AMERICAN CIVIL LIBERTIES UNION FOUNDATION
San Diego and Imperial Counties

LEGAL REPORT
September 2020

STATISTICS

	Open Cases	*Closed During 2020*
Direct	17	11
Amicus	4	8
Total	21	19

CASE UPDATES
(**New developments in bold**)

ADVANCING EQUITY

Racial Justice

City of Oakland v. Wells Fargo (new case) (amicus) **(closed)** – The City of Oakland sued Wells Fargo under fair housing laws, alleging that Wells Fargo unlawfully discriminated in mortgage lending against Oakland residents and harmed the city by causing decreased property tax revenues, increased municipal expenditures, and impairment of the city's goals for integration and nondiscrimination in housing. The district court held the city stated a claim for damages arising from decreased revenues and claims for injunctive and declaratory relief arising from increased expenditures. Wells Fargo appealed. The California ACLU affiliates joined the national ACLU and other organizations in an amicus brief supporting the district court's ruling, arguing that fair housing laws properly reach the harms claimed by the city and that modern predatory lending inflicts harms just as devastating as historical redlining. **On August 26, 2020, the Ninth Circuit issued a decision largely agreeing with our position. The case is closed.**

Villafana v. County of San Diego (direct) – San Diego County's "Project 100%" program (P100) 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 stigma and 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. Following briefing and argument, the trial court dismissed the case for

failure to state a claim, and we appealed. The appeal is fully briefed. We are waiting for the court to schedule oral argument. (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 Department of Fair Employment and Housing (DFEH), which enforces state civil rights laws. After DFEH filed suit against Crunch, we intervened on behalf of Ms. Wood, with co-counsel ACLU Foundation of Southern California and Nixon Peabody LLP, and the case went into discovery. On an issue of first impression in California, the trial court held that attorney-client privilege did not attach to Ms. Wood's confidential communications with DFEH lawyers during prelawsuit investigation. The California Supreme Court granted review and transferred the issue to the Court of Appeal for decision. On March 13, 2020, the Court of Appeal held that persons seeking help from DFEH to protect their civil rights can never have attorney-client privilege over communications with DFEH lawyers. We filed a petition for review in the California Supreme Court on May 21. The gym's manager, one of the defendants, filed for bankruptcy, which may halt the case against him, but in any event the case will proceed against the entity that owns the gym. (Melissa Deleon in trial court; David Loy in Court of Appeal)

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 Catholic 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 the case on the ground that Mr. Minton was eventually able to obtain the surgery at a non-Catholic Dignity Health hospital. We appealed, supported by amicus briefs from the National Center for Lesbian Rights and California Medical Association. On September 17, 2019, the Court of Appeal reversed the dismissal. The California Supreme Court denied review. On March 13, 2020, Dignity Health sought review by the United States Supreme Court. **The petition for review has been briefed for the Supreme Court's review at its conference on September 29, 2020**. (David Loy)

Economic Inequity

City of Sacramento v. Conner (amicus) – In August 2019, the City of Sacramento filed a "public nuisance" lawsuit against seven people experiencing homelessness, seeking to banish them permanently from large swaths of the City's downtown, claiming they had received a handful of citations for low-level offenses. On March 19, 2020, the California ACLU affiliates and Disability Rights California filed an amicus brief on behalf of Joseph Soto, the sole remaining

defendant. The brief argued that banishment would violate Mr. Soto's right to freedom of movement and unjustifiably permit cities to exclude marginalized and stigmatized residents from certain areas. This case has statewide significance because the mayor of Sacramento is the co-chair of the statewide homelessness and supportive housing task force.

ADVANCING IMMIGRANTS' RIGHTS

Apodaca v. USCIS **(direct) (new case)** – Erasmo Apodaca was brought to the U.S. when he was 4 years old and later became a lawful permanent resident. He is now a 40-year-old former Marine, veteran of the Gulf War, and applicant for United States citizenship. Although the Immigration and Nationality Act (INA) allows immigrant veterans to apply for citizenship based on honorable wartime service, Erasmo pleaded guilty to DUI and burglary charges in 1996. Upon release from imprisonment, during which time he served as a fire fighter, he voluntarily left for Mexico to fight his deportation rather than endure further incarceration in an immigration jail. He was separated from his sons, then 7 and 8 years old, as a result. He was eventually ordered removed based on his convictions. The ACLU first encountered Erasmo in 2016 and interviewed him for our report on deported veterans, Discharged then Discarded. In 2017, with the help of the ACLU, Erasmo submitted an application for citizenship based on his honorable wartime service and precedent holding that his convictions should not bar naturalization. Later that year, Governor Newsom granted him a full pardon. For years, immigration authorities refused to allow Erasmo to enter the United States for an interview on his application. Finally, in January 2020, immigration authorities permitted him to enter and interviewed him, but they failed to meet the deadline to decide his application. On July 10, 2020, with counsel at ACLU Foundation of Southern California and Latham & Watkins, LLP, we filed suit to compel a decision. By agreement, the district court remanded the case to USCIS on August 26 for decision. The next day, USCIS issued a notice of intent to deny the application, with an opportunity to respond by September 26, 2020. (Bardis Vakili)

