

The ACLU of Texas handles select, high-impact litigation on constitutional issues arising across the state. This docket describes a few of the many matters in which the ACLU of Texas has been actively involved this quarter. For more information on these matters and on the ACLU of Texas' other legal work, including copies of briefs and court orders and opinions, please visit us online at [www.aclutx.org](http://www.aclutx.org).

## FREEDOM OF RELIGION & BELIEF

### **Defending a School Teacher's Freedom of Faith**

*Pam McLaurin v. TEA* (53<sup>rd</sup> Judicial District, Travis County, TX)

On April 23, 2010, the ACLU of Texas and cooperating attorney Gretchen S. Sween of Dechert, LLP submitted an amicus brief in support of a Christian kindergarten teacher forced to choose between her job and her faith. The case involves Pam McLaurin, a 20-year veteran teacher in the Big Sandy Independent School District, who had her teaching certificate suspended last year by the Texas Education Agency ("TEA") after she declined to provide fingerprints as required by a new background check procedure adopted during the last legislative session. Mrs. McLaurin claims that the fingerprinting procedure violates her sincerely held religious beliefs, based on the Book of Revelations in the Bible. Mrs. McLaurin offered to submit to a criminal background check by alternative means, but TEA refused to make an exception for her, even though it has made exceptions for other teachers. The ACLU of Texas' brief sought to clarify current Texas law, including the Texas Religious Freedom Restoration Act, which guarantees strong protections for sincere religious beliefs. The parties agreed that Mrs. McLaurin could continue teaching during the pendency of the litigation. The case has yet to be decided.

### **Upholding the Rights of Texas Elementary School Students**

*Morgan v. Swanson*, No. 09-40373 (United States Court of Appeals for the Fifth Circuit)

The ACLU of Texas submitted an amicus brief in support of Plano ISD elementary school students' free speech and free exercise rights under the First Amendment. School administrators at multiple Plano ISD schools prevented elementary school students from distributing gifts featuring religious messages during a winter break party. The students were prevented from giving pencils and candy canes with messages such as "Jesus is the Reason for the Season" to their friends. At these same parties, other students were allowed to distribute similar gifts with non-religious messages. This case was argued on May 23, 2011. On September 28, 2011, the Fifth Circuit held that the principals' actions were unconstitutional. The majority held, however, that the principals were protected from liability by qualified immunity. Liberty Legal filed a certiorari petition seeking review by the United States Supreme Court on December 22, 2011.

### **Complaint to State Commission on Judicial Conduct re Harris County Judge**

On March 28, 2011, the ACLU of Texas wrote a letter to the State Commission on Judicial Conduct and to the Presiding Judge of the Harris County Criminal Courts to voice concerns over reports of judicial proselytizing in that court system. Judge Clinton presides over serious misdemeanor cases, such as driving while intoxicated, domestic violence, illegal possession of drugs, criminal pollution, and theft. We learned that Judge Clinton has been requiring or encouraging probationers in his court to complete Bible study exercises and reading assignments from a Bible study book that proselytizes Christianity and advocates turning to God to solve problems. Judge Clinton has reportedly discussed his religious beliefs in court and asked probationers about their religious beliefs and church attendance. In our letter to the Commission and the Presiding Judge, the ACLU of Texas cites cases that have ruled that requiring individuals to complete religious study or to enroll in faith-based programs as a condition of probation is a violation of those individuals' religious liberties under the Establishment Clause of the First Amendment to the U.S. Constitution. On July 8, 2011, the ACLU of Texas learned that the Commission plans to conduct an investigation of the allegations against Judge Clinton. On December 15, 2011, the State Commission closed its investigation after finding that Judge Clinton had changed his behavior.

## Keeping Religion Out of Public Schools

The ACLU of Texas sent out open records requests to a number of Texas ISDs this quarter in response to complaints regarding potential violations of the Establishment Clause. The open records requests sought to obtain information regarding the reported practices of these institutions of holding graduations in church or having school-sponsored prayer at graduations, football games and other school events. One school uses unconstitutional ballots to determine whether to have prayer at graduation. Another school selects students based on GPA ranking to say a prayer at graduation. The ACLU of Texas received several complaints in early September 2011 from citizens in a third district concerned about teachers and other school officials leading students and other community members in prayer at official school functions at which attendance for some was required. The ACLU of Texas is currently investigating these complaints.

## Know Your Rights Guide on Prayer in School

In response to an increasing number of complaints concerning school districts sponsoring prayer or preventing students' free exercise of their religious beliefs, the ACLU of Texas created a Know Your Rights Guide on Prayer in Schools. The guide provides an overview of the laws concerning how and when students may pray in school and the extent to which schools and school officials may be involved in prayer at school. This guide is available on [www.aclutx.org](http://www.aclutx.org).

