

American Civil Liberties Union of Alabama

Legal Docket

Spring 2006

(These are pending or recently completed cases. The most recent information is in bold.)

Privacy

Williams v. Attorney General of Alabama:

Acting on behalf of six individuals, the ACLU of Alabama and the National ACLU filed a challenge to a state law, Ala. Code § 13A-12-200.2(a), which prohibits as obscene the sale, production, or distribution of “any device designed or marketed as helpful primarily for the stimulation of human genital organs.” The ACLU argued that the statute is facially unconstitutional and unconstitutional as applied to the plaintiffs—consumers and vendors of sexual devices—because the law is an unwarranted governmental intrusion into private practices. The trial court ruled in favor of the plaintiffs on their facial challenge, holding that there was no rational basis for the law, but did not reach the as-applied challenge.

The Eleventh Circuit U.S. Court of Appeals reversed, holding that the law was not facially unconstitutional, but remanded the as-applied challenge to the trial court for further consideration. On remand, and following extensive discovery, U.S. District Judge Lynnwood Smith held that the law was unconstitutional as applied to the plaintiffs, and in particular that the law prohibiting the sale of sexual devices was an unwarranted interference with the fundamental right to sexual privacy. The State appealed and in August of 2003, the Court asked the parties to submit additional briefs in light of the United States Supreme Court’s decision in the landmark case, *Lawrence v. Texas*, in which a Texas statute banning homosexual sodomy was struck down. In that case, the Court held that the fundamental right to privacy extends to the right to sexual privacy unrelated to marriage or procreation.

The 11th Circuit, in a 2-1 opinion, ruled against the ACLU. The ACLU filed for a re-hearing en banc, which was denied. We then filed a cert petition with the U.S. Supreme Court, which was denied. The 11th Circuit then remanded the case back to the District Court.

We filed for Summary Judgment asking the Court to find, in essence, that, in light of *Lawrence* (even a narrow reading of the case) there is no rational relationship between the ban and a protectable state interest. The Court ruled against us, our first loss before Judge Smith, at the end of February. The gist of the ruling is that the State has a morality based interest in prohibiting the sale of sex toys separate and apart from the State’s interest in discouraging their use. Our view is that the error in Judge Smith’s analysis was evaluating the issues by reference to sales alone when the statute is aimed at use as well as sales.

We will appeal to the 11th Circuit. Our position is that, post-*Lawrence*, the State cannot make the kinds of judgments implied in the statute, a position which is strengthened because the statute allows the sale of these products for certain specified (presumably “moral”) uses.

First Amendment

Lake v. Henry:

In September 2001, Mr. Lake, a practicing Muslim, led an Islamic service while incarcerated at St. Clair Correctional Facility. Sparked by a passage in the Quran about repentance and making amends for one's sins, he led a discussion about reparations for African-Americans. He wrote questions and thoughts on a blackboard on the subject of reparations, a subject with particular relevance at the time since U.S. Congressman John Conyers had recently introduced, "The Reparations Study Bill" (H. B. 40). The discussion included references to the United Nations Charter and to other instances in which reparations were found to be necessary and appropriate, namely reparations paid by the German government to survivors of the Holocaust, reparations paid by the U.S. government to Native Americans for a number of abuses and paid to Japanese citizens as compensation for internment during World War II. Mr. Lake urged members of the group to write to the United Nations to request copies of the Universal Declaration of Human Rights.

Lake was subsequently disciplined for "intentionally creating a security, safety or health hazard within a prison facility," for his actions. He was also charged with "creating a security hazard by writing anti-American propaganda on the blackboard during Islamic services, attempting to influence participants in the service." Despite the absence of a disturbance of any kind resulting from the discussion of reparations, Mr. Lake was found guilty of a major disciplinary infraction, received a sentence of twenty days in disciplinary segregation, lost privileges for twenty days and lost incentive time.

Lake challenged the discipline pro se in Federal Court. His case was dismissed. We appealed to the 11th Circuit. One day prior to the hearing the Alabama Attorney General's Office filed a letter with the 11th Circuit conceding that the district judge erred in ignoring the First Amendment claim, and apologizing for misrepresenting the record and facts in their brief.

Oral argument was held in the summer of 2004. The Circuit Court ruled in Plaintiff's favor and remanded all issues to the District Court. An Amended Complaint has been filed.

Tanner Advertising Company v. Fayette Co. GA (amicus):

The 11th Circuit granted rehearing en banc to review an order holding that Tanner Advertising could not challenge Fayette County's sign ordinance in its entirety under the First Amendment's overbreadth doctrine. The District Court had concluded that Tanner had only suffered an injury-in-fact under §1-43 of the ordinance and, therefore, could only challenge that section of the ordinance.

