



Fall 2022

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# docket report

## Victory for Free Speech

*Rynearson v. Bass*

**T**he U.S. Air Force agreed to rescind a policy that allowed it to ban individuals who posted critical comments on an official Facebook page. This reversal is the result of a settlement that CIR reached on behalf of Richard Rynearson, whose comments were removed from the page for criticizing Air Force policy. This victory puts the government on notice that no public official may deny Americans access to government webpages based on their point of view.

Richard Rynearson is a retired Air Force pilot who sometimes criticizes Air Force policy. Recently, he has been concerned about the Air Force's embrace of divisive racial politics, an undue focus on cultural sensitivity issues, and a tendency of some leaders to suppress criticism. Rynearson used an Air Force social media page to openly voice his views directly to officials who were responsible for these policies.

In November 2020, Rynearson was blocked and his posts removed from the Facebook page

of Chief Master Sergeant of the Air Force JoAnne Bass. Shortly afterward, the Air Force amended its social media policy to allow administrators to remove any post for any reason.

CIR took up Rynearson's case to establish that government-run social media pages are public forums. Accordingly, the First Amendment restricts government officials from denying anyone access based solely on their point of view. CIR reached a settlement that ensures that the Air Force will no longer censor comments based upon viewpoint.

The settlement requires the Air Force to clearly post a statement on the Chief Master Sergeant's page to read, "Posts will not be removed, and users will not be banned, based on the viewpoint expressed in any comments."

Social media is one of the most popular means by which Americans can share their opinions and discuss political issues, but it is also the easiest for the government to covertly censor. Victories like this are vitally important to secure online speech from surreptitious government censorship.



*Richard Rynearson*



Greg  
Krehbiel

# Cat's in the Courtroom

## *Krehbiel v. BrightKey, Inc.*

A recent district court decision in CIR's workplace free speech case, *Krehbiel v. BrightKey, Inc.*, demonstrates how dangerous judge-made rules can be. BrightKey, Inc. fired Greg Krehbiel after he criticized hate crime laws and race-based hiring, views which some employees protested as a show of "white privilege." Krehbiel's case is on appeal before the Fourth Circuit following the district court's misuse of an obscure, judge-made rule, called the "Cat's Paw" theory. On appeal, CIR is fighting the dangerous expansion of this precedent.

When BrightKey hired Krehbiel as its Vice President of Operations in 2020, President Rita Hope Counts knew that he recorded a podcast in his spare time, which occasionally covered controversial political topics. She assured Krehbiel that BrightKey had no objection to his podcast. A few months later, an activist employee found two episodes of Krehbiel's podcast, in which he questioned the propriety of hate crime laws and mandatory diversity

hiring. These conservative views were too much for some employees to handle. They demanded BrightKey fire Krehbiel, and BrightKey swiftly acceded.

CIR took up Krehbiel's case to fight the intrusion of political ideology into workplaces nationwide. Employers and employees have the right to negotiate reasonable rules of professional behavior. But increasingly, political activists seek to replace these rules with highly ideological standards of speech, including off-work speech. We filed suit to protect Krehbiel from activist coercion under a local law that prohibits political opinion discrimination as well as federal civil rights law.

Earlier this year, District Court Judge Richard D. Bennett granted BrightKey's motion to dismiss the case by misapplying a judge-made rule known as the Cat's Paw theory of employer liability. Ordinarily, the Cat's Paw theory shields employers from liability for the hidden motives of lower-level, non-supervisory employees who conspire to get a co-worker fired for racially discriminatory reasons.

The crucial detail here is that the Cat's Paw theory addresses situations in which an employer does not know about their employees' secret illicit reasons for conspiring against their co-worker. It makes no sense to apply the theory in cases like Krehbiel's, where an employer responds to the demands of employees who are open and explicit about their discriminatory motives.

Counts knew full well that the protestors wanted her to fire Krehbiel because of his race and because they did not believe he had the right to express his opinions on racial issues. So, when she agreed to the protestors' demands, Counts unlawfully fired Krehbiel based on his race and political opinions. In the same way that it is illegal for a shop owner to fire an employee at the urging of a racist customer, it was illegal for BrightKey to fire Krehbiel because employees objected to someone of his race expressing his opinions.

Victory on appeal will set an important precedent limiting the Cat's Paw theory to its intended purpose.



# Nowhere Left to Hide

## *Wang v. University of Pittsburgh et al.*

Cooperating Counsel: Jonathan Goldstein, Goldstein Law Partners LLC

Three officials at the University of Pittsburgh (Pitt) are being called to account for retaliating against medical professor Norman Wang over his academic research. District Judge Marilyn J. Horan rejected motions to dismiss for Drs. Samir Saba, Kathryn Berlacher, and Mark Gladwin, who removed Dr. Wang from his position as the director of a fellowship operated by the University of Pittsburgh and the University of Pittsburgh Medical Center

claims used to support progressive race policies -- a trend that continues today.

