



# CIR

# docket report

Fall 2023

## Two fantastic victories... and a bold future



**W**ith deep gratitude for all that Terry Pell has done for CIR during his long and successful tenure as president, I couldn't be more excited to take over, especially with our recent successes and the plans we are developing to supercharge CIR's impact in the coming years.

CIR's achievements this year have been energizing for everyone. In July, we achieved a landmark victory against racial preferences in federal contracting in *Ultima Services v. USDA* (pages 2-3). After decades of work, CIR secured a nationwide injunction ending all racial preferences in SBA's section 8(a) contract set-aside program. The final push to

end all racial set-asides in contracting at all levels of government is upon us.

In October, CIR secured an equally important win for Daniel Mattson, the college music instructor who was punished for his private, off-campus writings. Our favorable settlement (page 5) is also a victory for CIR supporters who stood by Mattson and insisted that his free speech injury must be vindicated.

In the coming months, we're also launching an ambitious plan of action for CIR's 35th anniversary year and beyond, including hiring additional staff to expand our work in complex areas of the law, with goals that only CIR could achieve. CIR will never change its bedrock principles: that our most cherished and fundamental rights are individual rights—and that the protection of those individual rights is the essential feature of our constitutional government.

For over 100 years, self-styled progressives have waged war on these fundamental precepts. They take advantage of every "crisis" to expand and centralize government power, which they currently use to promote "equity," an equality of outcome that is the antithesis of equal rights under law. In every age, liberty needs its champions.

CIR has always been that nimble champion, which punches well above its weight. Yet CIR can assume an even larger role in the fight for liberty. As we do so, CIR will remain steadfastly committed to the strategies that have worked for over three decades. Carefully selected, strategic litigation made CIR the most consequential champion of core individual rights. It takes on the tough cases with the creativity and determination that is necessary for sweeping landmark victories.

With your continued support, CIR will ensure that individual rights prevail against government intrusion and abuse.

—Todd Gaziano, President

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# A huge win against racial preferenc

## *Ultima Services Corp. v. USDA*

This summer, CIR's federal court victory put an abrupt halt to one of the nation's most far-reaching and long-standing racial set-aside programs in government contracting.

CIR filed *Ultima Services Corp. v. USDA* in 2020 on behalf of Celeste Bennett, the owner of Ultima, challenging the racial preferences in the Small Business Administration's section 8(a) program.

Bennett is white, and therefore she didn't qualify for the automatic presumption of social disadvantage in the 8(a) program. Originally, the law allowed federal agencies to set aside contracts for small "socially disadvantaged" businesses without regard to race, but over the decades, the program morphed into a thinly veiled racial set-aside. Under a 1986 regulation, the SBA automatically presumed that members of certain racial groups are socially disadvantaged.

Federal District Judge Clifton Corker sided with CIR and put a stop to the SBA's four-decades-old, multi-billion-dollar government contracting set-aside program nationwide. Judge Corker's opinion reached the long overdue conclusion that government agencies cannot award contracts based on race.

### **The Cost of Race Preferences**

Since the 1980s, federal officials have awarded as much as \$34 billion a year in SBA 8(a) contracts. Sometimes, these officials want to create the appearance that the government is advancing "racial equity," as with President Biden's 2023 executive



*Celeste Bennett, Ultima Services Corp. Owner*

order that committed to increasing contracts with socially disadvantaged businesses by 50%.

The 8(a) program is no "benign" preference—as if race discrimination is ever benign. In the zero-sum world of competitive contracting, one person's unlawful racial benefit comes at a cost to someone else.

In Celeste Bennett's case, the cost was virtually her entire business.

Bennett built an effective and highly competitive company. Starting in 2004, Ultima performed technical and administrative support contracts for the Natural Resources Conservation Service (NRCS), an agency within the USDA. By 2017, she won four regional contracts, providing support to every NRCS office in the country.

That all changed in 2018, when the USDA decided to end all four contracts, and instead enter into individual contracts for each office through the 8(a) program. Because Bennett does not qualify as an

8(a) contractor, the USDA's move excluded her from bidding on the contracts that once made up the core of her business. Since then, Ultima has gone from five hundred employees to just one.

