AMERICAN CIVIL LIBERTIES UNION FOUNDATION
San Diego and Imperial Counties

LEGAL REPORT
September 5, 2019

STATISTICS

	Open Cases	*Closed During 2019*
Direct	21	8
Amicus	7	8
Total	28	16

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 like criminals. As an arm of local law enforcement, YAT disproportionately targets students of color for 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. On behalf of three students and the non-profit mentoring organization Sigma Beta Xi, with co-counsel at ACLU Foundation, ACLU Foundation of Southern California, ACLU Foundation of Northern California, National Center for Youth Law, and Sheppard Mullin LLP, we filed suit on July 1, 2018 arguing the program violates 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. 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. **The parties have reached agreement on a comprehensive settlement, which the court has preliminarily approved. A hearing on final approval and plaintiffs' motion for attorney fees is scheduled for December 9, 2019**. (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 November 16, the court granted the county's request to dismiss the case but gave us permission to amend the complaint, which we did on December 7. The county again moved to dismiss the case. After briefing and argument, the court entered a final order dismissing the case. We filed a notice of appeal on June 11, 2019, and are waiting for a briefing schedule. (Melissa Deleon, Jonathan Markovitz)

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. The case is in discovery, with production of documents and multiple depositions. **Trial has been set for November 8, 2019. In an issue of first impression in California, the court held that attorney-client privilege attached to Ms. Wood's communications with DFEH lawyers during their prelawsuit investigation, before we represented her. The Court of Appeal summarily denied our petition for a writ of mandate to vacate that ruling, but the California Supreme Court directed Crunch to respond to our petition for review by September 4. Our reply is due September 10, and the Supreme Court will decide whether to grant review, and possibly to transfer the issue to the Court of Appeal, by October 21**. **In the trial court, defense counsel has both moved to compel depositions of DFEH lawyers about their communications with Ms. Wood and to disqualify DFEH lawyers from continuing with the case. Opposition to those motions is due September 9.** (Melissa Deleon)

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. The court dismissed our initial complaint on the ground that Mr. Minton was able to obtain the surgery at another hospital and later dismissed our amended complaint, which we appealed. Our opening brief was filed November 5, 2018. Dignity Health filed its brief in opposition February 14, 2019. After our reply brief was filed April 5, the court granted permission for the filing of several amicus briefs, including briefs supporting our position by the National Center for Lesbian Rights, joined by several other organizations, and California Medical Association. (David Loy)

ADVANCING IMMIGRANTS' RIGHTS

United States v. Hernandez-Becerra (amicus) – The Federal Defenders of San Diego appealed to the Ninth Circuit on behalf of Claudia Hernandez-Becerra, an 18-year-old person who was convicted of a misdemeanor for entering the United States without legal inspection. Since July 2018, people like Ms. Hernandez-Becerra have been subjected to Operation Streamline, in which they are given mass hearings and forced to decide quickly whether to take a plea bargain or go to trial. Most people in Operation Streamline come to court after being held in Border Patrol detention facilities known as "hieleras," or "iceboxes," in which they suffer sleep deprivation, extreme temperatures, food deprivation, and little or no medical care. In support of the appeal, we co-signed an amicus brief written by the New York School of Law Immigrants' Rights Clinic that was filed April 17, 2019. The brief argues that inhumane conditions of confinement severely impact the mental state of persons subjected to Operation Streamline and render their guilty pleas invalid without searching judicial inquiry far beyond the cursory proceedings in Operation Streamline.

