ACLU
District
of Columbia

2016-2022
Litigation Report

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NOTES ON SCOPE, ORGANIZATION AND FORMATTING

This report includes cases litigated by ACLU of the District of Columbia attorneys from 2016 to 2022 (with a handful of updates where major developments occurred in early 2023). Within each subject-matter category, matters are listed in reverse chronological order, except as necessary to group related matters together in a single entry.

Major cases are indicated in boxed text.

The first-listed ACLU-DC attorney on each case served as the lead attorney for our office. Where an ACLU-DC attorney is listed in italics, that attorney was lead counsel for the case overall (or where two are italicized, each led the case during a different phase).

ABBREVIATIONS

The following common abbreviations are used throughout the document (in addition to, obviously, ACLU and ACLU-DC):

BOP	Bureau of Prisons (federal)
CIA	Central Intelligence Agency (federal)
FBI	Federal Bureau of Investigation
FOIA	Freedom of Information Act (D.C. or federal)
ICE	Immigration and Customs Enforcement (federal)
MPD	Metropolitan Police Department (D.C.)

ABOUT THE ACLU OF THE DISTRICT OF COLUMBIA

The ACLU of the District of Columbia works to defend and advance the civil liberties and civil rights of those who live in, work in, or visit D.C., and in matters involving federal agency action. We fight for civil rights and liberties through legislative advocacy, organizing, public education, and litigation. This report documents the litigation component of our work from 2016 to 2022.

We litigate in the federal courts and in the local courts, at every level: from D.C. Superior Court to the Supreme Court of the United States. We take all our cases on a pro bono basis, receiving compensation only when the law permits us to obtain attorneys' fees from our opponents.

The litigation program of the ACLU of the District of Columbia is carried out by the ACLU Fund (or Foundation) of the District of Columbia, a separate non-profit corporation qualified to receive tax-deductible contributions under section 501(c)(3) of the Internal Revenue Code. Prior to 2017, the ACLU of the District of Columbia and its Fund/Foundation were known as the ACLU of the Nation's Capital and the ACLU Fund of the Nation's Capital, respectively. (Cases in the period covered by this report that were handled prior to the name change are included.)

Cases come to the ACLU-DC through direct outreach from community members who feel that their rights have been violated; through other lawyers or referrals from other organizations; and through proactive investigations and research by our legal team. Depending on the nature of the case, our representation may be approved either by the Executive Director and Legal Director jointly, or by our Board of Directors.

As this report reflects, many of our cases are handled by ACLU-DC staff alone, but many more are handled in partnership with pro bono co-counsel who are not employed by the ACLU-DC. These lawyers receive no pay from either the ACLU-DC or our clients. Instead, they donate their valuable time because they understand the importance of protecting civil liberties. Without their help we couldn't begin to handle a caseload of this size or significance.

The ACLU-DC likewise could not function without the support of our members and donors. If you're not yet a member, *please join.* The basic membership fee is still only $35—a small price to pay, we think, for a vigorous defense of our constitutional and civil rights here in the District of Columbia.

ABOUT THIS REPORT

The ACLU-DC used to publish a yearly litigation report, the last one covering 2014-15. That report was useful as a snapshot in time, but many of the cases covered in any given report were necessarily left as cliffhangers, given the volume of cases our office has pending at any given time and the amount of time—often years—that cases take to litigate cases to completion. Covering a longer period, as this report does, will enable us to describe many cases from start to finish and give a more comprehensive sense of what our litigation has achieved over the medium to long term. The cost to this approach is that these more comprehensive reports will necessarily be long and appear less frequently. Fortunately, between reports, it is now easier than ever to get a snapshot of our current work because of our upgraded website, which is kept up to date and on which cases can be filtered by year filed, by status (such as "Open"), by subject matter, and more. Accordingly, we are moving to this periodic, rather than annual, report format.

ACLU OF THE DISTRICT OF COLUMBIA
LEGAL STAFF

Current

Scott Michelman, *Legal Director**
Arthur B. Spitzer, *Senior Counsel**
Michael Perloff, *Staff Attorney***
Tara Patel, *Dunn Fellow/Attorney*
Laura K. Follansbee, *Harvard Public Service Venture Fund Fellow/Attorney*
Elaine Stamp, *Paralegal/Intake Manager*
Jada Collins, *Intake Specialist*

Recent (during the period covered by this report)

Ruby Rorty, *Intake Specialist (2022)*
Megan Yan, *Liman Fellow/Attorney (2020-21)*
Shana Knizhnik, *Dunn Fellow/Attorney (2016-18)*
Jennifer Wedekind, *Staff Attorney and Special Projects Counsel (2016)*

We are grateful for the work of the many attorneys who have volunteered their time for us, whether to serve in a volunteer capacity in our office or as co-counsel on specific cases. These attorneys or firms are identified in connection with the matters to which they contributed and also listed in the Appendix.

** Art served as Legal Director from 1980-2020, sharing the role with Scott as Co-Director from 2018-20. Scott served as Senior Staff Attorney from 2016-18 and Legal Co-Director from 2018-20 before becoming Legal Director in 2020, when Art assumed the role of Senior Counsel.*
*** Michael was a Harvard Public Service Venture Fund Fellow/Attorney from 2018-19, then the Dunn Fellow/Attorney from 2019-21; he became a Staff Attorney in 2021.*

EXECUTIVE SUMMARY

This docket covers all cases (and a handful of selected non-litigation matters of import) that we handled at any time from 2016 to 2022. As with any irregular periodic report, the question naturally arises: Why now? We could have published this report two years ago, or two years from now. Several factors converge to make the current timing appropriate. First, quite simply, it has been seven years since our last litigation report—a long time, even by the standards of litigation and docket evolution. Second, the period 2016-22 coincides with a time of great change—in our nation, our District, and our organization—and so it will be particularly informative (I hope) to read how the ACLU-DC has responded to developments such as the most serious anti-civil liberties presidency of modern times, the murder of George Floyd and the important protest activity that followed, the rightward shift of the federal judiciary, and the COVID-19 pandemic, as well as to changes at the ACLU-DC in terms of our increased capacity for integrated advocacy that combines impact litigation with legislative reform, public education, and organizing. Finally, 2022 was a significant year for our docket, as we successfully concluded a number of major matters while preparing a number of new cases we hope to file in 2023. Accordingly, now is a useful time to take stock of the cases we have litigated and the results we have achieved.

Despite our small staff (at its largest, five litigators and two support professionals), we have, I believe, risen to meet the challenges of recent years. We have maintained an impactful and varied docket, with a focus on issues directly affecting the people of the District and significant attention to federal policies and programs as well; in both areas, we have consistently taken on matters with broad implications reaching beyond the individuals who are parties to the cases.

Our biggest issue areas over the past seven years have been criminal justice reform (both police practices and jail conditions); First Amendment rights (freedoms of speech, association, and religion, including protest cases); equal protection and antidiscrimination; immigrants' rights; and countering abuses of power by the national security apparatus. These areas are the ones in which we perceive both the greatest need for our advocacy here in D.C. and the greatest opportunity to have a significant impact. We are also influenced in case selection by initiatives of the National ACLU, to the extent they have yielded opportunities to pursue litigation in the D.C. federal courts with nationwide impact, and by the priorities of our colleagues in the ACLU-DC's Policy, Communications, and Organizing Departments, with whom we regularly identify opportunities to collaborate and enhance our joint impact by pursuing complementary projects.

I count among our major successes over the past seven years the following matters, by category:

Criminal Justice / Police Practices:

- An injunction requiring the D.C. police to collect comprehensive stop-and-frisk data as required by D.C. law (*Black Lives Matter D.C. v. Bowser*, p. 10)
- Significant settlements in three cases challenging sexually invasive searches by D.C. police; one of the cases led to the firing of the abusive officer and a training offer (*Cottingham v. Lojacono*, p. 12; *McComb v. Ross*, p. 16; *Mwimanzi v. Wilson*, p. 8)
- A court ruling striking down a D.C. statute permitting police to search without a warrant any person found in a location that police are searching pursuant to a warrant covering only the place (*Mwimanzi v. Wilson*, p. 8)
- An appellate ruling (based heavily on our amicus participation) requiring police to obtain a warrant before tracking a person's location by intercepting their cell phone data (*Jones v. United States*, p. 15)

▪ An appellate ruling limiting the authority of police to barge into a home unannounced and to seize property beyond the scope of a warrant (*Jones v. Kirchner*, p. 17)

▪ Justice Thomas's dissent from the denial of certiorari in our petition asking the Supreme Court to abolish qualified immunity in the case of a man on whom police sicced a police dog after he surrendered; our case received national press attention (by 2021, it had become, according to Time Magazine, a "famous example" of what's wrong with qualified immunity), and it continues to be cited in judicial opinions calling for qualified immunity reform (*Baxter v. Bracey*, p. 9)

Criminal Justice / Jails, Prisons, and Punishment:

▪ A year-long injunction followed by a settlement requiring conditions improvements backed up by independent monitoring, in our challenge to the D.C. jail's failure to take elementary COVID-19 precautions (*Banks v. Booth*, p. 22)

▪ A year-long injunction requiring COVID-19 conditions improvements at St. Elizabeths psychiatric hospital (*Costa v. Bazron*, p. 24)

▪ The closure of the Hope Village federal halfway house a month after we sued over deplorable COVID-19 conditions there (*Williams v. Federal Bureau of Prisons*, p. 21)

Due Process and Procedural Rights:

▪ In a three-decade long institutional reform case concluded in 2021, a sweeping overhaul of D.C.'s foster care system from deep dysfunction to what the presiding judge called "a national model" (*LaShawn A. v. Bowser*, originally *LaShawn A. v. Barry*, p. 29)

Equal Protection and Antidiscrimination:

▪ Significant changes to transgender housing and shackling policies at the D.C. jail (*Hinton v. District of Columbia*, p. 33)

▪ Significant changes to the way AmeriCorps treats applicants with disabilities (*Balcom v. AmeriCorps*, p. 37)

▪ An appellate ruling limiting and criticizing the judicially created "adverse action" hurdle for employment discrimination plaintiffs; our case was cited in the D.C. Circuit's later decision to abandon the requirement altogether (*Ortiz-Diaz v. U.S. Dep't of Hous. & Urban Development*, p. 38)

▪ A landmark ruling by then-Judge (now Justice) Ketanji Brown Jackson that the D.C. jail was required to accommodate a deaf person in custody by, for instance, providing sign language interpreters; the jury then awarded significant damages to our client (*Pierce v. District of Columbia*, p. 39)

First Amendment (speech, association, religion, including protest):

▪ Significant policy changes to U.S. Park Police and U.S. Secret Service rules for policing demonstrations, as a partial settlement of our lawsuit over the attack on civil rights demonstrators at Lafayette Square during the George Floyd protests of 2020 (*Black Lives Matter D.C. v. Trump*, p. 42)

▪ An injunction against the federal government's prohibition of administrative employees in the judicial branch from engaging in basic acts of political participation (expressing opinions about candidates, attending candidate events, being a member of a political party, and more); the injunction we won was affirmed and broadened on appeal (*Guffey v. Mauskopf*, p. 46)

▪ $605,000 in damages, plus changes to arrestee processing procedures, to settle our suit over D.C. police abuses against demonstrators on Inauguration Day 2017 (*Horse v. District of Columbia*, p. 50)

▪ Advocacy that spurred the Trump Administration to withdraw proposed regulations that would have dramatically limited the right to demonstrate near the White House and on the National Mall (National Park Service regulations, p. 46)

▪ Litigation protecting the Facebook accounts of two political activists and one political organization against an overbroad warrant seeking to investigate protest activity connected to the 2017 Inauguration (*In re Search of Information Associated with Facebook Accounts DisruptJ20 [Etc.]*, p. 49)
▪ A ruling narrowing a provision of the federal Computer Fraud and Abuse Act that would have chilled internet research and additional online activity (*Sandvig v. Barr*, p. 52)
▪ A successful First Amendment challenge to the Library of Congress's firing of an employee for his outspoken criticism of the government's Guantanamo detention policy (*Davis v. Billington*, p. 57)

Immigrants' Rights:

▪ A series of cases enjoining aspects of the federal government's use of the COVID-19 pandemic as an excuse to keep migrants out of the country and deny them the ability to seek humanitarian protections from removal (*Huisha-Huisha v. Gaynor*, *P.J.E.S. v. Wolf*, and related cases, pp. 61-64)
▪ An injunction against the Trump administration's policy of denying non-citizens serving in the U.S. Armed Forces the expedited path to citizenship that such patriots have had since at least the Civil War (*Samma v. Dep't of Defense*, p. 64)
▪ An injunction blocking a Trump Administration rule barring asylum for migrants who passed through another country on the way to the United States (*I.A. v. Barr*, p. 67)
▪ An injunction blocking the Trump Administration's attempted extension of "expedited removal" procedures to cover a broader swath of immigrants (*Make the Road N.Y. v. McAleenan*, p. 68)
▪ A ruling striking down the Trump Administration's unlawful revisions to asylum rules (*Grace v. Barr*, p. 69)
▪ An injunction blocking the Trump administration's blanket policy of denying parole to asylum seekers fleeing persecution, torture, or death in their countries of origin (*Damus v. Nielson*, p. 70)

National Security / Military / "War on Terror":

▪ A habeas petition on behalf of a U.S. citizen detained in Iraq as an "enemy combatant" and denied access to court or counsel; our case resulted in an appellate opinion that the government does not have authority to involuntarily transfer a U.S. citizen to another country without judicial review, and the government ultimately released the individual (*Doe v. Mattis*, p. 76)
▪ A habeas petition on behalf of Guantanamo detainee Mohamedou Ould Slahi, who after years of litigation was finally released by the government and repatriated to Mauritania (*Slahi v. Obama*, p. 80)

Other civil liberties issues:

▪ An injunction, upheld on appeal, against the Trump Administration's denial of access to abortion services for undocumented immigrant minors in federal custody (*J.D. v. Azar*, p. 85)
▪ An injunction against the District's requirement that daycare centers, nursery schools, and preschools subject all teachers and staff to random drug and alcohol testing without individualized suspicion (*Ass'n of Indep. Schs. of Greater Wash. v. District of Columbia*, p. 88)

I hope that in reading this summary and the details of our full docket below, you are as proud of our work and our team as I am, and maintain the sense of urgency about the need for a robust and principled defense of civil liberties in our city and our Nation.

