AMERICAN CIVIL LIBERTIES UNION FOUNDATION
San Diego and Imperial Counties

LEGAL DOCKET
July 2021

STATISTICS

	Open Cases	*Closed During 2021*
Direct	15	4
Amicus	3	4
Total	18	8

CASE UPDATES
(New developments in bold)

ADVANCING EQUITY

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, and the California Supreme Court denied review. The case has returned to the trial court for resolution after a stay arising from bankruptcy proceedings by one of the defendants was lifted. (Melissa Deleon in trial court; David Loy on 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 (No. 19-1135). The petition for review remains pending. **The parties recently filed supplemental briefs on whether the Court's decision in *Fulton v. City of Philadelphia* has any impact on the petition.**

Education Equity

Smith v. Regents of University of California (amicus) – In December 2019, a group of students and community organizations sued the University of California to halt the use of standardized tests when considering applications for admission and scholarships, given that the tests have a track record of discriminatory impact. The Regents voted to suspend testing requirements but left it up to individual campuses whether to use a "test-optional" approach until 2022 for admission and 2024 for scholarships. Plaintiffs sought an injunction against the test-optional approach, which the trial court granted on August 31, 2020. Defendants asked the Court of Appeal to stay the injunction. On October 9, the California ACLU affiliates filed an amicus brief asking the Court of Appeal to deny the stay and allow the injunction to remain in effect. The Court of Appeal denied the stay on October 29.

ADVANCING IMMIGRANTS' RIGHTS

Matter of O.E.B. **(direct) (new case)** – The California ACLU affiliates co-sponsored Cal. Penal Code § 1437.7, which protects the rights of immigrants against unjust removal by allowing them to ask courts to vacate convictions when they were deprived of the right to meaningfully understand, knowingly accept, or defend against immigration consequences of the conviction. O.E.B. is a lawful permanent resident subject to removal due to a criminal conviction. His conviction was vacated under § 1473.7. Initially without counsel, he moved to reopen his removal proceedings, but U.S. Immigration and Customs Enforcement ("ICE") opposed the motion, contending that a conviction vacated under § 1473.7 still makes a person removable. If accepted by the Board of Immigration Appeals ("BIA") or federal courts, that position would effectively nullify the impact of § 1437.7. Representing O.E.B., we filed a brief with the BIA opposing ICE's position. (Monika Langarica)

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 then 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. 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. On November 12, the court denied our renewed motion for release of medically vulnerable people from OMDC based on the resumption of new admissions to OMDC, including people who tested positive for COVID-19. The case is now in discovery. (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 detained families awaiting non-*refoulement* interviews in appalling conditions and refused 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 was argued on November 13. **By order of the court, we filed a supplemental brief July 6, 2021 explaining why this case is not moot despite the government's termination of the MPP program going forward.** (Monika Langarica, Jonathan Markovitz, 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 was argued on March 8, 2021. We are waiting for a decision. (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 whose parents are potentially in the expanded class and does not dispute that parents of 1,134 of them are class members. It has also identified 64 members of the original class that were not previously identified, making a total of 1,198 children whose parents the ACLU is actively attempting to locate. As of December 2, 2020, the ACLU and its steering committee for contacting impacted families had reached the parents or attorneys of 570 of these children. Of the remaining 628, the parents of 295 are believed to have been removed to their countries of origin and the parents of 333 are believed to be in the U.S. The ACLU and steering committee are still trying to reach the parents of these 628 children, and have been in contact with other relatives of 168 of them. (Bardis Vakili)

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. 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. The court initially dismissed the case for lack of jurisdiction in February 2018, but after an intervening Supreme Court decision, the court held in September 2018 that it has jurisdiction over our due process claims against prolonged detention without presentment to a judge. In June 2019, the court held those claims could proceed through discovery and decision on the merits, and in March 2020 it largely granted our motion to compel discovery. After extensive discovery, we filed a motion for class certification on October 16, 2020. The court is

reviewing that motion without oral argument. In light of new precedent, we have filed a motion to reconsider the court's earlier dismissal of our Fourth Amendment claim that immigration detention requires judicial reiew of probable cause to detain. (Bardis Vakili, Jonathan Markovitz)

Olivas v. Whitford (direct) – On June 12, 2014, we filed a complaint and petition for writ of habeas corpus challenging the 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 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. The government dismissed its appeals from both that decision and the underlying final judgment. **On May 20, 2021, the district court denied our motion for attorney fees. We are deciding whether to appeal**. (Bardis Vakili)

