AMERICAN CIVIL LIBERTIES UNION FOUNDATION
San Diego and Imperial Counties

LEGAL REPORT
November 1, 2018

STATISTICS

	Open Cases	*Closed During 2018*
Direct	27	4
Amicus	12	6
Total	39	10

CASE UPDATES
(New developments in bold)

ADVANCING EQUITY

Education Equity

Sigma Beta Xi, Inc. v County of Riverside (direct) – Riverside County has been operating a "Youth Accountability Team" (YAT) Program in public schools, treating students who have not been convicted of any crimes like criminals. As an arm of local law enforcement, YAT disproportionately targets students of color for normal, childish behaviors such as truancies, poor grades, disrupting classroom time and other discipline problems, and places them on overly punitive probation supervision contracts without procedural safeguards. Students and parents are not provided with specific information about the offense they are accused of committing, the terms of YAT probation, or advisement of their legal rights. Though YAT began as part of the Juvenile Justice Crime Prevention Act (JJCPA), aimed at curbing crime and delinquency in at-risk youth, it instead has funneled thousands of children into the school-to-prison pipeline for non-criminal offenses. This case was filed July 1, 2018 with the ACLU Foundation, ACLU Foundation of Southern California, ACLU Foundation of Northern California, National Center for Youth Law, and Sheppard Mullin LLP, on behalf of three students and the non-profit mentoring organization Sigma Beta Xi for violations of the First, Fourth, and Fourteenth Amendments and the California Constitution. **After Defendants filed their answer on September 5, the parties stipulated to certify a class of students impacted by YAT. The case is now in discovery. A scheduling conference is scheduled for November 19, 2018. As a result of the lawsuit, the Coachella Valley Unified School District Board voted to end its YAT program and terminate its relationship with the County probation department.** (Melissa Deleon)

Economic Inequity

Villafana v. County of San Diego (direct) – San Diego County's "Project 100%" or "P100" program is likely the only welfare policy in the country requiring virtually every applicant for cash aid benefits (CalWORKs locally, TANF nationally) to submit to an unannounced home search and interrogation by law enforcement investigators when their applications raise no basis for suspecting fraud. P100 harms families not only because of the privacy violations resulting from the home searches, but also because applicants do not know when the searches will occur, and therefore go days or weeks thinking that they must remain home at all times, lest they be denied crucial benefits. Applicants experience anxiety and stress and have reported feeling as though they are under house arrest. On June 26, 2018, we filed suit with Fish & Richardson P.C. in San Diego Superior Court challenging P100 under a California law prohibiting state-funded programs from discriminating on the basis of race, gender, and other protected categories. On August 27, the County filed a demurrer seeking to dismiss the case. Our opposing brief is due on November 2, and a hearing is scheduled for November 16. (Melissa Deleon, Jonathan Markovitz)

People v. Dueñas (amicus) – California has adopted a myriad of criminal fines, fees, and assessments that are among the highest in the country. As the Chief Justice of the California Supreme Court recently observed, this regime has created "an inequity when we have taken a fines, fees, and assessment accountability system and turned it into a revenue-generating system for government services." Velia Dueñas is an indigent, homeless, and disabled mother of two who was ordered to pay fees and a fine that the trial court believed were mandated by California law regardless of ability to pay. The ACLU Foundations in California joined an amicus brief filed January 23, 2018 arguing it is unconstitutional to impose such fees and fines without regard to ability to pay. (David Loy)

LGBT Rights

Wood v. Crunch Fitness (direct) **–** Christynne Wood is a transgender woman who has been a member of Crunch Fitness in El Cajon for approximately 11 years. In 2016, she began her gender transition to female and notified Crunch management and employees of her transition. Thereafter, she was threatened and harassed while using the men's locker room. She reported the incidents to Crunch management and provided medical records verifying her gender identity, along with documentation of her legal gender and name change, but Crunch refused to allow her to use the women's locker room. Ms. Wood filed a complaint with the California Department of Fair Employment and Housing (DFEH), which enforces state law against discrimination in business establishments. After DFEH filed suit against Crunch, we intervened in the DFEH case on behalf of Ms. Wood individually, with co-counsel ACLU Foundation of Southern California and Nixon Peabody LLP. On August 3, 2018, the court overruled Crunch's demurrer seeking to dismiss DFEH's complaint. **After we opposed Crunch's demurrer to the intervening complaint, Crunch withdrew its demurrer. During last month's case management conference, the court assigned a trial date in July 2019. The case is now in discovery.** (Melissa Deleon)

A.G. v. County of Los Angeles (amicus) (closed) – This is a wrongful death case brought by a minor for the killing of his father, who had treated A.G. as his son under California law although he was not a biological or adoptive parent. The trial court held wrongful death claims can be brought only by children for their biological or adoptive parents. With the National Center for Lesbian Rights, Los Angeles LGBT Center, and others, the ACLU Foundations in California joined an amicus brief filed February 5, 2018 arguing that the trial court's ruling violated the Constitution and California law, especially in light of the significant number of LGBT parents who are not biological or adoptive parents. **After argument on September 7, the court issued a decision on October 1 agreeing with our position. The case is now closed.** (David Loy)

Minton v. Dignity Health (direct) – Evan Minton is a transgender man who was scheduled to receive a hysterectomy in August 2016 at Mercy San Juan Medical Center, a hospital in the Dignity Health chain. Two days prior to the appointment, when a nurse called to discuss the surgery, Minton mentioned that he is transgender. The next day, the hospital canceled the procedure. With co-counsel Covington & Burling LLP, the ACLU Foundations in California and the national ACLU Foundation filed suit against Dignity Health for unlawfully denying care to a transgender patient. On August 30, 2017, the court dismissed the complaint on the ground that Mr. Minton was able to obtain the surgery at another hospital, but the court granted us leave to amend. Our amended complaint was filed September 9. The court dismissed the case without leave to amend on November 17. We have appealed that decision. **The opening brief to the Court of Appeal is currently due November 5, 2018.** (David Loy)

