

**F. M. KIRBY FOUNDATION SOLICITATION EVALUATION FORM**

**DATE:** November 20, 2023

**REQUEST DATE:** October 27, 2023

**Program Area:** Public Affairs/Society Benefit

**APPLICANT:**

Center For Individual Rights  
1100 Connecticut Avenue, N.W., Suite 625  
Washington, DC 20036

**CONTACT:** Todd Gaziano, President

**AMOUNT REQUESTED:** \$115,000

**NATURE OF REQUEST:** General Operating Support

**GRANT HISTORY**

**SUPPORT:** 1992-2022

**# OF APPROVED GRANTS:** 30

**TOTAL DOLLARS:** \$2,955,000

**LAST GRANT DATE:** 12/12/2022

**LAST GRANT AMOUNT:** \$95,000

**FYE DATE:** 03/31

**AFS DATE:** 09/15/2023

<b>Year Approved</b>	<b>Approved Amount</b>	<b>Approval Date</b>	<b>Grant Purpose</b>
2022	\$95,000	12/12/2022	General Operating Support
2020	\$120,000	08/31/2020	General Operating Support
2019	\$120,000	09/16/2019	General Operating Support
2018	\$120,000	09/17/2018	General Operating Support
2017	\$100,000	09/15/2017	General Operating Support

**HELEN BENSON COMMENTS:** See financial analysis.

**EMILY PRINCE COMMENTS:** The Center for Individual Rights (CIR) is a public interest law firm founded in 1989, with a mission to restore federal constitutional law as a source of predictable, enforceable individual rights. CIR’s legal strategy is to file ambitious cases that draw defendants into big, legal fights that go up on appeal and set lasting legal precedents. Ideally, CIR cases replace weak legal precedents with strong decisions that offer clearly articulated, unqualified protection for free speech, freedom of religious expression, and other individual rights. CIR employs an opportunistic approach to its litigation, focusing on cases where the threat to civil liberties is great and the chances of a landmark legal victory are most likely. Though CIR is officially nonpartisan, they tend to be viewed more favorably in conservative circles, where freedom from arbitrary government regulation is a top tier issue. In FY23, CIR requests a \$115K grant in support of its general operations.

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In August of 2023, CIR named Todd Graziano as its third President, succeeding long-time President Terry Pell. Graziano received his J.D. from the University of Chicago Law School and his B.A., *summa cum laude*, from West Virginia University. He previously worked in key positions in all three branches of the federal government: as a law clerk for a U.S. First Circuit Appellate judge, an attorney in the U.S. DOJ Office of Legal Counsel, and a chief subcommittee counsel in the U.S. House of Representatives. He also served a six-year term as commissioner on the U.S. Commission on Civil Rights. For the last 25 years, Graziano has been a legal scholar and public interest law leader, as the founding director of the Edwin Meese Center for Legal and Judicial Studies at the Heritage Foundation and the Chief of Legal Policy and Strategic Research and Director of the Center for the Separation of Powers, at Pacific Legal Foundation. He is an institution builder, proven leader, and astute strategist who has helped produce important legal victories throughout his career, and CIR will no doubt thrive in his capable hands. Terry Pell will retain his position on CIR's board to help ensure a smooth transition.

CIR had an impressive year, securing a nationwide injunction in *Ultima Services Corp v. USDA*, its decades-long battle to end automatic racial set-asides in federal contracting, and filing three new cases protecting free speech in the workplace, of which one was resolved favorably within seven months. As the organization heads into its 35<sup>th</sup> anniversary year, under new leadership, they have plans to broaden and entrench these recent victories and set the stage for organizational growth, including expanding staff to increase their impact. One key hire will be a senior litigation director toward the end of 2023, since CIR's Supreme Court-winning general counsel, Michael Rosman, is approaching retirement after nearly 30 years in that role. While Michael's retirement horizon is likely two and a half years away, significant overlap between himself and the new hire would ensure that the litigation docket can increase next year and the year after. There is also talk of adding additional, more junior attorneys, as well as board members, to achieve CIR's broader goals and mission.

