

# CTR

# docket report

Winter 2022

## Victory for Free Speech

*Davi v. Hein*

**R**ight now, employees can be fired for expressing views on almost any issue, even in their off-work hours. In 2015, a New York social services agency suspended administrative law judge Salvatore Davi without pay and removed him from hearing cases over posts he made in a semi-private Facebook exchange. Davi had written that welfare programs ought to be designed, at least in part, to get people off of welfare.

In early March, Davi was vindicated after a five-year-long assault on his rights, reputation, and career. In addition to ruling that Davi’s speech was clearly protected by the First Amendment, the court also ruled that three government officials must face a claim for monetary damages in their personal capacities.

Davi had commented on a *Daily Kos* article that argued for expanding welfare programs. Davi countered, “there should most certainly be a safety net, but it should be of limited duration and designed to get people back to self-sufficiency.”

The discussion turned nasty, and his opponent wrote an anonymous letter to Davi’s agency suggesting that it investigate him for bias against welfare recipients. Officials thoroughly investigated Davi, but found no evidence of bias. Despite their findings, they decided to fire Davi over his views -- one official explained that the office could remove anyone with Davi’s views *even if they had not been voiced*.

Federal Judge Edward Korman’s ruling did not mince words. He concluded that Davi’s superiors tried to fire him “because he held disfavored views” over a “quintessential matter of public concern.” Not only did Judge Korman order the office to reinstate Davi, but three of the individual officials who suspended Davi now face personal liability for the damage he suffered -- an unusual ruling reserved for intentional or reckless violations of the First Amendment rights of an individual.

The state appealed to the Second Circuit, and, in October, we filed our opposition brief. Eugene Volokh, a noted First Amendment scholar at UCLA Law School, filed an *amicus* brief in support of Davi on behalf of the Free Speech Institute and the Cato Institute.

The case has grown stronger since we filed it six years ago. The state’s early claim that Davi’s speech interfered with his duties as a judge has slowly given way to a more radical claim that the agency’s reputation was harmed by the mere fact that one of its employees had conservative views about welfare policy. Increasingly, this looks like pure retaliation for Davi’s views themselves -- a *per se* violation of the First Amendment.

*Federal Judge Edward Korman*



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*Greg  
Krehbiel*

# The Woke Workplace

## *Krehbiel v. BrightKey, Inc.*

**T**he left's dominance of American media, the universities and much of the government allows it to control public discourse. Certain views are systematically treated as off-limits, and individuals who cross those lines are promptly castigated in the news and on social media.

But in the past year, the left has expanded its already pervasive cultural power by pressuring private employers to police the speech of their employees when it crosses the left's political agenda. Greg Krehbiel learned first-hand what this means.

Krehbiel, a former vice president of operations at BrightKey, Inc, was summarily fired when a coworker objected to his views about mandated diversity and hate crime laws, which he had expressed in an off-work podcast.

The co-worker sent a company-wide e-mail, labeling Krehbiel's views the product of "white privilege" and demanded a response from management on behalf of the "UNITED employees of BrightKey." The next day, he marched into the parking

lot with some other employees and demanded the company fire Krehbiel. Several hours later, the company acceded to their demand and terminated Krehbiel.

The format of Krehbiel's podcasts was straightforward -- he and a cohost reviewed craft beers and discussed topics that interested them. In one podcast, the two discussed government policies concerning race -- including diversity requirements and the promulgation of "hate crime" laws.

Although they both supported diversity in the workforce, including racial diversity, they criticized the tendency of some employers to reduce diversity to skin color. And while they made clear that race-motivated violence ought to be vigorously prosecuted, they suggested that hate crime laws give too much weight to bad words, which might reflect violent anger rather than racial bias.

When Krehbiel started work at BrightKey, the company's president, Rita Hope Counts, assured him that his off-work podcast was his own business, even if it sometimes

discussed controversial topics. So Krehbiel was surprised when she abruptly fired him despite her earlier assurances. Instead of engaging with the employees who unfairly labeled Krehbiel as a racist, the company panicked and fired Krehbiel, seemingly out of political expedience.

In November, CIR filed suit against BrightKey for unlawful discrimination on the basis of political viewpoint and race. BrightKey fired Krehbiel not only over his views about hate crime laws and diversity hiring, but also because it decided it was offensive for a person of his race to express those views. BrightKey is located in Howard County, Maryland, which prohibits employers from retaliating against employees on the basis of political opinion. And, county, state, and federal law all prohibit retaliation on the basis of race.