ADVANCING IMMIGRANTS' RIGHTS

City and County of San Francisco v. Sessions (amicus) – Like many political subdivisions in California, the City and County of San Francisco receives federal funding for law enforcement efforts through the Edward Byrne Memorial Justice Assistance Grant (Byrne JAG) Program administered by DOJ. On August 11, 2017, the City and County of San Francisco filed a lawsuit challenging the Justice Department's imposition of new immigration-related requirements on Byrne JAG grant recipients. Plaintiffs argue that the requirements violate the U.S. Constitution's separation of powers and Spending Clause, as well as the Fourth Amendment by requiring jurisdictions to hold inmates longer than otherwise allowed. On March 5, 2018, the court denied the government's motion to dismiss. On August 22, the ACLU Foundation's Immigrants' Rights Project and the ACLU Foundations in California filed an amicus brief during summary judgment proceedings, arguing against the Justice Department's claim of authority to condition Byrne JAG funding on compliance with laws only tenuously related to the program. (Bardis Vakili)

Board of Immigration Appeals Amicus Invitation 18-06-27 (amicus) – When a state court grants post-conviction rehabilitative relief, such as withdrawal of a plea, expungement, or dismissal of charges because the defendant completed probation or other requirements, the conviction is not necessarily eliminated for immigration purposes and can still form the basis for deportation. In 2015, California adopted AB 1352, a bill co-sponsored by the ACLU, which acknowledged that the State's Deferred Entry of Judgment (DEJ) statute misinformed defendants that if they pled guilty and completed the DEJ program, there would be no adverse consequences to their plea, when in fact immigration consequences would still attach. AB 1352 created new Penal Code section 1203.43 to allow defendants who completed the DEJ program to withdraw their guilty

pleas altogether because they were obtained based on inaccurate and legally insufficient information. On June 27, 2018 the Board of Immigration Appeals solicited amicus briefs to address various questions regarding section 1203.43 and its impact in immigration proceedings, including whether it is preempted by federal law. In response, on July 25, the ACLU Foundation's Immigrants' Rights Project and ACLU Foundations in California filed a brief arguing the Board lacks authority to decide whether federal law preempts section 1203.43 and in any event federal law does not preempt the statute. (Bardis Vakili)

Matter of T-U- (direct) – In October 2017, Mr. U, his adult stepson and stepson's wife, and his 13-year-old son came to the United States to seek asylum after the political activities of his stepson led to threats and persecution. Rather than let them present their related cases together, DHS put them into separate proceedings, detaining Mr. U in Otay Mesa, detaining his stepson and wife over 150 miles away in Adelanto, and sending his child to a facility in Chicago as part of DHS's family separation policy. He has since been released from detention and reunified with his son. We are representing Mr. U in an appeal of his asylum denial, based on due process violations that are occurring with increasing frequency in removal proceedings. First, the immigration judge violated Mr. U's right to counsel by denying a continuance of his asylum hearing so that the *pro bono* attorney he had found, who had a conflict that day, could appear on his behalf. Second, having forced Mr. U to represent himself, the immigration judge violated Mr. U's right to present evidence on his behalf by failing to assist him in procuring the corroborating testimony of his adult stepson. With no lawyer and no corroborating witness, the judge found Mr. U not credible and denied his claim. Meanwhile, in a separate detention center in front of a separate immigration judge, Mr. U's stepson was found credible and granted asylum. On July 10, 2018, together with Catholic Charities, we filed an appeal to the Board of Immigration Appeals based on the due process violations in his case. **The appeal was denied on October 5. We will file a petition for review in the Ninth Circuit on November 2.** (Bardis Vakili)

United States v. California (amicus) – When state and local law enforcement become entangled with federal immigration enforcement, communities become less safe because immigrants are less likely to report crime. Accordingly, our state adopted the California Values Act in 2017, limiting the ways in which state and local police participate in the enforcement of federal immigration laws. In March 2018, the United States sued California over the Values Act and two other laws designed to protect the rights of immigrants, moving for a preliminary injunction to prevent their enforcement. On May 4, the ACLU Foundations in California and the ACLU Foundation Immigrants' Rights Project, together with National Day Labor Organizing Network and Asians Americans Advancing Justice – Asian Law Caucus, moved to intervene in the case on behalf of the California Partnership to End Domestic Violence and the Coalition for Humane Immigrant Rights to ensure that the rights of crime victims are adequately represented in the lawsuit. On June 5, the court denied our motion to intervene but invited us to submit an amicus brief in the case, which we did on June 12. Soon afterward, on July 9, the court granted the state's motion to dismiss in significant part, including dismissal of the challenge to the Values Act. On August 7, the United States filed a notice of appeal. (Bardis Vakili)

Aleman Gonzalez v. Sessions (direct) – On March 27, 2018, the ACLU Foundations in California, together with Van Der Hout, Brigagliano & Nightingale, LLP, Centro Legal de la Raza, and the Law Offices of Matthew H. Green, filed suit in the Northern District of California

against the Trump administration to challenge prolonged detention without bond hearings for individuals who have been found to have a reasonable fear of persecution or torture if deported. We moved for a preliminary injunction and class certification on April 12, 2018. On June 5, the court granted both motions, holding that all class members are entitled to bond hearings. The government appealed that order on August 3. (Bardis Vakili)

