



ANNUAL REPORT

2012

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2012 ANNUAL REPORT OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF VERMONT, INC.

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WHAT IS THE ACLU?

The American Civil Liberties Union of Vermont is an organization of Vermonters dedicated to the defense of individual liberties guaranteed by both the U.S. and Vermont constitutions. The American Civil Liberties Union Foundation of Vermont is the legal and educational arm of the ACLU, and it goes to court in defense of these essential liberties.

Both the American Civil Liberties Union of Vermont and its foundation are affiliated with the national ACLU, which was formed more than 90 years ago.

The principles guiding the ACLU are simple and clear:

- The right to free expression — above all, the freedom to dissent from the official view and majority opinion.
- The right to equal treatment regardless of race, religion, sex, sexual orientation, gender identity, national origin, age, or disability.

- The right to be left alone — to be secure from spying, from the promiscuous and unwarranted collection of personal information, and from interference in our private lives.

These guarantees of liberty are not self-enforcing. Those with power often undermine the rights of individuals and groups who lack the political influence, the numerical strength, or the money to secure their birthright of freedom. That is why ACLU programs — in the courts, in the legislature, and in the public forum — have most often been on behalf of people with the special vulnerability of the powerless.

We are all vulnerable. No group or person is permanently protected. That is why the ACLU accepts, as a first principle, the truth — validated by experience — that the rights of each person are secure only if those of the weakest are assured. The ACLU stands on this ground; if it fails to do so, it and liberty may perish.

“The ACLU has stood four-square against the recurring tides of hysteria that from time to time threaten freedoms everywhere. . . . Indeed, it is difficult to appreciate how far our freedoms might have eroded had it not been for the Union’s valiant representation in the courts of the constitutional rights of all people of all persuasions, no matter how unpopular or even despised by the majority they were at the time.”

Former Chief Justice Earl Warren

By Virginia Lindauer Simmon, president

It's hard for me to believe that this is already my third, and last, message to you as president of our organization. The last three years have gone by in

a flash. It's been fascinating to be involved with so many people dedicated to preserving our civil liberties. The experience has also helped to further shape and refine my own attitudes toward the diversity of opinion that can be both frustrating and exhilarating at the same time.

Our board and staff do a stellar job of identifying and following issues as they arise, both in the legislature and in the lives of folks who come to us for help.

One particular issue this last year grabbed my attention, because it has the potential to affect every one of us. It's the matter of a plan to allow police to have access, without obtaining a warrant, to the information in the state's drug database.

A bit of history: In 2006, when our prescription drug monitoring database was created, it was created for health purposes, and the legislature promised that the records would remain private. There was wisdom in this, because allowing access to prescription drug records is tantamount to laying bare a person's health history, something that has always been considered personal and private.

The Fourth Amendment to the U.S. Constitution, which protects us from "unreasonable searches and seizures," requires that a warrant be issued before our privacy can be violated. So you can imagine our concern when H. 745, a House bill created to have health care providers search the prescription database before prescrib-

ing a controlled substance, was proposed to be amended by the Senate Judiciary Committee to allow police to search the database without obtaining a warrant.

Warrants in Vermont are not that difficult to obtain if there's evidence someone has committed a crime. They can be obtained 24/7. Through public records requests, the ACLU could not find a single time that Vermont police, with warrant in hand, were turned away from accessing the state drug database. Moreover, we couldn't find a time that police even *tried* to get a warrant to access the database.

So not a terribly urgent issue, then. Sounds like a no-brainer, right? Suspect a crime; get a warrant. The Fourth Amendment requires it.

That's not how it played out in our legislature. After heated discussion, the Senate passed the amended bill, with the governor's blessing; the House disagreed with the Senate's changes; and this brought the bill to a conference committee. In more heated discussions, the Senate dug in its heels and refused to pass any parts of the bill unless warrantless access was included. The House insisted on retaining the protection of Vermonters' medical information. The legislature adjourned without further action on H. 745.

Prescription drug database searches are only one kind of digital access. GPS searches, cell-phone tracking data searches, e-medical records searches, smart meter searches — all



of these can be used to reveal significant information about people's private lives. Our one line of defense against the desire of authorities to get at that information is the Fourth Amendment.

We have not seen the last of this. Watch for it again this coming session. Also, consider contributing time and resources to support the ACLU.