Scott Michelman, Legal Director

AMERICAN CIVIL LIBERTIES UNION
OF THE DISTRICT OF COLUMBIA

2016-22 LITIGATION DOCKET

DOCKET STATISTICS*

By matter type:	Cases litigated	Amicus briefs filed	Informal advocacy	Total matters
Criminal Justice / Police Practices	19	3	3	25
Criminal Justice / Jails, Prisons, and Punishment	11	2	0	13
Due Process and Procedural Rights	2	3	1	6
Equal Protection and Antidiscrimination	12	1	1	14
First Amendment (speech, association, religion, incl protest)	15	13	7	35
Immigrants' Rights	22	0	0	22
National Security / Military / "War on Terror"	17	0	0	17
Privacy	2	0	1	3
Reproductive Freedom	2	0	0	2
Statehood	0	1	0	1
Transparency	3	3	0	6
All issues	**105**	**26**	**13**	**144**

By resolution, among cases litigated:	Victory!	Closed	Open	Total
Criminal Justice / Police Practices	15	1	3	19
Criminal Justice / Jails, Prisons, and Punishment	5*	1	5	11
Due Process and Procedural Rights	2	0	0	2
Equal Protection and Antidiscrimination	8	1	3	12
First Amendment (speech, association, religion, incl protest)	9	2	4	15
Immigrants' Rights	8	5	9	22
National Security / Military / "War on Terror"	6	8	3	17
Privacy	2	0	0	2
Reproductive Freedom	1	1	0	2
Statehood	0	0	0	0
Transparency	2	1	0	3
All issues	**58**	**20**	**27**	**105**

** Also counting the February 2023 settlement in Costa v. Bazron (St. Elizabeths Hospital)*

CRIMINAL JUSTICE / POLICE PRACTICES

Williams v. Dixon

Date filed: March 18, 2022 **Status: Open**

ACLU-DC attorneys: *Tara Patel*, Michael Perloff, Art Spitzer, Scott Michelman

Under United States Marshals Service (USMS) search policy, men arriving at Superior Court from pretrial detention at the D.C. Jail experience the following: While the incarcerated individual is shackled with handcuffs that are connected to a belly chain and leg irons, a courthouse marshal pulls down his pants and through his underwear manually probes around his genitals and presses inside his buttocks. USMS subjects people to this invasive search even though they undergo a visual body cavity search at the D.C. Jail before leaving for the courthouse, and then are shackled and supervised at all times between the two searches. Tyrone Williams endured this invasive dual-search procedure on several occasions—and the marshals who performed the search were particularly abusive, grabbing and yanking Mr. Williams' testicles. Mr. Williams experienced long-lasting pain and escalating emotional distress because of these searches. In March 2022, we filed suit in federal court challenging both the dual-search procedure and the manner in which marshals searched Mr. Williams. We sought a preliminary injunction against the dual-search procedure, arguing that the Constitution prohibits a second invasive search shortly following an initial invasive search where there is no opportunity for detainees to acquire contraband in between. In April, to resolve our preliminary injunction motion, USMS reached a settlement with us regarding future searches of Mr. Williams. In July, USMS moved to dismiss the case, arguing that Mr. Williams failed to exhaust his claims under the Prison Litigation Reform Act before suing in federal court. We argued in response that the exhaustion requirement does not apply to Mr. Williams's claims, which deal with conduct occurring in a courthouse rather than a prison and that, in any event, Mr. Williams did exhaust his claims. We await the court's decision.

Cameron v. District of Columbia

Date filed: November 4, 2021 **Status: Open**

ACLU-DC attorneys: *Michael Perloff*, Scott Michelman, Art Spitzer, Marietta Catsambas (volunteer)

Co-counsel: Wash. Lawyers' Comm. for Civil Rights & Urban Affairs; Law Office of Jeffrey L. Light; Tara Reinhart, Julia York, and Joe Sandman

When people are arrested, the police take their belongings, then generally give them back upon release unless the property is evidence. But MPD has a different practice for arrestees' cell phones. MPD keeps cell phones for months or even years—even if the owner is never charged with a crime, when the phone is not evidence, and long after MPD has any conceivable need for it. MPD policy says it if is going to obtain a warrant to search the phone, it should do that within 48 hours. And it has the technology to download within an hour any information it has received judicial permission to obtain. Once that has happened, or if the government doesn't seek a warrant or its application is denied, then the phone should be returned quickly to the owner. But that often doesn't happen. And when an individual is not charged with a crime, D.C. has no process for the owner to seek the return of the phone. Instead, MPD just keeps it until it feels like giving it back. Sometimes it never does. The consequences for the phone owners can be both economic and personal—including not only the cost of replacement but also the loss of important work data, personal photographs, or other irreplaceable content. MPD applies its phone-retention practice to individuals in all kinds of circumstances; one of them is where individuals are arrested during a

protest—where the possibility of losing your phone for participating in a protest can exert a chilling effect and also give rise to fears that MPD is using confiscated phones to monitor First Amendment activity of community groups.

In August 2020, MPD arrested a group of about 40 demonstrators and associated individuals (like medics) who were marching in Adams Morgan for civil rights in the wake of the killings of George Floyd, Breonna Taylor, and many other Black people at the hands of police. MPD released the arrestees the next day without charges, but it retained nearly everyone's phones. Despite multiple requests for the return of the phones, MPD continued to hold one phone for 285 days after seizing it and another for 312 days, and more than a year later still was retaining the phones of about three dozen of the protestors.

In November 2021, we sued D.C. on behalf of two protestors and three volunteer medics, and we seek to represent a class of all arrestees at that demonstration whose phones were retained for unreasonably long periods. We are asking the court to order MPD to end its unlawful practice, return the outstanding phones, and pay compensation. Our complaint documents more than 200 other instances of unlawfully prolonged retentions of cell phones—including many following the arrest of the Inauguration Day 2017 demonstrators (on whose behalf we sued for false arrest, excessive force, and unconstitutional conditions of confinement and won a significant settlement in *Horse v. District of Columbia*), and one following the arrest of a photojournalist at another summer 2020 civil rights protest (on whose behalf we have also sued, in *Asinor v. District of Columbia*, raising a challenge to this practice as well as the police's unlawful use of less-lethal weapons the D.C. Council has banned).

We argue that when the government retains a person's property beyond its legitimate need for it, the seizure of the property becomes unreasonable in violation of the Fourth Amendment's prohibition on unreasonable seizures. And that the government's failure to provide a process by which the individuals can obtain their phones back violates the Fifth Amendment's prohibition on depriving people of property without due process of law.

In August 2022, the district court dismissed the plaintiffs' complaint. We have appealed to the U.S. Court of Appeals for the D.C. Circuit.

Asinor v. District of Columbia
Date filed: August 12, 2021 **Status: Open**
ACLU-DC attorneys: *Michael Perloff*, Megan Yan, Scott Michelman, Art Spitzer

This case challenges two forms of abuse that MPD regularly inflicts on the people it polices. The first is the use of chemical irritants and explosive munitions, such as flash bang grenades, to break up protests. These tactics can cause demonstrators severe pain and long-term trauma. In July 2020, the D.C. Council banned MPD from using these weapons to disperse demonstrations. Yet on August 29, 2020, MPD officers sprayed chemical irritants and deployed flash grenades against a crowd of people near Black Lives Matter Plaza (near 16th Street NW and H Street NW) who were protesting brutality and racism in policing. Photojournalists Oyoma Asinor and Bryan Dozier, who were present to cover the event, were hit by the irritants and terrified by the explosions. They suffered searing pain and significant emotional distress as a result. The second tactic at issue is MPD's practice of retaining cell phones seized from arrestees long after the law enforcement need for the phones has ended (for details, see entry for *Cameron v. District of Columbia*, also challenging this practice). In this case, when Mr. Asinor covered another protest against unjust policing that occurred near Black Lives Matter Plaza on August 30, MPD arrested him (even though he broke no laws), seized his phone and camera, and held these items for more than eleven months after prosecutors declined to charge him with any crimes. On behalf of Mr. Asinor and Mr. Dozier, we filed this lawsuit in August 2021 to challenge these practices, which violated their rights under D.C. law and

the Constitution. In August 2022, the district court dismissed the plaintiffs' complaint. We have appealed to the U.S. Court of Appeals for the D.C. Circuit.

D'Quan Young Freedom of Information Act request

Date filed: April 29, 2021 **Status: Open**

ACLU-DC attorneys: *Michael Perloff*, Art Spitzer

On May 9, 2018, MPD Officer James Lorenzo Wilson III shot and killed D'Quan Young. Ever since, his family has tried to learn why and how this happened. MPD waited years to show them body-worn camera footage of the incident and, even now, the Department is still withholding important records. On April 28, 2021, the ACLU-DC filed D.C. FOIA requests on behalf of D'Quan Young's mother to ask for information regarding Mr. Young's death. Various D.C. agencies have responded, providing some but not all of what we requested. The ACLU-DC is continuing to press for full compliance.

Hugginsel v. District of Columbia

Date filed: September 22, 2020 **Status: Victory!**

ACLU-DC attorneys: *Michael Perloff*, Scott Michelman, Art Spitzer, Marietta Catsambas (volunteer)

On October 12, 2019, MPD officers broke down Khadijah Hugginsel's door to execute a warrant to search for items related to allegations concerning a family member who lived in a separate room of her home. The warrant said nothing about cell phones; nonetheless, the officers took three, including Ms. Hugginsel's iPhone from her own bedroom. Ms. Hugginsel asked for the phones back multiple times, but MPD never returned them. In September 2020, we sued MPD and the officers involved for violating Ms. Hugginsel's Fourth Amendment rights by effecting an unlawful seizure and unreasonably retaining her items. In December 2022, we reached a settlement on behalf of Ms. Hugginsel with the District and the officers involved.

Morgan v. Choi

Date filed: September 10, 2020 **Status: Victory!**

ACLU-DC attorneys: *Michael Perloff*, Scott Michelman, Megan Yan, Art Spitzer

In April 2020, Ryan Morgan was sitting in his car when an MPD officer approached him about the tint of his windows and ordered him out of the car. Officers surrounded him. Even after an officer measured the tint and even after an officer wrote him a ticket, MPD detained Mr. Morgan at the scene so that officers could bring a police dog to sniff the car for guns. In September 2020, we sued the officers and the District for false arrest and violating Mr. Morgan's Fourth Amendment rights by unreasonably prolonging the seizure. After defeating a motion to dismiss (or in the alternative for summary judgment), we reached a settlement with the District in April 2022.

Lewis v. Faltz

Date filed: April 7, 2020 **Status: Victory!**

ACLU-DC attorneys: *Michael Perloff*, Scott Michelman, Art Spitzer

Kayla Lewis was at the Columbia Heights Metro Station in April 2019 when Metro Transit Police Officer Derrick Faltz forcibly removed her from the station without any justification. We sued the officer for false

imprisonment and for violating Ms. Lewis's Fourth Amendment rights by detaining her without cause. In July 2020, WMATA agreed to compensate Ms. Lewis in exchange for dismissal of the case.

Mwimanzi v. Wilson

Date filed: January 13, 2020 **Status: Victory!**

ACLU-DC attorneys: *Michael Perloff*, Megan Yan, Tara Patel, Scott Michelman, Art Spitzer, Kayla Scott (volunteer), Annamaria Morales-Kimball (volunteer), Marietta Catsambas (volunteer)

On January 15, 2019, Mbalawinwe Mwimanzi was at a friend's house watching television when MPD officers arrived with a search warrant for the apartment. Despite having no individualized suspicion of Mr. Mwimanzi, Officer Joshua Wilson searched him; as he did so, he pressed hard on Mr. Mwimanzi's testicles and reached into his buttocks, forcefully pressing on his anus. This search, which caused Mr. Mwimanzi long-lasting physical and emotional pain, was conducted on a scant rationale: the possibility that Mr. Mwimanzi might have drugs because he was present in a friend's apartment at a time officers were executing a warrant to search that location.

Officer Wilson's conduct reflects two concerning, and unlawful, MPD practices. First, MPD allows officers to treat warrants to search residences as authorizing searches of any people inside. Under a D.C. statute and an MPD general order, these searches are permissible any time the person could conceal an item listed in the warrant on their person. The Fourth Amendment, however, prohibits such searches. A warrant to search only a place doesn't implicitly allow searches of persons, and presence in a place subject to a warrant doesn't constitute an exception to the warrant requirement. Thus, D.C. law allows searches where the Constitution does not. The second practice implicated by this case is MPD's reliance on sexually invasive searches. This is the fourth time in recent years that the ACLU-DC has sued a D.C. officer for inappropriately probing a person's sensitive body parts. Even if Officer Wilson had authority to search Mr. Mwimanzi for drugs, the manner of the search was unconstitutional.

After discovery, both sides moved for summary judgment. In March 2022, the court granted partial summary judgment to Mr. Mwimanzi, holding unconstitutional the D.C. law permitting searches of people based on warrants to search places. The court also mostly denied the defendants' motion and held that Mr. Mwimanzi would be entitled to have a jury decide whether the manner in which he was searched was unconstitutionally invasive.

In October 2022, the defendants agreed to a settlement to compensate Mr. Mwimanzi for his injuries. We hope that this case leads to substantial changes in MPD policy such that no one endures the type of gratuitous search Mr. Mwimanzi suffered.

McKay, Maurice

Date filed: July 17, 2019 **Status: Victory!**

ACLU-DC attorneys: *Michael Perloff*, Scott Michelman, Art Spitzer

In July 2017, MPD officers arrested Maurice McKay while he was wearing a gold necklace. Officers seized the necklace and never returned it, despite returning all the other property they took from him. We worked with Mr. McKay to negotiate with the District and in 2020 obtained compensation for the necklace.

Price v. Gupton

Date filed: April 29, 2019 **Status: Victory!**

ACLU-DC attorneys: *Michael Perloff*, Scott Michelman, Art Spitzer

On May 11, 2018, Ms. Price was sitting in her yard in Northeast D.C. with family members and friends, discussing funeral arrangements for her son, Jeffery Price, who had been killed by MPD officers just seven days earlier. During that conversation, MPD Officer Joseph Gupton barged into her yard and searched it. He had no warrant. He did not respond or even explain himself when Mr. Price and her brother repeatedly asked him to leave. He found no contraband or criminal suspects on the property. Safeguarding the home from unjustified police intrusions is a core purpose of the Fourth Amendment. Officer Gupton's warrantless entry violated that guarantee, causing Ms. Price to feel increased anxiety and less safe in her home in light of the fact that officers from the same police department responsible for her son's death apparently feel free to enter her property at any time. To remedy the harms Ms. Price suffered and enforce the constitutional guarantee of freedom from unreasonable searches, we sued Officer Gupton and the District of Columbia in April 2019.

Discovery concluded in early 2020, and in August 2020, we moved for partial summary judgment on behalf of Ms. Price, as the undisputed evidence showed that the police violated her Fourth Amendment rights when they entered her yard.

In the fall of 2020, the defendants agreed to compensate Ms. Price to settle the case. We hope that this settlement will discourage other officers from unconstitutionally intruding on other people's property.

Baxter v. Bracey

Date filed: April 8, 2019 **Status: Closed**

ACLU-DC attorneys: *Scott Michelman*, Art Spitzer, Michael Perloff

Co-counsel: ACLU Criminal Law Reform Project; ACLU of Tennessee

In 2014, Alexander Baxter was bitten by a police dog that was unleashed on him while he was sitting with his hands in the air, having surrendered to police. He sued for excessive force, but in late 2018, a federal appeals court ruled that his claim should be thrown out under the doctrine of "qualified immunity." Qualified immunity is a rule that when a person sues officials for violating the constitution, the official gets off the hook if the law was not "clearly established." Under this doctrine it is entirely possible—and quite common—for courts to hold that government agents *did* violate someone's rights, but that the illegality of their conduct wasn't sufficiently well-established for them to be held liable. In practice, "clearly established law" is a very hard standard to meet. It generally requires civil rights plaintiffs to show not just a clear legal rule, but a prior case from an authoritative court with very similar facts. The practical effect is that public officials—especially members of law enforcement—routinely get away with unconstitutional conduct, simply because no one else has committed that precise kind of misconduct before.