Regents of the University of California v. Department of Homeland Security (amicus) – The University of California and others sued the Trump administration challenging revocation of Deferred Action for Childhood Arrivals (DACA). The district court issued a nationwide injunction concerning DACA renewals, and the government appealed. The ACLU Foundations in California joined the ACLU Foundation Immigrants' Rights Project in an amicus brief supporting the plaintiffs on March 20, 2018, arguing that the district court correctly found it had jurisdiction and issued a nationwide injunction. (Bardis Vakili)

Ms. L. v. Immigration and Customs Enforcement (direct) -- Fearing death in the Congo, Ms. L. escaped with her daughter, eventually arriving at the San Ysidro port of entry in November 2017. She was given a screening interview with an asylum officer, who determined her fear of persecution was credible and she had a significant possibility of receiving asylum. Despite that determination, she was locked away in the Otay Mesa Detention Center, while her daughter was sent to a facility in Chicago. When the officers separated them, Ms. L. could hear her daughter screaming that she wanted to stay with her mother. The girl sat traumatized and alone for months. On February 26, 2018, with the ACLU Foundation Immigrants' Rights Project, we filed suit to end the forced separation of mother and daughter. On March 6, the government released Ms. L. from custody, and she has been reunified with her daughter. On March 9, we filed an amended complaint with an additional plaintiff, seeking to pursue a class action on behalf of parents to prevent future separation of families seeking asylum. The court denied the government's motion to dismiss on June 6. The court then granted our motions for class certification and preliminary injunction on June 26, requiring reunification of all class members and their children. To date, more than 2000 children have been reunited with parents. The parties continue intensive efforts to reunite or provide other appropriate relief to the roughly 500 class members, most of whom have been deported, who remain separated from their children. The parties file weekly status reports and hold weekly status conferences to apprise the court of their progress. (Bardis Vakili)

City and County of San Francisco v. Trump (amicus) – On January 25, 2017, the president issued Executive Order 13768, which threatened to withdraw federal funding from local governments that did not participate in immigration enforcement. After San Francisco and Santa Clara County challenged the order, the district court granted summary judgment to the plaintiffs and issued a nationwide injunction against enforcement of the executive order, holding that it violates the separation of powers, constitutional principles of federalism, and due process. The administration appealed, and on February 12, 2018, the ACLU Foundations in California joined the ACLU Foundation's Immigrants' Rights Project and other organizations in an amicus brief documenting the harms resulting from conscription of local governments into immigration enforcement. By decision issued August 1, 2018, the Court of Appeals affirmed the finding that the executive order is unconstitutional but held the record did not support a nationwide injunction. The Court

of Appeals remanded for reconsideration whether the injunction should apply nationwide or only to the named plaintiffs. (Bardis Vakili)

Thuraissigiam v. Department of Homeland Security (direct**)** – Vijayakumar Thuraissigiam fled Sri Lanka after being abducted, beaten, and tortured for his political activities. He is a Tamil, an ethnic minority group that is persecuted in Sri Lanka, and was active in supporting a Tamil political party and candidate. In the aftermath of the civil war in Sri Lanka, Tamils have been subjected to a consistent and extreme pattern of abduction and torture. Tamils removed to Sri Lanka after seeking asylum abroad are routinely assumed to be traitors, arrested, and tortured. After fleeing Sri Lanka in 2016, Mr. Thuraissigiam eventually reached the United States, where he was taken into immigration custody in 2017. The government issued an expedited removal order against him after improperly determining that he did not have a credible fear of persecution and torture if returned to Sri Lanka. With the ACLU Foundation Immigrants' Rights Project, we filed a habeas petition on January 19, 2018 seeking to prevent his removal. On March 8, the district court dismissed the case for lack of jurisdiction. We appealed to the Ninth Circuit, which stayed removal and issued an expedited briefing schedule. The case has been fully briefed, with amicus briefs supporting our position from refugee and human rights organizations and scholars of immigration law and habeas corpus. The Court of Appeals heard argument May 17, and we are awaiting a decision. (David Loy)

Gomez-Sanchez v. Sessions (direct) – Guillermo Gomez-Sanchez is a Mexican national with a severe mental disability. He has lived in the United States as a lawful resident since 1990. After he was convicted of assault in 2004, the Department of Homeland Security initiated removal proceedings against him. During those proceedings, we represented him in a challenge to his prolonged detention, which resulted in his release. He returned to live with his family in San Bernardino, and removal proceedings continued. Mr. Gomez-Sanchez argued that he would suffer persecution or torture based on his mental disability if he was deported. The immigration judge denied withholding of removal because he had been convicted of a "particularly serious crime," refusing to consider that Mr. Gomez-Sanchez suffers from a serious mental disorder that contributed to his action. The judge granted deferral of removal under the Convention Against Torture, a weaker shield against removal than withholding. Represented by the ACLU Foundation of Southern California, Mr. Gomez-Sanchez appealed to the Board of Immigration Appeals. The Board ruled against him, holding that "mental health is not a factor to be considered in a particularly serious crime analysis." The Board published its decision, making it binding on all immigration courts and impacting numerous individuals with mental health issues. The ACLU Foundation of Southern California petitioned for review to the Ninth Circuit, arguing that the Board improperly created a categorical rule for "particularly serious crime analysis," which requires individualized determinations of dangerousness, and that its rule unlawfully discriminates against people with disabilities under the Rehabilitation Act. The staff attorney originally slated to argue the case is no longer with the ACLU Foundation of Southern California. Our senior staff attorney, Bardis Vakili, argued the case on September 13, 2017, due to his familiarity with the case from previous representation of Mr. Gomez-Sanchez. In a published opinion on April 6, 2018, the court ruled in our favor, holding that mental health is a relevant factor that immigration courts must consider in deciding what is a "particularly serious crime." We continue to represent Mr. Gomez-Sanchez to complete his removal proceedings and have moved the Board to remand the case to the immigration court. (Bardis Vakili)

