington Post* thought the California law took political correctness too far. One paper called the flag-ban "absurd" and "notable for its idiocy."

CIR isn't used to having the media on its side, but we have to admit it was nice for a change. Faced with an onslaught of negative press, the California Attorney General agreed to allow Desmond display his painting at the 2016 fair,

and entered into an agreement that the law does not apply to the speech of individuals.

Our success in Desmond was a great encouragement. It showed that even in our increasingly polarized environment, where constitutional rights like free speech are often under attack, a well-timed and well-argued case can get just about everyone to admit that free speech is important and should be protected...even *NPR*.



Stopping the Legal Culture War: *Martel v. Healey* and *Davis v. Guam*.

Political partisans aren't ashamed of using the law to engage in social engineering. Whether it's gun control, affirmative action, or safe spaces like those mentioned on the last page, advocacy groups try to hijack the law to enshrine identity politics and undermine limited government based on clear rules.

Many major institutions in the culture war are increasingly driven by politics: academia, Hollywood, and much of the bureaucracy. But the cause of limited government maintains a strong foothold in the courts (and thanks to President Trump's nominations, that foothold is growing). Litigation will not stop the legal culture war, but it can contain it. That's what CIR is hoping to accomplish with these two important cases.

Surging to Victory: *Martel v. Healey*

Cooperating Counsel: *McCarter & English LLP, Boston, MA*

Gun control has become something of a proxy fight in the culture war. While gun control is ostensibly about public safety, advocates for gun control make little effort to hide disdain for those who cling to "God and guns." As a result, many reflexively support more and more gun control with little understanding of the nature of the weapons they want to regulate or the people who use them. Predictably, though, more and more regulation sometimes makes things worse. Just look at Massachusetts.

Christopher Martel is a sales engineer who installs big flat screen monitors in restaurants, grocery stores and other retail outlets that want to post electronic menus and sale promotions.

Frequently, he must complete his installation "after hours" at stores in rough areas. Since he carries several thousand dollars' worth of equipment, he must take reasonable steps to protect himself.

The obvious solution is for Martel to purchase a Stun-gun or Taser. They are lighter and safer than a handgun, and get the job done. But under Massachusetts's law, Martel could be fined—and even jailed—for possessing any electric weapon.

Massachusetts is one of four states that criminalizes the possession of electric weapons. The bans remain in place despite the fact that the Supreme Court has indicated stun-guns and Tasers are "arms" protected under the Second Amendment. An opinion by Justices Clar-

ence Thomas and Samuel Alito said that Massachusetts's reasoning in banning the weapons "poses a grave threat to the fundamental right of self-defense."

And grave the threat certainly is. In Massachusetts, the law tells people like Martel to use lethal protection or no protection at all. The law leaves no room for Martel to be conscientious in deciding what type of protection he needs.

CIR agreed to represent Martel and two other Massachusetts residents in a challenge to the ban. We filed suit in the Federal District Court for the District of Massachusetts in February. Our case argues that the ban violates the individual right to self-defense under the Second Amendment.

Although we filed a motion for a preliminary injunction, the district court asked instead for motions for summary judgment, indicating it wants to move the case along quickly. That's good news for us. We are confident we will prevail and establish a nation-wide precedent that strengthens the Second Amendment and forces progressive politicians to respect the rights of ordinary Americans like Christopher Martel.



Davis v. Guam: Equal Protection Means Equal Protection

Cooperating Counsel: Gibson Dunn, Washington, DC; Christian Adams, Election Law Center PLLC

Dave Davis was told he couldn't vote because he is white. Here's how that happened.

The government of Guam has long planned to hold a referendum to determine Guam's future relationship with the United States. Guam is an unincorporated territory. Long ago, Congress made Guam subject to most of the Constitution of the United States, with all the rights and duties that entails.

Davis is a retired Air Force officer who lives in Guam. He tried to register to vote in the referendum. This shouldn't have been a problem since under the Fourteenth Amendment to the Constitution—not to mention federal Voting Rights laws—voting may not be restricted on the basis of race.

But here's the catch. The government of Guam stipulated that only "Native Inhabitants of Guam" could vote in this election, defined as those who became US citizens pursuant to the Organic Act of 1950 and their descendants. Because Dave Davis is not so descended, he was turned away. And it turns

out that the term "Native Inhabitants of Guam" was used to refer largely to a racial group—the Chamorro. Because he does not belong to that race, Davis could not vote.

We filed suit on behalf of Davis, arguing that Guam's actions are unconstitutional voting discrimination. We are pleased to report that in March of this year, we won a knock-out victory in Federal Court. Judge Frances M. Tydingco-Gatewood scathingly chastised Guam for "artfully manipulating" the voting requirements to discriminate on the basis of race.

As great a result as the March decision was, it's just the beginning of the story. The Attorney General of Guam—spurred on by anti-American activists—has appealed the case to the Ninth Circuit.

CIR sees this as an opportunity. The law is squarely on our side and we are confident we can establish important nationwide precedent when we argue the case before the Ninth Circuit, and after that, possibly the Supreme Court.

A victory in Davis will mean several things.



First, we will have strong precedent against voting discrimination—no matter the person's race.

Second, our victory will ensure U.S. overseas territories are protected from anti-American activists who want to circumvent the Constitution on the way to severing relationships with the U.S. (Guam itself is home to such vital assets as Anderson Air Force Base.)

Last, but definitely not least, a victory will establish important precedent that condemns divisive identity politics. The Constitution doesn't allow the government to play favorites, and this case will help us remain a nation of laws.

A victory at a higher court in *Davis v. Guam* will achieve all this and more. We will keep you updated as the case proceeds.

Resources for the Future

These pages have detailed some great successes for the cause of liberty this year. And it's all thanks to our loyal friends and donors. With your help, we were able to go to bat for Ryan Yohn, Salvatore Davi, Timothy Desmond, and all our other clients.

Planned gifts, such as an annuity, charitable trust, or outright bequest (of stock, real estate, life insurance, or cash) give CIR needed resources to continue fighting—and winning—carefully chosen strategic legal campaigns.

These gifts take many forms, each one created specifically to serve your individual goals. Each form ensures maximum control over the future use of the gift. And each gift ensures that CIR can continue to work for your goals.

For CIR's supporters, a planned gift is the perfect way to ensure every dollar is spent according to your wishes. If you would like to speak with someone regarding a planned gift to the Center for Individual Rights, please contact Brian Miller at 202-833-8400 or miller@cir-usa.org.



CENTER FOR INDIVIDUAL RIGHTS
1100 Connecticut Ave NW, Suite 625
Washington, DC 20036

e-mail: genl@cir-usa.org

web: www.cir-usa.org

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