In *Ultima*, CIR challenged racial preferences in the Small Business Administration's (SBA) section 8(a) contracting program. Their client, a white woman, didn't automatically qualify for the presumption of social disadvantage under the program, and was ultimately excluded from bidding on the contracts that made up the core of her business. Since that time, her business has gone from five hundred employees to just one. In July, a federal district court found that the government failed to demonstrate any compelling interest for the program and that they had drawn an arbitrary line on who qualifies for the presumption of social disadvantage. The judge enjoined the SBA from using the presumption, which had the immediate effect of bringing the program to a halt. *Ultima* is a major victory for CIR and anyone who has been harmed by 8(a), but the ultimate victory is the impact that will likely be felt across federal, state, and local government contracting broadly, with CIR estimating that as much as \$150B is channeled through racial set-aside contracting annually. Under the reasoning in the *Ultima* opinion, CIR asserts that all such preference programs are constitutionally suspect and would likely fail strict judicial review. The SBA has seemingly accepted the core holding of the ruling, opening up the program on an equal basis so that every contractor has a fair chance to show that they are socially disadvantaged, regardless of race, but CIR has asked the court to appoint a monitor to ensure compliance, and of course, there is still time for the government to appeal. If there is an appeal, the Sixth Circuit will likely affirm the ruling, and CIR is confident that the Supreme Court will agree to hear a case in which a major federal program was struck down based on the use of racial set-asides. Why is CIR confident, you might

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ask? Because this past June the Supreme Court struck down race-based admissions programs at Harvard and UNC, at which time Justice Roberts wrote in the majority opinion that “eliminating racial discrimination means eliminating all of it.” In other words, CIR’s fight is not over, but they are feeling positive that this victory is a major step towards permanently ending the use of race preferences and automatic set asides in government contracting, which is exactly the type of legal landmark victory they strive towards.

On the free speech front, CIR has been incredibly busy, filing three cases in 2023. One case, *Mattson v. Guyette*, involved a professor who lost his public university job after administration became aware that he published an autobiography that espoused orthodox Catholic views concerning his own homosexuality. At no time did Mattson share his beliefs on campus or with his students, yet he was dismissed from his role within the college’s music department. Less than seven months after CIR filed suit, the college abruptly settled and agreed to pay substantial damages and attorney’s fees, rather than defend its viewpoint-based punishment in court. Another interesting case CIR filed is *Castro v. Doe*, which involves the defense of an anonymous Wikipedia editor’s free speech rights against a defamation lawsuit brought by a public official. In taking the case, CIR is fighting to strengthen constitutional protections for anonymous commentary on political figures and matters of public concern. I must admit, this case gives me pause, because I do see that anonymous speech has its place, particularly when dealing with whistleblowers or issues that could cause great harm to the writer, but in a world of disinformation and misinformation, where people can cause unimaginable harm anonymously, I believe there is a fine line we must tread (**JJK: Yes, anonymous trolls are a scourge in contemporary society, but also consider the long history of anonymity in American political speech, including Thomas Paine with *Common Sense* and Alexander Hamilton and James Madison with *The Federalist Papers***). I will personally be watching this case with great interest, as it is also connected to donors’ privacy rights in the face of state efforts to force disclosure of contributors to nonprofit organizations in violation of the First Amendment, something that FMKF grantee the NJ Center for Nonprofits is fighting against at the state level.

Looking ahead, CIR will be building on its historic strengths and filling needed gaps that other public interest legal organizations cannot realistically handle. Some new programs may be tighter concentrations on emerging or new liberty-market needs, such as ending racial stereotypes in government contracting, increasing protections for anonymous speech concerning public figures and the corresponding right of donor privacy, and restoring “Real Federalism,” which is the proper limitation of the federal government to its constitutionally enumerated powers. As is clear from the narrative above, CIR is already wading into these topics heavily, so this expansion will be very much within their mission, scope, and wheelhouse.

To achieve all of the above and meet its ambitious goals looking ahead, CIR’s board will consider an appropriate draw on reserves, and CIR is asking its key partners to consider a modest increase in support. CIR’s new president has also secured formal invitations from two new foundations to submit proposals for major grants this fall, including new hiring and planning grants to expand CIR’s issue areas and bring on the necessary staff to direct these initiatives. New leadership salaries are also expected to be partially offset by actual and anticipated retirements. They have garnered significant media attention this year, including a front-page, above-the-fold article in the Washington Post and a 300-station NPR interview in the wake of the *Ultima* decision, so this does seem an opportune time to ride the wave of popular sentiment towards operational growth and

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expansion. In the next year, CIR will significantly ramp up its public affairs activity, which should require some outside communications assistance and media training and travel for clients who will meet with journalists and editorial boards to serve as spokespersons for their cases and the larger causes at hand.

I had the chance to meet with Terry Pell earlier this year, and was extremely impressed with his commitment to CIR's work. He was transparent about his impending retirement, but assured me that he would stick around to ensure a smooth transition, and has clearly held to his word. CIR is not flashy, nor do they take on cases that are quick and easy to win – don't be fooled by the speed of the *Mattson* settlement, as it was a complete outlier. While they make a very compelling case for an increased ask this fiscal year, unfortunately, other campaigns and increases are taking priority at this time. CIR had been at the \$120K mark in the past, but was lowered to \$95K by my colleagues to bring them more in line with other, similarly situated organizations in a right sizing effort. As that right sizing occurred just last year, I do not believe a bump this fiscal year makes sense. Therefore, I recommend a \$95K general operating grant as budgeted.

