CIR
The Center for Individual Rights

Docket Report

Our latest legal moves

Even better than expected …

Like most kids, my daughter, Kate, changed her career plans as she grew, from a future dolphin trainer to a doctor like her grandpa. None of her plans included being a boring lawyer like both her parents. But during a gap year after college, Kate decided to study law. Her path may seem predictable now, but it didn't follow a straight line. And even now, she cannot know how her legal career will develop in the future. Plans take us far—but serendipity intervenes too.

Strategic litigation is no different. CIR is celebrating the 30th anniversary of its first Supreme Court victory, *Rosenberger v. University of Virginia*, which has had even broader impacts than CIR expected. It was both a free-speech and religious-liberty win, and it has contributed to many other advances in freedom. For example, the Supreme Court relied on *Rosenberger* seven years later in a landmark ruling that approved a school choice plan against arguments that government neutrality in funding is not enough if some funds end up in religious schools.

Our feature article (pages 4-5) discusses *Rosenberger*, its importance in other victories for freedom, and its continuing relevance today. In short, it helps connect our past to the present and future.

And new victories keep rolling along too. We earned a welcome appellate court win in our Project to Restore Competitive Federalism (page 3). Though an even bigger constitutional issue was in play, the unanimous court thought it sufficient to declare that routine student teasing was for local school officials to regulate and did not constitute a federal case.

Our First Amendment win for Councilman Matt Tortorice in Margaret, Alabama, was equally satisfying (page 2). City officials were forced to allow Matt to digitally record council meetings to share online. Matt now also proudly displays the $1 in damages he won in his lawsuit.

Meanwhile, CIR continues to file new cases (page 6) and accelerate our growth plans (page 7). We're excited about where our cases and plans will lead us. As with my daughter's career path and *Rosenberger*'s enduring influence, the future unfolds in unpredictable ways. But with CIR's history of landmark rulings and growing impacts, we are confident of even greater victories for liberty in the decades ahead.

— Todd Gaziano, President

IN THIS ISSUE

VICTORY

Town Councilman, now Mayor-Elect, is Vindicated

Matthew Tortorice v. City of Margaret

A small-town mayor and city council violated the First Amendment when they tried to shut down public scrutiny of its council meetings. CIR's action forced the city to reverse course and pay for its actions.

Our lawsuit exposed just how far local officials will go to evade accountability. Councilman Matt Tortorice ran for office in Margaret, Alabama, with a few simple goals, including to make the local government more transparent. When the City refused to record its council meetings, Matt decided to record the meetings himself and post them on his website so residents could watch them at home. This exercise was met with a campaign of obstruction, threats, and unconstitutional censorship.

> Our lawsuit exposed just how far local officials will go to evade accountability.

The City Council first banned all recordings, then after Matt raised legal objections, limited recordings to an area obstructed by a noisy air conditioner. Matt was also physically intimidated and prevented from doing his job as a councilman, including one meeting at which the mayor instructed the police chief to physically evict Matt from the chamber for attempting to record what was going on.

Matt refused to let this abuse stand, and we were glad to help him vindicate his rights. Matt also thought his recordings were necessary to expose the majority on the city counsel who obstructed consideration of reforms he proposed.

After nine months of pre-trial proceedings, the City of Margaret agreed to a binding legal settlement and court order that delivers everything Matt asked for. The City formally acknowledged that the "First Amendment protects the right of the public, including Matt, to attend public sessions of the meetings of the City Council and to make audio and video recordings of the same."

Officials must now proactively ensure that elected officials, journalists, or members of the public can record future meetings freely. The city also agreed to pay Matt $1 in personal damages and $40,000 in attorney fees, a reminder that violating the First Amendment comes at a cost.

After the court order was signed, Matt expressed gratitude "not just for myself but for everyone in Margaret who deserves a transparent and accountable government." The City residents seemed to agree. In an unexpected postscript, Matt recently won election as Mayor of Margaret, defeating the incumbent mayor who had played a role in thwarting Matt's constitutional right to record the council meetings.

And until Matt is sworn in as mayor on November 2, he is displaying his one dollar in damages at his designated seat in the City Council chambers, to the visible irritation of some of his fellow council members. Naturally, CIR took no position on his election, but the result suggests that the citizens of Margaret appreciated Matt's fight for government transparency.

As for us, we've shared the attorney fee award with the local counsel who worked with us on the case, and we're ready to fight the next battle to keep government in line. ■

Matt Tortorice & $1 in damages

VICTORY

Don't Make a Federal Case Out of It: Drawing the Line on Title IX Overreach

M.K. v. Pearl River School District

In today's regulatory climate, even a schoolyard dust-up can become a federal case, especially when bureaucrats in Washington see an opportunity to expand their power. When that happens, CIR takes action to stop it.