In April 2019, we filed a petition with the U.S. Supreme Court asking it both to reverse the grant of immunity to the officers responsible for the dog attack on Mr. Baxter and also to reconsider the doctrine of qualified immunity itself. The Court has justified qualified immunity based on the need to shield individual officers from personal liability because they might be reluctant to do their jobs vigorously if they thought they could be required to compensate victims of their misconduct. But recent studies show that officers almost never pay judgments themselves; the governments that employ the officers pay instead. And qualified immunity imposes huge costs on the legal system: It teaches officers that they won't face consequences for violating people's rights, and by letting constitutional wrongs pass without a

remedy, it weakens the rule of law itself. In Mr. Baxter's case, a qualified immunity wrongly immunized officers for attacking a defenseless man who had clearly indicated his surrender and posed no threat.

The Supreme Court considered the petition several times throughout its 2019-20 term, ultimately waiting to rule until it had several pending petitions calling for qualified immunity reform. Then in the wake of the killing of George Floyd in Minneapolis in May 2020 and the nationwide protests that followed, a bill to curtail qualified immunity was introduced in Congress in June 2020. On June 15, 2020, the Court denied our petition on behalf of Mr. Baxter, along with the other fully briefed petitions calling on the Court to revisit the qualified immunity doctrine. Justice Thomas dissented from the denial of review in Mr. Baxter's case. The ACLU will continue to fight to reform the doctrine in Congress and the courts.

Black Lives Matter-DC v. Bowser
Date filed: May 4, 2018 **Status: Victory!**
ACLU-DC attorneys: *Scott Michelman*, *Shana Knizhnik*, Michael Perloff, Art Spitzer
ACLU-DC v. District of Columbia
Date filed: February 16, 2021 **Status: Victory!**
ACLU-DC attorneys: *Megan Yan*, Michael Perloff, Art Spitzer, Scott Michelman

In March 2016, the District of Columbia enacted the Neighborhood Engagement Achieves Results (NEAR) Act of 2016. One of its key provisions required MPD to collect detailed and comprehensive data about stops and frisks the police carry out on the streets of the District. The collection of this data is crucial to ensuring that the police do not unfairly and unconstitutionally focus on people of color when conducting these stops. We filed a FOIA request in February 2017 for the NEAR Act stop-and-frisk data. MPD responded that the data collection requirement had not yet been implemented. Over the following year, officials from Mayor Bowser's office and MPD responded to oversight inquiries by the D.C. Council with a shifting and contradictory parade of excuses, the release of recycled and incomplete pre-NEAR Act data, and even the misleading claim that the NEAR Act had been "fully implemented." In fact, based on Council testimony by top D.C. officials in February 2018 and press statements from MPD in March 2018, it became clear that the NEAR Act's stop-and-frisk data collection requirement had not been implemented although the NEAR Act had been law for two years.

Meanwhile, the need for the data required by the NEAR Act remained acute. Although Black people make up about 47% of D.C.'s population, they are the subjects of the vast majority of all stops, frisks, and uses of force in the District. A February 2018 investigative report from WUSA9 analyzed pre-NEAR Act data and found that approximately 80% percent of the stops involved a Black subject. As D.C. Circuit Judge Janice Rogers Brown wrote in 2015, D.C. police have a practice of subjecting individuals "who fit a certain statistical profile" to "intrusive searches unless they can prove their innocence" "[d]espite lacking any semblance of particularized suspicion when the initial contact is made." However, without the data collection required by the NEAR Act, such practices would remain impossible to document comprehensively so as to facilitate meaningful reform.

In March 2018, we filed a renewed FOIA request for the NEAR Act stop-and-frisk data, on behalf of Black Lives Matter D.C. and the Stop Police Terror Project D.C. as well as ourselves. We also requested all of the District's plans to implement the NEAR Act data-collection requirement.

In May 2018, having received no response, Black Lives Matter D.C., the Stop Police Terror Project D.C., and the ACLU of D.C. sued Mayor Bowser and Chief of Police Peter Newsham in D.C. Superior Court for failing to comply with the law. We sought a preliminary injunction requiring MPD to begin collecting the required data. The court held hearings in the fall of 2018. After the government conceded that the NEAR Act remained unimplemented, that MPD was not collecting all the required data, and that

MPD did not have a firm timeframe for implementation, the court required the government to submit a report about implementation plans. In October 2018, the government moved to dismiss the case, principally claiming that plaintiffs lacked standing and that the government's actions were not subject to judicial review; our response later that month explained how the plaintiffs were denied information to which they were entitled by statute and which the D.C. Council intended be made available to them, and that courts have longstanding authority to enjoin an agency's failure to obey the law. Meanwhile, the government said it would implement an interim data-collection policy by early November and an ultimate solution by the end of summer 2019. However, as we pointed out in response, the interim solution was plainly inadequate, because (among other problems), it would still fail to collect all the required data. Given MPD's repeated refusal to implement the law over the course of more than two and a half years, we asked the court to order that all officers fill out a one-page form that we designed to begin collecting the data right away.

In November 2018, the Court denied the government's motion to dismiss, holding among other things that the plaintiffs had standing to challenge the failure to implement the NEAR Act because the goal of the law is to make the NEAR Act data accessible and shareable with the public and groups such as the plaintiffs. The Court also expressed concern about several aspects of D.C.'s proposed interim solution, especially the government's proposal to use officers' body worn cameras for collecting some of the required categories of data.

With our preliminary injunction motion still pending, in April 2019 the ACLU-DC submitted another FOIA request for a subset of the NEAR Act data (race/ethnicity data for traffic stops) to see whether the District was able to provide it. Just as we suspected, MPD was unable to provide that data in useable form, or in a reasonable time, or at a reasonable cost. Instead, MPD responded that the requested data was contained only in a set of 31,521 individual recordings from officers' body-worn cameras. For plaintiffs to compile a complete set of data about the race or ethnicity of individuals stopped by MPD, each of these videos would have to be individually reviewed, before being combined with race/ethnicity data for non-traffic stops. Even making the conservative assumption that a traffic stop lasts, on average, just 5 minutes, watching all the videos would take more than 109 days of nonstop, 24-hour-a-day video viewing. Although MPD did not provide a cost estimate for the video production, an invoice for another ACLU-DC body-camera FOIA request charged fees at a rate of $23 per minute of video. Multiplying the $23 rate by 5 minutes for each of the 31,521 videos yields the astronomical fee of $3,624,915. In June 2019, we filed a supplemental brief informing the court of these developments and urging immediate relief. A data-collection regime that requires paying millions of dollars and then watching thousands of hours of traffic-stop video to obtain the data falls farcically short of what the Council intended or what the NEAR Act required when it mandated that Defendants keep records of specific information on stops by police in the District of Columbia.

On June 27, 2019, the court held that the District had failed to comply with the law and granted a preliminary injunction ordering the D.C. police to comply with the NEAR Act within 28 days using the one-page form we proposed. As the Court explained, "if some of that data either is not collected or is collected in a form practically unusable by the public, then the law becomes hollow," and that the District's "delay robs the community of essential information about the interactions of its police officers with its citizens."

In July 2019, the District overhauled its data-collection system and then released four weeks' worth of NEAR Act data to show it was now complying with the Act; MPD also publicly committed in writing to continue to collect the data and to publish it semi-annually. Satisfied that MPD was now complying with the NEAR Act, the plaintiffs moved jointly with defendants to vacate the injunction.

MPD's initial data confirmed what community members have long felt but have been unable to document systematically until this release: that police in the District are disproportionately stopping Black people. We published a report analyzing the data; it showed Black people made up 72% of individuals stopped by police despite comprising only 47% of D.C.'s population. Furthermore, 86% of stops did not lead to a warning, ticket, or arrest, and 91% of searches that did not lead to a warning, ticket, or arrest, were of Black people, supporting an inference that Black people are more likely to have been stopped by MPD without justification.

MPD then failed to keep its promise regarding further releases. As of February 2021, MPD had not published any data since March 2020, and its published data covered just 6 months of 2019. We filed a FOIA request in January 2021 seeking all NEAR Act data from January 1, 2020, onward. When MPD failed to respond within time set by statute to do so, we sued in February 2021. D.C. could not and did not deny that it was in violation of its legal obligations. Within three weeks, it released the missing data. ACLU-DC conducted an analysis of the 2020 data, finding that it was more of the same: MPD continues to disproportionately stop and search Black people in the District. The 2020 data, like the 2019 data, support community members' repeated assertions that MPD's stop practices unfairly overpolice the Black community and require serious scrutiny and structural change.

After our FOIA suit, MPD improved its reporting; MPD has now released data through mid-2022.

ACLU-DC v. Department of Justice
Date filed: August 16, 2018 **Status: Victory!**
ACLU-DC attorneys: *Shana Knizhnik*, Scott Michelman, Art Spitzer

In 2017, we received complaints about the practice of the U.S. Marshals Service (USMS) of placing criminal defendants in full shackles during court appearances. We therefore filed a FOIA request with USMS in December 2017 to learn the circumstances under which it places pretrial detainees in shackles and the justification for its practices. In August 2018, having waited eight months and received no responsive information other than a single link to a publicly available website, we sued to obtain the documents to which we are entitled under FOIA. In response to our lawsuit, the government produced the documents we sought.

Cottingham v. Lojacono
Date filed: July 18, 2018 **Status: Victory!**
ACLU-DC attorneys: *Scott Michelman*, Michael Perloff, Art Spitzer, Shana Knizhnik

One afternoon in September 2017, in a peaceful encounter with D.C. police concerning an open container of alcohol, Black D.C. resident M.B. Cottingham gave Officer Sean Lojacono permission to frisk him. Ranging far beyond what should have been a limited pat-down for weapons, Officer Lojacono jammed his fingers between Mr. Cottingham's buttocks and grabbed his genitals. Mr. Cottingham physically flinched and verbally protested, making clear that this highly intrusive search was not within the scope of the frisk to which he had consented. Officer Lojacono responded by handcuffing Mr. Cottingham and returning to probe the most sensitive areas of his person—twice more. No warrant, probable cause, reasonable suspicion, or consent justified the scope of these probes, which were conducted with no other discernible reason than to humiliate and degrade Mr. Cottingham. The escalation of a low-level stop into a public body-cavity search was an affront to Mr. Cottingham's dignity as well as his constitutional rights.

In July 2018, we sued Officer Lojacono for this violation of Mr. Cottingham's Fourth Amendment rights. Like many Black men in the District, Mr. Cottingham has endured intrusive police stops-and-frisks

on a regular basis for years, and his experience is, we believe, emblematic of a problematic police culture in the District in which residents are too often disrespected and viewed as potential suspects rather than as community members and neighbors. After the case was filed, MPD announced in September 2018 that it had begun the process of firing Officer Lojacono. In December 2018—on the eve of the District's deadline to disclose information about Officer Lojacono's extensive disciplinary history, including more than 20 specific internal investigations involving Officer Lojacono—Lojacono and the District of Columbia agreed to pay Mr. Cottingham a substantial sum to settle the case. Ultimately, the District fired Lojacono as well as a training officer who testified that he taught MPD cadets to perform searches like this one. We are hopeful that the settlement and the terminations will send a strong message that officers must respect community members' dignity and constitutional rights, and that police officials must be proactive in disciplining officers who fail to do so.

Sheriff Road Police Encounters FOIA Request

Date filed: July 9, 2018 **Status: Closed**

ACLU-DC attorneys: *Michael Perloff*, *Shana Knizhnik*, Scott Michelman, Art Spitzer

Twice within a span of 12 days MPD officers arrived in the 5200 block of Sheriff Road NE in the Deanwood neighborhood and interacted with community members in ways that prompted complaints of disrespectful and potentially unconstitutional conduct. On June 13, 2018, plainclothes officers questioned a group of young African-American men sitting peacefully near a barbershop; at least one of the men was searched. On June 25, community leaders organized a press conference to complain about the conduct. That night, a large group of officers—armed with pepper spray, tasers, and batons—returned to same area and confronted members of the community who were protesting their actions. The police deployed pepper spray and arrested several community members. In July 2018, we filed a FOIA request for all MPD recordings of the incidents, including videos taken by officers' body-worn cameras. MPD rejected the request, arguing that releasing the footage could jeopardize officers' right to a fair trial or adjudication. However, no trial or adjudication was pending. We appealed to the Mayor's Office of Legal Counsel, which in August 2018 ordered MPD to release the footage or provide a "reasonable explanation" for continuing to withhold it. Later that month, MPD again refused to disclose its videos, repeating its prior argument. We again appealed. After months of negotiation, MPD agreed to release several videos depicting what occurred at Sheriff Road—but did so only after charging the ACLU-DC several thousand dollars for to pay for the costs of redacting the images of offices and bystanders. The Sheriff Road saga illustrates the difficulty in ensuring transparency and accountability for MPD misconduct.

Williams v. United States

Date filed: January 30, 2018 **Status: Victory!**

ACLU-DC attorneys: *Scott Michelman*, Art Spitzer, Michael Perloff, Shana Knizhnik

One morning in June 2015, multiple U.S. Marshals stormed into Donya Williams' home in Southeast D.C. where she lived with her daughter, then 12 years old. The Marshals, who were there to carry out a routine eviction (which is a role the U.S. Marshals play in D.C. because D.C. is not a state), entered with guns drawn, even though they had no information to indicate anyone in the apartment would pose a threat. The Marshals then burst in on Ms. Williams naked, despite her warning that she was getting dressed. Ms. Williams inadvertently grabbed a pair of pants belonging to her daughter, so when she put them on, they split at the crotch. Despite the large hole in her pants, the Marshals marched Ms. Williams with her daughter past an eviction crew of twenty men and out to the building's parking lot. The Marshals taunted

Ms. Williams and refused to allow her to return to the apartment to put on clothes. In February 2017, we filed an administrative complaint with the U.S. Marshals Service seeking damages for the Williams family's ordeal. The Marshals Service never responded. In January 2018, we filed suit on behalf of Ms. Williams and her daughter, seeking damages from the federal government and from the individual U.S. Marshals for violations of the Fourth Amendment and D.C. law. In apparent response to this case and to another problematic eviction, the Marshals Service announced that in the summer of 2018 it would roll out two policy directives: one to provide tenants better notice of upcoming evictions and the other to prevent tenants' belongings from being dumped on the sidewalk by the eviction crew. In August 2018, the defendants agreed to compensate our clients to settle the case.

Payne-Jones v. D.C. Taxicab Commission

Date filed: July 28, 2017 **Status: Victory!**

ACLU-DC attorneys: *Shana Knizhnik*, Scott Michelman, Art Spitzer

Co-counsel: Riley Legal; Gupta Wessler PLLC

The D.C. Department of For-Hire Vehicles (DFHV) regulates vehicles for hire like limousines and taxicabs to ensure compliance with standards governing cleanliness, vehicle maintenance, and appropriate licensing and documentation. The Department employs vehicle inspection officers ("hack inspectors") to enforce these policies by subjecting drivers to vehicle checks. The Department's regulations and policies, however, permit hack inspectors and D.C. police officers to detain vehicles and conduct vehicle checks without a warrant, individualized suspicion of wrongdoing by the driver, or a reasonable limit on how long the stop may take. Instead, a hack inspector or D.C. police officer can conduct a vehicle check for any reason or no reason, entirely at the officer's discretion. We learned that many drivers stopped by hack inspectors feel that they have been racially profiled.