By Allen Gilbert, executive director

This has been a year of significant successes for the ACLU of Vermont, particularly on the legal front. A Northeast Kingdom inn can no longer

discriminate against same-sex couples. A Connecticut River town's police department must turn over records to a journalist investigating possible racial profiling by officers. And a sectarian prayer won't be the first order of business at a northern Vermont town's annual meeting.

These litigation victories stand in contrast to the advocacy work we've been doing around key issues. At times, the advocacy efforts have felt like driving on a dirt road in mud season. You try hard to keep moving straight ahead, but the soft ground pulls and throws you in haphazard directions.

Two areas in particular that we worked in this year felt like just such a ride. Both involve law enforcement. One is the public's access to police records. The other is the professional regulation of police.

Debate over the public's access to police records took place mainly in the courts. By year's end, though, it had been thrown to the legislature.

Debate over professional regulation of police started in the legislature but then moved to administrative meeting rooms. At the start of the new year, it'll be back before the legislature.

For both issues, we don't know if we'll get to where we think Vermont should be. For police records, we feel it's important that disclosure be based on the federal standard of "access absent harm." For professional regulation, we feel both police and the public would benefit greatly if officers

were licensed, like members of other professions are.

Police have more immediate power over individual citizens than any other agency of government. An officer has the authority to take away, instantly, a basic right such as a person's freedom of movement.

Against this powerful authority is citizens' right to scrutinize police actions closely. Our state constitution protects this right, in Article 5. Yet the right is sometimes difficult to exercise. Records are often off-limits. We understand there's sometimes a need to consider privacy interests before releasing certain records. That's why we endorse the "balancing test" of the federal "access absent harm" standard.

Professional regulation of police, by an independent agency, would allow public complaints about officer misconduct to be reviewed by an autonomous oversight body. That body would license officers (or at least have their certification scrutinized throughout their careers), imposing sanctions when appropriate.

We have supported the establishment of a special legislative committee to review the state's public records law's many exemptions to open access. We've followed the committee's work closely. But progress has been slow, frustrating us and other open government advocates.

Tasers have attracted increased attention as they've become a common part of many police departments' arsenals. In 2012, the tragedy we've



warned was inevitable occurred – a disturbed Thetford man recovering from a seizure died after a state police officer shot him with a Taser.

We joined with mental health groups and other civil rights advocates to call for a moratorium on Taser use until statewide standards were adopted and training made mandatory for all officers carrying the weapons. Our call was rebuffed by state officials.

Police end-runs of search warrants, unauthorized access to person's e-medical records, and the gradual development – intended or not – of what amounts to a statewide surveillance system tracking people's whereabouts were other issues confronting us in 2012. (I write about the latter topic in *Perspective* on Page 7.)

Our fight to protect individual liberties depends on you. An informed public is our main protection against the abuse of individual rights. The ACLU will continue to speak out in the media, hold public events, and distribute critical information through our newsletter, e-mail list, Web page, and social media. Your support of this organization makes a huge difference in how successful we can be.

A SUMMARY OF MAJOR LEGAL ACTIONS DURING 2012

All filings available at acluvt.org/docket

PERSONAL PRIVACY

In re Appeal of Application for Search Warrants: In June 2011, we argued a case in the Vermont Supreme Court about whether judges may limit the intrusiveness of computer searches when granting search warrants. The court ruled in December that (1) a trial court has the discretion to limit the invasiveness of a search warrant for digital devices, and (2) that with one exception, the warrant conditions identified by the concurrence in *United States v. Comprehensive Drug Testing, Inc.*, "serve legitimate privacy interests" in narrowing a broad search warrant request for digital information.

Attorneys: Jay Rorty & Jason Williamson (*ACLU Criminal Law Reform Project*); Catherine Crump (*ACLU Privacy & Free Speech Project*); Hanni Fakhoury (*Electronic Frontier Foundation*)
Staff attorney: Dan Barrett

Smart Meters: Electrical smart meters are small computers that replace the electric meter on the side of houses. The meters are very sensitive, and some are even able to tell which appliances are in use at any given time. As part of its approval process for smart metering, Vermont's Public Service Board is investigating what kind of privacy rules should be placed upon smart meter usage. We are urging the board to mandate that smart meter data not be released without either a warrant or the customer's permission.