### **A Decades Long Fight**

CIR knew that challenging the 8(a) program would be a fight—but it was a fight for which CIR was uniquely prepared. Longtime supporters of CIR's work may recall *Dynalantic v. DOD*. Dynalantic, a small manufacturer of military training simulators, came to us when the Defense Department reserved a contract for a helicopter simulator to the 8(a) program. Since Dynalantic is not owned by a member of one of section 8(a)'s preferred racial groups, it was precluded from bidding.

After a more than ten-year-long battle, the court finally found in favor of Dynalantic, holding that the

# es in government contracting

8(a) program was unconstitutional as applied in the military simulation industry because there was no history of discrimination in that industry.

*Dynalantic* was a major victory against the section 8(a) program. But although we were able to vindicate our client's rights, CIR remained committed to finding a case that would end the whole program. CIR learned from *Dynalantic* how the government defends section 8(a)—and that gave us unique insight into how to challenge it.

## The District Court's Dizzying Blow to Section 8(a)

On July 19, 2023, Judge Corker

presumed socially disadvantaged, but no Arabs are). In Judge Corker's words, "Defendants' arbitrary line drawing for who qualifies for the rebuttable presumption shows that the categories are themselves imprecise in many ways."

Judge Corker found that the presumption of social disadvantage violates the Constitution's guarantee of equal protection under law. He enjoined the SBA from using the presumption, which had the immediate effect of bringing the program to a halt.

## The End of Contracting Preferences

now requesting existing 8(a) business owners to write narratives explaining how their minority status disadvantaged them.

The SBA says it is employing new staff to read the narrative essays, and it is training these agents to process these essays in mere days. These new agents are working in SBA's headquarters rather than the congressionally established office of compliance. Suffice it to say, there is plenty of room for abuse in that system.

CIR recently requested Judge Corker to stop this effort to circumvent his original injunction and appoint a court monitor to ensure

“Defendants’ arbitrary line drawing for who qualifies for the rebuttable presumption shows that the categories are themselves imprecise in many ways.”

issued a fantastic opinion that thoroughly dismantled the government's proffered justifications for its arbitrary use of race. He found that the government failed to demonstrate any compelling interest for the program and provided six independent reasons why it was not narrowly tailored to achieve whatever interest it was serving.

Among his reasons, Judge Corker found that the government had no legitimate goal for the program; the government had never considered any race-neutral alternatives; and the list of races that received the presumption was both over- and under-inclusive (all Hispanic Americans are

The impact of *Ultima* does not stop with section 8(a). Federal, state, and local governments award nearly \$2 trillion in contracting. One estimate is that as much as \$150 billion is channeled through racial set-asides.

Under the reasoning in the *Ultima* opinion, all such preference programs are constitutionally suspect and would likely fail strict judicial review.

As of the time of publishing, the DOJ has not filed an appeal. Its goal seems to be to give the SBA a chance to paper over Judge Corker's ruling with a nominal change to the program. Instead of assuming that all minority-owned small businesses are socially disadvantaged, the SBA is

that the SBA complies. However the court rules, one side may appeal to the U.S. Sixth Circuit. If we win there, the Solicitor General would likely file a *cert* petition, which the Supreme Court would almost certainly grant. That means in the next few years, we could achieve a Supreme Court precedent that delivers the knock-out punch to racial set-asides once and for all.

In other words: The fight is not over, but CIR's *Ultima* victory is a monumental step toward permanently ending the use of pernicious race preferences in federal, state, and local contracting.