In March 2015, Yolande Payne-Jones, a limousine driver, stopped outside a restaurant while waiting for her passenger. A hack inspector detained her without suspicion of wrongdoing and conducted an inspection, resulting in multiple citations totaling over $2,000. Ms. Payne-Jones and her company, Diamond Limousines, challenged the citations administratively, but they were upheld. Representing Ms. Payne-Jones and Diamond on appeal, we argued in our opening brief to the D.C. Court of Appeals in July 2017 that the Department's suspicionless-stop policy runs afoul of the Fourth Amendment because it does not provide sufficient limitations on the inspector's discretion. Instead of giving free rein to inspectors to stop drivers, we argued, the Department could require more frequent inspections or mandate that a sticker be displayed indicating the last date of inspection. Rather than respond to our brief on the merits, the government moved to have the citations dismissed. In January 2018, the Court granted that motion.

Hunter v. Rodgers

Date filed: February 28, 2017 **Status: Victory!**

ACLU-DC attorneys: *Shana Knizhnik*, Scott Michelman, Art Spitzer

On November 16, 2016, Lourdes Ashley Hunter, the Executive Director and co-founder of the Trans Women of Color Collective, was arrested without a warrant while hosting a gathering in her apartment for activists and advocates from around the nation who would be attending the White House Transgender Community Briefing with her the following day. The arrest followed a disagreement between Ms. Hunter and her neighbors about the level of noise coming from her apartment. Four police officers came to the apartment for what they described as an investigation of "a possible assault." After disagreeing with that characterization, Ms. Hunter retreated back into her apartment, where she was followed by an officer who

grabbed her by her arm and neck. The officers told Ms. Hunter she was being arrested for assault, placed her in handcuffs, dragged her out of her apartment, and held her in custody for hours. In February 2017, we filed a lawsuit seeking damages from the officers and the District of Columbia for this unlawful warrantless arrest and unconstitutional warrantless entry into Ms. Hunter's home. In October 2017, we reached a settlement with the District of Columbia on behalf of Ms. Hunter.

United States v. Mitchell
Date filed: January 30, 2017 **Status: Amicus**
ACLU-DC attorneys: Art Spitzer, Scott Michelman
Co-counsel: ACLU National Security Project; Electronic Frontier Foundation

United States v. Robinson
Date filed: September 28, 2017 **Status: Amicus**
ACLU-DC attorneys: Art Spitzer
Co-counsel: ACLU National Security Project; Electronic Frontier Foundation

In these cases, we filed amicus briefs to the nation's highest military court, the U.S. Court of Appeals for the Armed Forces (CAAF) in appeals regarding U.S. servicemembers' privacy interests in their iPhones during interrogations by military investigators.

In *Mitchell*, Army investigators compelled an Army sergeant to enter his password on his private iPhone so the phone could be searched for incriminating evidence (which was found). Our amicus brief argued that this violated Sgt. Mitchell's Fifth Amendment privilege against self-incrimination because providing his password involved revealing the contents of his mind and was therefore "testimonial" and covered by the privilege (as opposed to merely physical acts, such as providing a fingerprint, which the courts have held are non-testimonial and therefore not covered by the privilege.) In August 2017, CAAF agreed that the evidence should be suppressed, but on different grounds than we urged. The court held that asking Sgt. Mitchell to enter his password was an improper interrogation when he was in custody and had asked for a lawyer, who was not present when he was "badgered" into unlocking his phone. Nevertheless, the decision is in line with others showing that judges are alert to the dangers of cellphone searches, with their potential to expose all of a person's life to government investigators.

In *Robinson*, an Air Force senior airman, while in custody, requested counsel but also consented to a search of his iPhone. The investigators then asked Sr. Airman Robinson to provide the passcode. We argued that this was impermissible interrogation. The CAAF disagreed, ruling that the request for the passcode "was merely a natural and logical extension of the first permissible inquiry [asking consent to a search]" and so did not "rise to the level of a reinitiation of interrogation." Judge Stucky, dissenting, agreed with us that "while the passcode request here may well have naturally and logically followed a request for consent to search, it also qualified as an interrogation" and therefore violated the rule against resuming custodial interrogation after counsel has been requested and outside counsel's presence.

Jones v. United States
Date filed: February 24, 2016 **Status: Amicus**
ACLU-DC attorneys: Art Spitzer
Co-counsel: ACLU Speech, Privacy & Technology Project; Electronic Frontier Foundation

In November 2014, Prince Jones was convicted of rape and robbery. To apprehend Mr. Jones, police used a "StingRay"—a "cell site simulator" device that captures a cellphone's signal and uses it to pinpoint the cellphone user's location with great accuracy. The police did not have a search warrant authorizing them

to use the StingRay for this purpose, but Mr. Jones's motion to suppress the evidence obtained by the StingRay was denied by the trial court.

Mr. Jones appealed, and in February 2016, together with the National ACLU, we filed an amicus brief in this case in the D.C. Court of Appeals. We argued that a warrant should be required because, like turning a person's car into a tracking device by attaching a GPS, a StingRay turns a person's phone into a tracking device, and it does so by seizing locational information from him, not from the phone company. Additionally, a warrant should be required because cell site simulators interact with the cell phones of other people in the vicinity, forcing their phones to drop (or be unable to make) calls and transmitting data to the government that they would not otherwise have transmitted to the government. This considerable intrusion into the private affairs of innocent people should require a warrant because a judge, not the police, should determine that such interference is justified, and the warrant should mandate minimization of disruption and protection of bystanders' data. We participated in oral argument in April 2017, and in supplemental briefing later that spring regarding whether a person has a reasonable expectation of privacy when the person possesses a stolen cell phone. Our supplemental brief argued that a person's possession of a stolen cell phone doesn't reduce her legitimate expectation of privacy any more than her possession of any other contraband would; the Fourth Amendment would have little force if people who were found with evidence of crime were automatically deemed to have had no protection against the search that discovered the evidence.

In September 2017, the court reversed Mr. Jones's convictions, agreeing with us that the use of the StingRay required a search warrant.

Briggs v. District of Columbia
Date filed: January 2, 2015 **Status: Victory!**
ACLU-DC attorneys: Art Spitzer
Co-counsel: Crowell & Moring LLP

D.C. police broke down the door to Viola Briggs's apartment in Southwest D.C. to search for marijuana. It turned out they were in the wrong apartment, but her apartment number was on the search warrant, so that was not the executing officers' fault. Nonetheless, the officers charged into her apartment without waiting a reasonable time after knocking and announcing their presence, entered with drawn guns, and continued their destructive search long after realizing they were not in a drug dealer's apartment. In January 2015, we sued the officers and the District on behalf of Viola Briggs and her brother Frank for Fourth Amendment violations. In April 2016, the District agreed to pay $55,000 to settle the case.

McComb v. Ross
Date filed: January 14, 2014 **Status: Victory!**
ACLU-DC attorneys: *Art Spitzer*, Scott Michelman

Ricky McComb was arrested on a warrant for possession with intent to distribute cocaine. At the police station, a group of MPD officers surrounded him as one told him to drop his pants and then probed repeatedly in his rectum with a finger. No contraband was found. Mr. McComb was deeply humiliated by this treatment.

In January 2014 we filed a lawsuit seeking damages from the officers and the District of Columbia for this unconstitutional search. We learned through discovery that the police department had received a dozen complaints about similar misconduct by the same officers and had not adequately investigated,

disciplined, or retrained them. In May 2016, we moved to amend our complaint to add a claim of inadequate training/supervision against the District; the court granted our motion.

After mediation, the defendants compensated Mr. McComb to settle the case.

Jones v. Kirchner
Date filed: January 10, 2013 **Status: Victory!**
ACLU-DC attorneys: Art Spitzer
Co-counsel: Miller & Chevalier Chartered

Antoine Jones sought damages against federal and D.C. law enforcement officers for repeated violations of his Fourth Amendment rights, including warrantless searches of his home, nightclub, warehouse, and vehicles. (In a separate criminal case against him, the Supreme Court ruled in 2012 that attaching a GPS tracking device to a vehicle is a Fourth Amendment search. We and the National ACLU filed an amicus brief in that case.) After an earlier case that Mr. Jones filed without an attorney was dismissed, we filed an amended complaint on his behalf in January 2013. In September 2014 the district court again dismissed the case. We appealed with respect to some of Mr. Jones's claims, and in August 2016 the court of appeals, reversing the district court, agreed that Jones's allegations that the officers had not announced their presence before entering his home, and that they had seized material beyond the warrant's authorization, were plausible and could proceed. Also, the court of appeals agreed that the officers violated the Fourth Amendment when they executed at 4:30 a.m. a warrant that only authorized a daytime search. However, the court of appeals ruled that the officers were entitled to qualified immunity on that issue, because it "was not clearly established in Maryland in 2005 that the Fourth Amendment prohibits the nighttime execution of a daytime-only warrant." On March 20, 2017, the Supreme Court denied our petition to review this holding on immunity. In the district court, we proceeded with Jones's claims for damages based on his other allegations that the officers had not announced their presence before breaking into his home and that they had seized material beyond the warrant's authorization. In 2020, the case settled with a monetary payment to Jones and the return of his seized property.

CRIMINAL JUSTICE / JAILS, PRISONS, AND PUNISHMENT

ACLU v. Dep't of Justice (Prison mental health FOIA)
Date filed: March 21, 2022 **Status: Open**
ACLU-DC attorneys: Art Spitzer
Co-counsel: ACLU National Prison Project; David L. Sobel; Wash. Lawyers' Comm. for Civil Rights & Urban Affairs

The federal Bureau of Prisons (BOP) identifies less than 3% of the people in its custody as requiring mental health care. That percentage is in sharp contrast to state prison systems, most of which have 20% to 30% of their population receiving mental health care. Moreover, approximately 20% of the people coming into BOP custody are flagged by a court or in their pre-sentencing reports as likely requiring mental health care. Additionally, the few people identified by the BOP as requiring mental health care are about twice as likely as the rest of the population to be housed in solitary confinement, which poses well-recognized risks to people who are mentally ill. In December 2019 and March 2020, we made Freedom of Information Act requests to the BOP for records relevant to its care and housing of people with mental illness. We sought these documents to help us determine whether the extraordinarily low rate of mental illness identified by the BOP and the overrepresentation of the mentally ill in solitary confinement reflected constitutional and statutory violations. Having received no response, we sued in 2022 to compel one. The government began producing documents in August 2022 and finished at the end of 2022. We are now assessing whether there are any deficiencies in the production.

ACLU of San Diego & Imperial Counties v. U.S. Marshals Serv. (Prison privatization FOIA)
Date filed: February 14, 2022 **Status: Open**
ACLU-DC attorneys: Art Spitzer
Co-counsel: Ballard Spahr LLC

As part of an effort to reduce mass incarceration and its disproportionate impact on people of color, one of President Biden's first official acts was to issue an executive order forbidding the Department of Justice's renewal of contracts with private companies that run federal detention facilities. The GEO Group, Inc., a Florida-based private prison company, runs the 770-bed Western Region Detention Facility in San Diego. Its contract to run the San Diego facility was set to expire in September 2021. However, despite the Executive Order, the company announced that it received a six-month extension on its contract. Meanwhile, the company schemed to keep its operations and profits by suggesting the U.S. Marshals Service enter into an agreement with the City of McFarland, a town with less than 12,500 residents, to operate the facility; McFarland would then subcontract the operations right back to GEO, which would not only likely violate the President's executive order; it would allow a private prison company to again recruit a cash-strapped municipality to exert influence over incarceration policies in a far-off city. With the end of the six-month contract extension approaching on March 31, 2022, the ACLUs of Southern California and San Diego submitted FOIA requests to the Marshals Service, seeking documents related to the September contract extension and any renewal being considered. The Marshals Service provided no information in response. So on February 14, 2022, we filed a FOIA lawsuit on behalf of the ACLU Foundation of San Diego & Imperial Counties and the ACLU Foundation of Southern California against the U.S. Marshals Service, seeking information about communications among the Marshals Service, the City of McFarland, California, and GEO. The people have a right to know whether McFarland and GEO

are trying to evade President Biden's Executive Order, and whether the U.S. Marshals Service knows about that scheme and is complicit in it.

ACLU v. Federal Bureau of Prisons (CARES Act FOIA)
Date filed: November 29, 2021 **Status: Open**
ACLU-DC attorneys: Art Spitzer
Co-counsel: ACLU Criminal Law Reform Project

Responding to the COVID-19 pandemic and the great threat it posed to incarcerated people, Congress provided, as part of the March 2020 Coronavirus Aid, Relief, and Economic Security (CARES) Act, that the BOP could place incarcerated people in home confinement as a way of reducing the population of crowded prisons and mitigating the virus's spread. As a result, BOP placed more than 34,000 people—including many elderly or medically vulnerable—on home confinement from March 2020 to November 2021. Before doing so, BOP evaluated every person and determined that none of them would pose a threat to public safety while on home confinement. While most had completed their sentences by November 2021, 7,769 were still on home confinement. Many found gainful employment and have reunited with spouses, children, and other loved ones. In June 2020, the BOP Director testified in the Senate that people released under the CARES Act would be on home confinement "for service of the remainder of their sentences." But in the last days of the Trump administration, the Justice Department's Office of Legal Counsel (OLC) issued a memorandum saying that when the pandemic ends, prisoners on home confinement must be ordered back to prison unless they are in the final months of their sentences, even if they have been completely law-abiding. Such an order would disrupt their lives and the lives of their loved ones and would destroy the successful efforts they have made to reintegrate into society. Although the Biden Administration has said that the President will consider granting clemency to a subset of this group, he has not yet granted any such petitions. The ACLU has repeatedly called on President Biden to grant clemency to everyone who is on home confinement under the CARES Act and following the rules. Under FOIA, the National ACLU and ACLU-DC requested records providing information about people BOP moved to home confinement under the CARES Act, and for any DOJ and BOP policies implementing the OLC Memorandum. The government failed to provide the materials by the statutory deadline, so we sued, asking the court to order the records to be produced.

On December 21, 2021, the OLC released a new analysis of the CARES Act, concluding that the Trump administration was wrong, and that the law did allow individuals on home confinement to remain at home until the expiration of their sentences, even if the COVID-19 emergency ends before that. Under the government's new interpretation of the law, BOP will now develop rules governing when individuals on home confinement may be returned to custody, and we will have an opportunity to comment on those rules before they become final. While this new position does not directly affect our FOIA lawsuit, which will continue, it does dramatically change the administration's policy for the better.

Montgomery v. Barr

Date filed: November 6, 2020 **Status: Closed**

ACLU-DC attorneys: Art Spitzer

Co-counsel: ACLU Capital Punishment, Women's Rights & Nat'l Prison Projects; Fed. Pub. Defender for the Middle Dist. of Tenn.; Lisa G. Nouri; Morgan, Lewis & Bockius LLP

Lisa Montgomery was scheduled to be executed by the federal government in December 2020. Once her execution date was set, Lisa was deprived of all of her belongings, including books, legal papers, and photographs of her children. She was transferred to a cold cell with bright lights shining all day and night. Male guards watched her 24/7, including when she used the toilet. Her standard clothing, including underwear, were taken away, leaving her only with a loose gown with velcro straps. And the government planned to transfer her to an all-male prison as her execution date loomed.