Pitt, it turns out, was among the latter group. At the end of July, Saba, Berlacher, and Gladwin agreed to remove Wang from his fellowship director post, and in the following days and weeks, they made perfectly clear what motivated their action. Gladwin sent out a university-wide e-mail decrying Wang's article as "antithetical to the [school's values]." Berlacher joined a hostile Twitter campaign to

As CIR alleged in our complaint, there is no meaningful way to separate Pitt and the UPMC in this case. As their names suggest, the University of Pittsburgh Medical Center is closely affiliated with the University of Pittsburgh, and Wang's fellowship program was jointly operated by both. Saba, Berlacher, and Gladwin all work for the University of Pittsburgh — a public university — and have authority over Dr. Wang both in his role at Pitt and the UPMC.



*Dr. Norman Wang*

the door to proving that the complex, interlocking relationship between Pitt and the UPMC cannot be used as a smokescreen to shield Pitt officials such as Saba,

*Gladwin sent out a university-wide e-mail decrying Wang's article as "antithetical to [the school's] values."*

(UPMC) in response to an academic paper challenging the overuse of race preferences in the medical profession.

Wang's article caught the attention of several Pitt officials in the summer of 2020, as leaders in prominent institutions nationwide were eager to cultivate a progressive image on social issues involving race. Some put out anodyne statements. Others took the disturbing step of removing employees who questioned any of the factual

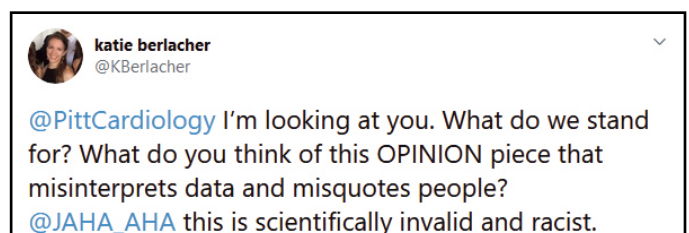
smear Wang's reputation, declaring his piece "scientifically invalid and racist."

Saba, Berlacher, and Gladwin have argued that the First Amendment does not apply to their actions. They claim that they removed Wang in their roles with the UPMC, not Pitt. The UPMC claims to be a private company that is not subject to the First Amendment. Evidently, these officials hoped that Pitt's complex institutional structure would shield them from accountability.

Because Wang alleged that Saba, Berlacher, and Gladwin acted in their capacity as officials of the University of Pittsburgh, he successfully pled a violation of the First Amendment. This early success opens

Berlacher, and Gladwin from liability.

The case now proceeds to discovery, where CIR attorneys will depose university personnel and request all relevant documents.



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

# Federal Racial Set-Asides on the

## *Ultima v. U.S.D.A.*

Cooperating Counsel: Rainey Kizer Reviere & Bell PLC

This summer, CIR's legal staff tackled a seeming mountain of work in one of our most difficult, ongoing cases, which could deal a fatal blow to one of the federal government's biggest racial set-aside programs.

*Ultima v. United States Department of Agriculture* (USDA) takes aim at Section 8(a), a Small Business Administration (SBA) program that authorizes federal agencies to set-aside government contracts for socially disadvantaged businesses. In practice, the program virtually guarantees that only businesses owned by members of preferred racial groups qualify.

CIR's challenge aims not only to end the USDA's use of Section 8(a), which is denying our client the right to bid on contracts that make up the core of its business, but to entirely dismantle the rationale that the government uses to legally justify racial

contracting preferences. A win in this case will force the SBA to rewrite the program or expose the government to ruinous litigation, challenging hundreds of contracts based on our precedent.

Not surprisingly, the Department of Justice has made this case a top priority. Armed with seemingly limitless resources, DOJ lawyers commissioned expert reports that purportedly demonstrate that racial discrimination is ubiquitous in federal contracting programs. Between its expert reports, disparity studies, and past Section 8(a) contracts, DOJ lawyers produced almost 150,000 pages in discovery that CIR had to carefully review.

CIR does not shy away from battles like this. We realized you can't fight an artillery barrage with rifles, so we hired our own high-profile expert to methodically take apart the reasoning of the government's global

claims of racial discrimination. We hired additional CIR staff to painstakingly examine the thousands of contracting documents that government lawyers produced.

