

## **Reproductive Rights in the Courts: 2010**

As we commemorate the 37<sup>th</sup> anniversary of *Roe v. Wade* we sit at the beginning of a new year and a new decade for reproductive freedom. Efforts to protect a pregnant woman's ability to make decisions about her medical care take place on many fronts, including in courtrooms throughout the country.

Below are brief descriptions of some important ACLU reproductive rights cases either decided last year or currently pending before the courts.

### **UPHOLDING THE SEPARATION BETWEEN CHURCH AND STATE**

#### [ACLU of Massachusetts v. Sebelius \(formerly ACLU of Massachusetts v. Leavitt\)](#)

In December, the ACLU argued before the U.S. District Court for the District of Massachusetts, asking the court to ensure that funds distributed through the Trafficking Victims Protection Act are not being used to impose religiously based restrictions on reproductive health services.

Every year, more than 14,000 individuals, predominantly women, are brought into the United States and exploited for their labor, including in the commercial sex industry. Many experience extreme violence and sexual assault at the hands of their traffickers. Some become pregnant as a result of rape; some contract sexually transmitted infections, including HIV.

Since April 2006, the Department of Health and Human Services, which administers funds allocated by the federal Trafficking Victims Protection Act, has awarded the United States Conference of Catholic Bishops (USCCB) grants ranging from \$2.5 million to \$3.5 million annually to support organizations that provide direct services to trafficking victims. However, USCCB prohibits its sub-grantees, based on its religious beliefs, from using federal funds to provide or refer for contraceptive or abortion services. Our lawsuit asks the court to stop this misuse of taxpayer dollars and to protect the health and safety of trafficking victims.

#### [Robinson v. Thompson](#)

In September, the ACLU asked a federal court in Mississippi to end government funding of religion in the state's abstinence-only-until-marriage program. The case was filed in the United States District Court for the Southern District of Mississippi on behalf of a teen and two community members who attended the annual abstinence summit.

As part of National Teen Pregnancy Prevention Month, the Mississippi Department of Human Services holds an annual teen abstinence summit each May. After the 2008 summit, which included overt religious messages, the ACLU sent a letter to MDHS asking for assurances that future events would remain secular. MDHS did not respond to the ACLU's letter and failed to address the legal concerns in this year's event: Using taxpayer dollars, the 2009 summit again featured religious themes and overtly Christian

messages. Our lawsuit asks the court to put an end to this blatantly unconstitutional use of taxpayer money to sponsor religious events.

## **PROTECTING ACCESS TO REPRODUCTIVE HEALTH CARE FOR INCARCERATED WOMEN**

The ACLU secured great victories, and broke new ground, this year in its continued efforts to defend the reproductive rights of incarcerated women.

### [Doe v. Arpaio](#)

Since 2004, the ACLU has fought Maricopa County Sheriff Joseph Arpaio's attempts to obstruct prisoners' access to timely, safe, and legal abortions. Despite clear rulings from the Arizona courts, Sheriff Arpaio continued to believe he is above the law. In 2008, the ACLU learned he was violating a court order by refusing to voluntarily transport women to obtain abortion care.

After the ACLU asked a court to hold him in contempt, Arpaio shifted tactics and began insisting that inmates who seek abortions must pay upfront for transportation and security costs. Inmates requiring transportation for other medical care are not charged for transport either before or after receiving services. We returned to court in November to challenge the pre-payment policy. In an immediate ruling from the bench, the judge struck the pre-payment policy as unconstitutional. We are currently waiting to see whether Sheriff Arpaio will appeal this ruling.

### [Nelson v. Norris](#)

In October, the full Eighth Circuit Court of Appeals held that Shawanna Nelson was entitled to have a jury hear her claim that being kept in shackles during labor and postpartum recovery constituted "cruel and unusual punishment" in violation of the Eighth Amendment of the U.S. Constitution. Three ACLU legal projects – Reproductive Freedom, National Prison, and Women's Rights – worked with Ms. Nelson's lawyer to achieve this critical victory, the first of its kind.

Shawanna Nelson entered an Arkansas prison in June 2003 with a short sentence for a nonviolent crime. When she went into labor, the correctional officer accompanying her shackled her legs to both sides of her hospital bed. She remained shackled until she was taken to the delivery room. She suffered intense pain and lasting medical problems from the birth and the inability to move her legs. The correctional officer knew that she was not a flight risk and knew that the restraints caused pain and unsanitary conditions.

Shackling women in labor and during childbirth is extraordinarily dangerous, for both mother and newborn, yet most jails and prisons continue the practice. This case is an important first step towards ending this brutal and inhumane practice. We await news on developments in the case, in light of its remand back to the trial court.

### [Cajúne v. Lake County Jail](#)

No woman should be punished with the threat of miscarriage. In November, the ACLU and the ACLU of Montana filed a lawsuit in the U.S. District Court of Montana against

the Lake County Jail. The lawsuit was brought on behalf of Bethany Cajúne after jail officials repeatedly withheld essential medical care that jeopardized her health and her pregnancy.