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)

Usubakunov v. Barr (direct) – In October 2017, Mr. Usubakunov, 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. Usubakunov 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. Usubakunov 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. Usubakunov'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. Usubakunov to represent himself, the immigration judge violated Mr. Usubakunov'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. Usubakunov not credible and denied his claim. Meanwhile, in a separate detention center in front of a separate immigration judge, Mr. Usubakunov'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. On October 5, 2018 the BIA dismissed the appeal, and we filed a petition for review in the Ninth Circuit on November 2. **We filed our opening brief on July 22, 2019. One week later, the American Immigration Council and Women's Refugee Commission each submitted amicus briefs in support. The government's answer is due September 20, 2019.** (Bardis Vakili)

United States v. California (amicus) **(closed)** – 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 June 12, 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, filed an amicus brief. Soon afterward, the court granted in part the state's motion to dismiss the challenge to the Values Act and denied the United States' motion for a preliminary injunction, after which the United States appealed. We submitted an amicus brief to the Court of Appeals on November 13. On April 18, 2019, the Ninth Circuit affirmed the denial of the preliminary injunction in significant part, upholding the California Values Act in full. **The case is now closed.** (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, after

which the government appealed to the Ninth Circuit. **Briefing is complete, and oral argument is scheduled for November 13, 2019**. (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 had jurisdiction and issued a nationwide injunction. On November 8, 2018, the Ninth Circuit affirmed the district court's preliminary injunction. **The government sought review in the Supreme Court, which granted certiorari and consolidated all similar cases on June 28, 2019. The government filed its opening brief on August 19. The respondents' brief is due September 27. Oral argument is set for November 12.** (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 to seek asylum. After passing a credible fear interview, 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. We converted the case to a class action on behalf of parents to prevent future separation of families seeking asylum. The court denied the government's motion to dismiss, and on June 26, 2018 it granted our motions for class certification and preliminary injunction, requiring reunification of all class members and their children. To date, 2,814 children in this original class have been identified as separated from their parents, and nearly all of them have been reunited with parents or placed according to parents' wishes. On March 8, 2019, the court granted our motion to also require reunification of parents separated from their children on or after July 1, 2017, after we learned the government did not include these children in its original tally. On April 25, 2019, the court issued an order requiring the government to identify all members of the expanded class by October 25. The government has thus far identified 966 children of parents in this expanded class. On June 6, we filed a motion asking the court to order the government to facilitate the return of 21 deported parents from the original class to reunify with their children and seek asylum. **By order issued September 4, the court granted that motion for 11 parents who were removed unlawfully and denied the motion without prejudice for 8 parents for whom the record did not yet establish unlawful removal. Of the three remaining parents, two have already returned to the United States and one no longer seeks to do so. On July 30, 2019, we filed a motion to enforce the preliminary injunction on behalf of the parents of more than 900 children who have been separated based on the government's unilateral determinations that they are not entitled to reunification, including roughly 700 separations based on allegations of criminal conduct that is often minor or distant in time. The government's opposition to that motion is due September 6.** (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. The district court dismissed the case for lack of jurisdiction. We appealed to the Ninth Circuit, in which our position was supported by amicus briefs from refugee and human rights organizations and scholars of immigration law and habeas corpus. On March 7, 2019, the Ninth Circuit reversed the district court and held Mr. Thuraissigiam has a right to judicial review of the procedures leading to his expedited removal order. Given the length of Mr. Thuraissigiam's detention, we asked ICE to release him on humanitarian grounds, which it ignored. As a result, we filed a second habeas petition on June 11, 2019 seeking his release or at least a bond hearing. Shortly afterward, ICE released him to live with his sponsor while the case remains pending. **The government filed a petition for review in the Supreme Court on August 5, 2019, and our opposition was filed September 4.** (David Loy, Sarah Thompson)

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. 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. 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." With the ACLU Foundation of Southern California, we 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. 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. **The next immigration court hearing is scheduled for November 20, 2019. On July 27, the Ninth Circuit awarded attorney fees at market rates to counsel for Mr. Gomez-Sanchez in the amount of $107,203.89, holding that the case required special skill and knowledge to litigate.** (Bardis Vakili, Monika Langarica)

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. Following a series of negotiations with the government, we have reached agreement in principle on attorneys' fees and costs, which is expected to be finalized in the near future. (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 current 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 found the same statute did not bar jurisdiction over similar claims, we moved to reconsider. By order issued September 5, 2018, the court held it has jurisdiction over due process claims against prolonged detention without presentment to a judge. On June 11, 2019, the court denied the government's motion to dismiss on the merits, finding that plaintiffs stated claims for violation of their due process rights, but declined to decide our motion for class certification that was filed at the same time as the complaint. **The case is entering discovery, with a briefing schedule on class certification to be determined**. (Bardis Vakili, Jonathan Markovitz)