Michael Rosman and Michelle Scott, CIR's General Counsel and Senior Counsel, respectively, spent from March through May deposing government witnesses. Our goal was to extract testimony illustrating the questionable assumptions underlying the government's case. On the basis of that testimony, CIR submitted a motion for summary judgment, which argued that the evidence failed to support the government's claim even when viewed in the light most favorable to the government.

Rosman's motion argued that Section 8(a) violates the Equal Protection component of the Fifth Amendment, which prohibits the fed-

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# Ropes

## *Lies, Damned Lies, and Disparity Studies.*

Victory in CIR's challenge to the use of racial set-asides for federal government contracts through the Section 8(a) program requires that we dismantle the government's expert testimony purporting to show widespread racial discrimination in government contracting. CIR brought on our own expert who presented a devastating rebuttal to the government witnesses.

The Fifth Amendment prohibits the federal government from classifying Americans by race. To justify racial set-asides like the federal Section 8(a) program, the government must demonstrate that preferences are necessary to redress longstanding patterns of deliberate racial exclusion. Unfortunately for the government, few, if

any, of its own contracting decisions are motivated by race. As a result, the government has had to try to infer racial intent from indirect evidence.

As it turns out, there is a cottage industry of consultants who provide statistical evidence to support government racial equity programs. Where there is no direct evidence of discrimination, these experts instead concoct "disparity studies," which involve comparing the number of minority-owned government contractors with the number of minority-owned businesses in a given industry. In *Ultima*, the government hired Dr. Jon Wainwright and Daniel Chow to do just that.

CIR quickly discovered that the government's expert reports were built on false assumptions,

significant omissions, and leaps of logic that severely undermine their validity.

To expose these problems, CIR brought in Dr. Jonathan Guryan, an esteemed economist at Northwestern University, who specializes in the analysis of racial disparities. Dr. Guryan's testimony revealed fatal flaws in the methods the government experts used to create the appearance of discrimination in government contracting practices.

For instance, one government expert analyzed more than two hundred studies that ostensibly showed racial disparities in government contracting, but a large number of his studies did not find statistically significant disparities. Many he cited neglected to test for statistical significance at all. Unless racial

disparities in contract awards are statistically significant, there is no basis to infer a pattern of racial discrimination.

The second government expert's study is so flawed that CIR is seeking to preclude his testimony entirely as falling below minimal scientific and legal standards. Among other critical flaws, the disparity study failed to control for crucially important variables like bidding activity. It is impossible to know whether the government discriminated against a firm if we do not know whether that firm ever bid on any government contracts in the first place.

Government imposed racial preferences must meet exceptionally high standards of evidence that can withstand expert scrutiny. So far, the government has failed to make its case.

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eral government from classifying Americans by race. While the courts permit racial set-asides that are narrowly tailored to remedy deliberate racial discrimination, Section 8(a) does not

come close to meeting the rigorous standards of this narrow exception.

As implemented, the Section 8(a) set-asides are not tied to any specific federal government discrimination. Rather, the SBA regulations presume that small business owners

from certain racial backgrounds are "socially disadvantaged" and are thus candidates to participate in the 8(a) program. Furthermore, federal agencies can award 8(a) contracts without demonstrating that they have ever engaged in racial discrimination.

*Ultima* remains one of CIR's most challenging cases. The case will likely be appealed to the U.S. Court of Appeals for the Sixth Circuit regardless of who wins.



# The Unflappable Mr. Rosman

## *Davi v. Hein*

**O**n September 16, CIR's Michael Rosman argued *Davi v. Hein* before the U.S. Court of Appeals for the Second Circuit. Rosman was representing CIR client Salvatore Davi, a New York state administrative law judge in the Office of Temporary and Disability Assistance (OTDA) who was punished for comments he made in a private Facebook exchange.

Davi said that the purpose of welfare should be to get people back on their feet rather than to subsidize their joblessness. A former law school classmate disputed Davi, and the exchange grew heated. Later, the classmate complained about his comments to his agency, which suspended Davi for six months and ultimately demoted him.

In March 2021, District Judge Edward R. Korman thoroughly repudiated the agency and several of its officials for violating Davi's right to free speech. OTDA immediately appealed the ruling. The agency argues that it had a reasonable fear that Davi's speech could cause disruption to the agency by giving the appearance of bias against welfare recipients, which

could provoke attorneys to seek Davi's recusal.

The panel pressed Rosman on every point. Rosman reminded the judges that the government has a heavy burden to meet to justify punishing Davi: "In the ordinary case, the government's burden is to show a substantial showing of likely disruption -- but that's the ordinary case... When the value of the speech is in the heart of the First Amendment... the burden on the government increases."

