

ACLU Case Selection Guidelines:  
Conflicts Between Competing Values or Priorities

The ACLU is the premier defender of the Bill of Rights and works on multiple civil liberties and civil rights issues, using an integrated advocacy approach that includes litigation, communications, grassroots activism, and policy advocacy. Our position in one area can sometimes present a conflict with our work and goals in another area. Work to protect speech rights may raise tensions with racial justice, reproductive freedom, or a myriad of other rights, where the content of the speech we seek to protect conflicts with our policies on those matters, and/or otherwise is directed at menacing vulnerable groups or individuals. At the same time, work to advance equality may create tensions with speech and religious liberty, where equality demands require individuals or institutions to limit their speech or to act in ways that contradict their religious beliefs. Privacy safeguards may create tensions with protections for women in the domestic sphere. As a multi-issue organization, these conflicts are inevitable. We cannot eliminate them, but we can ensure that we consider them carefully and thoroughly.

The ACLU's involvement in the protests and subsequent tragedy in Charlottesville, Virginia in August 2017 brought these issues to the fore once again and prompted these guidelines, first proposed on a nationwide call of the ACLU's affiliate legal directors. The guidelines are designed to assist in consideration of the competing interests that may arise when such conflicts emerge. The guidelines do not seek to resolve the conflicts, because resolution will virtually always turn on factors specific to each case. Nor do they change ACLU policy, which is set by the Board. Rather, consistent with Board policy, they attempt to identify the kinds of questions that ought to be considered, the processes for their consideration, and the measures that can help mitigate the harms to competing interests.

These guidelines were developed by a joint committee of national ACLU staff and legal directors of developed by i31.61 Tm[(direc)-3(tor)55-3( of) of w [(gui)l-3(t9 TJ TJeane)-4(.9r)4( .)-20(j)-2(eih Binputf)5

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<sup>1</sup> The committee was chaired by David Cole (National Legal Director), and included Jennifer Bellamy (Legislative Counsel, National Political Advocacy Department), Nusrat Choudhury (Senior Staff Attorney, Racial Justice Project), Louise Melling (Director, Center for Liberty), Dennis Parker (Project Director, Racial Justice Project), Jeff Robinson (Director, Trone Center for Justice and Equality), Lee Rowland (Senior Staff Attorney, Speech, Privacy and Technology), Terry Tang (Director of Publications and Editorial, Communications), Cecillia Wang (Director, Center for Democracy), and Mohammad Zaidi (Director of Gift Planning and Special Campaigns, Development) from the National office, and affiliate legal directors Nancy Abudu (FL), Emily Chiang (WA), Jamie Crofts (W-Va), David Loy (San Diego), Leslie Mehta (VA), and Andre Segura (TX). (Leslie Mehta left the ACLU before the committee's work was completed, but made valuable contributions to the process before leaving.) We solicited comments and suggestions from throughout the ACLU, through several messages to the staff of the national and all affiliate offices, and are indebted to the input of many staff members at the ACLU in the process of developing these guidelines. They were also reviewed by the Equity, Diversity, and Inclusion Council and its Task Force. The

national legal department, but as each ACLU affiliate has its own independent decisional authority, and its own case selection criteria and processes, these guidelines are not intended to be (and cannot be) mandatory for affiliates. ACLU affiliates may choose to adapt these guidelines as they deem fit.

### Background

The ACLU has faced conflicts between its values and priorities on many issues. Many arise in the speech realm in particular, because the ACLU is committed to defending speech rights without regard to whether the views expressed are consistent with or opposed to the ACLU's core values, priorities and goals. The potential conflict between advocacy for free speech and for equal justice in the fight against white supremacy is especially salient, but by no means unique in presenting tensions between ACLU values. These guidelines are intended to be useful for addressing any potential conflicts that may arise, but we will use speech and race examples as illustrative.

The ACLU is committed to the fundamental rights to equality and justice embodied in the Fourteenth Amendment and civil rights laws. ~~See~~ Policies # 301-332. We are determined to fight racism in all its forms, whether explicit or implicit, and the deep-rooted institutional biases that continue to reify inequality. We are also firmly committed to fighting bigotry and oppression against other marginalized groups, including women, immigrants, religious groups, LGBT individuals, Native Americans, and people with disabilities. Accordingly, we work to extend the protections embodied in the Bill of Rights to people who have traditionally been denied those rights. And the ACLU understands that speech that denigrates such groups can inflict serious harms and is intended to and often will impede progress toward equality.

