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# RHODE ISLAND CIVIL LIBERTIES

A Bi-Monthly Publication of the American Civil Liberties Union Foundation of RI

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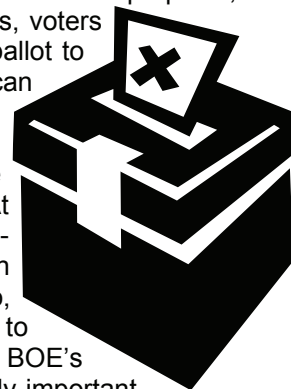
## Board of Elections Backs Off From Proposal To Discard Provisional Ballots

In an important victory for voting rights, the RI ACLU successfully opposed a state Board of Elections' proposal that would have kept potentially thousands of qualified Rhode Island residents from having their votes counted in November's election.

Six years ago, in response to the 2000 Florida election debacle, Congress passed the Help America Vote Act (HAVA). Among other things, it included a requirement for "provisional balloting," designed to prevent people from being turned away at the polling booth solely because their name did not appear on the voting list. In June, however, the state Board of Elections (BOE), in the name of administrative convenience, proposed to treat "provisional ballots" in a way that actually would have *disenfranchised* voters. At a public hearing in July, the ACLU persuaded the agency to shelve the proposal.

Presently, Rhode Island voters given provisional ballots because they have come to the wrong precinct have only their votes for federal office counted. The Board's proposal, first floated in June, would have not counted the ballots at all. That is, voters showing up at the wrong precinct would be given a provisional ballot to fill out – and the ballot would, in essence, be thrown in the trash can at the end of the day.

Since municipalities change and consolidate polling places all the time, it is not uncommon for voters to go to the wrong location. At a public hearing on the BOE proposal, the ACLU argued that punishing voters this way would have a particularly harsh impact on the elderly and people with disabilities who, even if they wanted to, would have great difficulty getting to the correct polling place to make their vote count. The ACLU also called the timing of the BOE's proposal disconcerting, occurring just months before an extremely important national election where record voter turnout is expected.



The number of ballots affected by the proposal was not small. More than 2,000 people cast provisional ballots in each of the last two state elections. Over one-third of those were ultimately counted as "full ballots," meaning that many people who showed up at the *right* polling place were told they were not eligible to vote.

After learning of the proposed regulations, the ACLU organized a strong turnout at the Board of Elections' meeting where it was being considered. From their initial comments, it was clear that Board members were prepared to adopt the change. However, after hearing the Affiliate's testimony, as well as that of the Urban League of R.I., Common Cause and other groups, the Board reversed course, and decided to withhold any consideration of the issue until after this year's elections.

Next year, the Affiliate will seek to persuade the Board to expand, not restrict, the counting of these ballots. The ACLU believes that provisional ballots should be counted for all elections for which the person is qualified to vote by reason of residency. For example, if a voter lives in Providence but comes to the wrong polling station, there is no reason to ignore his or her clearly valid votes for state and city-wide elections. ACLU legislation to codify such a practice has been introduced in the General Assembly the past two years, and will be pursued again in 2009.

## Immigration Raids Draw Fire

The controversy over immigration issues in Rhode Island took another ugly turn in July with the raids of six state courthouses by federal immigration agents and State Police, resulting in the roundup and detention of more than thirty janitorial workers.

Days after the raid took place, in what has become a routine scenario, some family members of those detained remained unable to learn from immigration officials where their loved ones were being held. In the meantime, community groups were working to coordinate legal assistance to the detainees whose whereabouts were known.

At a rally held in front of the District Court building in Providence the day after the raids, the ACLU was sharply critical of state officials for deceiving community representatives about the action. At the exact time that the raids were being executed, the Governor's advisory panel on immigration,

set up to examine any potential "unintended consequences" resulting from his recently-issued executive order on immigration, was holding its first meeting. At that meeting, community organizations were falsely told by the State Police that the agency would not be involved in conducting immigration raids, and that no raids were planned. When confronted with this blatant contradiction the next day, the State Police Superintendent replied that the courthouse raids weren't really "raids," but were "arrests." In similar Orwellian fashion, an ICE spokesperson explained that the people detained were entitled to "due process," but he refused to say where they were being held because "that's too sensitive a question."