In March 2009, Bethany Cajúne voluntarily reported to Lake County Detention Facility in Montana to complete an outstanding short-term sentence for traffic violations. At that time, she was approximately four to five months pregnant, raising five small children, and attending GED classes four days a week. She was also nearing a year of successful participation in a medication-treatment program for a diagnosed addiction to opioid drugs. Despite several attempts by Cajúne's treating physician and drug treatment counselor to ensure that Cajúne continue receiving Suboxone, a medication that suppresses withdrawal symptoms, facility officials, including its chief medical doctor, denied her this care. As a result, Cajúne suffered complete and abrupt withdrawal, experienced constant vomiting, diarrhea, rapid weight loss, dehydration, and other withdrawal symptoms, all extremely dangerous during pregnancy. Despite repeated warnings of the serious risk posed by abrupt withdrawal, including miscarriage, the facility continued to deny Cajúne her medication.

The ACLU's suit seeks compensation for Cajúne's physical and emotional suffering, as well as a declaration that denial of needed medical care to pregnant inmates is unconstitutional.

## **ENSURING ACCESS TO CONTRACEPTION AND ABORTION CARE**

### *Hope Clinic v. Adams*

In November, in response to a lawsuit brought by the ACLU and the ACLU of Illinois, an Illinois court issued an emergency order blocking a law that prevents teens from having an abortion unless they notify a parent or go to court. This victory ensures that teens throughout Illinois will continue, for the time being, to be safe and able to obtain the care that they need.

The truth is that most teens already turn to their parents when facing a pregnancy. This law endangers teenagers from dysfunctional families — those who face physical and emotional abuse, homelessness, and forced childbirth, among other things, if they tell their parents about their pregnancies. Indeed, the ACLU submitted extensive testimony to the court, from experts from around the country, detailing the serious and irreversible harm that will befall teenagers in Illinois if the law is allowed to go into effect.

Although promising, the emergency order is only a first step. We will continue to fight this law in the weeks and months to come.

### *Fischer v. Campbell (Alaska); Westacott v. Carnahan (Missouri); Bristol v. Personhood Nevada (Nevada)*

The ACLU has joined together with other reproductive rights organizations to challenge one of the newest trends in the assault on women's reproductive rights: fetal personhood

ballot initiatives. Along with our partners, we have already brought three such cases—in Alaska, Missouri, and Nevada.

By attempting to extend legal rights to fertilized eggs and fetuses, if these initiatives were to become law, they could threaten women’s access not only to abortion, but to contraception, infertility treatments, and treatment for miscarriage and ectopic pregnancies. The Alaska, Missouri, and Nevada cases, which were brought on behalf of pregnant women, doctors, nurses, professors, and other citizens, seek to prevent these harmful and misleading initiatives from ever making it to the ballot. On January 8, 2010, a [Nevada court declared an initiative introduced in that state invalid](#). The proponents of the initiative have indicated that they plan to appeal. We also await further briefing in the Alaska and Missouri challenges.

## **PROTECTING THE CIVIL RIGHTS OF PREGNANT WOMEN**

The ACLU works to protect the rights of pregnant women who wish to carry their pregnancies to term, including the right to make decisions about their own health care, to equal treatment under the law, and to conduct their lives according to what they believe is best for themselves and their families.

### [U.S. v. Tuleh](#)

In June, the ACLU and the ACLU of Maine became counsel for Quinta Tuleh, a pregnant woman living with HIV, who was sentenced to spend the duration of her pregnancy (approx. 4 months) in jail. Although Tuleh, who pleaded guilty to the charge of carrying false documents, was entitled to a time-served sentence, the judge kept her in prison solely because he believed incarceration was justified (and necessary) to guard against perinatal transmission of HIV.

After learning of Tuleh’s sentence, and in a remarkable turn of events, we partnered with the federal prosecutors who had charged Tuleh in the first place (but believed that her sentence was unjust) to ask the First Circuit Court of Appeals to reverse the lower court’s decision, on the grounds that the prolonged incarceration was both unconstitutional and prohibited by statute. The Court of Appeals granted our motion and, on August 4, Tuleh’s sentence was reversed.

### [Burton v. Florida](#)

In August, the ACLU filed a friend-of-the-court brief on behalf of the ACLU, the ACLU of Florida and the American Medical Women’s Association, in the District Court of Appeal, First District, in Florida, in the case of a pregnant woman who had been hospitalized against her will.

During a medical exam in March, a doctor ordered bed rest for the remainder of her pregnancy. Burton – a mother of two – was not satisfied with the care or treatment she was receiving at that hospital, and asked to get a second opinion at a different hospital. Her doctor refused and obtained a court order mandating her to be indefinitely confined to Tallahassee Memorial Hospital and forced to undergo any and all medical treatments

deemed necessary to save her fetus. After three days of state-compelled hospitalization, Burton suffered fetal demise and was released from the hospital.

The ACLU argued that, if allowed to stand, the decision below would invite court intervention in nearly all aspects of pregnant women's behavior and medical judgments. Such a result is unconstitutional, and is opposed by leading medical organizations. The ACLU argued the case in early January of this year and is awaiting decision.