## FREEDOM OF SPEECH

### TDCJ Censors Books that Help Inmates Cope with Prison Rape

*Prison Legal News v. Livingston*, No. 11-40128 (United States Court of Appeals for the Fifth Circuit)

On May 27, 2011, the ACLU of Texas filed an amicus brief in support of Prison Legal News ("PLN") written by Legal Panel member Lisa White Shirley in conjunction with Southern Poverty Law Center, American Booksellers Foundation for Free Expression, National Coalition Against Censorship, Texas Council of Teachers of English Language Arts, and authors of several books censored by the Texas Department of Criminal Justice ("TDCJ"). PLN filed suit against TDCJ in the Southern District of Texas concerning its decision to censor certain books from prison libraries. Among the books censored were ones that discussed how to cope with prison rape, unconstitutional prison conditions, and mistreatment of prisoners. The United States District Court for the Southern District of Texas granted summary judgment in favor of TDCJ. PLN appealed to the Fifth Circuit. Our amicus brief to that Court argues that the books were censored because the topics discussed are critical of the government. Freedom to criticize the government is a core component of the First Amendment right to freedom of speech. We challenged the district court's application of the reasonableness standard in evaluating whether TDCJ had a legitimate governmental interest in censoring the books and whether the censorship was rationally related to that legitimate governmental interest. This case is pending.

## PRIVACY & TECHNOLOGY

### Cell Phone Tracking Amicus

*In re Application of the United States of America for Historical Cell Site Data* (Southern District of Texas, Houston Division)

On October 29, 2010, Magistrate Judge Stephen Smith (S.D. Tex., Houston Division) issued an Opinion holding that, for the federal government to obtain historical cell phone location information, the Fourth Amendment requires it to get a warrant and show probable cause. On December 3, the federal government filed objections to Magistrate Smith's ruling, and the matter is pending before an as-yet-undetermined United States District Judge. The government believes it is entitled to obtain cell phone tracking records under the

federal Stored Communications Act (the “SCA”), which allows the government to obtain certain records from third parties where those records are “relevant and material” to an ongoing investigation.

The ACLU of Texas, the National ACLU’s Speech, Privacy, and Technology Project, and The Electronic Frontier Foundation filed an amicus brief on January 14, 2011, arguing that the district court should reject the United States’ objections to the Magistrate’s decision because the SCA gives judges the discretion to require a warrant, and that discretion was properly exercised here in light of the above-referenced Fourth Amendment requirements. On November 11, 2011, a federal judge in the Southern District of Texas issued an order upholding the requirement of probable cause and a warrant. The United States has appealed to the Fifth Circuit, and we plan to submit an amicus brief in support of the District Court’s decision on appeal.

## **WOMEN’S RIGHTS**

### **Title IX and School Discipline of Sexual Assault Victim**

The ACLU of Texas worked with cooperating counsel at Weil Gotshal & Manges LLP (“Weil”) to provide assistance to a 17 year old East Texas high school senior who was sexually assaulted by another student at her high school and was then sent to alternative school with her attacker as punishment for what the school erroneously decided was consensual sex. As a result of a letter from Weil and the ACLU of Texas to the school district, our client was removed from the alternative school and, pursuant to her wishes, transferred to another school district. We are still in discussions with the district to implement policies that will better address sexual assault and harassment issues. Additionally, along with the ACLU Women’s Rights Project, we have assisted the victim and the victim’s mother in filing a complaint with the Department of Education Office of Civil Rights (“OCR”). Finally, on September 29, we sent a letter to the superintendent of each of Texas’ over 1,000 school districts educating school officials on their obligations under Title IX. Contemporaneously, we sent an on-line petition request to our CAN network which resulted in an unusually high response rate. In November 2011, the OCR investigator interviewed both the student and her mother. OCR is likely to complete its investigation in the coming months.

## **LGBT RIGHTS**

### **Requiring that a School District Treat a Gay-Straight Alliance (“GSA”) Equally**

On March 2, 2011, the ACLU Foundation of Texas and the ACLU LGBT & AIDS Project sent a demand letter to the Flour Bluff Independent School District in Corpus Christi, Texas, on behalf of our client Nikki Peet, a 17-year-old senior in high school. Nikki’s efforts to form a Gay-Straight Alliance (“GSA”) in her school have been rebuffed by school and district officials, in violation of the Equal Access Act and the First Amendment. The district even kicked other student groups off campus in an attempt to skirt the law. On March 8, 2011, the school board conducted a four-hour emergency meeting and ordered that the superintendent allow non-curricular groups to form and meet on campus for the remainder of the school year and to adopt a new permanent policy on such groups by the start of the 2011-2012 school year. On April 13<sup>th</sup>, the school formally approved the formation of the GSA, and the group held its first meeting on April 15<sup>th</sup>. On August 4<sup>th</sup>, the school board agreed to allow the GSA to remain a club at the high school for the 2011-2012 school year. The ACLU of Texas will continue to monitor the situation to ensure that the GSA is allowed to meet on campus and is accorded the same treatment as other non-curricular clubs.