A victory will protect Greg Krehbiel's individual right to employment. And it will restore the idea that diversity in the workplace often depends on setting aside off-work political differences.

# VICTORY for a Fighter!

## Cocina Cultura v. Oregon

Cooperating Counsel: Shawn Lindsay, Esq., Harris Berne Christensen LLP

**M**aria Garcia is a fighter; her successful lawsuit against the Oregon Cares Fund proves it. The owner of a popular coffee shop, she launched a racial discrimination lawsuit against Oregon's \$62 million COVID-relief fund. Political activists tried to discredit her, the state and national press ran stories challenging her, but she pressed forward to victory and taught the Oregon government a costly lesson it won't soon forget.

Garcia owned a small café in downtown Portland, known for its specialty coffee and authentic Mexican meals. Her store was hit hard by the COVID lock downs last year. And even after she reopened, she sustained dramatic losses due to the reduction in foot traffic that normally drove sales.

Out of options, she turned to the Oregon Cares Fund, hoping to find some relief. But when she looked for assistance, she learned that only black Oregonians could apply.

In November, CIR filed suit on her behalf against the state of Oregon and the Oregon Cares Fund.

The Oregon Cares Fund is a striking example of how some states are trying to skirt the Constitution's long-established demands of racial *equality* in law in order to pursue "racial *equity*."

Oregon justified its fund on the flimsy ground that general historic racism has contributed to black Oregonians having lower average incomes than whites. Oregon's logic would justify any sort of reparations program at any time, which is why the Supreme Court has long rejected this kind of argument.

Garcia's story was immediately picked up by the state's major papers. Community leaders, local politicians, and prominent individuals who claimed to represent the Latino community, signed a statement condemning Garcia's lawsuit. They insisted that she drop her suit and apologize to leaders of the black community.

Garcia responded to the statement with a blistering op-ed of her own in one of Oregon's major papers. Her piece blasted the Oregon Cares Fund for its unapologetic racial discrimination. On top of that, it called out the so-

called "leaders" who tried to shame her for ignoring the needs of Oregon's Latino community in order to uphold the discriminatory fund.

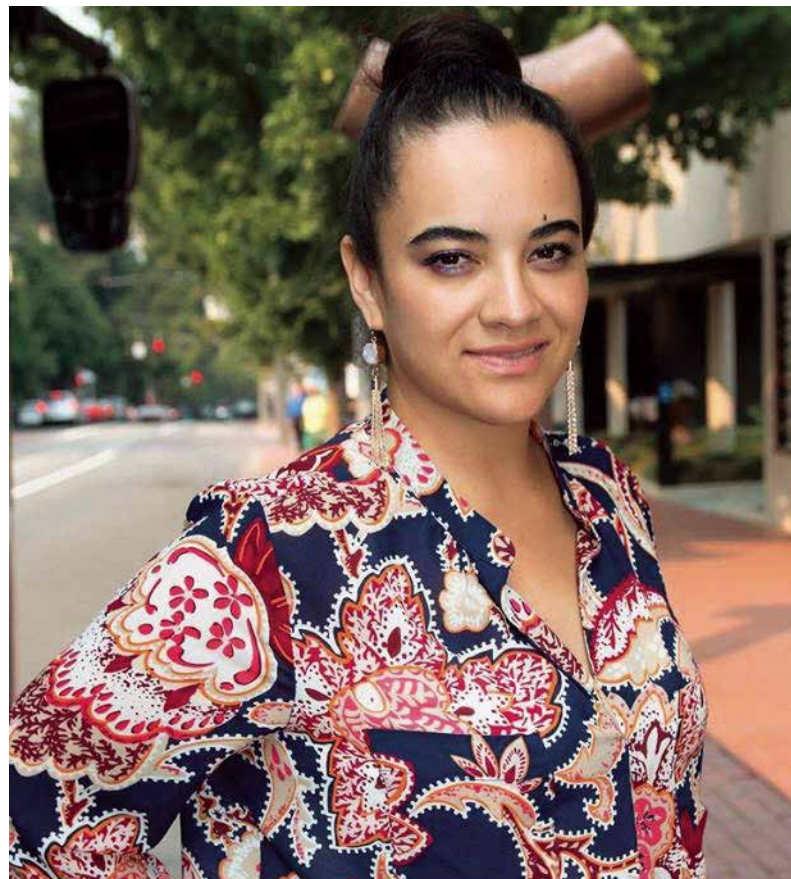
Her case quickly became a national story, receiving coverage from *Fox News* and *Tucker Carlson Tonight*. Even the *New York Times* published its own strident defense of The Oregon Cares Fund.

