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 six affiliates, with input from the full organization. ¹ They are intended to bind the

¹ 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 members of the EDIC are: Connie Chiang, Associate Corporate Counsel; Genie Cortez, Deputy Dir. of Centennial Campaign & Donor Stewardship; Terence Dougherty, General Counsel/Chief Operating Officer; Dorothy Ehrlich, Deputy Executive Director; Adina Ellis, Associate Director for Strategic Communications (WLO); Tomijean Fernandez, Director of Affiliate Fund Development; Sondra Goldschein, Director of Strategic Initiatives, Jo-Anna Joseph, Chief Diversity Officer; Jesselyn Mccurdy, Deputy Director of Washington Legislative Office; Susan Mizner, Disability Rights Program Director; Jeff Robinson, Deputy Legal Director; Chase Strangio, Staff Attorney,

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 pipeline protesters at Standing Rock. As the Board put it, "although the democratic standards in which the ACLU believes and for which it fights run directly counter to the philosophy of the Klan and other ultra-right groups, the vitality of the democratic institutions the ACLU defends lies in their equal application to all." Policy #46.

LGBT & AIDS Project; Jason Williamson, Senior Staff Attorney, Criminal Law Reform Project; and Ben Wizner, Director of the Speech, Privacy, & Technology Project. The members of the EDIC Task Force are: Mustafa Abdullah, Lead Organizer, ACLU of Missouri; Kenneth Archbold, Legal Assistant, LGBT & AIDS Project, National ACLU; Dorothy Ehrlich, Deputy Executive Director, National ACLU; Tomijean Fernandez, Director of Affiliate Fund Development, National ACLU; Elyla Huertas, Staff Attorney, ACLU of NJ; Jo-Anna Joseph, Chief Diversity Officer, National ACLU; Jesselyn McCurdy, Deputy Director of Washington Legislative Office, National ACLU; Jeff Robinson, Deputy Legal Director, National ACLU; and Ben Wizner, Director of the Speech, Privacy, & Technology Project, National ACLU. We express particular thanks to the California affiliates, whose collectively prepared draft guidelines served as a useful starting point for this document.

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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, e.g. 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; removing barriers to opportunities and equitable outcomes for communities of color and poor communities; and reforming systems that either perpetuate or worsen racial inequality, including the criminal justice system and mass incarceration. Much of our free speech work includes protecting the rights of civil rights protesters, prisoners, immigrants, abortion providers, the press, students, academics, unions and their members, and LGBT persons. Because we believe speech rights extend to all, and should be protected even when a speaker expresses views fundamentally opposed to our own, we have defended speakers who oppose abortion rights and who espouse homophobic, sexist, or racist views.

The ACLU has also made many other rights priorities, including religious liberty, privacy, autonomy, reproductive freedom, the rights of people with disabilities, and criminal defendants' rights. In deciding how to use our limited resources, no civil liberties or civil rights value should automatically be privileged over any other. There is no presumption that the First Amendment trumps all other amendments, or vice versa. We recognize that taking a position on one issue can affect our advocacy in other areas and create particular challenges for staff members engaged in that advocacy. For example, a decision by the ACLU to represent a white supremacist group may well undermine relationships with allies or coalition partners, create distrust with particular communities, necessitate the expenditure of resources to mitigate the impact of those harms, make it more difficult to recruit and retain a diverse staff and board across multiple dimensions, and in some circumstances, directly further an agenda that is antithetical to our mission and values and that may inflict harm on listeners.

We also recognize that *not* defending fundamental liberties can come at considerable cost. If the ACLU avoids the defense of controversial speakers, and defends only those with whom it agrees, both the freedom of speech and the ACLU itself may suffer. The organization may lose credibility with allies, supporters, and other communities, requiring the expenditure of resources to mitigate those harms. Thus, there are often costs both from defending a given speaker and not defending that speaker. Because we are committed to the principle that free speech protects everyone, the speaker's viewpoint should not be the decisive factor in our decision to defend speech rights.

As Policy #511 recognizes, because our resources are limited, "some selectivity must be exercised in deciding which cases should be taken. The ACLU cannot take every case where there is a civil liberties question being raised." We do not have the capacity to take every case that has legal merit. We seek to bring select impact cases to defend and promote civil liberties and civil rights. In addition, although the government may not discriminate based on viewpoint, the ACLU as a private organization has a First Amendment right to act according to its own principles, organizational needs, and priorities..

