CIR docket report

Fall 2018

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Freedom: The end of compulsory union dues…

Landmark legal victories don't come easily. They take years of detailed planning, hard work, and patience. That was certainly the case with our effort to overturn compulsory union dues.

We first filed the complaint for *Friedrichs v. CTA* in 2013. Though right to work efforts had been underway for years, our argument was simpler: compulsory union dues violate public employees' First Amendment rights.

We took it all the way to the Supreme Court. But with a stroke of bad luck, Justice Scalia died shortly after oral arguments and we had to start over again with a new case.

That was a disheartening time. But we pressed on.

And this summer, that work was vindicated. On June 27th, the Supreme Court finally ended compelled union dues in *Janus v. AFSCME*.

You can read more about the decision in these pages, but first, I wanted to thank you for all your support over the years to make this decision possible.

I've read the news coverage of *Friedrichs* and *Janus* with some amusement. The *New Yorker* called the Center for Individual Rights part of a cabal of "uber wealthy people." Senators Richard Blumenthal and Sheldon Whitehouse joined forces to write not one, but two editorials saying that CIR is part of a secretive right-wing "dark money" group.

The truth is far simpler. CIR firmly believes in the Constitution's original conception of *individual* rights. And over the years, our record of successfully strengthening those rights has attracted friends and supporters like you. Most of our donors are *individuals* who want to restore the Constitution's protections for all individuals.

That's why we've been hard at work—not just on the issue of union dues but in defending individual rights wherever they are under attack. In this *Docket Report*, you'll read about some of CIR's battles for the Second Amendment, voting rights, and the First Amendment.

The *New Yorker* and Senators Blumenthal and Whitehouse may believe CIR is part of a conspiracy funded by "dark money," but I know CIR's ability to fight and win is thanks to individual friends and supporters like you. I hope you'll be happy with our work. And I hope you'll continue to stand with us to support individual rights.

–Terence J. Pell, President

VICTORY!

Free at Last

On July 2, Ryan Yohn opened a letter he has been waiting for since he started teaching thirteen years ago. The letter was from the California Teachers Association, and it said "As a result of the *Janus* decision, non-members are no longer legally obligated to pay fair share fees…CTA is asking public school employers to immediately cease payroll deductions." For the first time in his career, Ryan no longer had to financially support a union with which he had deep, philosophical disagreements.

Ryan left the union in 2014 and every month since then, the CTA deducted dues from his paycheck to pay for "representational services" that he did not want and that *mis*represented his views. But no longer.

On June 27, the Supreme Court gave us the victory we have been working towards for the past six years. In *Janus v. AFSCME*, the Supreme Court struck down compelled union dues and freed public employees across the country from the coerced dues laws in place in twenty-two states.

The ruling is a big victory for CIR's clients and supporters. The Court ruled decisively that compulsory union dues are "compelled speech" that violates the First Amendment rights of public employees. This isn't news to those who have been following CIR's cases. With compelled fees, unions have been able to ignore the views of their teacher-members on a host of issues like charter school policy and teacher tenure.

As a result of *Janus*, unions can no longer take millions of dollars of dues for granted—they will now have to persuade public employees to join and provide financial support—just like every other professional organization.

A Complete Victory

Justice Alito's opinion in *Janus* did more than just end compelled union dues. Thanks to *amicus* briefs filed by CIR and several other organizations, Justice Alito also took note of the burdensome opt-out rules that many unions used to trap non-members into continuing to pay full dues, including dues to support the very political activities that non-members opposed. Typically, unions permitted non-members to "opt-out" of the political portion of the dues each year only during very limited time periods.

Justice Alito said of the opt-out rules that, "this procedure violates the First Amendment and cannot continue." But that's not all. He went on to add, "neither an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay." Justice Alito's broad language covers not just agency fee opt-out rules, but the complicated rules many unions use to keep members in the union to begin with.

The message from the Court is clear: employees are free to decide for themselves whether or not give their money to a union. No tricks and no burdensome rules.

VICTORY!

Massachusetts' Stun-Gun Ban Is No More

Massachusetts has prohibited its citizens from owning or even possessing electric weapons such as "Tasers" or stun-guns since the 1980s. But on July 3 of this year, Governor Charlie Baker finally signed a bill legalizing these non-lethal weapons.

His actions were the result of a string of lawsuits brought by CIR, a Massachusetts Second Amendment group called Comm2A, and Massachusetts attorneys. The suits attacked the constitutionality of the stun-gun ban. In our view, the Second Amendment protects more than firearms—it protects the right of individuals to defend themselves. And we've long argued that this obviously includes a right to a non-lethal means of self-defense.

In 2016, Supreme Court Justices Alito and Thomas cited CIR's legal brief in *Caetano v. Massachusetts*, a state criminal case in which Massachusetts prosecuted a homeless single mother for possessing a stun-gun. In *Caetano*, the Court strongly suggested the stun-gun ban wouldn't pass constitutional review and remanded the case. To save the statute, Massachusetts dropped the prosecution.