Being at the center of such a heated public challenge is never pleasant, but through it all, Garcia's message was clear: Oregon's

racially discriminatory program was wrong, the state never should have approved it, and no one should defend it.

After a year, the Oregon government gave up defending the law and agreed to pay whatever the court determined it owed Garcia in damages. The costly legal battle will stand as a powerful deterrent to any Oregon legislator who thinks about a similar law in the future. But if they don't learn the lesson this time, Garcia is ready and waiting for the next program.

*Maria Garcia, owner of Cocina Cultura*



# Fighting the Air Force and...

## *Rynearson v. Bass*

Cooperating Counsel: Christopher Day, Esq.

**R**ichard Rynearson is a retired Air Force pilot and a vocal critic of the Air Force's newfound embrace of identity politics. In November 2020, Chief Master Sergeant of the Air Force JoAnne Bass banned Rynearson from her official Facebook page after he made fun of her office's new attitude in a post. Even though the page was open to comments by the public, Chief Bass promptly deleted all his posts and excluded him from commenting further on the page based solely on the point of view he expressed.

Chief Bass's overreaction gave

*CIR Client Richard Rynearson*

CIR an opportunity to settle the question of whether official, government operated accounts on social media websites, such as Twitter and Facebook, are subject to the First Amendment. Increasingly, government officials have taken the position that they may "moderate," approve, and even censor citizen speech based solely on its point of view.

On November 22, 2020, Chief Bass posted "there's not a day that goes by that I'm not thankful for each of YOU. The people, Airmen and families, that make up the strongest Air Force in the world." She then invited visitors to the page to share things for which they were thankful.

Rynearson replied that he was thankful that other branches of the

military were concentrating on conducting warfare so that the Air Force could concentrate on "making sure we all feel good about ourselves" and that "nobody is offended or feels like a victim." He added a picture of the Care Bears for good measure, with the comment, "I am thankful the phrase 'air power' has now been replaced with #CarePower."

Within hours of his reply, all Rynearson's posts were removed, his entire comment thread was deleted, and he was banned from commenting on the page. This past August, CIR filed suit on behalf of Rynearson, arguing that Chief Bass violated his right to free speech. Government run social media pages are public forums, and as such, government officials may not exclude people on the basis of the viewpoint expressed.

Over the last two years, left-wing activists, big tech spokesmen, and even politicians have insisted that there must be greater control over the content that is published on social media platforms to prevent the spread of "hate speech" and "disinformation."

Rynearson's case shows just how arbitrary and one-sided government speech regulation can become. Rynearson was silenced solely because he criticized the military readiness policies promoted by Chief Bass. As the Supreme Court put it in *Texas v. Johnson*, "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."



# ...Fixing the First Amendment

**O**n August 27, CIR filed suit on behalf of retired Air Force Pilot, Richard Rynearson, who was banned from an Air Force-run Facebook page when he criticized an official's post. This case has the potential to patch up a hole in the First Amendment and prohibit the federal and state government

to social media forums, but some political activists and government officials have learned how to use social media to purge dissent on the pretext of regulating "disinformation." Because of the widespread usage of a few major platforms, cutting off access to these platforms can take a person out of the debate.

Over the last year,

ensorship insulates public officials from well-earned criticism and gives controversial views the appearance of wide-spread public support.

CIR filed a First Amendment lawsuit on behalf of Rynearson, challenging his ban from an official Air Force Facebook page to ensure that citizens have the strongest possible

Second Circuit found that Trump's Twitter account was a public forum, and blocking users violated the First Amendment. But, earlier this year, the Supreme Court dismissed the appeal shortly after President Biden took office.

The administration may have changed, but the issue has not gone away. It won't until the courts make

*“Political activists and government officials have learned how to use social media to purge dissent on the pretext of regulating ‘disinformation.’”*

officials from restricting who has access to public forums on social media.