The guidelines set forth below are designed to help ensure that we take into consideration the external and internal impact of any decision to accept or decline a case that presents a conflict among our values and priorities. They are not, by themselves, intended to determine a particular result on any particular set of competing values, but instead to ensure that the organization engages in a nuanced and intentional consideration of the competing interests when these situations arise.

General Case Selection Criteria

In light of the foregoing principles, we evaluate cases involving conflicts among our values and priorities, including but not limited to those involving free speech, equality, privacy, and religious liberty, according to numerous factors such as:

- 1. The merits of the case;
- 2. The potential impact of the government policy or practice on civil liberties or civil rights;
- 3. The importance of the case to the development or defense of legal doctrine protecting civil liberties or civil rights;
- 4. The likelihood of prevailing, or otherwise advancing ACLU objectives;
- 5. The potential impact on civil liberties and civil rights, including those of our allies and coalition partners if we decline or accept the case;
- 6. The potential impact on the ACLU's credibility and effectiveness as advocates for the issue presented, as well as other civil liberties and/or civil rights issues if we take or decline the case:
- 7. The availability of other competent counsel to represent the potential client if we do not take the case;
- 8. The opportunity to support the rights at stake in ways short of direct representation, such as by engaging in informal advocacy, filing amicus briefs, or making public statements on behalf of the ACLU that support the rights without representing a client;
- 9. The availability of other clients to advance the same issue, if we are concerned that a particular client would undermine the case or present conflicts with other values, priorities, or relationships;
- 10. The resources required to work on the case, and whether the work will displace other work that furthers ACLU priorities;
- 11. The potential benefit to our other work in light of our mission and values, including the impact of the case on the ACLU's principled commitment to defending civil liberties and civil rights even where we do not support the views of the individuals whose rights are at issue;
- 12. The potential harm to important relationships and ACLU standing with judges, cooperating counsel, and other members of the community, both from taking the case and from declining the case;
- 13. The benefits of taking the case, whether by ensuring protection of fundamental liberties, providing a helpful framework for addressing the conflict, and/or by earning credibility and respect for standing up for fundamental rights and liberties;
- 14. The feasibility of steps that might be taken to mitigate any potential harm from taking or declining the case, including but not limited to thoughtful and respectful outreach to allies, partners, and supporters before or as soon as our decision becomes public.

Considerations Specific to Speech Cases

In carrying out the ACLU's commitment to defend freedom of speech, a number of specific considerations may arise. We emphasize that in keeping with our commitment to advancing free

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

- Whether the speaker seeks to engage in or promote violence: The First Amendment is not absolute, and in particular, does not protect intentional incitement to imminent violence, conspiracy to commit violent acts, true threats directed at specific individuals, physical obstruction of the exercise of constitutional rights, or intentional destruction of private or public property. Speakers have a right to advocate violence and hate so long as it does not fall in the above narrowly defined categories. When we have reason to believe that individuals purportedly seeking to exercise their First Amendment rights are in fact intending to engage in unlawful incitement, violence, true threats, physical obstruction, or destruction of property, we should decline representation. To this end, and consistent with time and resource constraints, we should exercise due diligence in assessing the credibility of potential clients, including through review of social media and news reporting, research into prior events in which the speaker was involved, and any other reasonably reliable information we can obtain. Where there is concern that the potential client will engage in violence or other illegal and unprotected activity, and an affiliate lacks resources to investigate, the national office will seek to provide support. If there is not time to do research and there is reason to believe that the speaker seeks to engage in violence or other illegal and unprotected activity, we should be reluctant to accept representation.
- Whether the speakers seek to carry weapons: The presence of weapons can be intimidating and inimical to the free exchange of ideas. They can chill speech and justify state suppression of protest. Accordingly, the ACLU generally will not represent protesters who seek to march while armed. It is important that this content-neutral rule be applied without regard to a speaker's political views. It should also apply whether or not state law permits or prohibits the carrying of weapons in a protest. To this end, and consistent with time and resource constraints (including assistance from the national office to affiliates and vice versa), we should exercise due diligence in assessing whether the potential client seeks to march while armed. If there is reason to believe that the clients do so intend, and we are unable to satisfy ourselves that they will not do so, we should be reluctant to accept representation.
- The impact of the proposed speech and the impact of its suppression: Our defense of speech may have a greater or lesser harmful impact on the equality and justice work to which we are also committed, depending on factors such as the (present and historical) context of