That's exactly what occurred in Pearl River County, Mississippi, where CIR successfully defended a rural school district against a troubling attempt to stretch federal anti-discrimination law beyond its original meaning. The plaintiff, represented by a Georgetown Law School clinic and backed by the Biden Administration's Department of Education, argued that student teasing concerning sexual orientation was grounds for a federal civil rights lawsuit.

In this case, parents of a sixth-grade boy claimed that school officials failed to intervene quickly enough when a few of their son's classmates teased him, occasionally using the word "gay." They argued that the behavior was a federal offense under an education funding statute, Title IX, that could trigger school district liability and significant monetary damages.

Title IX was enacted in 1972 to end discrimination "on the basis of sex" in education programs that receive federal funding. Its purpose was to ensure that girls and boys had equal educational opportunities. The law says nothing about sexual orientation or gender identity, and Congress has never amended it to do so. But for years, federal agencies have tried to "reinterpret" Title IX to impose sweeping mandates that Congress never debated or approved.

Local school discipline *Getty Images*

CIR took action to defend the district but also to defend a more fundamental principle: Congress sets the conditions in federal funding statutes that states accept or decline, and unelected bureaucrats can't change those conditions at a later date.

The Supreme Court has ruled that spending statutes are "in the nature of a contract" between Congress and the states that accept the funds. The Court also has held that the terms of the deal must be *clearly* set forth in the statute. And thus, the states' reasonable understanding of a funding statute's terms control if there is any doubt. In this case, CIR also argued that the facts didn't trigger liability regardless of Title IX's scope.

In a unanimous three-judge opinion in July, the U.S. Fifth Circuit Court—which governs Texas, Louisiana, and Mississippi—ruled that the teasing was not "severe, pervasive, and objectively offensive" enough to constitute discrimination under Title IX. That threshold, long established in case law, exists to distinguish serious sex-based harassment from other improper conflict.

While the appellate court did not reach CIR's broader argument under the Constitution's Spending Clause, it left in place the lower court's ruling that had sharply limited the federal government's ability to unilaterally rewrite the terms of federal funding statutes. That decision remains one of the few published federal rulings to reject this kind of Title IX overreach.

We'll continue to seek broader limits on federal spending coercion under the Constitution, but we're also proud to have secured this victory for the school district. Our win reaffirms that not every grievance belongs in federal court. School teasing is common, and local school officials have wide latitude to take reasonable disciplinary actions without facing federal liability for run-of-the-mill decisions.

> Our win reaffirms that not every grievance belongs in federal court.

It is unreasonable to make a federal case out of such routine situations. Equally important, federal intervention also undermines local accountability structures that govern normal school operations. Strong, well-functioning local institutions are the bedrock of our Constitution's federalist design. ■

The Enduring Legacy of *Rosenberger*

A long-shot victory continues to generate impressive returns

Thirty years ago, CIR pulled off an improbable 5-4 victory in the Supreme Court that overturned a seemingly entrenched constitutional doctrine restricting free speech and religious liberty. That story is worth recounting today, not only because it reminds us that similar long-shot cases can be won, but also because it demonstrates how strategic litigation can generate continuing victories for decades to come.

From small disputes ...

In late 1990, Ronald Rosenberger and two other students at the University of Virginia (UVA) started a magazine discussing issues from a Christian perspective. A mandatory student activity fee funded student-run clubs and organizations, including publications, so the editors of *Wide Awake* applied for $5,862 to cover its publication costs. They didn't get a penny. UVA denied funds for any "activity [that] promotes or manifests a particular belief in or about a deity or ultimate reality."