# Defending revolutionary freedoms

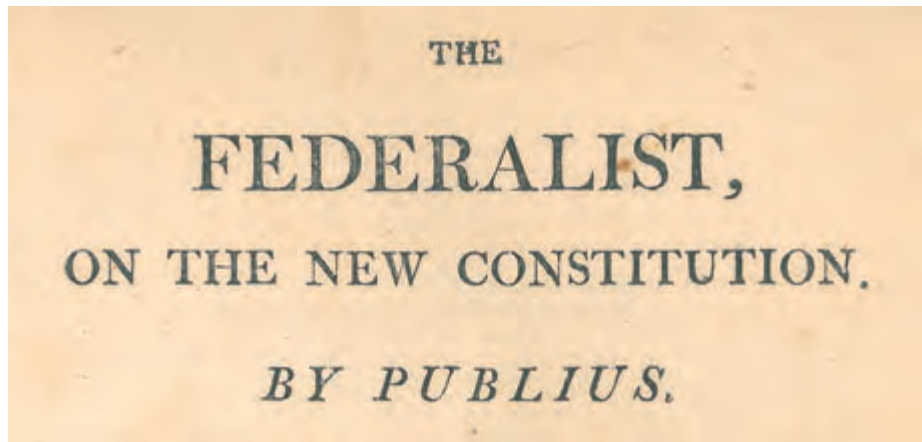
## Castro v. Doe

The importance of anonymous political speech has been recognized since America's founding. John Adams used a pseudonym to protest British taxation without representation. Madison, Jay, and Hamilton advocated for the Constitution in the *Federalist Papers* under the pseudonym "Publius." Thomas Paine wrote under a veil of anonymity to declare that independence was "Common Sense." Anonymous political speech has been protected ever since.

A U.S. presidential candidate, especially one with a law degree, should respect this legal rule. Not so for John Anthony Castro, a Texas-based tax consultant who is running a long shot campaign for the 2024 presidential election. Castro saw some unflattering entries on his Wikipedia page, and in July, he filed a frivolous \$180 million federal defamation suit against a Wikipedia editor who volunteers his time under the pseudonym Chetsford.

Castro alleges, among other spurious claims, that Chetsford described him as a "sleazy" tax attorney. Even if calling someone sleazy constitutes defamation, and it doesn't (statements of opinion are not legally defamatory), the page made no such claim. Instead, it related that a tax professor had recently given Castro his "Norm Peterson Award," a satirical prize conferred on tax consultants who give extremely bad advice.

CIR is defending Chetsford's privacy and freedom from abusive



litigation meant to silence him and others from public commentary. This will strengthen our time-honored First Amendment right to engage in anonymous political speech. Victory will also produce a far-reaching precedent that protects all types of anonymous advocacy, including private donations to political causes.

"Dark money" is decried by progressive politicians, think tanks, and journalists writing about anonymous contributions to conservative causes. They despise our defense of freedom and seek to control it. Their battle cry is for more laws that require disclosure of donor information, not just to political candidates, but to private associations opposing their views.

The Supreme Court has been skeptical of donor disclosure laws for private associations since its 1958 decision overturning an Alabama law that would compel a local NAACP chapter to disclose its membership rolls. The Court recognized that disclosure laws could be used

to intimidate and suppress political associations. Yet, efforts to enact such laws persist to this day.

In *Americans for Prosperity v. Bonta* (2021), the Supreme Court reaffirmed the right of private association, declaring a California law requiring nonprofits to reveal the identities of their top donors unconstitutional. Unfortunately, many states did not get the message. In 2023 alone, nineteen states either passed or considered legislation that would violate donor privacy rights. California's still at it too, mandating disclosure of key referendum supporters.

CIR's defense of anonymous advocacy in *Castro* will protect both political commentary and nonprofit donor privacy. The Court has long recognized that constitutional protections for anonymous speech also protect Americans' right to support political organizations free from the prying eyes of government officials. That's a revolutionary value worth fighting for.

# Victory! A trombonist's triumph for free speech on a college campus

*Mattson v. Guyette, et al.*

“**W**ith trumpets and the sound of the horn, sing joyfully before the King, the Lord.”

—Psalms 98: 5-6.

These Bible verses are a fitting finale for Daniel Mattson, a world-class trombonist and man of quiet faith. With CIR's help, he challenged wrongful treatment by Western Michigan University over his private, off-campus writings and scored an important victory for free speech and religious expression.

On campus, Mattson was an adjunct music professor and performer since 1999. Off campus, he returned to traditional Catholic practices and chronicled his spiritual journey to adopt a chaste lifestyle in his 2017 autobiography, *Why I Don't Call Myself Gay: How I Reclaimed My Sexual Reality and Found Peace*.