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 conceded 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 suit 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, and the government appealed. The Ninth Circuit heard argument on May 16, 2019. **The parties are now in mediation before the Circuit Mediation Office.** (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 review the Supreme Court, which we opposed. **In May 2019, the Supreme Court granted review in a parallel case from the Fifth Circuit, *Hernandez v. Mesa*, without taking action on the petition in this case. The ACLU filed an amicus brief in support of petitioner Jesus C. Hernandez on August 9, 2019. Oral argument in *Hernandez* is set for November.** (Mitra Ebadolahi)

Olivas v. Whitford (direct) – On June 12, 2014, we filed a complaint and petition for writ of habeas corpus challenging the ongoing banishment of Oscar Olivas, who spent his life in the United States as U.S. born citizen. However, despite the government's repeated acknowledgment of his citizenship for more than 40 years, he has been barred from returning to the United States since 2011 because the government now belatedly challenges his U.S. birth. As a result, Mr. Olivas remains stranded in stateless exile in Mexico. After a bench trial, the district court found that Mr. Olivas bore the burden to prove his U.S. birth, notwithstanding his justifiable reliance on the government's prior determinations that he was a citizen. The court found Mr. Olivas did not meet his burden. 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. By order issued November 29, 2018, the Ninth Circuit reversed the judgment of the district court, holding that it erred in requiring Mr. Olivas to bear the burden of proof and remanding for further proceedings. **On August 22, 2019, the district court issued judgment in favor of Mr. Olivas, holding that excluding him from the United States "violates his constitutional rights as a natural-born U.S. citizen." The government's deadline to file an appeal is October 21.** (Bardis Vakili)

ADVANCING JUSTICE

Jail Conditions

Nunez v. County of San Diego (direct) **(closed)** – Ruben Nunez is one of at least 135 people who died in San Diego County jails in the past decade. He was 46 years old when he was arrested in March 2014 for allegedly throwing a rock through a car window. Due to severe mental illness, he was found incompetent to stand trial and committed to a state psychiatric hospital for treatment. While in the hospital, doctors noted that he showed signs of psychogenic polydipsia, a condition that made him want to drink dangerous amounts of water. He was transferred to a county jail in August 2015 for a hearing to reevaluate his status. He was placed in a cell with a toilet and sink and died from overconsumption of water. Mr. Nunez's family sued the County of San Diego and Correctional Physicians Medical Group ("CPMG"), which then held a contract for mental health care in the county jail. The County settled with the family, leaving CPMG as a defendant. After the family's lawyers uncovered records documenting CPMG's repeated failures to protect Mr. Nunez, the court sealed the records at CPMG's request on the ground they were part of the "peer review" process, although federal law recognizes no "peer review" privilege. On May 14, 2019, we moved to intervene in the case to unseal the records and defend the public's right to know about failures in medical care in county jails. **By order issued June 24, 2019, the court unsealed the records and directed the parties to file them on the public docket although the underlying case against CPMG had been settled. The case is now closed.** (Jonathan Markovitz, David Loy)

Police Practices

Simmons v. City of San Diego (amicus) – CalGang is a shared gang database, accessible by law enforcement agencies, which maintains records of individuals designated as gang members or associates. The database has been used for employment and military-related screenings. Courts have also relied on the database to provide support for expert opinions about gang membership. After a state audit uncovered rampant errors in the CalGang system, the Legislature enacted AB 2298 to create a transparent gang designation review process. Tyrone Simmons was one of the first people to put the process to the test, but the trial court thwarted his effort to receive a fair hearing by a series of rulings that misinterpreted the governing statute and violated due process. The court erred in considering secret evidence and relying on vague and overbroad criteria that could justify including virtually anyone in a gang database. On April 5, 2019, drawing on our research and briefing in a similar case that was dismissed for reasons unrelated to the merits, we submitted an amicus brief to support Mr. Simmons' appeal and protect the community's interest in holding law enforcement accountable and providing fair opportunities to challenge erroneous gang designations. (Jonathan Markovitz, Bardis Vakili)