Staff attorney: Dan Barrett

In re HS-122: Annually, the state calculates how much each qualifying homeowner is owed in the way of an income-based property tax reduction. Because the formula used to calculate the reduction is straightforward, it is easy to determine a household's income if one knows how much of a reduction the household is getting. Therefore, when the state supreme court considered whether a town must divulge those figures to the public, we submitted an amicus brief arguing that the tax code forbids revealing incomes to the public. The court agreed with us and appellant Town of Manchester, holding that government agencies must protect such data.

Staff attorney: Dan Barrett

OPEN RECORDS

Addison Rutland Supervisory Union v. Cyr: When Marcel Cyr was issued a no-trespass order by his children's school supervisory union, it wouldn't give him a reason for doing so. He submitted a public records request for information about why he was issued the order. Instead of answering his request, however, the supervisory union sued, asking for a declaration that it need not even respond to his request. We moved to have the suit dismissed, and the superior court agreed, affirming that government agencies may not sue records requesters.

Attorney: Ted Hobson (*Law Offices of Edwin Hobson, Burlington*)
Staff attorney: Dan Barrett

The state supreme court issued three decisions this year in open records

cases that we were involved in. In *Galloway v. Town of Hartford*, we represented a journalist who was refused records dealing with police entry into a home and violent apprehension of a man inside – who turned out to be the homeowner having a medical emergency. We appealed after the superior court sided with the town. The state supreme court agreed with us in August, ruling that the homeowner had been effectively arrested. Because Vermont's public records law states that data about the arrest of a person cannot be hidden by police, the ruling unveiled the records.

Staff attorney: Dan Barrett

In *Bain v. Clark*, the court reversed a trial court ruling that withheld police radio logs from a public records requester. The superior court had interpreted Vermont's open records exemption for police records to cover all records held by police, but the supreme court instructed that the exemption only covers those materials "contain[ing] the type of information that might endanger the state's position in criminal prosecutions or reveal the names of informants, or other information that might threaten to intimidate potential witnesses."

Staff attorney: Dan Barrett

The ruling in *Rutland Herald v. Vermont State Police* was not as good. There, the court addressed whether records falling into the police records exemption can be pulled out by a compelling need, such as the public's need to know about official malfeasance. The records at issue showed the

investigation of a state trooper who, after being accused of possessing child pornography, shot himself at the state police training academy. The newspaper argued that the allegations' seriousness countered the need to keep the records secret. The supreme court disagreed, describing the police records exemption as categorical.

Staff attorney: Dan Barrett

Prison Legal News v. Prison Health Services, Inc.: We represented Prison Legal News of West Brattleboro, the nation's leading periodical on prison conditions, prisoners' rights, and prison litigation, in its quest for records about settlements between injured prisoners and a private contractor that provided medical care in prisons. The litigation ended favorably with the defendant turning the records over to Prison Legal News and paying some of our legal fees.

Staff attorney: Dan Barrett

OPEN COURTS

In re Search Warrants: Generally, details of search warrants become available to the public once the warrant has been executed. This summer, prosecutors asked to hide the details of search warrants executed in the disappearance of an Essex couple. After the superior court denied the request, the prosecutors appealed, and we submitted an amicus brief against sealing. In November, the state supreme court sided 3-2 with the prosecution and held that warrant returns may be sealed on an allegation that normal docketing would make investigation of crime more difficult.

Staff attorney: Dan Barrett

FREEDOM OF EXPRESSION

Cyr v. Addison Rutland Supervisory Union: Rutland County resident Marcel Cyr began attending school board meetings last year to observe the proceedings and voice criticism of the board during the public comment portion of each meeting. In April, the school supervisory union barred Marcel from all school property without explanation, depriving him of his ability to attend board meetings and speak during them. Worse, it refused to give him a way to contest the ban. We have brought suit alleging that the ban violated Marcel's First and Fourteenth Amendment rights.

Attorney: Ted Hobson (*Law Offices of Edwin Hobson, Burlington*)

Staff attorney: Dan Barrett

EQUAL RIGHTS

Baker v. Wildflower Inn: When two women wanted to have their wedding reception at a resort in Lyndonville, the resort turned them away because its owners did not wish to host wedding receptions for gay customers — even though state public accommodations law has required equal treatment for gay people since 1992. After we filed suit, the parties reached a settlement in the summer under which the Wildflower Inn will pay a \$10,000 penalty to the state, and will pay \$20,000 to a fund established by the women, most of which will go to a non-profit that helps avert LGBT youth suicide. The Wildflower Inn also agreed to exit the wedding business and to treat all customers on an equal basis.