Rodriguez Alcantara v. Archambeault (direct) – Due to ICE's refusal to release people threatened by COVID-19, we filed a class action on April 21, 2020 to demand a drastic reduction in the number of persons detained at the Otay Mesa Detention Center ("OMDC") and Imperial Regional Detention Facility ("IRDF"). We sought an emergency order for immediate release of medically vulnerable people from OMDC, which was the site of the largest outbreak of COVID-19 of any ICE detention center nationwide. Numerous detained persons and staff tested positive because ICE ignored the warnings of its own medical experts. ICE leadership admitted to Congress it was not considering release from detention due to the threat of COVID-19. ICE's indifference threatened lives, as tragically demonstrated by the death of Carlos Ernesto Escobar Mejia, who became the first person to die from COVID-19 in ICE custody. On April 30, the court issued a temporary restraining order that resulted in the release of 93 medically vulnerable people from OMDC, although 30 others continue to be detained. The court later denied our motion for a preliminary injunction as to OMDC, holding that the measures taken by defendants sufficiently reduced the risks. **Despite an outbreak at IRDF, the court also denied our motion for immediate release of medically vulnerable persons from that facility. We are now opposing the government's motion to dismiss the case and have filed a new motion for release of medically vulnerable people from OMDC because of the resumption of new**

admissions to OMDC, including people who tested positive for COVID-19. The motion will be heard October 2, 2020. (Monika Langarica, Jonathan Markovitz, Bardis Vakili)

Doe v. Wolf (direct) – We represent the parents of a family that is seeking asylum in the United States. They fled their home in Guatemala after they were extorted and their daughter was raped and threatened with death. Traveling through Mexico, the family was assaulted at gunpoint and robbed. After arriving in the United States, they were forced to remain in Mexico while their asylum cases were pending, under so-called "Migrant Protection Protocols" ("MPP"). As with other families that express fear of return to Mexico, they were entitled to a non-*refoulement* interview with asylum officers based on the government's obligation not to return people to countries where they fear persecution or torture. The outcome of a non-*refoulement* interview turns on complex factual and legal issues. It can determine if a person lives or dies. Border Patrol detains families awaiting non-*refoulement* interviews in appalling conditions and refuses to allow detained families to talk with their lawyers before the interviews or to allow lawyers to participate in the interviews. On November 5, 2019, we filed a class action to challenge this systemic denial of the right to counsel. We won a temporary restraining order ensuring access to counsel for the plaintiffs. The plaintiffs were released from custody after an asylum officer decided they should not be returned to Mexico. On January 14, 2020, the court granted our motions to certify the class and enter a preliminary injunction upholding access to counsel for persons detained pending non-*refoulement* interviews. **The government's appeal from that order has been fully briefed and is scheduled for argument on November 13, 2020.** (Monika Langarica, Jonathan Markovitz, 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)

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, the immigration judge violated his 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 him not credible and denied his claim. Meanwhile, in a separate detention center in front of a separate immigration judge, his stepson was found credible and granted asylum. Together with Catholic Charities, we appealed to the Board of Immigration Appeals based on the due process violations in Mr. Usubakunov's case. After the BIA dismissed the appeal, we filed a petition for review in the Ninth Circuit. The American Immigration Council and Women's Refugee Commission submitted amicus briefs in support of our position. The case is fully briefed, and we are waiting for an argument date. (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, and her daughter was sent to a facility in Chicago. When the officers separated them, Ms. L. could hear her daughter screaming 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 their forced separation. Soon afterward, the mother and daughter were reunited. We converted the case to a class action to prevent more separation of families, and the court granted a classwide injunction to reunify families. On a separate motion, the court held that separated parents with "criminal histories" remain outside the class definition and the failure to reunify them did not violate the injunction. However, it also held that before separating a family based on "parentage concerns," the government must conduct a DNA test to confirm parentage. To date, 2,814 children in the 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. The court granted our further motion to require reunification of parents and children who were separated earlier than the government first acknowledged doing so.
The government has identified 1,556 children who are potentially in the expanded class and does not dispute 1,134 of them are class members. **As of August 19, 2020, the ACLU and its steering committee for contacting impacted families had reached the parents or attorneys of 438 children in the expanded class. For 104, the government has provided no contact information. The parents of the remaining 592 undisputed class members have not been reached, despite significant efforts. The ACLU believes about 69 percent of these remaining parents have been returned to their countries of origin without their children. The effort to reunify families has been hindered by the COVID-19 pandemic, especially with respect to on-the-ground searches, which the steering committee has determined are necessary to locate the parents of at least 517 of those 592 children. The steering committee has established toll-free numbers and engaged in broad based media outreach in the home countries.** (Bardis Vakili)