These conditions would be unbearable for anyone, but in light of Ms. Montgomery's horrific history of sexual abuse—beginning at age 11 and continuing for years—and the mental illness that she developed as a result, the conditions were especially awful.

Together with co-counsel, we sued in November 2020 to enjoin the conditions as cruel and unusual under the Eighth Amendment, including to prevent her transfer to an all-male prison. After non-stop briefing in light of her looming execution date, the D.C. federal court transferred her case to a federal court in Texas. That ended our involvement.

Ms. Montgomery continued to seek relief in multiple courts but the Supreme Court lifted the last stay of execution on January 12, 2021, and she was executed that night. She was the first woman executed by the federal government since Ethel Rosenberg in 1953.

ACLU v. Dep't of Justice (BOP COVID FOIA)_

Date filed: October 21, 2020 **Status: Open**

ACLU-DC attorneys: Art Spitzer

Co-counsel: ACLU Criminal Law Reform & National Prison Projects; Williams & Connolly LLP; David Sobel

ACLU v. Dep't of Homeland Security (ICE COVID FOIA)

Date filed: November 6, 2020 **Status: Open**

ACLU-DC attorneys: Art Spitzer

Co-counsel: ACLU Immigrants' Rights & Nat'l Prison Projects; Williams & Connolly LLP

In 2020, the coronavirus pandemic was disproportionately ravaging the incarcerated population in this country. Despite knowing early on that this population would be particularly susceptible, the federal government failed to stop the spread of the virus in federal prisons and immigration detention facilities. As the virus infected and killed prisoners, guards, and their families, government officials were publicly patting themselves on the back for their efforts while withholding vital information about their response to the crisis. Seeking to learn more about how the BOP and ICE were responding to the pandemic, and what guidance the federal Centers for Disease Control and Prevention (CDC) was providing to carceral institutions, the ACLU filed FOIA requests on these topics in the spring and summer of 2020. When no records were disclosed, we filed two lawsuits (one for the BOP and CDC information, one for the ICE information) in the fall of 2020.

In the BOP case, thousands of documents have been released, and production continues.

In the ICE case, the agencies have been processing and producing documents at the rate of 750 pages per month. Production continues. Meanwhile, a dispute arose over whether our request properly

sought documents from the Department of Homeland Security (DHS) Inspector General (we say yes; DHS says no). We moved for partial summary judgment on that question in May 2022; we await a ruling.

ACLU v. Federal Bureau of Prisons (COVID-19 / execution protocol FOIA)
Date filed: August 21, 2020 **Status: Victory!**
ACLU-DC attorneys: Art Spitzer
Co-counsel: ACLU Capital Punishment Project

After the Trump administration presided over the first federal executions in 17 years, there was a spike in COVID-19 cases in Vigo County, Indiana, the home of the Federal Correctional Complex (FCC), Terre Haute: the prison where federal executions take place. This may have been a result of the executions, because executions involve the gathering and movement of hundreds of staff and law enforcement officers, as well as media, lawyers, family, and spiritual advisor witnesses, many of whom travel from around the country. On July 12, 2020, the government disclosed that a staff member involved in preparing for the executions had contracted COVID-19 and had been working without a mask even though the BOP had previously vowed that all staff members would wear masks to reduce COVID-19 risks.

With two more federal executions scheduled for August 2020, we filed a FOIA case seeking COVID-19 data for prisoners and staff at FCC Terre Haute, and cost and staffing data related to federal executions. When the government produced no documents with less than a week remaining before the next execution, we moved for a temporary restraining order, asking the court to order the immediate release of some of the records we had requested. The court denied our motion. We then filed a motion for a preliminary injunction, which was granted in part, with the court ordering prompt production of records about COVID testing and contact-tracing and potential exposure of people on death row to COVID.

In spring 2021, BOP finished producing the records it was willing to produce, and the parties filed cross-motions for summary judgment about whether it was required to produce more.

In November 2022, the Court upheld all but one of BOP's reasons for withholding documents. We will now seek attorneys' fees for our success at the preliminary injunction stage.

Williams v. Federal Bureau of Prisons
Date filed: April 1, 2020 **Status: Victory!**
ACLU-DC attorneys: Scott Michelman, Art Spitzer, Michael Perloff
Co-counsel: Latham & Watkins, Wash. Lawyers' Comm. for Civil Rights & Urban Affairs

In 2020, Hope Village was the largest federal halfway house in the country and was also the only federally contracted halfway house for men in D.C. It housed federal prisoners about to be released—many designated for home confinement by the BOP—and a smaller number individuals awaiting trial. The facility was run by Hope Village, Inc.

During normal operations, prisoners would come and go during the day for jobs and training, to look for work, to obtain medical care, to visit family, and for other necessities. With the COVID-19 pandemic spreading around the globe, in March 2020, Hope Village locked down, forbidding prisoners to leave. The conditions in which they were forced to live now placed them at grave risk of contracting the virus. Contrary to D.C. policy and guidance from the Centers for Disease Control (CDC), prisoners at Hope Village were required to sleep in close quarters and bunk beds, about three feet apart. The prisoners ate together in crowded dining rooms and shared bathrooms. The prisoners were forced to clean the facilities themselves, but Hope Village failed to provide prisoners with the most basic supplies to clean their living areas or maintain the rigorous personal hygiene the CDC was urging. Furthermore, Hope

Village failed to provide prompt medical attention and testing to those with COVID-19 symptoms. Hope Village did not have an on-site medical staff. Prisoners at Hope Village who were ill were forced to call 9-1-1 themselves for help.

In early April 2020, together with co-counsel, we filed a class action against federal and D.C. government agencies and Hope Village, Inc., on behalf of two Hope Village prisoners and everyone else at the facility. We moved for emergency relief requiring defendants to reduce the number of individuals confined at Hope Village and to implement basic health and safety policies and procedures that would mitigate the risk to the individuals forced to remain there. At a hearing five days after we filed the case, the court denied our motion for emergency relief but ordered daily reporting by Hope Village and the BOP regarding the number of residents at Hope Village and their COVID-19 status. As we continued to litigate in the ensuing weeks, Hope Village announced it would close its doors at the end of April, and the BOP steadily downsized the population confined there, in significant part by approving individuals for home confinement. At a status hearing on April 24, the government told the court that most of the 120 men who remained at Hope Village would be sent to home confinement in the next several days, and the rest would be sent to other halfway houses rather than back to prison. The following week, we learned that these transfers had in fact occurred. On April 28, 2020, with the Hope Village population down to single digits, we voluntarily dismissed the case.

Banks v. Booth
Date filed: March 30, 2020 **Status: Victory!**
ACLU-DC attorneys: Scott Michelman, Art Spitzer, Michael Perloff
Co-counsel: Public Defender Service for D.C.; Munger, Tolles & Olson LLP

COVID-19 posed an unprecedented threat to individuals in the custody of the District of Columbia Department of Corrections (DOC). In the final week of March 2020, the DOC announced five positive cases at different units in its facilities. The risk of mass contagion was high, and the effects of an outbreak would be devastating. With over 1,600 vulnerable residents in their care, the Department of Corrections demonstrated in March 2020 that it would not, and could not, ensure the reasonable health and safety of its residents. Residents in DOC facilities reported that they faced days-long delays before they could receive medical care, the lack of soap, hand sanitizer, and disinfectant; that DOC policies required large groups of residents to congregate in close proximity; that DOC failed to test residents showing symptoms and failed to provide personal protective equipment for staff and residents. Attorneys and investigators of the Public Defender Service for the District of Columbia (PDS) witnessed first-hand the DOC's failures to implement effective visitor and staff screening procedures. DOC staff reported that, even as of March 25, 2020, DOC staff had "no masks, insufficient gloves, no gowns, no disinfectants, and no comprehensive cleaning occurs on a regular basis," and DOC did not screen new residents coming into the jail for COVID-19 or enforce social distancing between residents.

On March 30, 2020, we filed a class action lawsuit on behalf of all the detainees in the D.C. Jail. The same day, we sought a temporary restraining order and preliminary injunction directing Defendants to take all actions within their power to reduce the Jail population and appointing an expert to effectuate the rapid downsizing of DOC facilities, consistent with Centers for Disease Control (CDC) guidance. We received amicus support from the union representing the guards at the jail, who were very concerned about their own health. On April 9, the Court appointed two independent experts as amici curiae (friends of the court) to conduct unannounced inspections of the jail. On April 19, based on the experts' report, the Court issued a Temporary Restraining Order (TRO) granting much of the relief we requested regarding conditions at the jail. The Court found that DOC had exposed prisoners to an unreasonable risk of damage

to their health and further had shown deliberate indifference to their health and safety. The Court found that the independent experts' report confirmed many of our allegations, including deficiencies regarding social distancing, the provision of cleaning supplies, visitor screening, education of prisoners and staff about proper precautions including the use of personal protective equipment, the imposition of punitive conditions in isolation units, lack of access to confidential legal calls, and prompt medical care. Accordingly, the Court ordered DOC to make immediate improvements in each of these areas.

The Court-appointed experts returned to the Jail in early May to assess compliance with the TRO. The experts' oral report to the Court on May 11 was deeply troubling, finding deficiencies in medical care, conditions in isolation units, social distancing, sanitation, and access to legal calls. For instance, the experts documented that days could pass before a resident submitting a "sick call slip" would receive medical attention. In a third of the slips analyzed by the experts, it took three or more days after a resident requested help for medical staff to respond.

On May 15, we moved for a preliminary injunction that would extend and expand the relief ordered in the April TRO. On June 18, the court granted our motion in part and issued a sweeping preliminary injunction requiring that DOC continue to improve conditions, because, even after months of the pandemic and months of litigation, "Plaintiffs have produced evidence that inadequate precautionary measures at DOC facilities have increased their risk of contracting COVID-19 and facing serious health consequences." The preliminary injunction mandated that DOC provide prisoners with medical care within 24 hours of reporting symptoms, enforce CDC policies on social distancing, provide prisoners with necessary materials to clean their cells and instruction on how to use them, ensure access to confidential legal calls, and improve isolation conditions for those exposed to COVID-19 so that they are non-punitive and specifically allow for access to legal calls, personal calls, daily showers, and clean clothes.

In July 2020, the government both appealed the preliminary injunction and asked the district court to reconsider it. The appeal was stayed while the district court reconsidered, including reappointing the experts to assess the Jail's compliance throughout the fall of 2020.

In January 2021, the court denied the motion to reconsider, citing the experts' findings of continued deficiencies regarding medical care, COVID testing, social distancing, and legal-call confidentiality.

In July 2021, the D.C. Circuit dismissed DOC's appeal of the preliminary injunction, ruling (as DOC urged) that the injunction actually expired in September 2020 under the terms of the federal Prison Litigation Reform Act. Importantly, however, the court did not say (as DOC argued) that the injunction should not have been entered or that individuals are not entitled to protection from contagious diseases while incarcerated, nor did the court find any fault with the district court's appointment of independent inspectors to shed light on the dangerous and troubling conditions in the Jail. Back in the trial court, the parties began discovery in the summer of 2021.

In February 2022, we reached a settlement agreement under which DOC agreed to specific improvements in seven areas and to five unannounced inspections over a six-month period by an infectious disease specialist, selected jointly by the plaintiffs' lawyers and DOC, to confirm compliance. The areas for improvement were: (1) sanitation and hygiene, including residents' access to cleaning supplies; (2) promptness of medical care for COVID-19 related symptoms; (3) masking for staff; (4) contact tracing for jail residents and staff who test positive for the virus; (5) social distancing; (6) reasonable access to showers and recreation, including outdoor and out-of-cell time; and (7) ensuring that residents on medical quarantine and isolation units are not subjected to punitive conditions that would discourage reporting of symptoms. The settlement also required regular reporting by DOC about vaccination rates, infection rates, and written policies for responding to the pandemic. On April 12, 2022, the court approved the class settlement, and inspections occurred throughout 2022. We dismissed the case in September 2022.

Costa v. Bazron

Date filed: October 23, 2019 **Status: Victory!**

ACLU-DC attorneys: Scott Michelman, Art Spitzer, Michael Perloff, Marietta Catsambas (volunteer)

Co-counsel: Arnold & Porter Kaye Scholer LLP, Wash. Lawyers' Comm. for Civil Rights & Urban Affairs

This case challenged the failure of the D.C. government to protect some of its most vulnerable medical patients from back-to-back crises at their treatment facility: first, an extended water outage in the fall of 2019, and second, the COVID-19 pandemic in the spring of 2020. For more than three weeks, Saint Elizabeths Hospital, an inpatient mental health facility operated by the District, did not have clean running water. The crisis caused the facility to drastically reduce the availability of therapy sessions and cease providing some medical care altogether. Patients and staff were not able to regularly flush toilets, resulting in fecal matter, urine, and menstrual blood overflowing onto bathroom floors. Indoor showers were turned off. The outdoor showers that the District obtained were clogged and dirty. Patients had to walk to those showers in groups and wait outside, dripping wet in cold temperatures, for other members of their group to finish showering before they could go indoors. The conditions in St. Elizabeths attracted insects and produced a stench that one patient compared to the smell of dead rats. In response, the District chose not to transfer patients to new facilities or even cease admitting new residents. Instead, it confined patients in filth and disorder, subjecting them to trauma that could exacerbate their mental health disabilities. The conditions that festered at St. Elizabeths and the District's response to them violated patients' rights under the Fifth Amendment.

In October 2019, together with our co-counsel, we sued to demand that St. Elizabeths provide patients the care they deserve. The same day we filed our lawsuit, the District restored clean running water at St. Elizabeths. It did not, however, explain how it would address the fallout from this crisis or prevent similar crises from arising the next time an emergency occurs at the facility, so we continued to seek relief. In December 2019, the District moved to dismiss the complaint, and in January 2020, the court allowed us to take discovery so that we could respond to the District's arguments.

In the spring of 2020, before discovery concluded, it became clear that the District's lack of emergency preparedness was again jeopardizing patients' health and safety when the COVID-19 pandemic hit Washington, D.C. Despite clear guidance from the Centers for Disease Control, the D.C. Department of Health, and the Mayor's orders, the District was not ensuring that patients at Saint Elizabeths Hospital were properly protected from the risk of contracting COVID-19. In particular, testing and medical isolation were woefully inadequate or nonexistent. Patients who tested positive for COVID-19 were not quarantined from other patients, and the Hospital continued to be open for new admissions.

By April 16, 2020, the D.C. government reported that four patients had died of COVID-19, and 32 patients and 47 staff at the Hospital have tested positive. That day, plaintiffs moved to amend their complaint to challenge the unconstitutional conditions at the Hospital and seek the release of patients, individualized patient assessments, and conditions reforms. The court granted our motion to amend the complaint, and after two telephone hearings, granted our motion for emergency relief on the two issues we identified as most pressing—the failure to medically isolate patients who had been exposed to the virus, and the failure to adhere to guidance from the Centers for Disease Control and Prevention (CDC) in deciding when to release patients from isolation. In an order issued early Saturday morning, April 25, the court noted that the number of patient deaths had risen to seven and recognized that "the risks to Plaintiffs are immediate and manifest." The court concluded that "Plaintiffs have offered compelling evidence (on the extremely expedited schedule governing their motion for a [temporary restraining order])

that the challenged practices substantially depart from accepted professional standards." Accordingly, the court ordered the District to conform to CDC guidance by increasing its use of medical isolation at the Hospital and by imposing more stringent criteria before releasing patients from isolation.