ACLU of San Diego & Imperial Counties v. Department of Homeland Security (direct) (Muslim Ban FOIAs) – In a series of coordinated requests under the Freedom of Information Act (FOIA), multiple ACLU affiliates sought information from Department of Homeland Security (DHS) about the conduct of U.S. Customs and Border Protection (CBP) local field offices in implementing executive orders banning individuals from several Muslim-majority countries from traveling to the United States. The FOIA requests seek documents regarding CBP's chaotic and cruel enforcement to investigate troubling reports that local CBP officers ignored federal court decrees suspending the executive orders. After DHS ignored the FOIA requests, we filed suit on April 12, 2017 with Davis Wright Tremaine LLP, at the same time as 12 similar lawsuits elsewhere. After a scheduling conference on November 6, 2017, the court here rejected CBP's claims that it lacked the resources to timely respond to our request and ordered the agency to process 1,000 pages of responsive records each month. The agency completed its production earlier this year. **Accordingly, on October 18, 2018 the court granted a joint motion to dismiss the case with prejudice and extend time to file a motion for attorneys' fees and costs if negotiations on that issue are unsuccessful.** (Mitra Ebadolahi)

Cancino Castellar v. Nielsen (direct) – On any given day, federal immigration agencies incarcerate tens of thousands of longtime U.S. residents, victims of persecution, and other individuals, often in remote detention centers. In San Diego and Imperial Counties, the two main detention centers warehouse about 1,500 people. Those individuals often languish for months before they appear before a judge and learn why they are incarcerated, how they can defend themselves, and whether they can seek release. With the new administration promising to expand detention and deport millions more people, delays in immigration courts are likely to increase. To challenge these systemic delays, we filed suit on March 9, 2017 with Fish & Richardson P.C. and Law Offices of Leonard B. Simon P.C. seeking to represent a class of persons who have been confined for weeks or months without seeing a judge. On February 8, 2018, the court dismissed the complaint for lack of jurisdiction under a particular immigration statute. Based on the Supreme Court's decision in *Jennings v. Rodriguez*, which was issued February 27 and found the same statute did not bar jurisdiction over similar claims, we filed a motion to reconsider on March 8. By order issued September 5, the court held it has jurisdiction over our due process claims against prolonged detention without presentment to a judge. **On October 15, the government moved to dismiss our claims on the merits. Our brief opposing that motion is due November 26.** (Bardis Vakili, Jonathan Markovitz)

Al-Mowafak v. Trump (amended to *Roe v. Trump*) (direct) – On January 27, 2017, the president signed an executive order banning citizens of seven Muslim-majority countries from entering the country for 90 days, suspending refugee admissions from any country for 120 days, and indefinitely suspending admission of refugees from Syria. The order also prioritized refugee claims based on religious persecution from individuals of a minority religion in their home countries. Representing several individuals and an organization, the ACLU Foundations in California, joined by the ACLU Foundation Immigrants' Rights Project and Keker, Van Nest & Peters LLP, filed a class action challenging the executive order on February 2. The order was revoked and replaced on March 6, and one week later, we filed an amended complaint challenging the second order. After we filed motions for preliminary injunction and class certification, the case was placed on hold pending other similar litigation. On September 24, the

administration indefinitely banned immigrants and many categories of nonimmigrants from five Muslim-majority countries, and on October 24, it indefinitely suspended the admission of refugees from eleven countries, nine of which are majority Muslim, as well as relatives of refugees previously admitted to the United States. On December 8, we amended our complaint, which is now captioned *Roe v. Trump*, and moved for a preliminary injunction against the latest restrictions. On June 26, 2018, the Supreme Court upheld the latest iteration of the ban in *Trump v. Hawaii*. We are considering next steps. (Bardis Vakili)

ACLU v. Department of Homeland Security (direct) (roving patrols FOIA) – The incidence of civil rights violations associated with Border Patrol's interior enforcement operations, which include checkpoints and "roving patrol" stops, is a matter of pressing public concern. There is little publicly available information regarding the extent or impact of Border Patrol's roving patrol operations or its agents' respect for limitations on their authority. In Southern California, Border Patrol agents operate in a number of metropolitan and rural areas at considerable distance from the U.S.-Mexico border. In July 2014, our Border Litigation Project, along with the ACLU Foundation of Southern California and the Immigrants' Rights Clinic at UC Irvine School of Law, submitted a FOIA request to both DHS and CBP seeking records related to "roving patrol" operations in the San Diego and El Centro Sectors. When the agencies failed to respond as required, we filed suit in February 2015. After extended negotiations and document production, the parties cross moved for summary judgment. The court issued three orders on the motions. First, in February 2017, the court ordered additional briefs and argument and directed the government to submit certain documents for *in camera* review. Second, in November 2017, the court ordered the government to disclose CBP's "Enforcement Law Course" with limited redactions and submit Border Patrol Academy training materials for *in camera* review. Third, on April 19, 2018, the court ordered the government to produce the majority of the Border Patrol Academy training materials at issue. After the court entered final judgment, the government decided not to appeal, and the parties entered negotiations on fees and costs. **We have reached agreement in principle with the government over attorneys' fees and costs and expect to finalize the settlement soon.** (Mitra Ebadolahi, Sarah Thompson)