So we immediately filed another case in federal court—*Martel v. Healey*—attacking the statute directly. While we fought Attorney General Maura Healey in federal court, other cases continued to challenge the law in state court.

A strong proponent of gun regulation, General Healey hoped to defend the law as long as possible. She continued to press for stricter gun regulations while the litigation was ongoing.

But by March of this year, the Supreme Court's view of the Second Amendment caught up with the Attorney General. The Massachusetts Supreme Court finally agreed the law was unconstitutional under the Second Amendment. CIR's arguments in *Caetano* prevailed. The legislature was forced to introduce a law legalizing stun-guns, and the governor signed it into law.

Our efforts in *Caetano* and *Martel* show that sustained pressure and clear constitutional arguments can win the day against even the most recalcitrant opponents. Despite living in a state whose elected officials are hostile to Second Amendment rights, the citizens of Massachusetts will finally be able to enjoy the right to choose non-lethal means of self-defense.

Extending Janus

Making Employee Freedom a Reality

Janus significantly broadened the First Amendment protection against compelled speech. CIR is moving forward in two cases that challenge state-coerced speech in areas *beyond* public employee unions. In one, we are helping to challenge state laws that coerce private-sector employees to accept union representation that they do not want and in another we filed in support of a case that challenges class action settlements that mandate the funding of advocacy groups that class members do not support.

Pick Justice: Freeing Private Sector Farmworkers from State-mandated Unions

In *Janus*, the Supreme Court struck down state laws that force *public* employees to fund union activity against their will. Recently, CIR and Jones Day attorney Michael Carvin filed an *amicus* brief challenging another California law that compels private companies and their employees to unionize against their will. In our view, the First Amendment prohibits the state from forcing private sector employees to unionize.

The facts of *Gerawan Farming v. Agricultural Labor Relations Board* shows what can happen when the state forcibly unionizes a workplace based on a presumption that a union is inherently beneficial to workers.

Although Gerawan Farming was unionized in 1990, the United Farm Workers abandoned Gerawan's workers for nearly two decades. The workers at Gerawan got along with their employer just fine without a union—they even enjoyed higher wages than other farms in the region.

Then in 2012, the UFW suddenly showed up again at Gerawan. Even though most of the employees who originally voted for the UFW in 1990 were long gone, the UFW claimed it was still entitled to represent Gerawan's employees. After two decades of absence, the UFW demanded Gerawan's employees pay three percent of their wages in dues to the union or lose their jobs.

Many of the workers believed they were better off without a union. Led by worker Silvia Lopez, the employees mounted a decertification election. After the UFW challenged the election, the California Agricultural Labor Relations Board (ALRB) impounded the ballots and set aside the election without tallying the result. That allowed the ALRB to invoke a California law applicable to agricultural workers that allows a mediator to create a collective bargaining "agreement" if the parties cannot do so themselves within a one-year time limit.

Gerawan Farming challenged the law, arguing that a forced contracting scheme that targets a single grower and its workers violates due process and equal protection. The California law imposes contracts between a private employer and its workers, and does so at the behest of a union, without any evidence that the union represents a majority of the bargaining unit or has done anything to represent these workers.

The California Supreme Court allowed the new contract to stand, concluding that a forced contract and its abridgment of constitutional rights does not last "forever." In fact, though, the contract devised by the state made it difficult for employees to ever leave the union by barring their right to mount another decertification election.

Gerawan Farming has asked the Supreme Court to overturn the California decision on the grounds of free speech, free association, and notably, the private right to contract. Though freedom to contract is thought by many to have been repudiated by the Supreme Court, the Gerawan case is an opportunity to revive and strengthen the right of private parties to enter into contracts without state interference.

A victory in *Gerawan* will preserve freedom for California farmworkers and help to expand the legal doctrines protecting the right of individuals to decide for themselves what organizations best represent their interests.

Reforming Class Actions: Extending Janus' Free Speech Principles

At first glance, class action reform may seem unrelated to *Janus* and the principles of worker freedom, but this fall, the Supreme Court is hearing a challenge to class action law that could very well extend the hard won free speech principles of *Janus* into a new area.

Frank v. Gaos was brought by longtime CIR friend Theodore Frank. Frank is the director of the Center for Class Action Fairness at the Competitive Enterprise Institute and sits on CIR's litigation advisory board. And *Frank v. Gaos* could be a big Supreme Court win for free speech.

Class action settlements typically involve multi-millions of dollars—but it's often the case that the money doesn't end up with the plaintiffs. After the attorneys take more-than-generous fees for themselves, left-over funds are often awarded to third party charities and foundations. Under the legal doctrine of *cy pres* (pronounced "sigh pray"), the settlement award can be donated to third parties as a symbolic act of restitution if it is too difficult to divide the award among the entire class.