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, which 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. 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," and later awarded attorney fees of $107,203.89. We continue to represent Mr. Gomez-Sanchez to complete his removal proceedings. An immigration court hearing scheduled for June 25, 2020 was postponed due to the COVID-19 pandemic. (Bardis Vakili, Monika Langarica)

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 can languish for months before they appear in immigration court 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. After two rounds of briefing and an intervening Supreme Court decision, 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. By order issued March 23, 2020, the court largely granted our motion to compel discovery, which is continuing. (Bardis Vakili, Jonathan Markovitz)

ACLU of Arizona & ACLU of San Diego & Imperial Counties v. Department of Homeland Security (direct) (CBP Child Abuse FOIA) **(closed)** – 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 district court granted summary judgment in part and denied it in part, ordering the government to undertake additional searches and produce certain records. The government produced additional documents and filed a motion for reconsideration concerning disclosure of certain agents' names, which the court denied. The government appealed, and the Ninth Circuit heard argument on May 16, 2019. After the argument, the parties agreed to a settlement under which the order to disclose names will be vacated but DHS will replace the agents' names with unique identifiers, enabling advocates to attempt to track systemic failures of accountability. **The Ninth Circuit agreed to remand the case, and the district court approved the settlement, resulting in dismissal of the district court case, with jurisdiction reserved to oversee compliance with the settlement. The case is closed.** (Mitra Ebadolahi, Sarah Thompson)

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 a natural-born citizen, which the government repeatedly acknowledged. Nonetheless, the government summarily barred him from entering the country in 2011 after it belatedly challenged his U.S. birth. The government stranded him in Mexico without a hearing, forcing us to file this case. After a bench trial in 2015, the district court incorrectly held 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. Following a prolonged appeal, the Ninth Circuit reversed and held the government must bear the burden to prove by clear and convincing evidence that Mr. Olivas is not a U.S. citizen. Finding that the government did not carry its burden, the district court ruled for Mr. Olivas in August 2019, holding that excluding him from the United States "violates his constitutional rights as a natural-born U.S. citizen." After the government appealed, it moved to vacate the district court's decision based on alleged newly discovered evidence. **The Ninth Circuit found the motion presented a substantial issue and remanded the case for the district court to decide it. After briefing and argument, the district court denied the motion on September 3, 2020, holding that the government failed to exercise reasonable diligence in searching for the alleged new evidence until after it lost the case.** (Bardis Vakili)

ADVANCING JUSTICE

Conditions of Confinement

Alvarez v. LaRose (direct) – The U.S. Marshals' Service (USMS) detains people facing federal criminal charges at the same Otay Mesa Detention Center, operated by CoreCivic, that confines persons facing immigration charges. Persons detained on criminal charges face the same risks from COVID-19 as persons detained on immigration charges. On April 26, 2020, together with the National Immigration Project of the National Lawyers Guild, the ACLU Foundation, and Ropes & Gray LLP, we filed a class action in federal court demanding a drastic reduction in the number of people detained by USMS at Otay Mesa. We sought an emergency temporary restraining order directing the release of medically vulnerable people detained by USMS. Neither USMS nor CoreCivic developed or implemented an action plan sufficient to protect detained people, employees, and employees' families and communities from the deadly risks of COVID-

19. On May 10, the court denied our motion for a temporary restraining order, citing the Prison Litigation Reform Act. We continue to fight for persons detained on criminal charges. On May 15, we filed a motion for preliminary injunction addressing the court's concerns and again seeking release of medically vulnerable people. The court heard that motion May 29 and denied it by order issued June 7. (Mitra Ebadolahi)

Police Practices

S.B. 1421 litigation (direct) **(closed)** – 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, as did every other court in which ACLU argued the issue. The unions did not appeal 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. After argument on May 13, 2020, the Court of Appeal ruled on May 18 that we have a right to seek attorney fees. **After remand to the trial court, the parties agreed to a settlement on attorney fees. The case is closed.** (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. 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 Ninth Circuit agreed with our position and reversed the district court decision, remanding the case for trial. Defendants sought review by the Supreme Court. **The petition for review has been briefed for the Supreme Court's review at its conference on September 29, 2020**. (David Loy)