ACLU of Arizona & ACLU of San Diego & Imperial Counties v. Department of Homeland Security (direct) (CBP child abuse FOIA) – For years, advocates have documented persistent allegations of child abuse by DHS officials, in particular Border Patrol agents. In June 2014, at the height of a surge of unaccompanied children entering the United States, the ACLU filed a complaint with DHS documenting 116 allegations of child abuse. Although high-ranking officials initially conceded that there were problems, DHS later shut down all investigations. In December 2014, the ACLU Border Litigation Project sent a FOIA request to DHS for any records pertaining to allegations of child abuse or mistreatment. DHS failed to timely respond. With Cooley LLP and the ACLU Foundation of Arizona, we filed a federal lawsuit in Arizona to compel DHS to search for and turn over those documents. Despite obstruction and delay by DHS, we succeeded in compelling the agency to produce thousands of pages of documents. The parties cross moved for summary judgment on the adequacy of DHS's search for responsive documents as well as the validity of exemptions DHS asserted for withholding certain documents. On August 14, 2017, the district court granted summary judgment in part and denied it in part, ordering the government to undertake additional searches and supplement the record. The government produced additional documents as a result of the

order requiring supplemental searches and filed a motion for reconsideration concerning disclosure of certain agents' names, which the court denied on March 22, 2018. The government has appealed that portion of the court's decision. **Our Ninth Circuit answering brief is due December 17, 2018. Parallel to appellate proceedings, we are engaged in negotiations over attorneys' fees on the remaining issues that were not appealed.** (Mitra Ebadolahi, Sarah Thompson)

Rodriguez v. Swartz (direct) – In October 2012, Border Patrol agent Lonnie Swartz shot and killed J.A., a minor, while he was walking peacefully down a street, unarmed, in Nogales, Mexico, just across the border from the United States. On July 29, 2014, the ACLU Border Litigation Project and the ACLU Foundation Immigrants' Rights Project, along with Morrison & Foerster LLP, Parra Law Offices, and Roberto Montiel Law Offices, filed suit in federal court to challenge the shooting on behalf of J.A.'s mother, Araceli Rodriguez, both on her own behalf and as personal representative of J.A.'s estate. Swartz moved to dismiss on the ground that the Constitution does not apply to his actions. On July 9, 2015, the district court issued an order rejecting that contention. Swartz appealed to the Ninth Circuit, which heard oral argument October 21, 2016. By decision issued August 7, 2018, the court held the Fourth Amendment protected a Mexican citizen standing in Mexico against the use of unreasonable deadly force, and the complaint states a claim that the force used was excessive. The court found that on the facts alleged, the agent violated clearly established law and was not entitled to qualified immunity. Finally, the court rejected arguments that the agent could not be subject to a damages lawsuit for his actions. **Agent Swartz filed a petition for writ of certiorari with the Supreme Court, which we opposed. We await decision whether the Supreme Court will grant review.** (Mitra Ebadolahi)

Olivas v. Whitford (direct) – On June 12, 2014, we filed a complaint and petition for writ of habeas corpus challenging the Kafkaesque exile of Oscar Olivas, who has been barred from returning to the United States since 2011. As a result, Mr. Olivas remains in Mexico where he cannot work to support his family and his U.S. citizen daughter does not receive the special education she requires. The complaint states that federal officers coerced Mr. Olivas's mother into signing a false confession that he had been born in Mexico rather than Los Angeles, as the government previously accepted, and details his efforts to obtain a fair hearing proving his citizenship so that he can bring his family back to the United States. After a bench trial, the district court found we did not prove that Mr. Olivas is a United States citizen and eventually entered judgment against Mr. Olivas. We appealed on the ground that the court erred in not placing the burden on the government to disprove Mr. Olivas's citizenship by clear and convincing evidence, given his longtime reliance on previous administrative findings that he was a citizen. **After briefing was completed, the court heard argument on October 11, 2018. We are waiting for the court's decision.** (Bardis Vakili)

ADVANCING JUSTICE

Police Practices

Nehad v. Browder (amicus) – On April 30, 2015, San Diego police officer Neal Browder shot and killed Fridoon Nehad. Mr. Nehad was an immigrant from Afghanistan who had battled

mental illness and post-traumatic stress disorder after serving in the Afghan army. Officer Browder responded to call about a disturbance involving Mr. Nehad. Mistakenly informed Mr. Nehad had a knife, Officer Browder killed Mr. Nehad within seconds of arriving at the scene. Mr. Nehad's family sued the officer and City of San Diego. The district court granted summary judgment in favor of the defendants, and the family appealed. On June 27, 2018, the ACLU Foundations in California filed an amicus brief in the Ninth Circuit arguing that the district court's decision should be reversed because it gave undue weight the officer's claim of subjective fear in light of evidence showing the officer failed to issue any warning or consider any less deadly alternatives to protect Mr. Nehad and himself before opening fire. (David Loy)

Jane Roe v. San Diego Police Department (direct) – "CalGang" is a shared database, accessible by law enforcement agencies, which lists individuals allegedly designated as gang members or associates based on subjective criteria susceptible to abuse and racial profiling. As the California State Auditor found, the database suffers from inadequate oversight that has resulted in numerous errors and violations of privacy rights. In response, California adopted legislation supported by the ACLU to provide a process for judicial review of gang database listings. The legislation took effect January 1, 2018. On February 15, we filed one of the earliest cases under the new law, seeking our client's removal from the database. Because the client is a juvenile, the case is filed in the name of his mother, with both remaining anonymous in the interest of privacy and safety. The petition was denied on July 31. We filed a notice of appeal on August 28. Although we contended the matter is an unlimited civil case subject to review in the Court of Appeal, the trial court initially treated it as a limited civil case subject to review in the Appellate Division of the Superior Court. **After several rounds of briefing, the case has been reclassified as an unlimited civil case and sent to the Court of Appeal. Briefing deadlines have yet to be determined.** (Jonathan Markovitz, Bardis Vakili)