At the same time, the ACLU is also committed to freedom of speech and peaceful protest embodied in the First Amendment. ~~See, e.g.~~ Policies #1, #3, #6, #41, #41a, #42, #43, #44, #46, #71, #72a, #103, #119. As human rights, these rights extend to all, even to the most repugnant speakers—including white supremacists—and pursuant to ACLU policy, we will continue our longstanding practice of representing such groups in appropriate circumstances to prevent unlawful government censorship of speech. We have seen the power to suppress speech deployed against those fighting for the rights of the weak and the marginalized, including racial justice advocates and

At the national and affiliate level, the ACLU has long defended both free speech and racial justice, has invested significant time and resources to further work in both areas, and will continue to do so. ~~See~~ Policy # 312b (" Each affiliate should give the empowerment of all people of color within their community the highest priority." ). Our racial justice work includes challenging the root causes of racial inequality, including institutional bias, implicit and explicit bias, and intentional discrimination



speech for all, these are neutral principles that apply to all speakers, irrespective of the speaker's particular political views:

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another organization that works to advance those values, preferably in the geographical area where the speech occurred.

### Process for Consultation, Communications, and Public Education

The process by which decisions about case selection are made are as important as the substantive questions that should guide those decisions. We recognize that time and resource constraints will affect the process that the national office or the affiliates will be able to undertake in any particular case. We acknowledge, in particular, that protest cases often arise at the last minute, in response to actions taken by the authorities shortly before the protest, thereby reducing the time available for process. Nonetheless, the following principles are set forth as best practices, time permitting:

1) Consultation. Lawyers considering whether to take on a case that presents a potential conflict with other values advanced by the ACLU should consult with staff whose work focuses on advancing and defending those values. Thus, if an equal protection case against a religious entity might create tension with our religious liberty work, at minimum, lawyers and advocates who work on both equality and religious liberty should be consulted. In speech cases raising racial justice issues, at a minimum, staff in both the Racial Justice Project and the Speech, Privacy, and Technology Project should be consulted. Communications staff should be consulted early to ensure that we are ready to explain our actions to the public. Affiliates are encouraged to do this outreach within their own affiliate, **and** to reach out to the National Legal Director, who will be responsible for ensuring that lawyers from the relevant projects are notified and made available for consultation. Should the affiliate seek assistance in vetting potential clients' intention to engage in violence or to march armed, the Legal Director will seek to identify staff to assist. Where appropriate, the Legal Director and/or Center Directors should facilitate a meeting among representatives of the various interests at stake to ensure a full airing of competing concerns. Those meetings need not include everyone who has an interest in the issue, but should seek to ensure that all of the principal interests are represented. The representatives in that meeting are responsible for acting both as representatives of their constituency and of the organization as a whole. Where feasible and appropriate, representatives from Advocacy, Communications, and Development should be included in the discussion. Where appropriate, consultation with affiliate boards may be advisable.

2. Communications Preparation. Where the ACLU decides to take, or not take, a controversial case, every effort should be made to prepare for the questions that will inevitably arise, both internally and externally. Where possible, and consistent with confidentiality dictates, staff should be notified of decisions to take or not take controversial cases before the decisions are public, so that they understand the decision-making process and rationale. Especially when we are taking a controversial case, we should be prepared to explain our reasoning and how we have reconciled the competing values at stake. Communications should be involved as early as possible to prepare for public inquiries. And internal communications should be as prompt as possible, so that those within the organization — including affiliates — are not surprised, and understand the rationale for the ACLU's action. The internal communications should wherever possible make clear who was engaged in the discussions about the case and urge respect for staff carrying out the decision. Staff involved in advocacy and organizing in affected communities

3. Public Education. Controversial cases tend to garner public attention, and provide an important opportunity to educate the public about the ACLU and its values. We should work to recruit allies and prepare educational materials, consistent with confidentiality obligations, that will help explain and defend the ACLU's decision to take — or not to take — a controversial case presenting tensions between our values.

### Conclusion

The guidelines and practices outlined here are not a panacea. They do not dictate outcomes in particular cases. In our view, that would be both unwise and inconsistent with ACLU policy. We are deeply committed to a wide range of rights and