Attorneys: Joshua Block and Leslie Cooper (*ACLU Lesbian, Gay, Bisexual, Transgender & AIDS Project*)

Staff attorney: Dan Barrett

Cote v. Bardin: Since the 1970s, the bankruptcy code has forbidden a debtor from discharging a support obligation to a former spouse (what used to be called alimony). The Defense of Marriage Act ("DOMA"), however, defines the word "spouse" to refer "only to a person of the opposite sex who is a husband or a wife." Does that mean that a person who has divorced her same-sex spouse may rid herself of a spousal support obligation in bankruptcy? We filed suit on behalf of Jan Cote this summer, asking for a declaration that DOMA unconstitutionally discriminated against her by permitting her former spouse to discharge a support obligation, while opposite sex former spouses are forbidden from doing so. The case resolved when Jan's former spouse agreed not to argue that DOMA permitted her to discharge the ongoing support obligation.

Staff attorney: Dan Barrett

RELIGION AND BELIEF

Hackett v. Town of Franklin: Marilyn Hackett has lived in Franklin since the mid-'90s, and attends town meeting each year. For a decade, however, the town has included Christian prayer during town meeting. We filed suit against the town last year, arguing that the Vermont Constitution forbids forcing voters to sit through religious worship in order to participate in town meeting. This spring, the superior court granted judgment to us. We expect an appeal to the state supreme court soon.

Attorneys: Bernard Lambek

(*Zalinger, Cameron & Lambek, P.C., Montpelier*); Julie Kalish (*Norwich*)

Staff attorney: Dan Barrett

ACLU-VT and ACLUF-VT STATEMENT OF ACTIVITIES, FY 2012*

	ACLU	ACLU Foundation
Support and Revenues		
Memberships	\$ 46,045	
Revenue-sharing		\$ 204,156
Gifts:		
Annual campaign		61,060
Memorials/Honorariums		3,670
Foundation		2,292
Bequests		750
Donated Items and Services	210	19,914
Events		9,095
Fee Awards		5,248
Net National Shared Income		198,538
Interest and dividends	44	22,669
Unrealized gain (loss) on investments		22,888
Realized gain (loss) on investments		(6,820)
Miscellaneous	<u>1,277</u>	<u>(5)</u>
<i>Total support and revenues.</i>	<u>\$ 47,576</u>	<u>\$ 543,455</u>
 Expenses		
Program services		
Legal		\$ 103,412
Public education		37,995
Legislation	<u>\$ 18,619</u>	<u> </u>
<i>Total program services</i>	<u>\$ 18,619</u>	<u>\$ 141,407</u>
Supporting services		
Fundraising	2,128	48,051
Management and general	<u>15,915</u>	<u>160,509</u>
<i>Total supporting services.</i>	<u>\$ 18,043</u>	<u>\$ 208,560</u>
<i>Total expenses</i>	<u>\$ 36,662</u>	<u>\$ 349,967</u>
NET CHANGE IN NET ASSETS	10,914	193,488
NET ASSETS – BEGINNING	<u>74,840</u>	<u>1,485,019</u>
NET ASSETS – ENDING	<u>\$ 85,754</u>	<u>\$ 1,678,507</u>

*These statements of activities cover the fiscal year beginning April 1, 2011 and ending on March 31, 2012, and were prepared by ACLU staff based on an annual audit report by outside independent auditors.

YES, YOU'RE BEING WATCHED

By Allen Gilbert, executive director

I want to brief you about a special project we undertook this year.

It's still a work in progress, but we hope to have a report out soon. Our working title for the report is "Surveillance Along the Northern Border." It encompasses a range of issues that we've been dealing with for several years, as well as some entirely new ones.

We started with this proposition: We used to be a state where both the notion and the reality of privacy were true.

Today, that no longer seems accurate. While we still think we value privacy, there seems to be less and less of it.

As we've dug deeper into the topic, we've found that over the last 10 years, Vermont has been transformed into a state where we are being watched. We can hardly go anywhere without being tracked or without creating a trail of digital information that pinpoints our whereabouts at nearly any time, day after day.

Some of the changes have been dramatic – we were made aware they would be, or already were, happening. Other changes were nearly imperceptible – they happened, we maybe knew about them, but we didn't think much about them.