## Stopping Homosexual Conduct Fines

The ACLU of Texas received a complaint from a concerned citizen in the Dallas-Fort Worth area concerning fines for homosexual conduct listed on a city's website. The City of Forest Hill Municipal Court's website indicated that the city imposes a fine of \$419.00 for "Disorderly Conduct/Homosexual Conduct." On September 13, 2011, the ACLU of Texas sent a letter to the City of Forest Hill demanding that the city refrain from imposing fines or any other sanctions for homosexual conduct and remove all references to homosexual conduct from regulations, fines, and ordinances. The City appears to have removed the reference from its website.

## Fighting Web Filtering of LGBT Sites at Public Schools

*LGBT Web Filtering.* Last quarter, the ACLU of Texas began working with the National ACLU's LGBT Project on a "Don't Filter Me" initiative, which seeks to combat illegal censorship of pro-LGBT information on public school computer systems. To date, we have sent letters to 12 school districts, of which 7 have removed the objectionable filters. This quarter's activities relating to the "Don't Filter Me" campaign include:

- On October 19, 2011, the ACLU and the ACLU of Texas sent letters to officials of Grand Prairie, Eustace and Orangefield Independent School Districts requesting information about the district's use of internet filtering software to block LGBT websites.

## SCHOOL-TO-PRISON-PIPELINE

### Challenging "Debtor's Prison" for Truant Teens in Hidalgo County

*Francisco de Luna, et al v. Hidalgo Cty., et al.* (Southern District of Texas, McAllen Division)

On July 26, 2010, the ACLU of Texas and cooperating attorney Michael A. Caddell of Houston-based Caddell & Chapman, PC filed a class action lawsuit against Hidalgo County challenging the county's unconstitutional jailing of scores of low-income teens, for days, weeks or months at a time, for failure to pay fines related to missing school. The lawsuit, filed in federal court in McAllen, alleges that Hidalgo County magistrates and sheriff's department staff do not make indigency determinations during the process of committing individuals to jail for non-payment of fines—a failure that is contrary to Texas law and violates constitutional protections against incarceration because of financial circumstances. While the "debtor's prison" issue extends far beyond the truancy context, low-income teens over the age of 17 with multiple outstanding fines based on underage truant conduct are particularly vulnerable to such unconstitutional jailings. Judge Mary Alice Palacios, the lead judge responsible for handling truancy cases in Hidalgo County, was convicted of official oppression based in part on the testimony of our plaintiffs.

One of the plaintiffs, Elizabeth Diaz, was jailed for 18 days in early 2010 because she and her mother could not afford to pay over \$1,600 in accumulated fines related to truancy charges dating back to 2006, when Elizabeth was 14 years old. While in jail, Elizabeth missed taking her TAKS test, and the charter school she was attending revoked her enrollment for being absent more than five days, thereby preventing her from graduating this August as she had hoped. In investigating this case, the ACLU of Texas found that teens who landed in jail for unpaid truancy fines were often first subjected to excessive ticketing by school police. Between 2005 and 2009, the number of "failure to attend school" tickets filed by school districts in Texas increased by more than 40 percent to 120,000 from about 85,000.

On December 9, the parties argued their competing motions for summary judgment and Plaintiffs' motion for class certification. A status hearing is scheduled for February 17, 2012 and trial is set for March 6, 2012.

## POLICE MISCONDUCT & RACIAL PROFILING

### **Dallas Police Department Excessive Force and Misconduct**

The ACLU of Texas received numerous complaints accusing the Dallas Police Department of excessive force and misconduct. In one complaint a concerned citizen was using a cell phone to film Dallas police officers dragging a woman out of a car by her hair; an officer grabbed the phone and threw it into the street. The phone broke and the citizen was pushed roughly against a wall by the yelling officer. The ACLU of Texas is investigating other similar complaints against the Dallas Police Department and will continue to monitor the behavior of Dallas police officers.