UVA students Ron Rosenberger (right) and Robert Prince

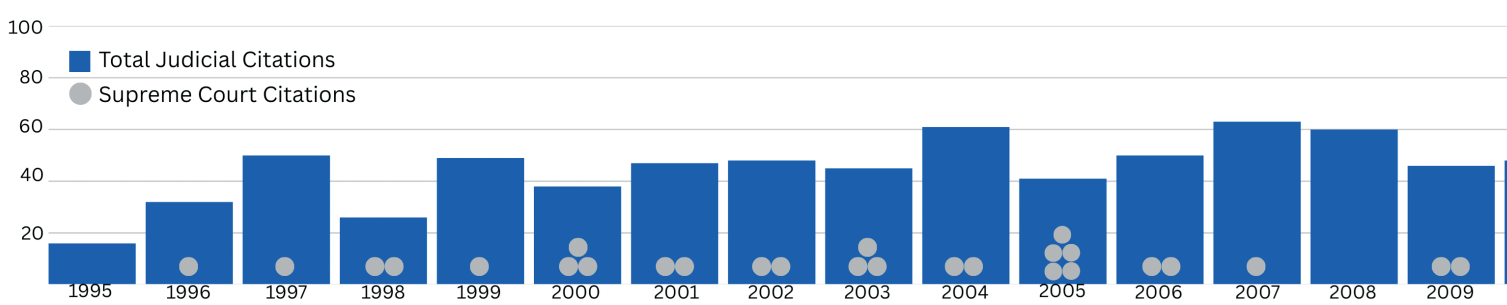
AP Images/Denis Paquin

> As UVA later confirmed, it would fund all other beliefs and political positions, except for religious viewpoints.

Ron and his colleagues saw this for what it was: government hostility to religious speech. As UVA later confirmed, it would fund the promotion of all other beliefs and political positions, except for religious viewpoints. The students pledged to fight this discrimination.

That's when CIR stepped in. After an appeal within UVA failed, CIR filed suit in federal trial court, where it lost. CIR then enlisted the nation's foremost religious liberty scholar, law professor Michael McConnell, as its advocate. Yet again, it lost in the federal appellate court, which ruled that a "strict separation of church and state" was required and that even neutrality in student funding could be seen as endorsing a particular religious viewpoint.

This aversion to religious-oriented speech was common, even required, by a series of wrongheaded Supreme Court rulings. Those decisions held that the constitutional ban on establishing a government religion required a "high wall" or "strict" separation of church and state such that "no aid" could ever flow from government to a religious entity. Two cases chipped away at this high wall, but UVA argued that the "no aid" rule prohibited even neutral funding decisions.



When the Supreme Court agreed to hear the case, a battle of titans ensued. The bench was hot, and most observers thought a landmark ruling would follow. Justices Antonin Scalia and Anthony Kennedy had hammered UVA's advocate, a member of the UVA Law School faculty. His position that UVA only barred funds for religious *activity* was untenable if that activity was speech. CIR's then executive director, Michael Greve, wrote in the Spring 1995 Docket Report that the decision "may become the most significant religion case of the decade."

And yet, when the Court announced its decision on July 27, 1995, it was a narrow 5-4 victory for the *Wide Awake* editors, with Justice Sandra Day O'Connor writing a handwringing concurrence that limited the holding to its facts. Even so, Greve quipped in the next Docket Report that he was confident that the "principle of neutrality will prevail over … artless, implausible qualifications" in the long run.

Over 1,609 citations and counting

Greve was right, but he may have still underestimated the legal revolution that *Rosenberger* unleashed. As the graph below shows, *Rosenberger* has been cited in more than 1,609 published judicial rulings, including 57 by the Supreme Court. Eleven of the High Court cases are particularly significant. As the graph also shows,

CIR co-founder and Scalia Law School Professor Michael Greve

this impact did not trail off after a few years. If anything, it has increased in recent years, owing in part to its relevance to campus speech debates.

And *Rosenberger* has had wide-ranging implications beyond the rights of campus religious groups. The Supreme Court has relied on *Rosenberger* to end many other viewpoint speech restrictions and make government funds equally available to all comers. The first follow-on case was in 1997, when the Court ruled that federal aid for disadvantaged students could flow to students in religious schools.

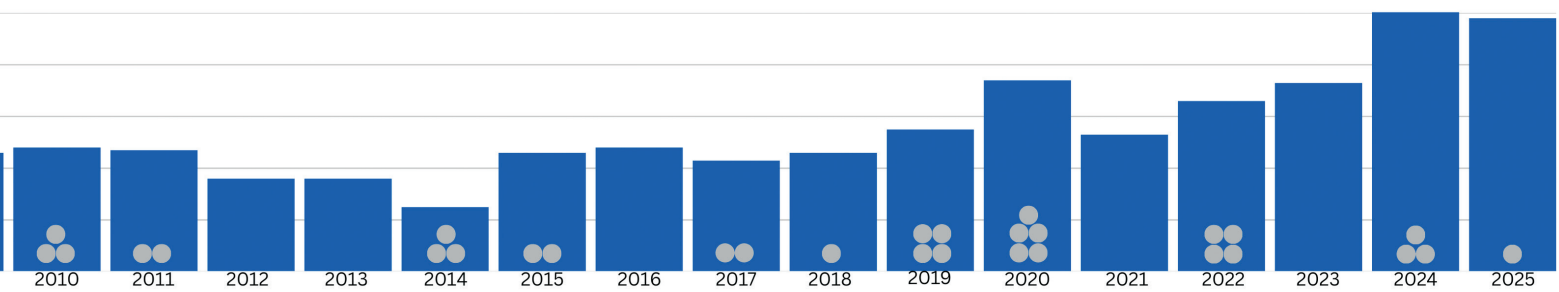
In 2002, the Court took an even bigger leap when it ruled that states could include religious schools in their K-12 choice programs. The school choice movement had long been hampered by the argument that the "no aid" rule prohibited religious school participation. But *Rosenberger* established that distributing student funds equally to all comers was not an endorsement of religion.