P.D. v. City of San Diego (direct) – In March 2016, San Diego police officers unlawfully stopped and frisked several African-American youths as they walked through Memorial Community Park. Without a warrant or parental consent, the officers took DNA samples after telling them they would not be released otherwise. On February 15, 2017, representing one of the juveniles and his mother, we sued the City of San Diego and the officers involved for conducting an unlawful search and seizure. The case challenges a policy that authorizes officers to obtain consent from juveniles to take DNA on the same terms as adults. **In light of the enactment of state legislation (AB 1584) introduced because of this case, which will prohibit police departments from taking DNA from juveniles without parental involvement or a warrant, the court continued all deadlines until November 15, 2018 to facilitate settlement negotiations.** (Jonathan Markovitz, Bardis Vakili)

Jones v. Hernandez (direct) – In August 2014, U.S. Border Patrol agents assaulted U.S. citizen and former Navy SEAL Alton Jones while he was visiting Border Field State Park with his wife and young child. Mr. Jones was taking a jog through the park when he was surrounded and tackled by Border Patrol agents, who arrested and held him overnight without charge, explanation, or access to a lawyer. We filed suit on August 8, 2016. The case presents three sets of claims: (1) violations of Mr. Jones's constitutional rights by individual agents (*Bivens* claims); (2) torts committed against Mr. Jones for which the United States is responsible under the Federal Tort Claims Act (FTCA); and (3) violations of the Freedom of Information Act (FOIA).

The government counterclaimed against Mr. Jones for allegedly assaulting an agent involved in the incident. Munger, Tolles & Olson LLP later joined us as cooperating counsel. In November 2017, the court dismissed our First Amendment claim for retaliation due to Mr. Jones's verbal challenge to the agents, holding federal law does not recognize such a damages claim in this context, but otherwise allowed the case to proceed. The parties have completed discovery. On July 30, 2018, the court denied our motion for summary judgment to dismiss the counterclaim as barred by the statute of limitations. We are waiting for the court to decide the defendants' motions for summary judgment on our *Bivens,* FTCA, and FOIA claims. (Mitra Ebadolahi, Sarah Thompson)

Rights of the Accused

People v. Johnson (amicus) – On August 21, 2018, the ACLU Foundations in California filed an amicus brief with the California Supreme Court in a death penalty case that raises the question whether the right to a jury afforded by the state and federal constitutions requires a jury in a capital case to decide unanimously and beyond reasonable doubt on the existence of any one aggravating factor (or factors) in support of death and that death is the appropriate sentence. Our brief explains that the common law understanding of the jury right encompassed both the unanimity requirement and the requirement that the government prove beyond a reasonable doubt every factual issue submitted to the jury. The brief also shows that previous California precedent does not bar that result, which we believe is compelled by recent U.S. Supreme Court precedent. (David Loy)

State of California v. Superior Court (amicus) **–** In a murder prosecution, San Diego District Attorney seeks to keep secret the software, source code, algorithms, and other materials related to STRmix, a controversial DNA analysis technology used to place the defendant at the scene. When these source codes and algorithms have been analyzed in the past, serious flaws and human errors have been found. The Superior Court ruled in favor of the defendant, holding that the prosecution had to turn over the materials, and the prosecution appealed. On July 2, 2018, together with the ACLU Foundation's Speech, Privacy, and Technology Project, we filed an amicus brief in support of the defense, arguing that keeping the materials secret would violate the defendant's confrontation and due process rights under the Sixth and Fourteenth Amendments, as well as the public's First Amendment right of access to the courts. **By decision issued October 17, the Court of Appeal reversed the trial court's order and held the company providing the DNA analysis technology is not part of the prosecution team and the company may be heard in the trial court to assert the trade secret privilege. The case has been remanded to the trial court for hearings on that issue. If the matter is appealed to the California Supreme Court, we will consider whether to file an amicus brief.** (Bardis Vakili)

In re Humphrey (amicus) – In January 2018, the Court of Appeal held that equal protection and due process prohibit the state from detaining persons before trial simply because they cannot afford bail. To justify pretrial detention, the court must find that detention is necessary to serve the state's interests in protecting the public and ensuring a person's appearance in court, and in evaluating the amount of bail, the court must consider an individual's ability to pay. In response to requests for the California Supreme Court to review or depublish the decision, the ACLU Foundations in California submitted an amicus letter opposing review or depublication on April

5, 2018. The court granted review on May 23, 2018. **We filed an amicus brief on October 9, 2018.** (David Loy)

Association for Los Angeles Deputy Sheriffs v. Superior Court (amicus) – This case concerns the relationship between the constitutional obligation of prosecutors to disclose exculpatory evidence to the defense and California laws, known as *Pitchess* statutes, limiting disclosure of officer personnel files. In 2016, the Los Angeles County Sheriff's Department proposed procedures designed to more efficiently notify prosecuting agencies about exculpatory material in officer personnel files. The procedures are similar to those already in place for several years at California Highway Patrol, San Francisco Police Department, and other law enforcement agencies across the state. However, on July 11, 2017, the Court of Appeal ruled that the procedures violated the *Pitchess* statutes. That ruling would effectively prevent law enforcement agencies from telling prosecutors about exculpatory evidence in officer personnel files, a result inconsistent with decades of precedent. To safeguard the due process right to a fair trial, the ACLU Foundations in California submitted a letter in support of a petition for review to the California Supreme Court, arguing that the statutes, properly construed, do not prohibit disclosure of exculpatory information to prosecutors. The court granted review on October 11. The ACLU Foundations in California filed an amicus brief on the merits May 4, 2018, arguing that the Court of Appeal's decision should be reversed. (David Loy)