In our brief we argue 1) that a section-specific standing requirement conflicts with the Supreme Court's overbreadth decisions, 2) that a section-specific standing requirement would gut the framework for analyzing overbreadth challenges and empower government entities to immunize objectionable sections of their statutes from constitutional review and 3) that the Supreme Court has already imposed a standing and merit-based limitation on the overbreadth doctrine that strikes the proper balance between social benefits and the expansive remedy.

City of Montgomery v. Zgouvas (amicus):

The Defendant was charged with violating Montgomery city ordinance 125-79 (identical to ALA.CODE §13A-11-8(b)(1)(a)(1975)), which states that an offense is committed “if, with intent to harass, or alarm another person, (a Defendant) communicates with a person, anonymously or otherwise, by telephone, telegraph, mail, or any other form of written or electronic communication, in a manner likely to harass or cause alarm.” The trial court granted the Defendant’s motion to dismiss on the grounds that the ordinance was unconstitutionally vague and broad. The City appealed. In our brief we argue that:

1) The statute/ordinance is unconstitutionally overbroad because it seeks to criminalize constitutionally protected speech.

- Although speech is not protected if it constitutes “fighting words,” those which “by their very utterance inflict injury or tend to incite an immediate breach of peace,” this ordinance criminalizes speech that is only possibly harassing or alarming.
- The “fighting words” doctrine is adequate to protect members of the public from danger without restricting speech as broadly as this ordinance does.
- Courts have held that harassing, alarming, disturbing speech is constitutionally protected: KKK, Nazis, etc.
- The statute creates a risk that the ordinance will be enforced based on one listener’s subjective reaction to the speech.
- Although the Alabama Court of Criminal Appeals expanded harassment beyond “fighting words,” to include circumstances where a person is placed in reasonable fear of injury, this ordinance is different because of the lack of proximity involved in the communications prohibited by the ordinance.

2) The statute/ordinance is unconstitutionally vague because a person of ordinary intelligence and law enforcement officers cannot readily determine what speech is prohibited.

- There is no notice to ordinary people of what speech is proscribed. The lack of notice is problematic because it could chill speech through self-censorship.
- The law enforcement officers do not have guidelines for determining what speech is prohibited, thereby encouraging arbitrary and discriminatory enforcement.
- The statute provides no objective basis for defining “alarm” or “harass.”

Religious Freedom

Twarog v. Campbell (Commissioner, Alabama Department of Corrections):

Many, if not most, state custody prisoners must participate in drug rehabilitation programs in order to be eligible for parole, work release, Incentive Good Time and the like. Our case challenges the fact that all of these programs are religiously based. The case was filed last fall.

The defendants filed a motion to dismiss. We responded the first week of March.

This is the second time we have filed suit over this problem. We settled the case favorably the first time, but the State failed to comply with the terms of the settlement.

Knight v. Thompson:

Pro se prisoners filed suit claiming that Alabama Department of Corrections regulations prevented them from practicing the Native American religion. Thereafter, the ACLU of Alabama entered the case seeking to file an amended complaint that requested declaratory and injunctive relief as well as adequate training of correctional officers regarding prisoners' exercise of religious freedom.

After a trial on the merits, the Court granted Plaintiff's relief with the exception of their request for access to sweat lodges and exemption from hair length restrictions. While the sweat lodge and hair length issues were pending appeal, Congress enacted the Religious Land Use and Institutionalized Persons Act ("RLUIPA"). Plaintiffs requested that the matter be remanded for reconsideration in light of the newly enacted federal statute. The request for remand was granted over the State's objection, and the Court heard evidence on the sweat lodge issue in December 2004. As a result of Plaintiffs' evidence at that hearing, the Department of Corrections now permits sacred sweat lodge ceremonies at designated facilities on certain holy days. In light of the current circuit split on the issue of hair length exemptions, Plaintiffs anticipate appealing the summary judgment entered against them on this issue after resolution of various pending motions.

Rights of Gay Men and Lesbians

Jane Doe v. John Doe:

Ms. Doe is a mother and a lesbian. She had been awarded physical custody of her six year old son at the time of her divorce. Ms. Doe, her partner and her son had been living together for three years when her former husband, who had visitation privileges, remarried and sought a change in custody. This is a very common situation and the point at which many parents who are gay and lesbian lose custody of their children. The father had two convictions for domestic violence. His wife had recently tested positive in a court-ordered drug screen for methamphetamine. Nothing was presented to the Court about poor parenting on the part of Jane Doe, only the fact that she was lesbian and had a live-in partner. The court ruled that custody should remain with Jane Doe but only on the condition that her son never see her partner without supervision by the State and that she refrain from speaking with her son about her partner or her lifestyle. The Court determined, however, that the father's wife could have unsupervised visits with the child. The ACLU was contacted after this ruling.

We entered an appearance in the case and filed a motion for reconsideration based on the USSC's ruling in *Lawrence v. Texas*. The motion was denied. In January, Ms. Doe decided not to appeal because her relationship with the father took a turn for the better, and she felt it in her overall best interest to drop the matter.