Some changes we willingly invited through our own actions. For example, we want the convenience of cell phones. But in return for that convenience, we've agreed to a system that always knows where we are. That means police can get location

information from our cell providers and use it to map our movements.

Some changes were the direct result of the events of Sept. 11, 2001. For example, the U.S. Border Patrol has intermittently run checkpoints along I-91 in Hartford, a location nearly 100 miles from the Canadian border. The ostensible purpose of the stops is to deter terrorists from slipping across the border into the U.S.

It turns out that these "temporary" stops might actually be a prelude to routinized highway surveillance.

The Department of Homeland Security has developed plans to erect permanent checkpoints along every major north-south Interstate highway in New England and New York: I-95, I-91, I-89, and I-87. Plans for these checkpoints are currently on hold, but possible sites for the facilities have been identified.

Other changes are the result of numerous federal grants from the federal Department of Homeland Security to local police departments. Automated License Plate Readers (ALPRs) have been purchased by nearly two dozen Vermont departments, for example. The readers "capture" images of license plates from cars whizzing by, or parked on streets and in lots. Added to the images are geo-location data and a date-and-time stamp.

The readers can capture thousands of images an hour, upload the information to a database, and check the plates against "hot lists." All the Vermont data is aggregated, and

retained for up to four years. Punch in your license plate number, and law enforcement gets a pretty good picture of where you've been.

Finally, other changes are just starting to appear – the use of facial recognition software, so images of individual Vermonters can be found digitally and verified; the appearance of drones overhead, flying at altitudes where we may not hear or see them but where their high-powered cameras can zoom in on people and places on the ground.

On top of these different systems sits something called a "fusion center." There's one in every state, and Vermont's is located in Williston. Exactly what information about whom is collected is unknown. There is little oversight of the centers, so we don't know much about how they operate.

We seem to have become caught in webs of surveillance whose stated purpose may not necessarily be to watch us, but whose impact nonetheless has been the development of government's ability to track nearly everyone's movements.

The arrival of some of these surveillance tools is partly because of Vermont's position along an international border. But, as suggested earlier, we've also allowed numerous projects to get underway with tacit acceptance from state legislators, approval by local select boards for specific "public safety" expenditures, and, largely, unquestioning acceptance by citizens.

The conclusion of our draft report is this: Vermont, with little public discussion or acknowledgement, has become a surveillance society. Our report will outline the tools and practices that have enabled this to happen. Look for its publication soon.

DAVID W. CURTIS CIVIL LIBERTIES AWARD



Geoff Brumbaugh

The American Civil Liberties Union of Vermont presented its 29th Annual David W. Curtis Civil Liberties Award to Laura Ziegler for protecting the rights of psychiatric survivors and people with disabilities and for her steadfast commitment to government accountability.

Laura Ziegler has been a tireless, self-appointed advocate for citizens who are frequently marginalized and unheard in our society. For them, she simply seeks a measure of justice. In her advocacy work, Laura often clashes with public officials. She files many public records requests to learn the details of government actions. She attends public meetings to understand and follow difficult issues, often reminding participants of past actions they did or did not take. She complains when she feels the open meeting law is being violated. But she also expresses appreciation for a good law passed or a bad one defeated. A society could ask for no better public citizen, and we are proud to honor Laura with our David W. Curtis Civil Liberties Award.

Laura Ziegler is presented with the Curtis Award by Executive Director Allen Gilbert.

JONATHON B. CHASE COOPERATING ATTORNEY AWARD

The American Civil Liberties Union of Vermont presented its 24th annual Jonathon B. Chase Cooperating Attorney Award to Julie Kalish and to Bernie Lambek in recognition of their work defending religious freedom.

Julie Kalish and Bernie Lambek took up the cause of a Franklin resident, Marilyn Hackett, who for years had complained that the saying of a sectarian prayer to open her town's annual meeting was unconstitutional. Julie and Bernie fashioned their argument on the Vermont Constitution's Article 3, which ensures freedom of conscience while prohibiting state endorsement of any religion through compelled attendance at worship. The argument prevailed in Vermont Superior Court. Such cases demand a steady focus on tolerance and acceptance. Criticism is inevitable, the opprobrious comments stinging. We are grateful for attorneys such as Julie and Bernie who are willing to stand up for people such as Marilyn.

Geoff Brumbaugh



Julie Kalish and Bernie Lambek accept the Chase Cooperating Attorney Award.