The court appointed three experts as "friends of the court" to investigate and report on the conditions at St. Elizabeths. Following their report, the court on May 11, 2020, extended and expanded the original TRO—adding requirements that the Hospital limit staff movement between units and test staff for the virus. On May 24, the court issued a preliminary injunction requiring the Hospital to continue with the court-ordered measures regarding isolation, staff movement, and staff testing for the duration of the litigation. As the court explained in its May 24 order, "roughly one out of every twenty patients has died and more than one out of every three patients have been infected." Further, the court found that the District could not defend, as a matter of professional judgment, its "perilous practice" regarding isolation prior to the TRO, and the court "conclude[d] that Defendants' delay in testing all staff and their lack of a plan to continue testing all patients and staff constitutes a substantial departure from professional judgment."

The government appealed the preliminary injunction in June 2020. While the appeal proceeded, we moved the court to lift its injunction at the end of April 2021, because of the high vaccination rate for patients and staff, significant improvements in the care and testing for patients and staff, and adherence to CDC COVID-19 protocols. At the time of the court's order in May 2020, 187 had tested positive and 14 individuals had died in the 2 ½ months since the pandemic began. In the 11 months the Hospital operated under the court's order, by contrast, there were 18 positive cases and one death. We believe the injunction was a life-saving measure for patients at St. Elizabeths. The court vacated the preliminary injunction in early May 2021, and the court of appeals dismissed the District's appeal as moot. Back in the district court, the case was stayed for mediation regarding the claims regarding the water crisis.

(2023 Update: In February 2023, we reached a settlement. In exchange for dismissal of the case, the District agreed to provide documentation that the water contamination has been remediated; to procure and maintain a supply of personal protective equipment for patients and staff; to maintain agreements with other District hospitals to ensure they can accept St. Elizabeths patients in the event of an emergency and that resources are available for the patient to continue receiving medical and mental health treatment at those facilities; and to inform patients, families, and the community about future emergencies at St. Elizabeths. The District has also made substantive improvements to its Outbreak/Pandemic Management Plan in compliance with the standards set by the D.C. Department of Health and CDC. We believe this settlement will help ensure that the government meets its constitutional obligation to provide a safe environment for the patients of St. Elizabeths.)

ACLU v. Dep't of Homeland Security (Hunger strike FOIA)
Date filed: May 25, 2017 **Status: Victory!**
ACLU-DC attorneys: Art Spitzer
Co-counsel: ACLU National Prison Project; David L. Sobel

Advocates for social change—including Mahatma Gandhi, Nelson Mandela, and Cesar Chavez—have long used hunger strikes as a form of nonviolent protest. The modern-day immigrants' rights movement is no exception. Together with co-counsel, we sued the Department of Homeland Security to expose the treatment of hunger strikers in ICE detention facilities. The lawsuit sought documents related to hunger strike policies in ICE detention and records concerning specific incidents. Between 2017 and 2019, we received more than 10,000 documents, and we agreed to dismiss the case in November 2019.

In 2021, the ACLU released a report, *Behind Closed Doors: Abuse and Retaliation Against Hunger Strikers in U.S. Immigration Detention*, based on the documents obtained in the litigation. The report

offers an unprecedented look at the scale and scope of ICE's cruelty and coercion against hunger strikers in immigration detention facilities, spotlighting an array of punitive practices against hunger strikers, such as force-feeding, forced hydration, forced urinary catheterization, and other involuntary and invasive medical procedures; solitary confinement; retaliatory deportations and transfers of hunger strikers; excessive force including tear gas, rubber bullets, and beatings; denial of basic privileges such as water and communication; and mistreatment of hunger striking parents, along with plans to separate hunger striking parents from their children in family detention facilities.

Involuntary medical procedures like force-feeding have been condemned by the American Medical Association and described as torture by international human rights groups.

The full report and selected documents are online: aclu.org/hungerstrike.

Aref v. Lynch

Date filed: November 4, 2015 **Status: Amicus**

ACLU-DC attorneys: Art Spitzer

Co-counsel: ACLU National Prison Project; Hughes Hubbard & Reed LLP; Legal Aid Society of the City of New York

Several individuals incarcerated in federal prison were transferred to "Communications Management Units" for long periods of time (years), during which their physical contact and communications with the outside world, including family members, were severely restricted. They sued for violations of their due process and free speech rights, but the district court dismissed their claims because the Prison Litigation Reform Act (PLRA) bars incarcerated people from seeking damages in a federal civil action "for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act." The plaintiffs appealed, and in November 2016, we filed an amicus brief in the D.C. Circuit, arguing that the PLRA does not bar monetary compensation for violations of constitutional rights even when they do not include physical injury, because violations of constitutional rights are not just "mental or emotional" injuries. In August 2016, the D.C. Circuit agreed with us that plaintiffs' claims were eligible for monetary compensation but affirmed judgment for the defendants on other grounds.

Nat'l Ass'n of Criminal Defense Lawyers v. Dep't of Justice (Federal prosecutor discovery FOIA)

Date filed: July 1, 2015 **Status: Amicus**

ACLU-DC attorneys: Art Spitzer

Co-counsel: Law Office of John D. Cline; Ehlert Appeals

In July 2015 we joined with National ACLU and the Electronic Frontier Foundation in an amicus brief in the D.C. Circuit supporting disclosure, under the Freedom of Information Act, of the Department of Justice's "Federal Criminal Discovery Blue Book," a manual distributed to all federal prosecutors and their paralegals instructing them on how to comply with their discovery obligations in criminal cases. We argued that the Blue Book contained "working law": "binding agency opinions and interpretations that the agency actually applies in cases before it," and so must be released. In July 2016, the court disagreed, accepting the government's argument that the entire Blue Book was exempt from FOIA under the "attorney work product privilege," which protects lawyers' mental processes from disclosure. But in an unusual development, the court reconsidered in response to the plaintiff's petition for rehearing. The court issued an amended decision in December 2016, concluding that the Blue Book might contain some material that is not exempt from FOIA. The court therefore sent the case back to the district court to figure out if there is any information that can be released.

DUE PROCESS AND PROCEDURAL RIGHTS

Taylor v. McDonough

Date filed: October 4, 2021 **Status: Amicus**
ACLU-DC attorneys: Art Spitzer, Scott Michelman
Co-counsel: ACLU National Security Project

In 1969, seventeen-year-old Bruce Taylor enlisted in the army and volunteered for a secret weapons testing program at the Edgewood Arsenal in Maryland, where he was used as a human guinea pig in experiments with chemical weapons. As a result, he has suffered from a lifelong, disabling mental health condition. But for 35 years he was unable to apply for veterans benefits because he had signed a secrecy agreement prohibiting him from telling anyone about his experience at Edgewood.

In 2006, the Pentagon finally notified servicemembers who had participated in the Edgewood testing program that they had permission to disclose their experience to health care providers and seek health benefits from the VA. Mr. Taylor filed a claim for VA benefits in February 2007, and the VA awarded him disability benefits beginning on that date. He would have been entitled to benefits going back to his 1971 discharge from the service, but for a statute providing that benefits cannot be granted for time prior to when they were applied for.

Mr. Taylor went to court seeking retroactive benefits on the ground that the government had prohibited him from applying until 2007, but the agency and a three-judge panel of the Court of Appeals for the Federal Circuit all ruled that the statutory deadline could not be disregarded (technically, that it was not subject to "equitable tolling"). But the court then decided on its own motion to reconsider the case en banc and invited amicus briefs.

In October 2021 we filed an amicus brief, arguing that "[t]hreatening a person with punishment for accessing the courts, erecting insurmountable barriers, or covering up evidence all violate the right to access courts," which is protected by the First Amendment, due process, and equal protection.

(2023 Update: The court has ordered the parties to brief the significance of the Supreme Court's intervening decision in *Arellano v. McDonough*, a case that raised similar questions.)

Cruz-Martin v. Dept. of Homeland Security

Date filed: December 18, 2020 **Status: Victory!**
ACLU-DC attorneys: *Art Spitzer*
Co-counsel: Patrice M. Scully

When a federal agency proposes to take an adverse employment action (such as discharge or forced leave without pay) against an employee, federal civil service laws entitle the employee to notice of the reasons for the proposed action. A prior ACLU-DC case from 2005, *Cheney v. Dep't of Justice*, held that when an adverse action is based on the suspension of a security clearance, telling the employee just that the reason is suspension of the clearance is not sufficient. Rather, the employee is entitled to be given the reasons *for the suspension* of the security clearance so that the employee can "make a meaningful response."

Rafael Cruz-Martin is an Attorney-Advisor with the Transportation Security Administration (TSA). He began working for TSA as a security screener and attended night school to obtain a master's degree and then a law degree. He has an unblemished record. But in April 2020, his security clearance was suspended, and he was suspended from his job without pay. He was told only that the suspension of his clearance was based on "potentially disqualifying information regarding your Personal and Criminal Conduct." He was not charged with any crime. Mr. Cruz-Martin appealed his suspension to the Merit

Systems Protection Board (MSPB), the federal agency charged with protecting the rights of federal civil servants. The Board ruled that Mr. Cruz-Martin had received all the information he was entitled to.

We took Mr. Cruz-Martin's case on appeal to enforce the requirements of the *Cheney* decision, which the TSA and MSPB appeared to have forgotten. (While TSA employees are not covered by the same civil service law that covers most federal employees, TSA's regulations on this topic are the same.) After the appeal was briefed and scheduled for argument, Mr. Cruz-Martin was notified that "there was no supported evidence to substantiate the allegations" against him, and that his security clearance had been reinstated. He returned to duty on May 3, 2021, and the government settled the case on very favorable terms, with full back pay and restoration of benefits to Mr. Cruz-Martin and attorneys' fees for the lawyers.

E.M.

ACLU-DC attorneys: *Art Spitzer*
Date filed: June 19, 2020 **Status: Victory!**

E.M. is an 82-year old military veteran living in a remote area of Montana. There is no internet access, so his amateur radio license from the Federal Communications Commission (FCC) is essential for his safety. He had an amateur radio license from the FCC for decades, and it had been renewed every ten years without question. But under the Trump Administration, the FCC began requiring new or renewal applicants to state whether they had ever been convicted of a felony. When E.M. applied for renewal and answered yes to this question because of a 20-year-old conviction, his application was denied. We were concerned the new policy might violate the First Amendment and/or the Administrative Procedure Act (because it was implemented without notice to the public and an opportunity to comment). Through informal advocacy, we were able to get E.M. his license renewed.

United States v. Reed

Date filed: April 28, 2020 **Status: Amicus**
ACLU-DC attorneys: Scott Michelman, Art Spitzer
Co-counsel: Hogan Lovells LLP

Across the country, most criminal prosecutions take place in state and local courts, not federal courts. That's because most cases are prosecuted by state and local authorities. By contrast, because D.C. felonies are prosecuted not by the D.C. Attorney General but by the U.S. Attorney's Office (USAO), it is the federal government that decides which court to use, local or federal. Most prosecutions here are usually brought in D.C. Superior Court under D.C. law. But in 2019, the federal government changed that—shifting gun-possession cases to federal court and charging D.C. criminal defendants under harsher federal laws that were enacted by Congress (in which D.C. resident have no voting representative) and which are out of step with the decisions of the people of the District to pursue a criminal-justice reform agenda through their elected representatives on the D.C. Council. By imposing harsher penalties, the new USAO policy will exacerbate the already-high incarceration rate of D.C. residents, particularly residents of color. And research suggests that the new policy is unlikely to be effective in reducing crime in the District.

In this case, a criminal defendant on a gun possession charge in federal court challenged the USAO's policy of shifting prosecutions to federal court, arguing that it violated (among other things) the D.C. Home Rule Act passed by Congress and the Administrative Procedure Act.

In April 2020, we filed an amicus brief in support of the challenge to alert the court to the deleterious consequences of the USAO policy on D.C. criminal justice policy and on D.C. residents of color. The D.C. Attorney General likewise filed a brief supporting the challenge.

Despite having initially presented it publicly as a District-wide policy, federal prosecutors later stated in a court filing that it was only implemented in police districts 5, 6, and 7, the three majority-Black districts in D.C. While Black people make up only 7.53 percent of residents in police district 2, for example, they make up 92.79 percent of residents in police district 6. The policy was so egregious that the U.S. Attorney's Office's own Black prosecutors opposed it.

In September 2020, after the geographic focus became public, the U.S. Attorney's Office ended that focus and began applying the policy throughout the District. But the Office refused to end the policy outright, despite the outcry.

In May 2022, the court denied the criminal defendant's motion to dismiss his prosecution.

Bado v. United States

Date filed: March 7, 2016 **Status: Amicus**

ACLU-DC attorneys: Art Spitzer

Co-counsel: Public Defender Service for D.C.

Mr. Bado arrived here as a political asylum-seeker from Burkina Faso after being prosecuted and tortured there for his political and religious beliefs. He was accused of committing a misdemeanor sexual assault here, a crime with a maximum penalty of 180 days. His request for a jury trial was denied on the ground that the crime with which he was charged was a "petty offense." He was convicted. Because he is an immigrant, his conviction would lead to his deportation. In July 2015, a panel of the D.C. Court of Appeals ruled that the consequences of his conviction entitled him to a jury and therefore he should get a new trial. But the full court granted the government's petition for rehearing, and ordered new briefing. In March 2016, we and the D.C. Public Defender Service filed an amicus brief supporting Mr. Bado's right to a jury trial. In June 2018, the full court held that a defendant who will face deportation if convicted of a crime has a Sixth Amendment right to a jury trial, even if the crime with which he is charged is so "petty" that it ordinarily doesn't trigger the right to trial by jury—which is the holding our amicus brief had urged.

LaShawn A. v. Bowser (originally LaShawn A. v. Barry)

Date filed: June 1, 1989 **Status: Victory!**

ACLU-DC attorneys: Art Spitzer

Co-counsel: A Better Childhood, Inc. (originally ACLU Children's Rights Project)

On June 1, 2021, the ACLU of the District of Columbia's oldest (and longest-ever) case came to a close, with the court's approval of a settlement agreement in a class action that, over the course of 32 years, transformed the D.C. foster care system from a dysfunctional mess to what the judge called "a national model." When we filed the case in 1989, the District of Columbia's foster care system was in total disarray. More than 40% of staff positions were vacant, and the agency didn't even know how many active employees it actually had. Social workers were untrained and had impossible caseloads of more than 100 children each. Reports of child abuse went uninvestigated. Children were kept in "90-day emergency placements" for years. Foster homes were overcrowded and unsafe. Medication was inappropriately used to control children's behavior. There were no specialized placements for children with specialized needs, no reunification services for families, and little if any planning for children in foster care. Although federal funding was available to state foster care agencies, the District of Columbia received none because it couldn't figure out how to apply.

When the case was filed, lead plaintiff LaShawn A., then 4 years old, had been in "emergency" care for more than two years, during which time the District had failed to provide her mother with any

services to assist in reunification and had failed to provide LaShawn with services she needed for her serious emotional and developmental problems. Other plaintiffs had similar stories. The case went to trial in February 1991. In his post-trial opinion, U.S. District Judge Thomas F. Hogan (a Ronald Reagan appointee) described what the evidence had shown: "District children relegated to entire childhoods spent in foster care drift. . . . A lost generation of children whose tragic plight is being repeated every day." He ruled that the District was failing to meet constitutional and statutory minimum standards of care for the children in its custody, and entered an order requiring an across-the-board overhaul of the District's child welfare system.