The RI ACLU is working with other organizations to address the impact of the raids on the immigrant community, and to strategize on future steps to address the increasingly xenophobic atmosphere in the state.

## ACLU Sues Narragansett Over "Orange Sticker" Policy

The Rhode Island ACLU has filed a lawsuit against the Town of Narragansett, challenging the constitutionality of its highly-publicized ordinance which allows police to charge tenants and landlords with allowing — and to place orange stickers on houses that have allegedly been the site of — "unruly gatherings." The lawsuit, filed by ACLU volunteer attorney H. Jefferson Melish, is on behalf of the URI Student Senate, as well as four students and three landlords who have been affected by enforcement of the ordinance. The suit argues that the ordinance violates the plaintiffs' rights to privacy, freedom of association, equal protection, and procedural and substantive due process.

The lawsuit notes that the ordinance "gives sole discretion to the police department" to post the stickers on houses where "unruly gatherings" have allegedly occurred, "without any opportunity for a hearing or appeal by owner or renter." The suit further calls the ordinance unconstitutionally vague, as it "fails to provide a clear definition of prohibited behavior, merely listing examples," and thus "invites arbitrary and capricious enforcement" by police. The suit also calls the ordinance "overinclusive" by imposing liability on individuals who have committed no crime but are "simply present at or associated with a location or an event" at which an "unruly gathering" allegedly takes place.

Three of the plaintiffs — David Keach, Timothy DeMerchant and Michael Spatcher — face pending charges in district court of violating the ordinance. Two other plaintiff students — Warren Byrne and Ben Cuddy — were evicted from their residence after police posted an orange sticker on the house they were renting, and then were forced to pay rent for the balance of the school year for both that residence and their new one. Three other plaintiffs — Walter Manning and Steven and Karen Jedson — are landlords whose houses have been pasted with an orange sticker. They claim this has adversely affected their ability to rent the houses. The URI Student Senate has condemned the "orange sticker" procedure as a "scarlet letter" approach.

The lawsuit asks the court to declare the ordinance unconstitutional and halt its enforcement. ACLU attorney Melish said: "This challenge seeks to stop the enforcement of an ordinance that unfairly targets URI students and those who rent to them. The 'orange sticker' ordinance attempts to shame and humiliate students and landlords, and violates their rights to due process and equal protection of the laws."

## Congressional Scorecard Rating Issued

The National ACLU has released a Congressional scorecard for the 110th Congress. The scorecard rated U.S. Representatives on nine key votes, and U.S. Senators on fourteen votes. The votes cover a variety of issues, including wiretapping, genetic privacy and employment discrimination.

Rhode Island's delegation did relatively well. Rep. Patrick Kennedy received a perfect 100% score. His colleague, Rep. James Langevin, received a 78% rating. On the Senate side, Sen. Jack Reed was given a 93% rating, while Sen. Sheldon Whitehouse received a 79% score. For more information about the particular votes and our delegation's individual voting records, go to <http://scorecard.aclu.org>.

## Supreme Court Rules on Free Speech, Juvenile Rights Cases

The R.I. Supreme Court issued two important civil liberties rulings of note in recent months, one addressing free speech issues, and the other resolving some of the problems associated with last year's brief legislative debacle that treated 17-year-old offenders as adults.

### "Gag Rule" Fines Overturned

Although a great deal of attention followed the Court's decision overturning a precedential lawsuit seeking to hold lead paint companies responsible for cleaning up thousands of houses in the state, an important free speech victory was tucked away in the 81-page ruling. Addressing an issue on which the RI ACLU had filed a "friend of the court" brief, the Court overturned the imposition of \$15,000 in fines against Attorney General Patrick Lynch for public comments he made during the case. The ACLU's brief had argued that the fines violated Lynch's First Amendment right to free speech and the public's right to hear the "views of attorneys concerning pending litigation in which the attorneys are involved."

Lynch was twice fined by a Superior Court judge for allegedly violating the Rules of Professional Conduct and a "gag order" the judge had issued against him in the controversial, high-profile case. The comments leading to the fines included a statement from Lynch decrying what he called the lead paint companies' "despicable" tactics in attempting to delay resolution of the case and for referring to the lead-paint makers as "those who would spin and twist the facts." The ACLU brief, filed by volunteer attorney Amy R. Tabor, argued that the fines and "gag order" were imposed in clear violation of Lynch's free speech rights and should be overturned.