His efforts to help Catholics like himself and advocate for sympathetic engagement with same-sex-attracted people connected with individuals

around the world. During all that time, Mattson never mixed his spiritual work with his university work. Nor did he discuss his personal views with his music students.

Nevertheless, in the fall of 2021, another music professor discovered Mattson's writings, deemed his orthodox Catholic views “harmful” to the LGBT community, and launched a social media campaign condemning his views. The administration's response to Mattson's private speech was swift and harsh. Mattson was first stripped of his core duties, hindered in important school activities, and finally, WMU refused to renew his teaching contract.

Mattson, however, refused to allow woke activists to cancel him from a public university just because they disagree with his off-campus speech and convictions. He also challenged WMU's forcing him to choose between earning a livelihood as a world-class artist and mentor for aspiring musicians on campus, and life as a religious believer and witness

for conflicted Catholics off-campus.

In March 2023, CIR filed a federal lawsuit on Mattson's behalf, challenging his firing as a free speech violation under the First and Fourteenth Amendments. WMU's response was again swift. In October, less than seven months after CIR filed suit, the university abruptly changed its tune. Rather than attempting to defend its viewpoint-based punishment in a court of law, WMU settled the case and agreed to pay Mattson substantial damages and attorney's fees.

The financial compensation is welcome, to be sure,

but even more rewarding for Mattson is the vindication in standing up for the rights of all individuals to religious expression regardless of what others think.

The favorable settlement is also a victory for everyone who supported Mattson's heroic stand and joined CIR to hold WMU accountable for his free speech injury. Going forward, extremist college bureaucrats should be on heightened notice that they can't cancel someone for private speech they don't like without facing legal consequences.

*Daniel Mattson*



# Meet CIR's new president

## *A Movement Leader and Man of Action*

**C**IR's board is excited to introduce our new president, Todd Gaziano—a proven institution builder, an inspiring leader, and an astute strategist who has helped produce important legal victories throughout his career. This veteran of the liberty legal movement has ambitious plans to capitalize on CIR's strengths to increase its impact. CIR's board shares his enthusiasm for CIR's future.

### **Career Highlights**

Gaziano previously worked in key positions in all three branches of the federal government: as a law clerk for U.S. Fifth Circuit Appellate Judge Edith Jones, an attorney in the U.S. DOJ Office of Legal Counsel, and a chief subcommittee counsel in the U.S. House of Representatives (where he was the principal staff drafter of the Congressional Review Act). Later, he served a six-year term as commissioner on the U.S. Commission on Civil Rights, helping to lead oversight and investigations of federal civil rights agencies.

For the last 25 years, Gaziano has been a legal scholar and public interest law leader, promoting individual liberty. From 1997 to 2013, he was the founding director of the Edwin Meese Center for Legal and Judicial Studies at The Heritage Foundation, where he developed new programs to help public interest legal foundations flourish. From 2014 until he joined CIR, he was the Chief of Legal Policy and Strategic Research at Pacific

Legal Foundation, where he built and staffed three new components of PLF.

### **Man of Ideas and Action**

Besides his success as an institution builder, Gaziano has directly influenced Supreme Court and other landmark legal victories that expanded fundamental individual rights. He knows that swift action is often necessary to vindicate individual rights under threat. For example, Professors Randy Barnett's and Josh Blackman's books both describe how Gaziano seized the moment when the ObamaCare bill was pending to initiate, produce, and coauthor (with Professor Barnett) the first scholarly paper detailing why the individual healthcare mandate was unconstitutional.

Gaziano then convinced Senator Orrin Hatch to enter the paper into the *Congressional Record* during the bill's final debate, and he helped convince Florida officials to add the NFIB to its lawsuit to ensure standing in the case that was eventually heard by the

Supreme Court. Although Chief Justice Roberts strained to uphold the mandate as a tax, Gaziano's Commerce Clause theory was vindicated, making it harder for Congress to abuse that Clause in the future.