The District government essentially ignored the court's order. After many efforts by the plaintiffs and the court to achieve compliance, Judge Hogan held the District in contempt of court in April 1995, and in May 1995 he appointed a Receiver to run the agency, removing its operation from the incompetent hands of the District government. The District appealed but lost.

Under the Receiver's direction, the agency finally began to make progress, and in 2001 the plaintiffs (now represented by Children's Rights, Inc., because the Children's Rights Project had left the ACLU and become an independent entity) and the District agreed to end the Receivership in exchange for additional promised reforms. One of the agreed changes was the promotion of the Child and Family Services Agency to be an independent cabinet-level agency reporting directly to the Mayor. Back under District control, however, the agency began backsliding, and in 2008 things came to a head. In January of that year, the bodies of four deceased children (ages 5, 6, 11, and 17) were discovered in the home of Banita Jacks. Agency investigators had been alerted to potential problems at the Jacks home for more than a year but had not adequately investigated. In July, the Washington Post reported that a six-month-old had died of an undetermined cause almost three months after becoming the subject of a report of child neglect, but the investigator assigned to the case had never visited the infant or his home; she reportedly was carrying 50 open investigative cases at the time and had never visited 17 of those 50 children. The agency's director resigned. Reports of abuse and neglect skyrocketed, causing caseloads to balloon and many employees to resign, which caused the caseloads of the remaining employees to explode.

A new director was appointed, and substantial new resources were directed to the agency. In 2010 the parties optimistically agreed to a new "Implementation and Exit Plan," but full implementation remained elusive.

By 2019, however, the agency was finally doing well in meeting most of its goals, and the plaintiffs (now represented by A Better Childhood, Inc., the new organization led by Marcia Lowry, who had been plaintiffs' lead counsel since the beginning of the case) and the defendants agreed to an Exit and Sustainability Plan. Performance continued to improve, and in August 2020 the parties reached a tentative settlement of the case. Because settlements in class actions must be approved by the court, the court scheduled a public "fairness hearing" for June 1, 2021, and ordered notice to be sent to all class members. No member of the class objected to the settlement, and Judge Hogan—who had presided over the case since it was filed—approved it, formally closing the case, three weeks short of its 32nd anniversary. He praised all the parties for their hard work over many years, and observed what a powerful tool a federal class action, pursued over many years, can be.

Institutional change can be lengthy and difficult, but worthwhile. Reports of abuse or neglect are now promptly investigated, and when confirmed, child victims can expect to receive caring, professional treatment from trained caseworkers. They strive for prompt reunification with parents or other family members when possible, or prompt adoption by a suitable family when reunification is not possible.

Having seen the case to its conclusion, Judge Hogan retired in early 2023.

EQUAL PROTECTION AND ANTIDISCRIMINATION

Neloms v. District of Columbia
Date filed: December 19, 2022 **Status: Open**
ACLU-DC attorneys: *Laura Follansbee,* Scott Michelman, Michael Perloff

In December 2021, D.C. Department of Motor Vehicles (DMV) Hearing Examiners R. Neloms and B. Horsley were left scrambling to find childcare when they received only a few days' notice that their children's schools would shift back to virtual learning for four weeks amid a record-breaking COVID surge in the area. Despite having been allowed to telework with DMV laptops during the first fifteen months of the pandemic without issue, Ms. Neloms and Mr. Horsley were denied permission to return to that arrangement for the temporary school closure. Unable to secure childcare immediately during the worsening Omicron wave, Ms. Neloms and Mr. Horsley were forced to use their personal leave or pay out of pocket for childcare to prevent their children from being left home alone.

After two weeks, the DMV sent Ms. Neloms and Mr. Horsley a telework application that explicitly prohibited teleworkers from having sole responsibility for a dependent during the workday—a provision obviously incompatible with the parents' need to work from home. A few weeks after the school closure ended, the DMV offered all Hearing Examiners the same laptops that they used early in the pandemic and instructed them to take them home for use during inclement weather office closures. The DMV's willingness to allow telework for some purposes, but not to accommodate family responsibilities, discriminated against Ms. Neloms and Mr. Horsley, forcing them to expend their personal leave and pay for unnecessary childcare.

In December 2022, we filed a complaint with the D.C. Office of Human Rights alleging discrimination based on family responsibilities (a prohibited basis for employment discrimination under the D.C. Human Rights Act) and seeking compensation for our clients and changes to the DMV telework policy so it does not disadvantage parents and caregivers.

Jones v. District of Columbia
Date filed: November 17, 2021 **Status: Open**
ACLU-DC attorneys: Scott Michelman, Megan Yan
Co-counsel: WilmerHale

Deon Jones, a gay man, has been employed by the D.C. Department of Corrections (DOC) for more than two decades, where he has endured pervasive acts of harassment based on his sexual orientation. He has been called demeaning slurs and has faced threats of violence and false accusations of inappropriate sexual behavior. On several occasions, officers have put Sgt. Jones's safety at risk by refusing to answer his calls for assistance over the internal radio system when he was responding to incarcerated persons or attempting to execute his duties. During one particularly frightening incident, an incarcerated person threatened to sexually assault Sgt. Jones and "cut his throat." The harassment suffered by Sgt. Jones was so severe that he was diagnosed with Post Traumatic Stress Disorder (PTSD) and Major Depressive Disorder. He has suffered more than 15 panic attacks in direct response to the various incidents at work. Sgt. Jones repeatedly reported the harassment to his superiors, the DOC Director, and ultimately the Mayor, but they took no action. Additionally, Sgt. Jones has uncontrolled diabetes, which puts him at a high-risk for complications from COVID-19, in addition to suffering from PTSD and Major Depressive Disorder. Sgt. Jones made numerous requests for reasonable accommodations based on these disabilities, which DOC denied (while making similar accommodations to other DOC employees).

In November 2021 we sued the District and several of Sgt. Jones's supervisors and a coworker under the D.C. Human Rights Act for discrimination; a hostile work environment; the District's retaliation against Sgt. Jones when he opposed or reported unlawful employment practices; and the District's failure to make reasonable accommodations for Sgt. Jones's disabilities (among other claims). The defendants filed a series of partial motions to dismiss in 2022; the court granted them in part, but after we amended the complaint, most of our claims remained intact. Discovery began in the summer of 2022.

Kirton v. Mayorkas

Date filed: May 12, 2021 **Status: Victory!**

ACLU-DC attorneys: *Megan Yan*, *Scott Michelman*, Art Spitzer

Co-counsel: Morris E. Fischer LLC

Alicia Kirton is a Black woman who was employed by the Federal Emergency Management Agency (FEMA) as a budget analyst. Her job involved coordinating the proper allocation of funding for programs within FEMA. In December 2015, Ms. Kirton requested full-time telework status, a request her supervisor denied, even though her work could be done remotely and a white man with the same job had been granted telework status for years. Ms. Kirton sued for discrimination, but the trial court ruled in favor of the government on the broad basis that, without a showing that the denial of telework "affected her salary, job responsibilities, or future employment opportunities," Ms. Kirton had not shown an "adverse action" consisting of "objectively tangible harm" and therefore was not protected by federal law against discrimination with regard to telework status. The court thus did not permit Ms. Kirton to present to a jury her evidence that her request was denied on the basis of race.

In cooperation with Ms. Kirton's existing counsel, we took on the case for the purpose of appeal to seek a ruling that federal employment discrimination law covers discrimination with respect to all "personnel actions" (or "terms" and "conditions" of employment), not just discrimination that causes certain harms that courts have deemed "tangible," like loss of pay or benefits. The "tangible" limitation wrongly narrows federal protections against employment discrimination by permitting employers—including the federal government—to discriminate openly based on race, national origin, and other prohibited grounds in decisions about telework, transfers, work assignments, work hours, and more. No less than other employment actions, decisions about working conditions should be made free from discrimination. After we filed our appeal in May 2021, the government asked the court to summarily rule against Ms. Kirton based on existing precedent. In September 2021, the court denied that motion.

In a separate case decided in June 2022, *Chambers v. District of Columbia*, the appeals court overruled its requirement that a plaintiff under Title VII show "objectively tangible harm," and held that under the correct standard, discrimination with respect to a job transfer decision always qualifies as a violation of Title VII. The court relied prominently on a decision in a prior ACLU-DC case, *Ortiz-Diaz v. U.S. Dep't of Housing & Urban Development*.

In August 2022, the court sent Ms. Kirton's case back to the trial court to reconsider in light of the new ruling.

Hinton v. District of Columbia
Date filed: May 11, 2021 **Status: Victory!**
ACLU-DC attorneys: *Scott Michelman*, Megan Yan, Michael Perloff, Art Spitzer, Marietta Catsambas (volunteer)
Co-counsel: Public Defender Service for D.C.

When Sunday Hinton, a transgender woman, came into the custody of the D.C. Department of Corrections (DOC) in late April 2021, DOC housed her in a men's unit at the D.C. Jail, because DOC's housing policy for transgender individuals contained a default presumption in favor of housing individuals based on their anatomy, rather than their gender identity. DOC's Transgender Housing Committee could change transgender individuals' housing assignments, but that committee had not met in over a year. And declarations from criminal defense attorneys reported that the committee, even when operational, did not override the DOC default of housing transgender individuals based on anatomy. When Ms. Hinton's public defender asked for her to be moved to a women's unit, DOC refused and said her only other "option" was protective custody—essentially, solitary confinement. In effect, DOC's policy put Ms. Hinton and all transgender individuals in their custody to the choice of being held in a unit inconsistent with their gender identity or in solitary confinement. DOC's demeaning policy discriminated against transgender individuals and subjected them to a high risk of physical harm, violating Ms. Hinton's constitutional rights to equal protection and due process, as well as her statutory rights under the D.C. Human Rights Act. DOC's policy also conflicted with federal regulations under the Prison Rape Elimination Act.

On May 11, 2021, we filed a class action lawsuit on behalf of Ms. Hinton and a class of current and future transgender individuals in DOC custody. Ms. Hinton sought emergency relief: her immediate transfer to a women's unit and an injunction against the use of transgender individuals' anatomy as the default or sole criterion in making their housing assignments. The day after we filed our case, four DOC officials met with Ms. Hinton and, after refusing her request to meet with her lawyers, coerced her into signing a waiver stating she wanted to be in a men's unit. In court papers, DOC argued on the basis of the waiver that the request for emergency relief was moot. We responded that the court should disregard DOC's assertions about Ms. Hinton's wishes because they were tainted evidence procured unethically through a coercive meeting with a represented party to make an end run around her lawyers. The court set a hearing for the morning of May 14. At 10 pm on May 13, we were informed by DOC's lawyers that they would provide Ms. Hinton an internal hearing the next morning at 9:30 am, at which her lawyers could listen but not speak. At the hearing, Ms. Hinton strongly reiterated her desire to be transferred to the women's unit. The jail officials reversed themselves and decided to recommend that Ms. Hinton be transferred to a women's unit. Fifteen minutes before the hearing in federal court, DOC notified us that it would, in fact, grant the transfer. Ms. Hinton was moved to a women's unit later that day.

In June 2021, DOC adopted a revised policy that eliminated the "anatomy" presumption and purported to take account of individuals' preferences through individualized hearings, but we learned that, as of mid-July, at least three transgender individuals in DOC custody received no hearings and were not reassigned housing even after the new policy was issued. The new policy also introduced a new discriminatory measure: placing all transgender individuals, simply because they are transgender, into "protective custody" at intake—which our evidence revealed shared key characteristics of solitary confinement, including the demeaning shackling of people housed in that status whenever they are moved within the jail. We continued to seek classwide relief; DOC cannot comply with the Constitution by replacing one form of discrimination with another.

The court heard argument on the preliminary injunction and class certification motions in August 2021, and denied them both in September. Because Ms. Hinton was no longer in custody at the time of the ruling she no longer needed injunctive relief for herself, and because DOC had changed its original policy, the court could not be sure there were enough people in the proposed class to certify it as a class action. However, the court ruled that the challenge to the new protective-custody policy was still live, and the court indicated that if more trans residents are identified as the case proceeds, class certification could be appropriate.

In March 2022, the parties reached a settlement. Under the settlement, DOC agreed to implement new safeguards to ensure that transgender people will be housed in accordance with their gender identity upon intake and agreed to limit the time they may be held in isolating "protective custody" status absent the person's request or specific safety concerns. Equally important, DOC agreed to end its practice of shackling all "protective custody" residents, including transgender people, while they are being transferred or moved within the Jail. DOC also agreed to report to PDS for four months about the implementation of its new policies.

Batté, Dorea K.

Date filed: March 23, 2020 **Status: Victory!**

ACLU-DC attorneys: *Scott Michelman*

George Washington University law student Dorea Batté sought help from her school for harassment by her ex-boyfriend. The school told her that the simplest resolution was for her and the accused student to agree to a mutual no-contact order with no formal adjudication. They did so. Nonetheless, GW reported, as part of Ms. Batté's application to the D.C. bar, that she had "discipline" against her in the form of a no-contact order. This misleading bar report effectively punished Ms. Batté for trying to assert her rights under Title IX. We approached GW about the matter, and the school agreed to write the D.C. bar and explain itself. GW then inexplicably refused to release Ms. Batté's transcript; after further negotiation, the school lifted the hold.

Barber v. District of Columbia

Date filed: October 4, 2019 **Status: Open**

ACLU-DC attorneys: *Michael Perloff*, Tara Patel, Megan Yan, Art Spitzer, Scott Michelman

Co-counsel: Faegre Drinker Biddle & Reath LLP; Tritura

Hedgeman v. District of Columbia

Date filed: June 18, 2020 **Status: Victory!**

ACLU-DC attorneys: *Michael Perloff*, Scott Michelman, Art Spitzer

Like countless medical marijuana patients throughout the country, D.C. Department of Public Works (DPW) employee Doretha Barber uses her medication responsibly. She has never come to work impaired or used medical marijuana on her employer's property. She simply wanted to be able to use medical marijuana at home to treat her painful back condition and to continue working as a sanitation worker—a position that involves raking leaves and trash from the streets but does not require operating machinery.

In summer 2019, DPW placed Ms. Barber on forced leave without pay and informed her that she could not return to work until she stopped using medical marijuana, even though she used it only during her off-duty hours. After advocacy by the ACLU-DC and Ms. Barber, DPW assigned Ms. Barber to a new position and allowed her to use medical marijuana after work. DPW did not, however, compensate her for

the extended time she spent on unpaid leave, time that forced her to run up debt with family and friends and ultimately lose possession of her car. Nor did it compensate her for the significant pain she endured during months she spent refraining from using medical marijuana in the hopes of passing a urinalysis test and returning to her original position.

We filed this suit in fall 2019 to vindicate Ms. Barber's rights under the D.C. Human Rights Act, which requires employers to address the needs of people with disabilities based on facts, not stereotypes. She should not have been punished for using medicine crucial to her health. The case is now in discovery.