### **The Use of Tasers by Correctional and Law Enforcement Personnel**

The ACLU of Texas has a long-term research project looking into the impact of the use of tasers and the use of force policies used by correctional and law enforcement departments/agencies throughout Texas. The goal of this research is to produce a report documenting the lack of uniform policies vis-à-vis the use of tasers, the dangers inherent in the use of tasers, and the discriminatory manner in which tasers are often deployed. Guided by our findings, we plan to issue a call for a uniform use of force policy throughout the state that recognizes the discriminatory deployment and the potentially lethal effects of tasers.

## IMMIGRANTS' RIGHTS

### **Litigating Farmers Branch's Latest Anti-Immigrant Ordinance (Farmers Branch III)**

*The Villas at Parkside Partners et al. v. City of Farmers Branch*, CV No. 10-10751 (United States Court of Appeals for the Fifth Circuit)

The ACLU of Texas, in cooperation with Mexican American Legal Defense and Educational Fund, ACLU Immigrants' Rights Project, and cooperating attorney David Broiles, continue litigation against Farmers Branch to stop its latest unconstitutional anti-immigrant housing ordinance. Specifically, the ACLU of Texas is challenging Farmer Branch Ordinance 2952, which requires the city building inspector to verify renters' immigration status. The ACLU of Texas represents landlords and tenants who claim that the Ordinance violates the Supremacy Clause as well as Due Process and Equal Protection Clauses of the Constitution. On March 25, 2010, Judge Jane Boyle of the Northern District of Texas, Dallas Division, permanently enjoined the implementation of Ordinance 2952, finding it violated the Supremacy Clause. The City of Farmers Branch has appealed to the Fifth Circuit. We filed our response brief in the Fifth Circuit on March 24, 2011, urging the Court to uphold Judge Boyle's decision. Oral argument before the Fifth Circuit was held October 4, 2011. We are awaiting the Court's decision.

### **Sexual Abuse Allegations at the Hutto Detention Center**

*Doe v. Neveleff*, CV No. 1:11-cv-00907 (W.D.Tex.)

On May 28, 2010, US Immigration and Customs Enforcement ("ICE") officials in Washington contacted the ACLU of Texas to advise us that female detainees held at the T. Don Hutto Detention Facility in Taylor, Texas, were sexually abused by a guard employed by the Corrections Corporation of America ("CCA"), a private for-profit prison management company that operates the facility under contract with the US Department of Homeland Security. The women were reportedly groped and threatened with further violation. In recent years, guards have been accused of assaults on women at a number of immigrant detention facilities in Texas. Also at Hutto, another CCA guard was fired in May 2007 after he was discovered having sex with a detainee in her cell. In 2008, a guard employed by another private prison provider, GEO, at the South Texas Detention Facility in Pearsall reportedly impregnated at least one

detainee. Most recently, in April 2010, a guard at the Port Isabel Detention Facility in Los Fresno, Texas, was sentenced to three years in prison for sexually assaulting female detainees being kept in medical isolation. The ACLU of Texas has joined the National ACLU and a number of national advocacy organizations to call for ICE officials to move more aggressively in implementing reforms, including improved detention standards, strengthened federal oversight of private providers such as GEO and CCA, or the elimination of the use of contract providers altogether. On October 19, 2011, the ACLU of Texas filed a suit in district court seeking class action damages on behalf of three Plaintiffs. We have briefed class certification and responded to motions to dismiss.

### **Holding Private Immigration Detention Facilities Accountable**

*Reeves County v. Greg Abbott*, No. D-1-GN-11-000434 (353<sup>rd</sup> Judicial District, Travis County, TX)

The ACLU of Texas, represented by pro bono counsel Vinson and Elkins, is intervenor in a lawsuit filed by Reeves County against the Attorney General regarding the ACLU's public information act request for documents relating to the Reeves County Detention Center. Reeves County claims that it does not have to comply with an Attorney General ruling that found that the County must disclose information relating to the for-profit prison to the ACLU of Texas. The ACLU of Texas has filed a plea in intervention asking the court to affirm the Attorney General's ruling and to compel the release of public records related to the facility. The hearing for motion to compel is scheduled for January 5, 2012.

### **Safeguarding American Citizens' Right to a Passport on the U.S. Border**

*Castelano, et al. v. Clinton, et al.* (Southern District of Texas, McAllen Division)

The ACLU of Texas, ACLU Immigrants' Rights Project, ACLU Racial Justice Program, Hogan & Hartson (now Hogan & Lovell), and Refugio del Rio Grande, Inc. challenged the refusal by the U.S. Department of State ("DOS") to issue passports to American citizens because their births were attended by midwives. DOS has agreed to implement new procedures designed to ensure the fair and prompt review of U.S. passport applications so no eligible applicant should be denied a passport. The ACLU of Texas is monitoring the implementation of the settlement agreement.