And in 2020, the justices used the *Rosenberger* principle to strike down a state constitutional ban on funding religious institutions, even on a neutral basis, in its school choice program. Many similar anti-religious state amendments fell as a result.

Just over 30 years ago, there was a deeply entrenched legal consensus that barred these advances. Since *Rosenberger*, that consensus has faded from our memory. Not all CIR cases have such significant impacts, but it is the nature of strategic litigation that landmark wins can continue to deliver unexpected benefits for decades.

> "*Rosenberger* changed constitutional law deeply and continues to influence the law today."

Current law professor—and CIR donor—Michael Greve put it best: "We thought *Rosenberger* had the potential to be one of the biggest cases of the 1990s, but it's gratifying to see that its logic has changed constitutional law deeply and continues to influence the law today." ■



Blocked for Speaking Out: When Government Censors Go Digital

Rodriguez v. Bohner

When a brutal power outage swept through a naval submarine base in Georgia, a decorated military spouse and retired Army veteran stepped up to help. Sergio Rodriguez posted practical guidance on the base's official Facebook page to help military families secure compensation for spoiled food and access emergency housing. He also criticized the slow action to correct the problem. The response? Base officials deleted his posts and blocked him from ever commenting again.

CIR now represents Sergio in *Rodriguez v. Bohner*, which challenges censorship in open public forums the government hosts. The case draws direct parallels to CIR's related suit in *Stanhope v. Hunt*, where a retired North Carolina National Guardsman was banned from the Guard's official Facebook page after his critical posts. Both cases strike at the same unconstitutional core: viewpoint discrimination by government actors who open public forums for all purposes but then block criticism.

Sergio is not a fringe agitator. He is a nationally recognized advocate for military families, honored with a presidential commendation and the "Navy Spouse of the Year" award in 2022. His work focuses on improving housing conditions and guiding families through the military's bureaucracy. He used the submarine base's Facebook page—a government-run forum open to public comment—to continue that mission.

> The First Amendment doesn't permit the government to shut down speech when it is inconvenient or embarrassing.

The base's commanding officer directed subordinates to erase Sergio's comments and block his access, which they did without contacting him. The First Amendment doesn't permit the government to shut down speech simply because it finds it inconvenient or embarrassing.

Sergio's comments were almost exclusively aimed at helping fellow military families navigate difficult situations like the power outage on the naval base. This is the civic-minded engagement that justified his presidential commendation, but the legal rule would be no different if his posts were mostly critical. When a government entity opens a platform for public discussion, it cannot pick and choose who can speak or what messages are allowed based on whether officials like the message or viewpoint. The Supreme Court has affirmed this principle repeatedly, and it applies just as strongly to digital spaces as it does to town halls and public squares.

Sergio Rodriguez

The submarine base's Facebook page is a public communications channel operated by the federal government. Blocking Sergio because of his critical speech is a textbook First Amendment violation.

CIR seeks to hold officials accountable and reaffirm that constitutional protections don't end where social media networks begin. As government agencies expand their presence online, they must respect the public's right to speak freely and openly. The government can limit its forum to a particular topic and can prohibit obscenities, but it cannot discriminate based on the views expressed.

This is not just about Sergio's right to post on a Facebook page. It's about protecting the rights of all Americans who engage with their government online. We cannot permit speech critical of government conduct to be silenced with a click. ■

Dynamic Litigators Join CIR's Fight for Liberty

Darpana Sheth and Mike Petrino

CIR is excited to welcome two highly accomplished litigators to our team: Darpana Sheth and Mike Petrino. Together, they bring decades of courtroom experience, a deep commitment to constitutional principles, and a clear-eyed sense of what it takes to defeat government overreach.

Their arrival comes at a pivotal time. The courts are more inclined to protect individual liberty than at any point in our lifetimes. To take advantage of this historic moment, CIR is executing an aggressive plan to double our caseload. Adding senior legal specialists in two core practice areas—freedom of speech and competitive federalism—is a key step toward achieving our goals.

> Welcoming litigators of Darpana and Mike's caliber adds to CIR's specialized legal knowledge and reinforces our core strategy.