Without addressing the constitutional issues raised by the ACLU's brief, the Court unanimously concluded that Lynch's comments simply were not egregious enough to be considered violations of the lower court's orders, and therefore they could not be sanctioned. ACLU attorney Tabor said: "The public had the right to hear all sides of the lead paint debate, and the public comments of the Attorney General were just one part of that much larger debate. I am pleased that the Court recognized that any limits on attorney speech in a case like this must be narrowly drawn."

### "Gap Kids" Ruling Issued

In July, the Court resolved some of the problems facing so-called "gap kids," the victims of a state law that was in effect for four months last year that stripped the Family Court of jurisdiction over 17-year-old offenders and sent them to adult court. The Supreme Court unanimously ruled that, despite its intent, the poorly-drafted statute did not divest the Family Court of jurisdiction over the juveniles. Rather, the Court said, it remained up to the Family Court to determine whether, because of the seriousness of the offense, a juvenile should be waived to adult court.

As a result of the ruling, hundreds of cases that had been in limbo will now be transferred to the Family Court for adjudication. As for those juveniles whose cases were already concluded, the court held that they could seek post-conviction relief to address the adult criminal records they have. The ruling favorably resolved many of the concerns that the ACLU and others raised when the legislature repealed the ill-fated law last October, but in doing so, left untouched the "gap kids" who had been sent to adult court during the months the law had been in effect. The ACLU had promoted legislation this session designed to address those very concerns.

## Congress Protects Telecoms That Shared Phone Records

In a distressing abdication of its oversight responsibilities, Congress passed a domestic spying bill in July that, among other things, gives telephone companies retroactive immunity for having as part



illegally shared phone records with the National Security Agency of the Bush Administration's "war on terror." The new law also expressly bars any state investigations of violations of customer's privacy rights by the companies under the controversial program.

ernment's unconstitutional spying program. The ACLU expects the phone companies to move to have the complaint dismissed in light of the new law. The net effect is that the public may never learn the truth about what the phone companies and the government did with millions of private communications over the seven-year course of the program. The RI ACLU complaint before the PUC was handled by volunteer attorney John McConnell, Jr.

Immediately after President Bush signed the bill into law, the National ACLU filed a lawsuit challenging various aspects of the new statute. However, the suit does not contest the immunity provision that undermines the RI ACLU's pending complaint. Sen. Jack Reed and Rep. Patrick Kennedy voted against the final bill, while Sen. Sheldon Whitehouse and Rep. James Langevin voted for it. Whitehouse did support an effort to strip the telecom immunity provisions from the final bill, but that effort was unsuccessful.

The new law will directly affect a complaint that the RI ACLU filed in 2006 with the Division of Public Utilities and Carriers, alleging that Verizon and AT&T violated the rights of telephone customers by participating in the federal gov-

## Affiliate Testifies on State Regulations

The RI ACLU has testified this summer on a number of proposed state regulations affecting civil liberties. Some of them are briefly summarized below.

### ***Commission Hears Sex Discrimination Exemption Request For a Second Time***

For the second time this year, the ACLU testified against a request by Rhode Island College (RIC) to discriminate on the basis of sex when hiring for two housekeeping positions at the College's recreation center. The request was first submitted in January to the R.I. Commission for Human Rights under procedures available for employers to seek exemptions from the state's Fair Employment Practices Act.

RIC initially justified its request by claiming that it could not "close off part of the men's or women's locker rooms for routine maintenance/cleaning during the course of our 16 hours of operation." At the time, the ACLU argued that the College had failed to justify its request with any concrete information about why alternatives to discriminatory hiring practices were not available to address any legitimate privacy concerns. The Commission agreed, ruling that the "evidence presented [by RIC] simply is insufficient to meet the decidedly heavy burden of showing that there are no reasonable alternatives to sex-based hiring."

RIC responded by seeking another hearing in order to present additional evidence. However, ACLU Chairperson Jennifer Azevedo, testifying at the second hearing, argued that the College had still failed to provide any clear evidence that non-discriminatory alternatives were unavailable. A final ruling from the Commission is awaited.