### **A History of Mutual Admiration**

Gaziano has long admired and supported CIR's work. Among other interactions, Gaziano organized a high-level moot court in 2000 for CIR's general counsel, Michael Rosman, to prepare him for his winning argument in *U.S. v. Morrison*, the landmark federalism case that limited Congress's overreach. Gaziano also chose the day of Rosman's argument in *Morrison* to be sworn into the Supreme Court bar himself. In Gaziano's own words, "I chose CIR 23 years before CIR chose me."

Whether it's providential, or simply a case of mutual attraction, CIR is lucky to have Gaziano as its third president.



*Michael Rosman and Todd Gaziano (right)*

# Pitt's allergic reaction to argument

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

“Were you aware of what Norm Wang wrote?” Assistant professor Amber Johnson asked in a terse email to her colleagues at the University of Pittsburgh. “I find his White Paper offensive.”

In an elite university committed to advancing “diversity,” “racial equity,” and “affirmative action,” Johnson’s email inflamed an institutional immune system. Within hours, every high-ranking official at Pitt was aware of



*Dr. Norman Wang*

discredit Wang’s study and punish him professionally. First, they removed Wang as the director of a prestigious cardiac fellowship at the University of Pittsburgh Medical Center and pro-

retaliating against him for calling out its illegal racial preference policies. The civil rights retaliation claim couldn’t be filed until it was reviewed by both federal and state civil rights agencies; earlier this year, they both issued “right to sue letters” to Dr. Wang, and CIR immediately added the new claim to his lawsuit.

In depositions this fall, Professor Kathryn Berlach and Cardiology Division Chief Samir Saba were quick to reject any suggestion that Pitt uses race preferences in its admissions and hiring poli-

believe in...progressive and affirmative recruitment of a diverse workforce.”

Unsurprisingly, Pitt has tried to suppress views that suggest that its own diversity policies violate federal law. Pitt’s response to Wang’s article reflects a common attitude in elite universities throughout the country, which are increasingly allergic to good faith debates about racial equity initiatives.

Following the Supreme Court’s recent decision ending the use of race preferences in academic admissions, many univer-

**CIR amended Dr. Wang’s free speech lawsuit to allege that the university violated federal law by retaliating against him for calling out its illegal racial preference policies.**

an academic article that Professor Norman Wang had published in the *Journal of the American Heart Association* months before, criticizing the use of racial preferences in medical school education. By the next day, faculty and administrators were coordinating a response, and it wasn’t reasoned or pretty.

Officials quickly devised a multi-pronged strategy to

hibited him from speaking with any students, residents, or fellows. Next, they sent a letter, signed by Pitt faculty, including the dean of the school of medicine, asking the journal to retract Wang’s article for mishandling sources.

Since our last update, CIR amended Dr. Wang’s free speech lawsuit to allege that the university violated federal law by

cies, but emails uncovered by CIR during discovery prove otherwise. According to Saba, Wang’s paper was particularly dangerous because his criticisms of affirmative action “undermine the work many of us have been doing at our respective institutions.” Explaining the university’s actions concerning Dr. Wang, Mark Gladwin wrote “we firmly ascribe to and

city leaders have declared their intention to circumvent the decision. With widespread resistance to the constitutional principle of non-discrimination, it is critically important that we set a precedent protecting the rights of dissenting professors like Norman Wang who have experienced firsthand how universities pursue their unlawful agendas.

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# Investing in liberty

**C**IR's precedent-setting legal victories are possible only through the generosity of thousands of supporters from across the nation. Their investment in the Center for Individual Rights provides the funds we need to move quickly when individual rights are at stake. Our recent victory against the section 8(a) racial set-aside program in *Ultima v. USDA* would not have been possible without the generous support of longtime CIR supporters.

Many of CIR's contributors choose to make their gifts by donating stock. You may be eligible to take an income tax deduction based on the current value of your shares. In

addition, you may be able to bypass capital gains tax that would otherwise be due.

We can accept gifts of stock electronically through our broker or directly through the mail.

Please advise us when you make a stock transfer by calling or emailing CIR's Director of Legal and Public Affairs, Zane Lucow at (202) 971-1573 or [lucow@cir-usa.org](mailto:lucow@cir-usa.org). He will be glad to answer any questions you might have. CIR is a 501(c)(3) non-profit public interest law firm. Contributions are tax-deductible to the limits provided by law.

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