Social media has been a boon to free speech for people of all political viewpoints. Conservatives have been able to share information that is often ignored by progressive controlled academic and media institutions. And progressives have made ample use of these platforms to criticize the previous administration. There are few places where the American tradition of fighting bad speech with more speech has been as fully realized.

In order to make all of this work, private citizens who want to share their views publicly need access

left-wing journalists and activists have argued that we should shut down critical speech on social media. Democratic senators have pressed social media giants to crack down on "hate speech" and "disinformation." Both of those terms are alarmingly vague and could be easily marshalled to silence anyone with an unpopular viewpoint.

What is easier, however, is to silence criticism in more insidious ways, as in Rynearson's case, by quietly removing posts government officials do not like. By removing "offensive" comments, officials can strip public forums of critical views. This cen-

protection from government censorship online. CIR seeks a declaration that removing Rynearson violated the First Amendment.

In the same way that government officials may not pick and choose which speakers get to share their views in a public park based on their viewpoint, they may not decide who can comment on government social media pages.

This issue has not yet been decided by the Supreme Court -- though it has come close. In 2017, some Twitter users filed a lawsuit against then-President Trump after he blocked them from his Twitter account. The

clear that the government does not have the authority to decide who may speak on social media.

Unfortunately, some government officials view the expansive opportunities for speech made possible by social media as obstacles to the government's ambitions. Sometimes, they go so far to claim that the proliferation of "undesirable" speech is a threat to democracy.

Our suit on behalf of Richard Rynearson gives the courts an opportunity to affirm that the government may not regulate speech no matter how disruptive to its plans. Speech is not a threat to democracy; it is its lifeblood..

# Stage Set

## *Barke v. Banks et al.*

Cooperating Counsel: David Schwarz, Sheppard Mullin LLC

The Supreme Court put union-friendly states in a bind when it ruled that public sector unions could no longer compel nonmembers to pay dues. Lawmakers faced a choice. They could let massive public unions compete on their own to retain their rolls. Or they could stack the deck in favor of the unions. California chose the latter.

California Government Code Section 3550 prohibits public employers from saying anything that might “deter” or “discourage” union membership. Of course, any statement that is remotely critical of unions is liable to deter membership. So, the law in California is, “if you don’t have anything nice to say about unions, then don’t say anything at all.”

CIR filed a legal challenge to Sec-

tion 3550 in February 2020 on behalf of seven elected public officials who are unable to speak openly with their constituents about union-related issues.

The trial judge dismissed the case with prejudice on the grounds that elected officials have no First Amendment rights when they are speaking in their official capacities and no fear of regulation when they are speaking in their individual capacities. She ignored the fact that the law gives elected officials no way of knowing when they are speaking in which capacity.

CIR promptly appealed, and in October, we argued the case before a three-judge panel of the U.S. Court of Appeals for the Ninth Circuit. Two of the judges expressed serious reservations over the idea that officials who

are elected to represent voters are precluded from expressing opinions about some of the very issues on which they campaigned.

Because there is no way to know in advance whether one is speaking officially or personally, California’s Public Employment Relations Board (PERB) must make that decision in retrospect on the basis of all the “facts and circumstances.” The cost of getting it wrong is a deterrent to criticizing the union.

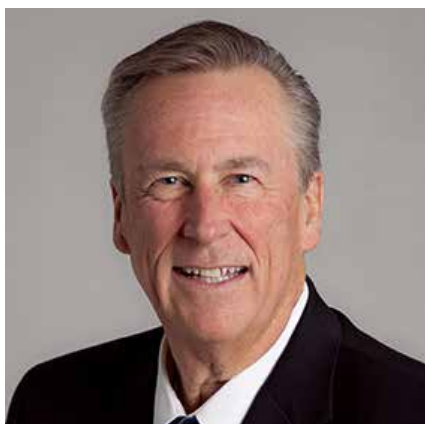
Ninth Circuit Judge Consuelo Calahan expressed grave concern about PERB’s practice of assessing liability after the fact, explaining that the idea that a government agency can determine in hindsight whether speech was lawful or unlawful was enough to give “chills up people’s back.”

We expect a ruling later this year.