² "True threats," which are not protected by the First Amendment, are "statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v. Black*, 538 U.S. 343, 359 (2003). For the ACLU, subjective intent to threaten is an essential element of any true threat. By contrast, the First Amendment does protect broadly threatening language not targeted at a particular individual or group of individuals, hyperbolic threats, and speech that it is deeply offensive to particular individuals. *NAACP v. Claiborne Hardware* 459 U.S. 886, 926-29 (1982) (NAACP boycott leader's public statement that those who did not participate in boycott would have their necks broken was protected by the First Amendment) *Snyder v. Phelps*, 562 U.S. 443 (2011) (Westboro Baptist Church's homophobic signs directed at funeral of gay servicemember protected by First Amendment); *Watts v. United States*, 394 U.S. 705 (1969) (threat to kill President was hyperbole, not a true threat, and therefore protected).

the proposed speech; the potential effect on marginalized communities; the extent to which the speech may assist in advancing the goals of white supremacists or others whose views are contrary to our values; and the structural and power inequalities in the community in which the speech will occur. At the same time, not defending such speech from official suppression may also have harmful impacts, depending on the breadth or viewpoint-based character of the suppression, the precedent that allowing suppression might create for the rights of other speakers, and the impact on the credibility of the ACLU as a staunch and principled defender of free speech. Many of these impacts will be difficult if not impossible to measure, and none of them should be dispositive. But as an organization equally committed to free speech and equality, we should make every effort to consider the consequences of our actions, for constitutional law, for the community in which the speech will occur, and for the speaker and others whose speech might be suppressed in the future.

- The extent to which we are able to make clear that even as we defend a speaker's right to say what they want, we reserve our right to condemn the views themselves: While the ACLU vigorously defends the right to free speech of those who espouse views antithetical to our own, we also reserve our right to condemn those views. Our defense of free speech rests squarely on the proposition that speech deserves defending even if we, or others in the community, find it reprehensible. Accordingly, as a general matter we should be able to simultaneously defend a speaker's right to speak and condemn their views, and we should seek to preserve that right through ethically appropriate representation agreements. See, e.g., Policy #46 ("[W]hen an ultra-right group[] espouses positions adversely affecting civil liberties . . . the [ACLU] should vigorously present its position, while defending the group's right to speak."). Attorneys must have the discretion to make judgments about what speech might undermine their case. But we generally should not agree to represent people who will not agree to sign an ethically appropriate advance waiver of potential conflicts arising from our condemnation of their views.
- The extent to which we are able to mitigate any harm to our mission, values, priorities, and/or relationships: Where the ACLU defends the right to speak of those with whom it disagrees, it should generally engage in counter-measures both to reinforce the values the speaker attacks and to make clear that we do not endorse the substance of the views. Some options might include:
 - 1. Denouncing the views in press statements, op-eds, social media, and other available fora.
 - 2. Participating in counter-protests. When we assist people in securing the right to march or demonstrate for views we condemn, we can and generally should support and participate in counter-protests, with consideration given to participation by senior staff or board members to highlight the ACLU's commitment and ensure that such participation does not disproportionately burden other staff.
 - 3. Supporting other counter-speech by supporting, organizing or helping to organize events, facilitating access to media, or taking other actions that will amplify and strengthen the voices of those espousing our values.
 - 4. Expanding our work on behalf of the values the speaker attacks.
 - 5. Earmarking any fees recovered from the case to projects within the ACLU that further the values that we support and the speaker attacked, or donating them to

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 should be notified and consulted as early as possible, so that they have the tools necessary to explain our actions to allies and other interested parties in the affected communities. Development staff should also be involved, to enable them to respond to questions from supporters.

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 to the extension of those rights to all, and at times those rights will come into conflict. When conflicts do arise, the best we can do is work toward a response that is true to our principles, recognizes the costs associated with acting and not acting, includes a process that ensures attention to all of the competing values of the organization, and seeks to mitigate the costs of acting or not acting. The national office, working with the EDIC, will work to put protocols and procedures in place at National to ensure that the principles and guidelines set forth above can be realized in practice. Our commitment to a wide range of civil rights and civil liberties is a unique strength of our organization, but it means that these tensions will never disappear. Our hope is that these guidelines will assist in navigating difficult issues while maintaining fidelity to our deepest commitments.