### ***Ethics Commission Considers Conflict of Interest Regulations***

The RI ACLU urged the state Ethics Commission to act cautiously before considering any changes to the so-called "class exception" to conflict of interest standards, a rule that allows government officials to vote on policies that affect them if they are part of a much larger class that is similarly affected. The Governor has urged that the exception be significantly narrowed. In testimony submitted at a public hearing of the Commission, however, the ACLU argued that an expansion of what constitutes a "conflict of interest" would unfairly disenfranchise both elected officials and their constituents.

The ACLU further claimed that expanding the definition of "unethical" conduct well beyond actual and substantive impropriety to anything that creates even the slightest appear-

ance of a conflict, would only increase, rather than diminish, public cynicism about government institutions. The Commission took under advisement the various comments presented at the hearing.

### ***DMV Acts to Tighten Drivers' License Rules***

Responding to the ACLU's successful lawsuit against the agency earlier this year, the DMV has proposed regulations making clear that people do not need to present a Social Security card in order to renew their drivers' license. However, the proposal also tightens up current requirements by requiring proof of a Social Security number to be presented by any person renewing their license whose SSN is currently not in the DMV's database. The effect of this change in policy would be to bar license renewals for immigrants who obtained their license during a period when the DMV was accepting Individual Tax Identification Numbers (ITINs) from individuals who did not have an SSN.

The ACLU called the proposed change poor public policy that would make the roads less safe, pushing immigrants further underground and preventing them from getting car insurance. Nonetheless, the Affiliate expects the DMV to adopt the regulation.

### ***Affiliate Opposes Change to Same-Day Voting Law***

Under a Rhode Island statute, qualified but unregistered Rhode Island residents can go to their city or town hall on Election Day and cast a vote for President and Vice-President. In July, the Affiliate testified against proposed Board of Elections regulations that would allow municipalities to instead have that voting take place at other locations.

The ACLU noted that state law specifically designates the city and town halls as the location for this special voting and that, while adoption of *additional* sites would be appropriate and helpful, the Board had no authority to eliminate the statutorily-required voting location at municipal seats of government. In addition to violating the statute, the Affiliate further argued that such a change would generate confusion and difficulty for the voters the law was designed to help. Many, going to their town hall in accordance with the statute and then being turned away, might not have the ability to travel to the alternative site.

Although the agency's legal counsel advised against making the change, the Board unanimously adopted it. The Affiliate is considering mounting a legal challenge to the new rule.

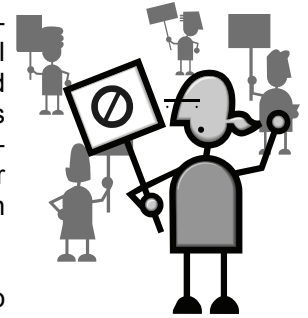
## ***ACLU Participates in Eastside Marketplace "Friendship Fund"***

In an effort to give back to the community, Eastside Marketplace has devised an easy way for non-profit organizations to raise money. It's called the "Friendship Fund." Simply save your receipts from Eastside Marketplace and mail them to the RI ACLU office. Eastside Marketplace will issue checks at the rate of 1% of the total Eastside Marketplace register receipts redeemed. The more receipts redeemed, the more money we raise! Thank you Eastside Marketplace!

## News Briefs

### ACLU Defends State House Protesters

The ACLU has taken up the defense of two members of the organization People to End Homelessness, who were charged by Capitol Police with disorderly conduct when they staged a small rally in front of the State House to protest the Governor's budget cuts. Catherine Rhodes and Joseph Freitas were charged with making "unreasonable noise" for using a bullhorn to express their views at the small rally. Capitol Police claimed that the two were violating a City of Providence ordinance requiring a permit to use a bullhorn, but neither of them was charged under that ordinance. Instead, they were charged with violating the state's "disorderly conduct" ban on "unreasonable noise."



RI ACLU volunteer attorney Thomas G. Briody is handling their criminal case and will seek to get the charges dismissed. The Affiliate is also considering mounting a separate legal challenge, on First Amendment grounds, to the constitutionality of the statute under which they were charged. Protesters with bullhorns regularly speak out at the State House, and the ACLU is unaware of any other group that has run into this problem as did the People to End Homelessness.