Phillips v. State of California (direct) – Because public defenders do not receive the resources necessary to represent their clients, thousands of Fresno residents must navigate the criminal justice system without the minimum legal representation guaranteed by the Constitution. In Fresno County, public defender attorneys are forced to shoulder up to four times the recommended number of clients, leaving so little time that attorneys have little if any meaningful communications with clients. The failing public defense system violates the Constitution and perpetuates racial inequalities that plague the criminal justice system. The ACLU Foundations in California joined with the ACLU Foundation to file suit against the State of California, Governor Brown, and County of Fresno seeking an overhaul of the County's indigent defense system. On March 12, 2016, the court denied motions by the state and county to dismiss the case. The state filed a petition for writ of mandamus seeking review of the trial court's decision, which the Court of Appeal summarily denied. The case is now in discovery. (David Loy)

In re Ricardo P. (amicus) – The California Supreme Court granted review on the question whether juvenile courts can require minors on probation to submit to warrantless searches of their electronic devices in cases unrelated to the use of such devices to commit any crime. With the Electronic Frontier Foundation, the ACLU Foundations in California filed an amicus brief on October 27, 2016 arguing that the routine imposition of such conditions unreasonably violates rights to privacy and expression and undermines juvenile rehabilitation. The case is fully briefed and awaiting an argument date. (David Loy)

Drug Law Reform

Harris v. City of Fontana (direct) – In November 2016, California voters approved Proposition 64, which allows adults 21 and older to possess up to one ounce of marijuana and cultivate up to six marijuana plants inside their residences out of public view. While the new law allows cities

to regulate cultivation, they must do so reasonably and cannot prohibit it entirely. As did other cities, the City of Fontana adopted an ordinance that is so restrictive as to operate as a de facto ban on cultivation. With co-counsel O'Melveny & Myers LLP, the ACLU Foundations in California and the Drug Policy Alliance filed suit against Fontana on June 5, 2017, arguing that the ordinance is preempted by Proposition 64 and otherwise violates the California Constitution. The court will hear argument on our motion for a writ of mandate to invalidate the ordinance on September 14, 2018. (David Loy)

DEFENDING CIVIL LIBERTIES

Freedom of Expression and Information

Porter v. Gore (direct) – Susan Porter participated in regular weekly protests at the district office of Representative Darrell Issa in Vista. On October 17, 2017, deputy sheriffs arrived at the protest in response to neighborhood complaints. After the deputies arrived, Ms. Porter moved her car and beeped her horn in support of the protest. A deputy sheriff cited her for violating California Vehicle Code § 27001, which prohibits using a vehicle horn for any purpose except giving a warning or sounding a theft alarm. The citation was eventually dismissed when the deputy failed to appear in court. On June 11, 2018, with co-counsel Foley & Lardner LLP, we filed suit on behalf of Ms. Porter to challenge the statute, arguing that it violates the First Amendment by prohibiting nearly all use of a horn for expressive purposes. While certain restrictions might be justified in the name of promoting traffic safety and preventing excessive noise, the statute is overbroad because it is not limited to those concerns, and in fact it undermines those interests by allowing loud, repetitive theft alarms. It is also content-based because it allows the use of a horn for warning and theft alarm but not to express other messages. On August 13, the defendants moved to dismiss the case. **Our brief opposing that motion was filed October 19, and the motion is scheduled for hearing on November 2.** (David Loy)

The Koala v. Khosla (direct) – University of California campuses collect student activity fees for the purpose of funding a wide range of speech by student organizations. By delegation from the university, student governments allocate those funds to support events, meetings, speeches, or the publication of newspapers. *The Koala,* a student newspaper at UCSD known for outrageous satire, has received funding through that process, as have numerous other student organizations. After *The Koala* published a satire of safe spaces and trigger warnings containing numerous racial epithets and stereotypes, the UCSD administration condemned it, as it had a right to do. The student government then terminated funding for the publication of student newspapers but not other forms of student speech, including printed materials other than newspapers.
That decision violated the First Amendment because it singled out the press, unreasonably disqualified student newspapers from funding that remains available to other organizations, and derived from opposition to *The Koala*'s viewpoint. After a demand letter and negotiations were unsuccessful, we filed suit on May 31, 2016, with co-counsel Ryan Darby. The district court eventually dismissed the case in February 2017, and we appealed to the Ninth Circuit.
Two amicus briefs were filed in support of our position, one by the Foundation for Individual Rights in Education and Cato Institute, the other by Student Press Law Center, American Society of News Editors, Associated Press Media Editors, Association of Alternative Newsmedia, College Media Association, First Amendment Coalition, Reporters Committee for Freedom of

the Press, and Society of Professional Journalists. The case was argued on June 8, 2018, and we await a decision. (David Loy)

Jacobson v. Department of Homeland Security (direct) – As part of the federal government's ongoing militarization of the U.S.-Mexico border region, the Border Patrol runs an aggressive program of checkpoints throughout the Southwest. In the rural community of Arivaca, Arizona, community members launched a monitoring campaign to observe, photograph, and video record the actions of Border Patrol agents at a nearby checkpoint. The campaign arises from longstanding concerns about harassment and civil rights violations committed by Border Patrol agents at the checkpoint. Border Patrol responded by harassing and retaliating against the residents and forcing them to observe from such a large distance that they cannot effectively monitor checkpoint operations. As part of our Border Litigation Project, together with the ACLU Foundation of Arizona and the law firm of Covington & Burling LLP, we filed suit in Arizona federal court on November 20, 2014, to hold Border Patrol accountable for violating the First Amendment. The district court denied our motion for a preliminary injunction and granted the government's motion for summary judgment, after which we appealed to the Ninth Circuit. The Cato Institute, Center for Investigative Reporting, and National Press Photographers Association filed amicus briefs supporting our position. On February 13, 2018, the Court of Appeals reversed the district court and remanded for development of the factual record necessary to decide the First Amendment issues presented by the case. The case is now in discovery. (Mitra Ebadolahi, Sarah Thompson)