ADVANCING JUSTICE

Fourth Amendment

Griffin-Jones v. City of San Diego (direct) – Christina Griffin-Jones participated in a protest on September 23, 2020 demanding justice for the police killing of Breonna Taylor. During the protest, she was arrested, and her personal property was impounded, including her cell phone. When she was released, most of her property was returned, but San Diego Police Department refused to return her cell phone. In response to similar unlawful seizures of cell phones, we sent a letter to SDPD demanding return of all cell phones held without warrants. Due to the immense trove of data contained on smartphones, the Supreme Court has held police cannot search a phone without a warrant except in emergencies. The courts also prohibit law enforcement from retaining cell phones for a prolonged time without seeking a warrant. Nonetheless, SDPD has neither returned Ms. Griffin-Jones's phone nor given her the written notice required by state law of any warrant to search her phone. With co-counsel Community Advocates for Just and Moral Governance and Singleton Schreiber McKenzie & Scott, we filed a lawsuit and motion for preliminary injunction on January 7, 2021 demanding immediate return of Ms. Griffin-Jones's phone, arguing the prolonged seizure of her phone violates the Fourth Amendment and derives from City policies that authorize police to ignore the Constitution. In response to our motion, the City returned Ms. Griffin-Jones's phone and indicated it had not been searched. We are continuing with the case to recover damages and seek decision of important legal issues. (Jonathan Markovitz)

Conditions of Confinement

Jones v. Gore (direct) – Jails and prisons are widely recognized as dangerous hotbeds for COVID-19 transmission. San Diego County jails are in the midst of a months-long COVID-19 outbreak. At least two people, Edel Corrales Loredo and Mark Armendo, died of COVID-19 after apparently contracting the virus while incarcerated in county jail. In late December 2020, there were 527 people with active COVID-19 infections in custody. There have been more than 1,200 cumulative positive cases in San Diego jails since the start of the pandemic. Although jail populations are reduced from pre-pandemic levels, they remain too high to permit effective physical distancing and other precautions, especially in facilities that are occupied at over 95 percent capacity. In December, we sent a letter urging the Sheriff to take immediate action to prevent the COVID-19 crisis from deepening. The Sheriff acknowledged his authority to release additional people to ensure their safety but emphasized his determination not to exercise this authority. The Sheriff recently reported an active outbreak at George Bailey Detention Facility, with 46 people testing positive. Accordingly, on March 10, 2021, we filed suit in San Diego Superior Court demanding that the Sheriff reduce jail populations to levels that allow people to practice and maintain safe distancing and also provide sufficient vaccinations to protect the entire jail population, protecting not only those who are incarcerated but the entire community from renewed outbreaks. **The Sheriff is asking the court to dismiss the case. We oppose that request and will argue the issue in court on July 16, 2021.** (Jonathan Markovitz, Bardis Vakili, Monika Langarica, Emily Child)

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, and on June 7 it denied our motion for preliminary injunction again seeking release of medically vulnerable people. The magistrate judge granted our motion for initial discovery on September 18, but defendants objected to the ruling before the district judge. The court overruled the objections and denied defendants' motion to dismiss the case, which is continuing in discovery. (Mitra Ebadolahi, Emily Child)

Rights of the Accused

People v. Lewis (amicus) – In 2018, the California Legislature adopted SB 1437, which authorized petitions to vacate certain murder convictions based on legal theories that have since been repealed. Among other provisions, the law authorizes the court to appoint counsel for the petitioner in certain circumstances. In March 2020, the California Supreme Court granted review to determine when that right arises. On November 18, the California ACLU affiliates filed an

amicus brief arguing that the right to counsel arises when a facially sufficient petition is filed, and if the statute is ambiguous, constitutional issues require the court to construe it in favor of protecting the right to counsel.

DEFENDING CIVIL LIBERTIES

Freedom of Expression and Information

Twitter v. Barr (amicus) – Six years ago, Twitter sought to publish a transparency report describing the aggregate number of government surveillance orders it received from July to December 2013. The FBI prohibited Twitter from doing so, and Twitter filed suit, challenging the prohibition as an unconstitutional prior restraint on speech. The district court ruled for the government, and Twitter appealed. The California ACLU affiliates joined with the national ACLU and Electronic Frontier Foundation in an amicus brief asking the Ninth Circuit to reverse the district court, arguing that prior restraints on publication are the most severe and least tolerable infringements of protected speech and are allowed only in the narrowest of circumstances, for which mere assertions of "national security" are insufficient.

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. On March 30, 2021, the court denied the government's motion to dismiss, moving the case forward into discovery. (Mitra Ebadolahi, Emily Child)

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 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 discovery concluded, the court granted summary judgment in favor of the government on

February 5, 2021, holding that the statute does not violate the First Amendment. **We filed our opening brief on appeal July 6, 2021.** (David Loy)

Jacobson v. Department of Homeland Security (direct) **(closed)** – 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. **Following discovery, the case was dismissed by agreement and is now closed.** (Mitra Ebadolahi, Emily Child)

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.

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.

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.