DEVELOPMENT AWARD

The American Civil Liberties Union of Vermont presented its 23rd annual Development Award to Eileen Blackwood and Lynn Goyette in recognition of their dedicated and energetic work in helping to ensure that the American Civil Liberties Union of Vermont has the financial resources needed to accomplish its work.

Eileen Blackwood and Lynn Goyette, long-time fans of auctioneer Richard O. Hathaway, recognized that his death in 2005 left a gaping void for the ACLU of Vermont and other Vermont nonprofits. They decided to carry on his fundraising legacy, attending auctioneering school and becoming licensed auctioneers. Since 2006 they have presided over the ACLU's annual auction, raising nearly \$36,000 to date. Lynn and Eileen bring us a tightly choreographed spectacle that requires knowledge, personableness, and persuasion. They represent items in an attractive yet truthful light, yielding maximum return for civil liberties along with satisfaction for the buyer. Our organization is the richer, in energy and dollars, because of Eileen and Lynn.



Geoff Brumbaugh

Lynn Goyette (left) and Eileen Blackwood put their auctioneering skills to work at the annual meeting auction.

TIMMY BOURNE AWARD FOR EXCEPTIONAL VOLUNTEER SERVICE

Geoff Brumbaugh



Robyn Cook-Hubner

The American Civil Liberties Union of Vermont presented its 25th annual Timmy Bourne Award for exceptional volunteer service to Robyn Cook-Hubner in recognition of her contribution of time and energy to the American Civil Liberties Union of Vermont.

Organizations dedicated to worthy causes run on the fuel of passion, principle, and committed volunteers. Robyn was an ACLU-Vermont staff member from 1988 to 1992. During her tenure she helped revive the tradition of an annual ACLU of Vermont auction. She has continued her support of the auction by soliciting donations and by serving as an experienced and always-cheerful auction runner. Robyn also served a number of years on the ACLU's Legal Advisory Panel, contributing her knowledge as a paralegal as well as her past office experience when helping to evaluate potential cases. We are grateful for her long-time interest in, and commitment to, civil liberties and the work of the ACLU.

HOW YOU CAN SUPPORT THE ACLU



I want to support the vital work of Vermont's American Civil Liberties Union Foundation.

Enclosed is my contribution of: \$500 \$100 \$25 Other: \$ _____

Contributions will be recognized in the next annual report, but only with your permission.

Please list my/our name(s) as follows: _____

I prefer not to be listed.

Name(s): _____

Mailing address: _____

E-mail: _____ Phone: _____

Please make checks payable to: ACLU Foundation of Vermont. Gifts are tax-deductible to the fullest extent permitted by law.

Clip and return to: American Civil Liberties Union Foundation of Vermont, 137 Elm Street, Montpelier, Vermont 05602.

Your support is deeply appreciated.

With A Single Sentence, You Can Defend Freedom Now and Forever

Right now, by adding the ACLU to your will, you can leave a legacy of liberty for generations to come and defend our freedom today.

Name the ACLU in your estate plans and the LuEsther T. Mertz Charitable Trust will make an immediate matching cash contribution of up to \$10,000 to the ACLU (while matching funds are available).

For simple bequest language to include in your will and for information on other gifts that qualify for the Legacy Challenge, visit www.aclu.org/legacy. Or, you can call toll-free 877-867-1025.

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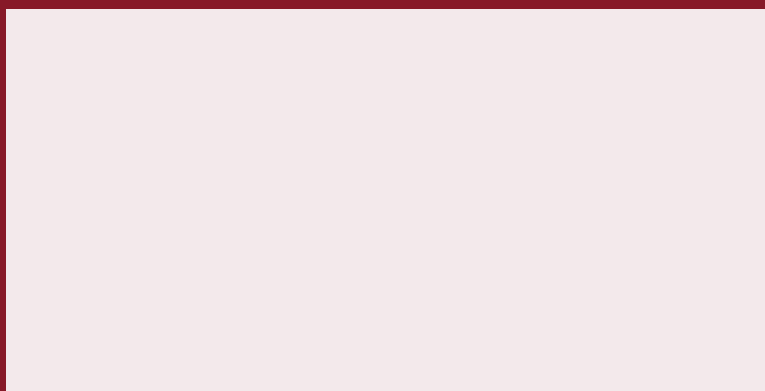


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2012 Annual Report

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