Gill v. U.S. Department of Justice (direct) – On July 10, 2014, the ACLU Foundations in California, along with Bingham McCutchen LLP and Asian Americans Advancing Justice – Asian Law Caucus, filed a complaint for declaratory and injunctive relief in federal court alleging that the federal government's "suspicious activity reporting" program targets constitutionally protected conduct and encourages racial and religious profiling. Plaintiffs are five United States citizens – two photographers, one white man who is a devout Muslim, and two men of Middle Eastern and South Asian descent. Each plaintiff engaged in innocuous and lawful activity, some of which was protected by the First Amendment, yet all were reported as having engaged in "suspicious activities." As a consequence, reports about them were entered into counterterrorism databases, and they were subjected to unwelcome and unwarranted law enforcement scrutiny and interrogation. After denying the government's motion to dismiss the case and ordering production of relevant documents, the court granted the government's motion for summary judgment, and we appealed. **After briefing was completed, the case was argued on October 18, 2018. We await the court's decision.** (Mitra Ebadolahi)

Askins v. Department of Homeland Security (direct) – This case is about protecting the First Amendment right to hold government accountable at the border. Ray Askins is an activist concerned about environmental issues. While standing on a public street in Calexico, he took photographs of the port of entry building to illustrate a presentation he planned to give on vehicle emissions at ports of entry. Christian Ramirez is a human rights activist who photographed male Customs and Border Protection (CBP) agents frisking female travelers as they were preparing to leave the United States at San Ysidro. In both cases, border enforcement agents detained, harassed, and threatened them, temporarily confiscated their cameras, and deleted their photographs. We filed an action claiming that CBP violated the Constitution by prohibiting all

photography at ports of entry. The court eventually held that CBP's policy does not violate the First Amendment but gave us permission to amend the complaint. After conducting further investigation, we filed an amended complaint on November 5, 2015, updating the facts to reflect new construction at Calexico and San Ysidro and refining our claims. After the district court dismissed the case, we appealed to the Ninth Circuit. The Cato Institute, Reporters Committee for Freedom of the Press, and seven media organizations including the San Diego Union-Tribune and Los Angeles Times filed amicus briefs supporting our position. The case was argued on February 16, 2018. By decision issued August 14, the Ninth Circuit reversed the district court's order, holding our complaint states a claim that CBP's policy violates the First Amendment. **The government did not appeal that decision. The case has been remanded to the district court for discovery and further proceedings.** (Mitra Ebadolahi, Sarah Thompson)

Reproductive Justice

ACLU et al. v. Wright (direct) (closed) – On October 6, 2017, the Trump Administration issued interim final rules that would allow nearly all employers to deny their employees insurance coverage for contraception based on religious or moral objections. On the same day, the ACLU Foundations in California and ACLU Foundation, with co-counsel Simpson, Thatcher & Bartlett LLP, filed suit to challenge the rules, arguing that they violate the Establishment Clause and equal protection by authorizing and promoting religiously motivated and other discrimination against women seeking reproductive health care. By agreement of the parties, on March 8, 2018 the court stayed this case pending resolution of an appeal in another case raising similar issues. **Because the other appeal covers similar issues, this case will be dismissed November 2 by agreement of the parties. The case is now closed.** (David Loy)

Chamorro v. Dignity Health (direct) – Rebecca Chamorro lives in Redding and was a patient at Dignity Health's Mercy Medical Center, the only hospital in Redding with a labor and delivery ward. She decided with her doctor that she would get a tubal ligation during her scheduled C-section in late January 2016. But the hospital refused her doctor's request to perform the procedure, citing religious directives written by the United States Conference of Catholic Bishops that classify sterilization procedures as "intrinsically evil." For Chamorro, there are no hospitals within a 70-mile radius that have birthing facilities and do not follow these directives. After Dignity Health refused to comply with a letter demanding that it authorize the tubal ligation, the ACLU Foundations in California, ACLU Foundation, and Covington & Burling filed suit on behalf of Ms. Chamorro and Physicians for Reproductive Health, arguing that it violates California law to withhold pregnancy-related care, including but not limited to tubal ligation, for other than medical reasons. The court denied an emergency motion to prevent Dignity Health from using the religious directives to interfere with Ms. Chamorro's care so that her doctor can perform the procedure during her scheduled delivery, but the case continued through the litigation process. An amended complaint was filed February 29, 2016, after which Dignity Health moved to dismiss. By order filed August 1, 2016, the court dismissed all but one of our claims, allowing us to proceed on the claim that Dignity Health is engaging in an unlawful business practice. The case is now in discovery. (David Loy)

MONITORING

Armstrong v. Board of Supervisors – In violation of constitutional, statutory, and administrative requirements, San Diego County jails were severely overcrowded. Even though a consent decree setting population caps for each facility was adopted in 1988, the County's only jail for women was still severely overcrowded in 1993, at which point we initiated contempt hearings. The Court of Appeal affirmed the contempt finding, which remained in effect until 1997. After realignment shifted many prisoners from the state to counties, we are watching the County to make sure it remains in compliance with the decree. (David Loy)

In the Matter of Overcrowding of Detainees at San Diego County Juvenile Hall – Immediately after court oversight of conditions at Juvenile Hall ended in 1996, the population at the facility increased to the point that there were eighty more children than beds. In mid-1998, we contacted the San Diego County Counsel's office to resolve the crisis without resorting to new litigation. The juvenile court then limited the number of detainees at Juvenile Hall, which has yet to exceed that limit. We continue to monitor compliance. (David Loy)