While it's a nice thought in theory, in practice *cy pres* is susceptible to abuse. For instance, in a 2007 class action in Kentucky, a court used *cy pres* to award millions to a charity that just so happened to be run by the judge and several of the attorneys working on the case. They used the process to enrich themselves at the expense of the class members who had no say in the matter.

That's what *Gaos* is trying to change. Frank is challenging the settlement in a class action lawsuit against Google. A class of one hundred twenty-nine million people sued Google in 2012, alleging that Google violated their privacy. Google agreed to settle the case for $8 million, but thanks to *cy pres*, the plaintiffs never saw a penny. The attorneys received $3.2 million of the award, and the remaining $5.3 million was sent to third party charities that just so happened to be run by the alma mater of several of the attorneys.

Thanks to *cy pres*, the class members had little say in how their settlement was divided up—while the attorneys were able to enrich themselves with hefty fees and provide a generous donation to their favorite organizations.

Frank's case is an opportunity to expand on CIR's work in *Friedrichs* and *Yohn*. Just as public sector workers shouldn't be compelled to support third party unions, class action plaintiffs should not be forced to fund third party charities without their consent. CIR filed an *amicus* brief that urged the Court to review the case because *cy pres* violates the First Amendment and, after the Court agreed to hear the case, CIR filed a brief in support of Frank.

The Court will hear arguments this fall, and a decision should be issued next year.

Justice Department Goes to Bat for CIR in Fight Against Race Exclusion

The Ninth Circuit is one of the most important appeals courts in the country. It is the largest of the U.S. Appellate Courts—covering eight states, all U.S. Pacific territories, and 20% of the U.S. population. Rulings from the Ninth Circuit affect the lives of millions of people—and they can have outsized legal importance. Out of all the federal appellate courts, the Ninth Circuit is the one that sends the most cases to the Supreme Court.

Those are only a few of the reasons why our case—*Davis v. Guam*—is so important. Last year, CIR won a hard-earned victory in federal court when a judge blocked Guam's attempt to exclude voters based on race. But the government of Guam is still pressing on. It's appealing the case. And this fall, we'll be arguing the issue again before the Ninth Circuit.

Guam's goal is straightforward. It wants to hold an election to determine Guam's future relationship to the United States. And it wants to restrict voting in the election to "native inhabitants of Guam." This means that U.S. citizens like our client, Dave Davis, have and will continue to be turned away based solely on their race.

Our response to this has been just as straightforward: The Constitution says plainly that "The right of citizens of the United States to vote shall not be denied or abridged… on account of race." And as the Supreme Court has explained, "race cannot qualify some and disqualify others from full participation in our democracy."

Our appeal to the Constitution was vindicated in the Federal District Court last year in a major victory for constitutional rights. But Guam is intent on fighting to keep this election going forward as planned.

A ruling from the Ninth Circuit would stop Guam dead in its tracks. And not only that, it would put a major dent in efforts to pick election winners and losers based on race. And it would bring us one big step closer to the Supreme Court.

With the stakes so high, CIR was elated earlier this year when the Justice Department announced it would support our position. The DOJ filed a brief as *amicus curiae* ("friend of the court") urging the Ninth Circuit to uphold our victory in the District Court.

A Ninth Circuit victory will be a big step toward ending voting discrimination in Guam and across the country.

Recent CIR Facebook "Likes" and Testimonials

"The smartest, most able and determined fighters in the arena of First Amendment protection."
–Arlington, Virginia

"Great organization fighting for free speech and other all-too-ignored rights."
–Washington, DC

"The Center for Individual Rights has been a stalwart leader in establishing rights for all teachers, especially those whose voices have not been heard."
–Irvine, California

"Fearless. Important. Life altering. Few groups have the huevos to challenge arguably the most powerful union in just about any state."
–La Jolla, California

"A few teachers on their own cannot muster much of an attack on the union that controlled all means of money, legislation, and media. Without your enormous effort and devotion to the cause, we would still be powerless, lonely, and maligned teachers."
–Irvine, California

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docket report

Planned Giving: Higher Charitable Gift Annuity Rates

This *Docket Report* recounts our recent successes for the cause of liberty. Thanks to our loyal friends and donors, compulsory union dues are a thing of the past. CIR clients Rebecca Friedrichs, Ryan Yohn, Dave Davis, Chris Martel are the immediate beneficiaries, but the precedents they helped us to set will last for years.

For CIR's supporters, a planned gift is the ideal way to ensure that CIR can continue to work for your goals for many years to come. These gifts take many forms, such as an annuity, charitable trust, or outright bequest. Each one gives you control over the future use of your gift.

In the last three months, interest rates for charitable gift annuities (CGAs) have increased and are at the highest they have been in years. This may offer an attractive option for those sixty and older who are looking for a way to boost retirement income while ensuring a bequest that helps shape CIR's future.

If you would like to speak with someone regarding a planned gift to the Center for Individual Rights, please contact Brian Miller at 202-833-8400 or miller@cir-usa.org.