### Church Attendance Question Eliminated from State Form

Responding to an ACLU complaint, the state Department of Human Services has agreed to remove from a General Public Assistance application form a question that asked applicants how frequently they attend church. The question was one of many on DHS's "Information for Determination of Disability" form, designed to determine how often applicants engage in various social activities.

On behalf of an applicant who objected to the church attendance question, the ACLU argued in a letter to DHS that "an explicit inquiry about a person's religious comings and goings strikes at the heart of First Amendment principles. No government agency should have a record of how often clients claim they go to church." After considering the matter, DHS officials agreed to remove the question .

### "Excited Delirium Syndrome" Autopsy Questioned

The ACLU has criticized the state medical examiner's determination that a mentally ill person who was Tasered and then died after a scuffle with police in February, died of "excited delirium syndrome." In what the ACLU called an explanation that was "clear as mud," the ME called the cause of death of the 40-year old East Providence resident "sudden death complicating Excited Delirium Syndrome due to chronic schizophrenia, during physical altercation (with multiple cutaneous injuries) with police."

The ACLU said that the diagnosis deflected any responsibility for Leonel Farias' death from the police back onto the victim himself, essentially blaming his untimely demise on his mental illness. EDS is an extremely controversial diagnosis in the medical community, and is presently not recognized by either the American Medical Association or the American Psychological Association. The state Department of Health was unable to point to any other cases in Rhode Island where EDS has been designated as the cause of death. Across the country in recent years, the diagnosis has appeared almost exclusively in situations where people died while in a confrontation with police, and often after being Tasered. The Affiliate is considering whether further action can be taken to contest the medical examiner's findings. Three individuals with mental illness have died this year in encounters with police in Rhode Island, prompting widespread concern in the mental health community.

### Student Tracking Program Lapses

The Middletown School District has decided, at least for the time being, not to continue a pilot program in which elementary school children were tagged with electronic chips to monitor their whereabouts on school buses. The program, using Radio Frequency Identification (RFID) technology, placed RFID chips on the backpacks of Aquidneck Elementary School students. The ACLU raised privacy concerns about the program as soon as it was introduced earlier this year, and lobbied for the passage of legislation – ultimately vetoed by the Governor – to bar such practices.

The pilot program was offered for free to the school district on a trial basis by a private company whose owner happens to be the brother of the school district's facilities manager. After the pilot program expired in June, the school district concluded that it could not afford to pay for its continued use in September. RFID tracking raises obvious Big Brother concerns, and its use on students, the ACLU argued, could only serve to acclimate children to being monitored by their government at any time.

## Affiliate Report Criticizes “Red Light Cameras”

Calling the technology “expensive, ineffective, inefficient and intrusive of civil liberties,” the Rhode Island ACLU issued a report criticizing legislative efforts to make permanent a three-year experiment allowing municipalities to use “red light cameras.” The 19-page report argued that “no compelling rationale has been offered for allowing the continued use of red light cameras in the state.”



“Red light cameras” are devices that photograph automobiles going through red lights and then send automated citations to the registered owner or lessee of the vehicle photographed. Because of legislative concerns about the technology, a 2005 law authorizing use of the cameras contained a July 2008 sunset clause. Thus far, Providence is the only municipality to have made use of the law, and it vigorously sought repeal of the sunset provision. Unfortunately, the City succeeded in doing so in the waning hours of the General Assembly session.

In arguing that it would be a mistake for the state to repeal the sunset clause, the ACLU report relied largely on data supplied by the City of Providence itself, noting that:

\*Although initially touted by the City as a revenue-enhancing measure, Providence thus far has actually lost almost a million dollars in this enterprise – making money for the private company running the technology, while the taxpayers foot the bill.

\*Data submitted by the City fail to document that the cameras have reduced the number of crashes at intersections where the technology has been employed.

\*Although the 2005 statute required the City to submit annual reports designed to help policy-makers reach an informed conclusion about the cameras’ utility, the City’s reports are filled with inconsistencies and inaccuracies. The City has also failed to separately submit related data and reports to the Providence City Council as required by city ordinance.

\*Fewer than half of the alleged violations photographed by the cameras result in the issuance of citations.