## *The Seven Public Officials Challenging California’s Gag Law*



*Laura Ferguson,  
San Clemente City Council*



*Leighton Anderson,  
Whittier Union High School District  
Board of Trustees*



*Phillip Yarbrough,  
Board of Trustees for Rancho Santiago  
Community College*

*(Not pictured: Jeffrey Barke, Rodger Dohm, Ed Sachs, Jim Reardon)*

# Norman Wang: The Truth Is No Defense

*Wang v. University of Pittsburgh et al.*

Cooperating Counsel: Jonathan Goldstein, Goldstein Law Partners LLC

**D**r. Norman Wang is not afraid to speak the truth. A professor at the University of Pittsburgh School of Medicine, he was removed from his position supervising a fellowship program in electrocardiology, prohibited from contacting students, and publicly attacked over an article he wrote documenting the harm to minority medical students caused by the overuse of racial preferences. Through it all, he has stood firm and defended his work.

In March 2020, Wang published a paper in the *Journal of the American Heart Association* warning that recent efforts to achieve proportional representation in medical education are unlikely to succeed and that advocates of racial preferences fail to address well-documented harms of admissions preferences to minority students.

When university administrators heard about Dr. Wang's article, they swiftly removed him from his position as a program

director and prohibited him from contacting medical students. To justify their actions, they publicly attacked his reputation as a scholar in a series of mass e-mails.

In addition, Dr. Wang was subjected to a vicious Twitter campaign. Woke activists bombarded the journal with tweets accusing Dr. Wang of racism, demanding that it retract his article. The journal capitulated.

Last year, CIR filed a lawsuit against everyone involved in the campaign against Dr. Wang. The public university's employment actions violated his First Amendment right to free speech. Moreover, the American Heart Association -- publisher of the journal -- and several Pitt administrators libeled Dr. Wang by falsely attacking the veracity of his work.

Dr. Wang is not the only person to be silenced for questioning progressive orthodoxy. Two editors for the *Journal of the American Medical Association* were compelled to resign after publishing a podcast

expressing skepticism about "systemic racism." By contrast, articles that make accusations of systemic racism have been published with little, if any, comment.

This censorship campaign shields activists from criticism as they make increasingly extreme demands on hospitals and medical schools. Among other measures, activists now propose to allocate medical treatment, in part, by race rather than need. The AMA has put forward a "Strategic Plan to Embed Racial Justice and Advance Health Equity," explaining that equitable medical care would address social drivers of illness. Recently, New York and Minnesota both began to allocate scarce COVID treatments

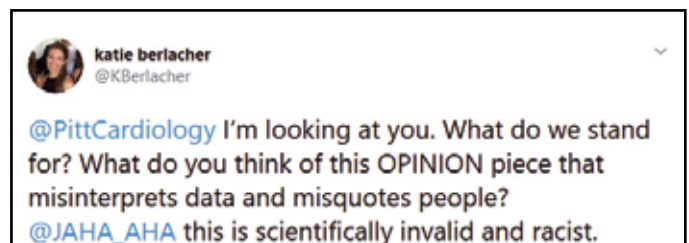


*Dr. Norman Wang*

partly on the basis of race.

In late December, the District Court granted certain of the Defendants' motions to dismiss Dr. Wang's claims. CIR will amend the complaint and likely appeal other portions of the District Court's decision.

Victory for Dr. Wang will be a major step toward reestablishing the right to dissent from the prevailing progressive orthodoxy at some of America's most influential universities and storied academic journals.



*Tweet by Katie Berlach, a Pitt professor who was partly responsible for punishing Dr. Norman Wang*

Dedicated to the defense of

**INDIVIDUAL  
RIGHTS**



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## CIR's website got an upgrade!

**Y**ou've read about CIR's newest cases defending free speech and challenging racial set-asides on behalf of Maria Garcia, Richard Rynearson, Salvatore Davi, Dr. Norman Wang, and Greg Krehbiel. If you want to read more about these cases or any of the other legal battles CIR is fighting, visit our new website! We've upgraded the layout and design to help you stay up-to-date with all of CIR's work to strengthen individual rights.

You can keep track of our docket of active, ongoing cases. And you can scroll through the landmark victories that you have made possible over the years -- legal precedents that have expanded free speech, increased protection for religious liberty, and curbed divisive and unconstitutional race-based policies at all levels of government.

The new website also makes it easier to make one-time or ongoing contributions to CIR's work with credit card or PayPal payments, stock transfers, or through your Amazon purchases.

Visit [www.cir-usa.org](http://www.cir-usa.org) to read about the work that you are making possible to protect individual rights.



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