S.B. 1421 litigation (direct) – In 2018, the California Legislature passed Senate Bill 1421, a landmark law co-sponsored by the California ACLU affiliates that requires disclosure of certain records relating to police misconduct and use of force. Police unions opposed the bill, and once it took effect on January 1, 2019, they filed lawsuits against local governments throughout the state to undermine the law by arguing it does not apply to records created before that date. In Contra Costa, Los Angeles, San Diego, and San Francisco courts, the California ACLU affiliates and

family members of victims of police violence intervened to defend S.B. 1421. In allowing us to intervene, the San Diego court prohibited us from asking for attorney fees if we won. On March 1, 2019, the San Diego court held that S.B. 1421 applies to all covered records regardless of when they were created. The unions have not appealed that ruling. Because of the public interest in protecting the right of community members to seek public records and deterring third parties from filing unfounded lawsuits to delay or prevent disclosure, we appealed the decision prohibiting us from seeking fees. We filed our opening brief on August 21, and are waiting for the unions to respond. In other cases, after we prevailed on the merits in Contra Costa, Los Angeles, and San Francisco, the unions appealed only from the Contra Costa decision, but the Court of Appeal rejected their position in a published opinion. **On August 25, after prolonged review due to limited resources for addressing the backlog of requests for records covered by S.B. 1421, the City of San Diego finally disclosed records relating to the killing of Raul Rivera, the brother of our client Flora Rivera.** (David Loy, Jonathan Markovitz)

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 to 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. The case was argued to the Ninth Circuit on February 27, 2019. **By decision issued July 11, the Ninth Circuit reversed the district court decision, agreeing with our position, and remanded the case for trial. Defendants filed a petition for rehearing on August 8.** (David Loy)

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 trial 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. **The case is scheduled for argument on September 3, 2019, with a decision expected within 90 days of that date.** (David Loy)

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. After the court granted review, we filed an amicus brief on October 9, 2018. (David Loy)

Association for Los Angeles Deputy Sheriffs v. Superior Court (amicus) **(closed)** – 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 supported a petition for review to the California Supreme Court and later filed an amicus brief on the merits, arguing that the statutes, properly construed, do not prohibit disclosure of exculpatory information to prosecutors. We also filed a supplemental brief on February 22, 2019 concerning the impact of S.B. 1421, a new law that requires public disclosure of police officer personnel files concerning discharge of a firearm at a person, killing a person or causing great bodily injury, sexual assault on a member of the public, and dishonesty in the line of duty. **On August 26, the California Supreme Court agreed with our position and reversed the Court of Appeal's decision, holding that the *Pitchess* statutes do not prohibit disclosure to prosecutors of exculpatory material in officers' personnel files. The case is now closed**. (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) **(closed)** – 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. **On August 15, 2019, the California Supreme Court issued a decision agreeing with our position. The case is now closed.** (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. Denying motions to dismiss, the court held we state a claim that the statute violates the First Amendment as applied to political speech such as Ms. Porter's. After an early neural evaluation and case management conference on April 4, 2019, the case is now in discovery. (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. **After hearing oral argument on June 8, 2018, the court issued a decision in our favor on July 24, 2019, reversing the district court and holding we state a claim under the First Amendment. By agreement, UCSD's deadline to file a petition for rehearing has been extended to September 27.** (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. Due to repeated obstruction by the government, we filed a motion to compel production of essential documents, which remains pending. (Mitra Ebadolahi, Sarah Thompson)

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 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 Ninth Circuit reversed the district court's order, holding our complaint states a claim that CBP's policy violates the First Amendment. Arnold & Porter then joined our team as co-counsel. After an early neutral evaluation and case management conference on April 5, 2019, the case is now in discovery. Due to information learned in discovery, we filed a second amended complaint on June 10, naming the General Services Administration and Federal Protective Service as additional defendants. **The case is now in discovery.** (Mitra Ebadolahi, Sarah Thompson)

Reproductive Justice

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. (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)