### **Investigating Border Patrol Abuse**

We have received a number of complaints about abusive practices by Customs and Border Protection agents, including denial of due process to individuals with colorable claims to status that are entitled to see an immigration judge; use of force; and poor conditions of confinement. We are working with attorneys from our Immigrants' Rights Project and staff from the New Mexico Border Regional Office to investigate these issues more closely.

## PRISONERS' RIGHTS

### **Holding Court in a Prison Church Inaccessible to the Public**

*Lilly v. State*, No. PD-0658-11 (Court of Criminal Appeals of Texas, filed September 26, 2011)

The ACLU of Texas joined an amicus brief prepared by the Texas Fair Defense Project in support of the defendant in a Court of Criminal Appeals of Texas appeal challenging an Eleventh Court of Appeals decision that Texas Department of Criminal Justice's practice of holding court inside a chapel at the prison did not violate the defendant's rights under the Sixth Amendment and under the Texas Constitution despite the fact that the chapel is functionally inaccessible to the public. The amicus brief argued that the Eleventh Court of Appeals failed to apply the standard established by the United States Supreme Court for analyzing whether a court may exclude the public or press from a criminal trial. A favorable ruling on this issue will strengthen the ACLU of Texas's ongoing and future challenges to unconstitutional criminal justice policies. This case is pending.

## CRIMINAL LAW REFORM

### **ACLU of Texas' Newest Campaign Is Criminal Law Reform**

In July 2011, the ACLU of Texas added a new campaign focusing on Criminal Law Reform which seeks to end excessively harsh criminal justice policies that result in mass incarceration and mistreatment of inmates. These harsh policies stand in the way of a just and equal society.

### **Crack Sentencing Disparity Reduced**

*USA v. Ross*, No. 5:06-CR-019-01-C (Northern District of Texas-Lubbock Division)

On November 1, 2011, the ACLU of Texas a motion filed in support of Ronald Rashone Ross seeking retroactive application of the sentencing guidelines pursuant to the Fair Sentencing Act 2010. Ross pled guilty to a drug charge in 2006. Amendment 706 to the Federal Sentencing Guidelines became retroactive in March 2008. Defendant filed his application in 2008 but was denied due to disciplinary infractions. The ACLU Criminal Law Reform Project entered the case at that point in order to assist Mr. Ross with his appeal to the 5th Circuit. In March 2011, the district court granted the two-point reduction. Meanwhile, Congress passed the Fair Sentencing Act (FSA) in 2010. And, in June 2011, the Sentencing Commission voted to make the FSA retroactive, effective November 1. As a result, Mr. Ross was eligible for a further reduction in sentence. On November 29, 2011, the court granted the motion and reduced Mr. Ross's sentence.

## DEATH PENALTY

### **Indigent Defendant Denied Statutory Right to be Represented by Two Attorneys**

*Garcia v. White*, No WR-45,875-02 (Court of Criminal Appeals of Texas, filed July 1, 2011).

On July 1, 2011, the ACLU of Texas provided an amicus brief in support of inmate Fernando Garcia's Motion for Leave To File Application for Writ of Mandamus to the Court of Criminal Appeals of Texas. In that Motion, Garcia argued that his right to receive the services of two attorneys, guaranteed by the Texas Legislature for indigent defendants facing trials for their lives, had been violated in the trial court below. In 1989, Mr. Garcia was tried and convicted of a capital offense. Mr. Garcia was granted relief from his sentence in 2008. Mr. Garcia faced a resentencing trial in Dallas County. At that time Mr. Garcia was indigent. After Mr. Garcia's pro bono counsel was forced to take a leave of absence, another attorney was appointed to represent Mr. Garcia. When his pro bono attorney wished to return to his case, Mr. Garcia was told by the judge that he could not have his pro bono attorney and appointed attorney both representing him. The ACLU of Texas' amicus brief



argued that under the Fair Defense Act, Mr. Garcia as an indigent capital defendant is entitled to two attorneys representing him; therefore, Mr. Garcia had a right to his pro bono attorney in addition to his court appointed attorney representing him. On July 12, 2011, the Court of Criminal Appeals of Texas issued an order inviting the lower court and a representative of the Dallas County District Attorney's Office to respond to several questions regarding this matter before it reached a decision as to whether it should grant Mr. Garcia's Motion. While the motion ultimately failed, it produced a good concurring opinion from the Court of Criminal Appeals and may ultimately have contributed to the prosecutor's decision to agree to a life sentence for Mr. Garcia.