**JUSTIN J. KICZEK COMMENTS:** Though Institute for Justice and CIR have very different operations, I always find myself more compelled by the human stories and the typically powerless people IJ works with. Moreover, so many of the IJ cases are very clear and actionable abuses of power, whereas CIR is often more interested in working the case through various levels of courts in order to set precedent. That said, I recognize that, by setting precedent, CIR can help protect similar people and against similar abuses of power.

The overall caseload is lighter this year, but we also know that CIR has always chosen judiciously and has a small staff. The focus on *Ultima* and the free speech cases do appear to be the sort of precedent-setting cases that CIR likes. Furthermore, if *Ultima* goes to the Supreme Court, which CIR thinks is a strong possibility, it will likely have a strong chance of going their way, if recent decisions are any guide. As they move to working with a new leader, I would like to recommend a small bump to \$100K. That said, I am not suggesting a complete return to their former level, considering the way we looked at the reduction as a bit of a right-sizing and in line with some budgeting we have done in the Public Affairs program area.

I recommend \$100K.

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<b>FM KIRBY FOUNDATION</b>			
<b>Financial Statement Analysis</b>			
<b>Grantee Name:</b>	Center For Individual Rights	<b>Date:</b>	11/15/2023
<b>Prepared By:</b>	HVB		
<b>Grant Request Amt.</b>	\$115,000.00	<b>Type of Financial</b>	
<b>Budgeted Amt.</b>	\$95,000.00	<b>Report Submitted</b>	AUDIT
		<b>Period Covered</b>	
		<b>in Financial Report</b>	March 31 2023 and 2022
<b>Audit Firm</b>	Councilor, Buchanan & Mitchell, P.C.		
<b>Opinion</b>	Present Fairly	<b>Date of Report</b>	
<b>Basis of Acctg.</b>	GAAP	<b>Issuance</b>	September 15,2023
<b>Current Ratio (Liquidity Ratio/Working Capital Ratio)</b>	16.56	<b>Amount of Unrestricted Net Assets (Operating Reserve)</b>	\$5,325,744
<p><b>Note:</b> A current ratio measures an organization's ability to pay short-term and long-term obligations. The higher the ratio, the more capable the organization is of paying its obligations. A ratio under 1 indicates that the organization's liabilities are greater than its assets.</p>			
<b>Allocation of Functional Expenses</b>	3/31/2023	%	
<b>A. Program Service Expenses</b>	\$ 1,303,833	81%	Ideally program expenses should be at least 70% of total budget.
<b>B. Management and General</b>	\$ 134,195	8%	
<b>C. Fundraising</b>	\$ 177,372	11%	
<b>D. Total Expenses</b>	\$ 1,615,400	100%	
<b>Comments/ Notes:</b>			
<p><b>FY24 BUDGET:</b> The Budget is projecting a deficit of \$127k in 2024 which is slightly less than the deficit of \$199k for 2023. Revenues are projected to increase by \$416k or 29% over 2023 primarily due to a forecasted increase in Contributions and Grants of \$300k and an increase in Investment Income of \$121k. Personnel Expenses are also anticipated to increase by \$260k which appears in line with CIR's action plan to hire a senior litigation director and other staff to expand its work in complex and essential areas of the law. CIR's grant request reflects 7.8% of the total 2024 Contributions and Grants Budget.</p>			
<p><b>FY23 AUDIT:</b> CIR has a deficit of \$199k in 2023 versus a surplus of \$43k in 2022 and a surplus of \$688k in 2021. Total 2023 revenue decreased by \$268k(15%) versus 2022 which is primarily due to decreases in the following: Bequests: \$133k, Attorney Fees: \$100k, Donated Legal Services: \$97k and Contributions:\$63k. These revenue decreases are offset by an increase in Investment Income of \$125k. Overall, expenses were down \$25k in 2023. CIR has cash/cash equivalents of \$5.4M as of March 31, 2023. There are no red flags as a result of my review.</p>			

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**DISPOSITION:**

- Declination
- Hold for review on/about:
- Approval for: **\$100,000**
- Hold for Board Review
- Payee Other Than Addressee:
- Insert Information: **General Operating Support**
- Other:

Initials: \_\_\_\_\_ Date: \_\_\_\_\_

Check # \_\_\_\_\_ Date: \_\_\_\_\_