Darpana: Punching Above Her Weight

Darpana joins CIR as General Counsel and head of its Freedom of Speech practice. Her public-interest experience includes sweeping constitutional litigation and nationwide TV and print appearances. Before joining CIR, she led the litigation team at the Foundation for Individual Rights and Expression, where she helped transform the organization from a campus-focused advocacy watchdog into a national litigation powerhouse for the First Amendment.

Mike Petrino and Darpana Sheth

Before that, she spent over a decade litigating cutting-edge constitutional cases at the Institute for Justice, where she successfully led its National Initiative to End Forfeiture Abuse. Darpana started her legal career in private practice in Manhattan, clerked on the Tenth Circuit Court of Appeals, and served as an Assistant Attorney General for the State of New York.

What drew her to CIR? "This organization has a proven track record of taking on the toughest constitutional challenges and winning landmark precedents without a lot of resources. As a five-foot tall, 90-something-pound woman, I simply couldn't resist the opportunity to help expand and lead a national nonprofit litigation shop that already punches well above its weight as it seeks ever bigger challenges."

CIR's president, Todd Gaziano, is delighted to have Darpana's focus and experience: "She's a dynamo, and we trust her to identify the current First Amendment problems where we have the greatest opportunity to advance individual rights."

Mike: Coming Full Circle

Early in Mike's career, he worked with CIR co-founder Michael Greve on federalism initiatives. Coming full circle, Mike's work at CIR will focus primarily on restoring constitutional federalism. His professional path is marked by a deep intellectual commitment to constitutional structure. He clerked on the Fifth Circuit for Judge Edith H. Jones, practiced at high-profile DC law firms, and brings sophisticated trial and appellate experience, including cases where core questions of state autonomy and individual liberty intersect.

And what brought Mike to CIR? "Greve inspired my strong interest in competitive federalism, which is about limiting federal overreach and allowing states to compete with one another to improve people's lives. I'm thrilled to focus on cases that will highlight and advance that important structural constitutional issue, which makes our society freer and fairer."

Todd is equally proud to welcome Mike to CIR: "Few people possess both a deep understanding of competitive federalism and the strategic litigation prowess to help restore its promise. Mike will help ensure CIR remains the leader in this effort."

continued on next page

Dynamic Litigators Join CIR's Fight for Liberty
continued from page 7

Strategic Imperatives

Welcoming litigators of Darpana and Mike's caliber adds to CIR's specialized legal knowledge and reinforces our core strategy. We litigate where others hesitate, even when the issues are complex. We pick cases for their legal reform potential, not for press attention. And we take them as far as they need to go—even to the Supreme Court.

That approach attracted both new hires, who aren't here to play defense. Like their colleagues, Darpana and Mike will litigate aggressively, thoughtfully, and with the courage of their convictions. Their addition reflects what CIR has always stood for: independence, legal rigor, and a deep, unapologetic commitment to the limits of government power outlined in the Constitution. ■

Make a Year-End Gift That Funds Freedom, Not Big Government

Now is the perfect time to make your year-end gift to CIR. And here are two ways to make your gift and save on your taxes too:

1. **Give from your Individual Retirement Account (IRA)**—If you are age 70½ or older, you can make a qualified charitable distribution (QCD) directly to CIR. This counts toward your required minimum distribution and can be excluded from your taxable gross income for the year. Ask the holder of your IRA account to mail your QCD directly to CIR (see address at the bottom of this page) well in advance of December so there will be plenty of time for them to process and mail the check.

2. **Give Shares of Stock**—Giving shares of stock directly to CIR could save you from paying capital gains taxes on your earnings. Just ask your broker to transfer the shares to CIR's account at Morgan Stanley (account #: 504-107-046-124; DTC: 0015) and to email Zane Lucow (lucow@cir-usa.org) with the type of stock and number of shares so we can properly credit your gift.

Making a gift to CIR through your IRA or with shares of stock means you can send less of your money into the wasteful black hole of Big Government—and instead invest that money in *securing lasting victories for liberty and limited government.*

Of course, we also welcome your year-end gift through these other ways of giving:

- **Contribute Online**—Go to cir-usa.org/donate or scan the nearby QR code.
- **Send a Check**—Mail your check to Center for Individual Rights at the address at the bottom of this page.
- **Give through your Donor-Advised Fund (DAF)**—Ask your DAF manager to mail a contribution from your fund to CIR at the address at the bottom of this page.

Like CIR's first Supreme Court victory 30 years ago, your year-end gift today will make an enduring impact on liberty and limited government in the decades ahead. Thank you for your wonderful support of CIR!

Scan QR code to donate online

Tax ID: 52-1600481