Scott Univer, a long-time CIR friend and supporter was in the audience. (Scott successfully litigated *Levin v. Harelson* — one of CIR's early public employee free speech victories before the Second Circuit). He wrote:

*Mike did an incredible job. In forty years of practicing litigation, I have never seen an appellate panel totally disregard counsel time limits and burrow into the issues on an appeal the way today's panel did. Though counsel were given ten minutes, the panel questioned Mike for well over forty-five minutes. He responded unflappably,*

*covering every issue in the briefs and then some. I hope this performance receives the recognition it deserves.*

Rosman explained to the panel that this case goes to the heart of the First Amendment. Davi's comments were part of a longstanding political debate and thus, in the very top category of speech protected by the First Amendment. Rosman said that protecting Davi's right to express his view about government policy

"is why the First Amendment was enacted in the first place."

Rosman stressed the total lack of evidence that Davi's comments had ever threatened the agency's operations. In the eight weeks after his comments, no attorney sought his recusal. Moreover, any party who suspected Davi of bias in any of his past cases could have sought a reconsideration of those decisions. Again, no one sought a reconsideration.

The panel likely will issue its decision in 2023.

*CIR General Counsel Michael Rosman*



# An Opportunity Like No Other

## *CIR's Walpin Fellows Take on Cutting Edge Litigation*



*Gerald Walpin (1931-2016) with CIR client Tom Sypniewski and his brothers shortly after filing Sypniewski v. Warren Hills SD, August 16, 2005*

There aren't many opportunities for law students to learn about conservative public interest law. There is almost no opportunity for them to get hands-on experience litigating high-profile legal challenges to racial set-asides in most law school clinics.

To address the need to train the next generation of conservative public interest lawyers, CIR created the Walpin Fellowship Program in 2020. Named in honor of the late Gerald Walpin, a well-known litigator in New York City and a former member of CIR's Board of Directors, the program offers a ten-week, paid,

competitive fellowship to first- and second-year law students.

This summer, two exceptional law students joined CIR's legal team -- Brandon Broukhim, a rising Harvard Law School 2L, and Nicholas Galluzzo, a Villanova Law School rising 3L.

Brandon is a History, Political Science, and Public Affairs graduate of the University of California Los Angeles, where he was awarded the Highest Departmental Honors in Political Science and History. While at UCLA, Brandon worked for the Bruin Political Union, a nonpartisan organiza-

tion improving on-campus dialogue between speakers from different political viewpoints.

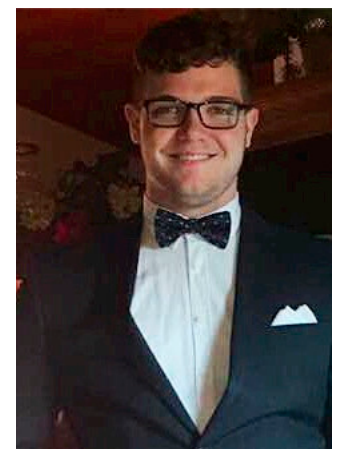
Nicholas graduated summa cum laude with a Bachelor of Science in criminology and crimi-

nal justice from Eastern Michigan University. At Villanova, Nick has had first-hand experience working to advance constitutional liberty as a researcher for the McCullen Center, a First Amendment organization dedicated to freedom of speech and the free exercise of religion.

Brandon and Nick spent the summer immersing themselves in *Ultima Services v. USDA*, CIR's exceptionally promising challenge to one of the biggest and longest-lasting federal set-aside programs. They provided invaluable assistance in the last-minute research necessary to file CIR's motion for summary judgment and its brief in opposition to the defendant's motion for summary judgment.



*Brandon Broukhim  
Harvard Law School*



*Nicholas Galluzzo,  
Villanova Law School*



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## Have I Got News for You

**C**IR is advancing individual rights both in and outside of the courtroom! CIR looks for news opportunities to discuss the frequent incidents of censorship on college campuses, in government agencies, on social media, and in workplaces nationwide. CIR's cases demonstrate not only how individual rights are under attack but how high profile litigation can restore individual rights.

In 2022, CIR's cases have been covered in dozens of news stories, op-eds, and interviews. Since the beginning of the year, CIR's work has been covered in the *Wall Street Journal*, the *Washington Times*, the *Daily Caller*, and the *Daily Signal*. We have done radio interviews on the nationally syndicated Jim Bohannon Show, the Pro America Report, and many more.

You can find the latest coverage of CIR's work, including op-eds, news stories, and interviews at [www.cir-usa.org/2022/09/cir-in-the-news](http://www.cir-usa.org/2022/09/cir-in-the-news).

While you're there, you can read about our latest cases, get updates on our ongoing litigation, or make a contribution to help CIR advance an agenda of individual rights through strategic litigation

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