\*The use of red light camera technology continues to raise significant due process, privacy and other civil liberties concerns.

In light of the fact that the technology has not made Providence any money, has not been demonstrated to reduce crashes or injuries at the intersections where the cameras have been installed, and has been implemented by the City without adequately complying with state and city reporting standards, the ACLU report argued, ultimately unsuccessfully, that “such failures should not be rewarded, especially in light of the civil liberties incursions implicit in the implementation of a red light camera system.” The ACLU’s report, “The Case Against Red Light Cameras,” is available online at [www.riaclu.org](http://www.riaclu.org).

### Organizational Notes

#### **ACLU’s Cable Access Show Summer Schedule**

The Rhode Island ACLU’s cable access TV show, “Rights of a Free People,” airs on Statewide Interconnect Channel A (Channel 13 in most areas) Tuesdays at 10 PM and Fridays at 3:30 PM. In Providence, North Providence and Kent County, the show can also be seen Wednesdays at 9 PM on Channel 18. Watch for these upcoming programs:

**August/September:** *Legislative Wrap-Up Part 1 (August) and Part 2 (September) with Representative Edith Ajello and RI ACLU Executive Director Steven Brown, and ACLU Volunteer Attorney Christopher Corbett as guest host.*

**October:** *2007 Term U.S. Supreme Court Wrap-Up with ACLU volunteer attorney Richard Sinapi and R.I. ACLU Board member Anne Mulready. With guest host Christopher Corbett.*

#### **ACLU Welcomes New Development Coordinator**

The RI ACLU is pleased to welcome Anne Rocheleau as the Affiliate’s new Development Coordinator. Anne, a sculptor and arts administrator, comes to the ACLU after serving for a few years as the founder and director of a non-profit organization, Spaces For Peace. She also served before that as director for four years of the Rhode Island Foundation Gallery. She is looking forward to her work with the Affiliate, and has hit the ground running on a number of projects.

#### **Affiliate Participates in Annual PrideFest**

The affiliate’s table at this year’s PrideFest event in Kennedy Park in downtown Providence was a popular spot. The Affiliate’s handouts were extremely popular among passers-by, who showed a great interest in the work of the ACLU. The affiliate would like to especially thank board members John Blakeslee and Marc Cohen for volunteering their time to promote and educate event-goers on the ACLU’s mission.

# RI ACLU 2008 ANNUAL DINNER PROGRAM BOOK

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## **HELP WITH OUR 50TH ANNIVERSARY!**

The RI ACLU has begun planning an ambitious year-long celebration in 2009 in recognition of the 50th anniversary of the founding of our affiliate. We are contemplating a variety of events throughout Rhode Island, including art, music, theater, lectures, film, debates, historical perspectives, a capital campaign and more.

If you have ideas on the commemoration of our affiliate's 50 year quest to protect Rhode Islanders' constitutional rights, or if you have an interest in volunteering for the celebration, please call the office and let us know. In the months ahead, there will be many and varied tasks to be done. Get involved early. Call and add your name to the list of the ready and willing and help us create a fitting commemoration for this noteworthy occasion.

### **2008 Annual Dinner to be Held Thursday, November 13th**

The Rhode Island ACLU's 2008 Annual Dinner will take place **Thursday evening, November 13th at the Providence Biltmore**. This year, it will be our honor to present the Civil Libertarian of the Year award to the Providence Youth Student Movement (PrYSM), an organization composed largely of teenagers focused on supporting and advocating for the Southeast Asian community in the state. The group is being particularly honored for its courageous work this year in standing up to the Governor after he laid off interpreters at the Department of Human Services. Keep an eye out for your invitation in the fall, but **mark the date on your calendar now!**

In the meantime, purchasing an ad in the program book is a great way to advertise your business, congratulate the honoree, or just show your support for the ACLU's work. On the back of this page you will find a form with instructions for submitting your ad; if you have any questions, call the ACLU office at 831-7171.

### ***Watch for our Special Legislative Issue***

We will shortly be mailing out to you a special edition of our newsletter. For those unable to attend our legislative wrap-up event, the special editron will contain a detailed review of the 2008 General Assembly session, along with a legislative voting scorecard of your state Representatives and Senators. Watch for it in the mail.