Rights of the Accused

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)

DEFENDING CIVIL LIBERTIES

Freedom of Expression and Information

Guan v. Wolf (direct) – On multiple occasions in 2018 and 2019, journalists Bing Guan, Go Nakamura, Mark Abramson, Kitra Cahana, and Ariana Drehsler were tracked, detained, and interrogated by the Department of Homeland Security after reporting on conditions at the U.S.-Mexico border. Border officers targeted them for secondary screening, compelled them to disclose information about their sources and observations as journalists, and searched their photos and notes. Each was identified in a secret government database leaked to NBC San Diego in March 2019. The database contained their headshots and personal information, including name, date of birth, occupation, and whether they had already been interrogated. Three of the headshots were crossed out with a bold 'X.' A fourth, which was not crossed out, warned "Pending Encounter." On November 20, 2019, we filed suit with co-counsel at the ACLU Speech, Privacy, and Technology Project and New York Civil Liberties Union. Filed in the Eastern District of New York, home of two of the plaintiffs, the case alleges that the government violated the First Amendment by chilling journalists from reporting the news out of fear of being detained and questioned. **The government's motion to dismiss the case is fully briefed, and the parties have requested oral argument.**

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 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 speech such as Ms. Porter's. **After completing discovery, the parties moved for summary judgment on August 18, 2020. Our opposition to the Defendants' motion for summary judgment will be filed September 11, and our reply brief in support of our motion is due September 25**. (David Loy)

The Koala v. Khosla (direct) **(closed)** – University of California campuses collect student activity fees to fund a wide range of speech by registered student organizations (RSOs). By delegation from the university, student governments allocate such funds for the use of RSOs. *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 racial epithets and stereotypes in November 2015, the

UCSD administration condemned it, as it had a right to do. The student government then terminated RSO funding for printing student newspapers, but not other forms of RSO speech, including other printed materials. 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 in May 2016, with co-counsel Ryan Darby. The district court dismissed the case, 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 Ninth Circuit ruled in our favor in July 2019, reversing the district court and holding we state claims under the First Amendment. **After the Ninth Circuit denied rehearing and remanded the case, the parties engaged in extensive negotiations resulting in a settlement under which UCSD shall provide funds to *The Koala*, ensure other student newspapers remain eligible for campus activity funding, and pay attorney fees. The case is now closed.** (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. Together with the ACLU Foundation of Arizona and the law firm of Covington & Burling LLP, we filed suit in Arizona federal court in November 2014 to hold Border Patrol accountable for violating the First Amendment. After the district court dismissed our case, we appealed. The Cato Institute, Center for Investigative Reporting, and National Press Photographers Association filed amicus briefs supporting our position. In February 2018, the Court of Appeals reversed the district court and remanded for development of the factual record necessary to decide the First Amendment issues. **In discovery we learned that a key government witness falsified his declaration earlier in the case and that he destroyed important evidence when he retired. In response, we filed a motion for sanctions on June 30.** (Mitra Ebadolahi, Sarah Thompson)

Askins v. Department of Homeland Security (direct) **(closed)** – 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. 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 and held we state a claim that CBP's policy violates the First Amendment. Arnold & Porter Kaye Scholer LLP then joined as co-counsel. **After lengthy negotiations, the parties reached a settlement approved by the court on September 8, 2020, under which the government agreed to respect the right to record events in outdoor areas of every port of entry into the United States, subject to the court's jurisdiction to oversee compliance with the settlement. The government also agreed to pay substantial attorney fees. We will remain engaged in advocacy and education to publicize the settlement and enforce compliance as needed, but for now, the case is closed**. (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. (David Loy)

Access to Courts

***Patel v. Chavez* (new case) (amicus) (closed)** – The California Court of Appeal held that defendants wrongly sued in state court for federal claims under 42 U.S.C. § 1983 could invoke the state anti-SLAPP law, Code Civ. Proc. § 425.16, and recover attorney fees if plaintiffs did not show a probability of prevailing on their claims. Federal law provides a stricter standard for recovering fees from plaintiffs in § 1983 cases, in order to avoid an undue chilling effect on cases seeking to protect federal rights. The plaintiff petitioned for review to the California Supreme Court. On June 30, 2020, the ACLU affiliates in California sent a letter to the court in support of the petition for review, arguing that federal law should control recovery of attorney fees in cases brought to vindicate federal rights. The court denied review on August 12.

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)