DPW also placed another employee, Phillip Hedgeman, on unpaid leave after he voluntarily disclosed that he used medical marijuana to treat a disability—even though (like Ms. Barber) he used his medication off work hours and never came to work impaired. Although the District eventually transferred Mr. Hedgeman to a new job (after advocacy by Mr. Hedgeman and the ACLU-DC), it refused to pay him backpay for the time he spent on unpaid leave while the parties negotiated that accommodation, and so we sued. Mr. Hedgeman's case raised the question whether an employer can place an employee on leave and deny the employee pay while negotiating with the employee over whether to provide a reasonable accommodation. Rejecting a motion to dismiss, the Superior Court concluded that Plaintiffs stated a claim for the denial of pay during negotiations about a disability accommodation. The parties then settled.

Gordon v. United States

Date filed: October 31, 2018 **Status: Amicus**

ACLU-DC attorneys: *Scott Michelman*, Art Spitzer

Co-counsel: ACLU Women's Rights Project; ACLU of Arkansas

The Equal Pay Act (EPA) is a cornerstone of the legal framework protecting women from sex-based discrimination and helping to narrow the persistent wage gap between workers of different sexes. More than 50 years after the EPA's passage, the gender wage gap persists: on average, women earn just 80 cents for every dollar earned by men. Gayle Gordon and Teresa Maxwell were emergency room physicians at a VA hospital in Little Rock, Ark., who accused the VA of paying them less than several male doctors who performed similar work. Although the plaintiffs showed unequal pay for equal work—which was enough to prove discrimination under the EPA and win their case unless the VA could prove the disparity was due to a legitimate reason—a three-judge panel of the U.S. Court of Appeals for the Federal Circuit ruled against them in September 2018 based on that court's requirement that plaintiffs provide additional evidence of discrimination *on top of* the pay disparity. The plaintiffs petitioned for the full appeals court to rehear their case and to eliminate that requirement. In October 2018, we filed an amicus brief on behalf of ourselves and 23 other women's rights groups to support rehearing of the plaintiffs' case. We urged the court to reconsider its requirement that the plaintiffs prove more than the fact that they received unequal pay for equal work. We argued that this standard poses two distinct problems. First, it's not clear what this standard means and as a result, lower courts have struggled to interpret it consistently. Second, this standard improperly places an additional burden on plaintiffs under the EPA, which provides that once the plaintiffs have shown a pay disparity, the employer has the burden to demonstrate that the difference is due to a factor unrelated to sex. After we filed our amicus brief and while the petition for rehearing was pending, the parties agreed in February 2019 to settle the case and dismiss the appeal.

Arthur v. District of Columbia Housing Authority
Date filed: August 30, 2018 **Status: Victory!**
ACLU-DC attorneys: *Art Spitzer*, Shana Knizhnik
Co-counsel: Arnold & Porter Kaye Scholer LLP

Evelyn Arthur is a 77-year-old, deaf D.C. public housing resident who uses American Sign Language (ASL) to communicate. Under D.C. Housing Authority (DCHA) policy, a visitor to a resident of public housing can enter only after the security desk calls the resident and receives approval. Because Ms. Arthur cannot hear a telephone ring, DCHA initially allowed Robert Arthur, her son and caretaker, to go to his mother's apartment upon presenting identification and signing in only; no phone call was required. Ms. Arthur also has a Video Relay System to enable her to receive calls and be connected to a trained sign-language interpreter, but the system equipment relies on a television, so she would be aware of incoming calls only when she was in her bedroom (where her television was), awake, and looking in the direction of the television.

In January 2017, DCHA inexplicably revoked the exception to its visitation policy for Ms. Arthur. As a result, when Robert tried to visit his mother throughout 2017, he was on numerous occasions denied entry because the security desk called her and she did not answer or see the Video Relay System. Despite the Arthurs' complaints, DCHA, its management company CIH Properties, and its security company, Butler Security, did not reinstate an exception to its policy to accommodate Ms. Arthur.

One night in June 2017, Ms. Arthur called her son in medical distress. He rushed to her building but was once again denied entry because Ms. Arthur did not answer a call from the security desk. Fearing for his mother's health, Robert went up to her apartment anyway. In response, the Butler Security officer on duty, Edward Traynham, requested, and DCHA authorized, Robert to be barred from his mother's building for two months. The Arthurs' attempts to have the bar lifted were rejected by DCHA. After the initial bar expired, Robert attempted to visit his mother to bring her medication in August 2017. Traynham once again denied Robert entry, claiming that a second bar against Robert had been imposed in July—although neither Ms. Arthur nor her son had been notified of the bar. Later in August, an arrest warrant was issued for Robert due to alleged violations of the various bar notices. D.C. police officers came to Ms. Arthur's apartment on August 30, 2017, in search of Robert. They failed to bring an ASL interpreter with them, even though they knew or should have known Ms. Arthur was deaf. Ms. Arthur was confused and frightened by the entry of the MPD officers into her home. She became agitated and began to make noises. Robert tried to explain to his mother in sign language what was happening, and he told the officers that she had a disability. The officers were indifferent. They restrained Ms. Arthur by holding her wrists or arms, thereby cutting off her ability to communicate with her son. They also handcuffed Robert, cutting off his ability to communicate with her. (The charges against him were later dropped.) Although Ms. Arthur presented no threat of any kind, one of the officers said he was tired of Ms. Arthur's moaning and ordered that she be handcuffed. The officers' rough treatment caused the elderly Ms. Arthur to suffer injuries, including acute lower back pain, left and right shoulder strains, and significant bruising on her arms and elsewhere.

In August 2018, we sued DCHA, CIH Properties, Butler Security, Traynham, and several D.C. police officers for failing to accommodate Ms. Arthur's disability, retaliation for the Arthurs' advocacy for reasonable accommodations, and excessive force, among other claims. In May 2019, Defendant Butler Security offered a monetary settlement, which our clients accepted. The other parties moved to dismiss the case; the court dismissed many of our claims, but allowed our Fair Housing Claims to proceed.

The case was settled in June 2021 on confidential terms.

National Fair Housing Alliance v. Carson

Date filed: May 8, 2018 **Status: Closed**

ACLU-DC attorneys: Art Spitzer

Co-counsel: ACLU Racial Justice Proj.; Relman, Dane & Colfax; Pub. Citizen Litig. Grp.; Lawyers' Comm. for Civil Rights Under Law; NAACP LDF; Poverty & Race Res. Council

In 2015 HUD issued the "Affirmatively Furthering Fair Housing" Rule, requiring jurisdictions receiving federal financial aid for housing to account for fair housing issues in their planning processes—for instance, jurisdictions would have to avoid urban planning that would lead to segregation, or unfairly impact people's ability to buy or rent homes due to their race, color, religion, sex, family status, disability, or national origin. In January 2018, HUD suddenly suspended the Rule's requirement that local governments complete assessments that follow the guidelines in the Rule. This suspension was not the result of a notice and comment rulemaking procedure. In May 2018, we represented a coalition of fair housing groups suing to challenge the suspension as a violation of the Administrative Procedure Act. We sought a preliminary injunction. In late May 2018, HUD withdrew its notice suspending the Rule. But at the same time, it withdrew the Assessment Tool that the Rule required local governments to use for their planning processes, and it told local governments they were not required to meet the Rule's requirements. We filed an amended complaint and a renewed motion for preliminary injunction or summary judgment. In August 2018, the court dismissed our case on the ground that the plaintiffs didn't have standing to bring the lawsuit because they weren't injured by the government's action. Rather than appeal, we asked the court's permission to file a second amended complaint alleging the plaintiffs' injuries in more detail. That motion was denied in August 2019 and we decided against an appeal.

Balcom v. AmeriCorps

Date filed: October 11, 2017 **Status: Victory!**

ACLU-DC attorneys: Art Spitzer

Co-counsel: ACLU Disability Rights Project; ACLU Women's Rights Project

Susie Balcom was a 22-year-old recent college graduate and two-term AmeriCorps state program alumna who received multiple offers to serve with the national AmeriCorps program. In April 2017, Balcom accepted a one-year position to serve as a support team leader, which would require her to coordinate logistics and trainings for members in the AmeriCorps office in Mississippi. In May, she was contacted by an AmeriCorps counselor who had additional questions regarding the three sessions of counseling she sought for anxiety (which she had disclosed on a medical questionnaire). She explained that she had been sexually groped by a co-worker and had sought counseling for self-care. A few weeks later, AmeriCorps notified Balcom that she was disqualified from service because of the anxiety she had disclosed on the medical form.

Together with the national ACLU, we filed an administrative complaint with the Corporation for National and Community Service (CNCS), the federal volunteer service agency that operates the AmeriCorps National Civilian Community Corps. The complaint, filed on behalf of all current and recent applicants for service positions with AmeriCorps who either have, or who were regarded as having, a mental health disability as part of the CNCS health screening process, alleged that the process violated the Rehabilitation Act, the federal law that prohibits disability discrimination by federal agencies, as well as CNCS's own civil rights policy.

In September 2019, CNCS and the ACLU announced a settlement under which CNCS will overhaul its health screening process to ensure equal opportunities for everyone, including applicants with

disabilities. The revised health screening process will use a new questionnaire that focuses on whether applicants are able to perform the core functions of service with AmeriCorps, with or without reasonable accommodation. As a result, no applicant will be automatically shut out of service with the organization because of an actual or perceived disability, medical diagnosis, or treatment. In addition, AmeriCorps will institute a new formal system for applicants and current service members to request reasonable accommodations that will help them serve, such as access to mental health counseling via phone or videoconference. AmeriCorps will also invite all class members who are still age-eligible to reapply, financially compensate those who applied and were not placed in the program, offer a professional development course to class members, and establish a recruitment program for people with disabilities. The organization agreed to report to the ACLU for two years on how the new process is working.

Ortiz-Diaz v. U.S. Dep't of Housing and Urban Dev.
Date filed: September 6, 2016 **Status: Victory!**
ACLU-DC attorneys: *Scott Michelman*, Art Spitzer
Co-counsel: Brown Gaines LLC

Samuel Ortiz-Diaz was a senior special agent in HUD's Office of Inspector General in Washington, D.C., who was denied a transfer from the D.C. office to a position in Albany or Hartford. Mr. Ortiz-Diaz is from Puerto Rico. The supervisor who denied the transfer had exhibited a hostile attitude toward Latinos in the office and had approved transfers for white employees who were similarly situated to Mr. Ortiz-Diaz.

Mr. Ortiz-Diaz sued under federal antidiscrimination law (Title VII) for race and/or national origin discrimination in employment. The trial court dismissed the case, and a panel of the D.C. Circuit affirmed the dismissal, ruling that a "lateral transfer" that does not involve a loss of pay, benefits, or job responsibilities is not an "adverse employment action" that can be challenged under Title VII.

In September 2016, we filed a petition asking the entire D.C. Circuit to rehear the case because the panel's decision incorrectly narrows federal protections against employment discrimination by permitting employers—including the federal government—to discriminate openly on the basis of race, national origin, and other prohibited grounds in transfers, work assignments, work hours, and more.

In August 2017, in response to the petition, the original panel of judges decided to vacate its original opinion and substitute a new opinion unanimously reversing the judgment against Mr. Ortiz-Diaz and holding that the Title VII claim must be reinstated on the ground that the denial of the transfer affected Mr. Ortiz-Diaz's potential for future career advancement. Two of the three judges on the panel—including then-Judge Kavanaugh—expressed the hope that the court would, in the future, go even further in making clear that discriminatory lateral-transfer decisions are ordinarily subject to Title VII's broad prohibitions against discrimination.

Five years later, in another case, the full D.C. Circuit reconsidered its Title VII precedent and overruled its requirement that a Title VII plaintiff show some further harm beyond discrimination in "terms, privileges, and conditions" of employment. Under the correct standard, it explained, discrimination with respect to a job transfer always qualifies as a violation of Title VII. The court relied prominently on the revised opinion we secured in *Ortiz-Diaz*.

Manning v. Carter

Date filed: September 15, 2014 **Status: Victory!**

ACLU-DC attorneys: Art Spitzer

Co-counsel: ACLU LGBTQ & HIV Project; ACLU of Kansas; Jenner & Block LLP; Law Office of David E. Coombs

Together with co-counsel, we sued on behalf of U.S. Army Private First Class (PFC) Chelsea Elizabeth Manning to obtain proper medical treatment for her gender dysphoria while serving a 35-year sentence at Ft. Leavenworth, Kansas, for disclosing classified information to WikiLeaks.

When we filed suit in September 2014, PFC Manning had been in military custody for more than four years, and at Ft. Leavenworth for more than a year, without receiving any treatment, despite her requests. We filed a motion for a preliminary injunction with our complaint, arguing that treatment was medically necessary and that its denial was cruel and unusual punishment. Soon after, the Army developed a treatment plan for PFC Manning and began to provide psychotherapy, medical treatment, and appropriate clothing. But, citing unspecified security risks, the Army decided not to allow PFC Manning to grow hair in accordance with the standards for female prisoners. We filed an amended complaint in October 2014, asserting both Eighth Amendment and Equal Protection claims.

On May 18, 2016, PFC Manning filed her brief to the Army Court of Criminal Appeals, appealing her conviction and sentence. President Obama commuted PFC Manning's sentence on January 17, 2017, and PFC Manning took her first steps of freedom on May 17, 2017, mooting this case about the conditions of her confinement.

Pierce v. District of Columbia

Date filed: February 15, 2013 **Status: Victory!**

ACLU-DC attorneys: Art Spitzer, Frederick Mulhauser (volunteer), Jennifer Wedekind

Co-counsel: Steptoe & Johnson LLP

In February 2013, we filed suit on behalf of William Pierce, who is profoundly deaf and received virtually no accommodations—such as qualified ASL interpreters for intake and medical visits, adequate access to videophones, and visible alarms for emergencies—while in custody at a D.C. jail facility operated (at the time) by the Corrections Corporation of America (CCA), a private company. In September 2015, the district court (then-Judge Ketanji Brown Jackson) ruled at summary judgment that the District has an affirmative duty to assess the accommodation needs of people with disabilities in custody, and that it violated the law when it "did *nothing* to evaluate Pierce's need for accommodation, despite [its] knowledge that he was disabled." The court found that officials acted with "deliberate indifference" to Mr. Pierce's rights, entitling him to compensatory damages in an amount to be determined by a jury. In May 2016, the jury awarded Mr. Pierce $70,000 in damages. The District did not appeal.

FIRST AMENDMENT (SPEECH, ASSOCIATION, RELIGION, INCLUDING PROTEST)

Mashaud v. Boone

Date filed: October 4, 2021 **Status: Amicus**

ACLU-DC attorneys: *Art Spitzer*, Scott Michelman

The D.C. law against stalking makes it a crime to "purposefully engage in a course of conduct directed at a specific individual [w]ith the intent to cause that individual to [f]ear for his or her safety or the safety of another person; or [f]eel seriously alarmed, disturbed, or frightened; or [s]uffer emotional distress." To "engage in a course of conduct" is defined to include "communicat[ing] to or about another individual." A victim of stalking can also get an "Anti-Stalking Order," ordering the stalker to stop his conduct, stay away from the victim, and more. Apparently recognizing that a law making "communicat[ion]" a crime risks the prosecution of speech protected by the First Amendment, the law provides that "[t]his section does not apply to constitutionally protected activity." But the D.C. Court of Appeals has never explained what that means.

In this case, Dr. Mashaud's wife had a brief affair with Mr. Boone. She was an intern at the company where he was a vice president. Dr. Mashaud disclosed the affair to the Human Relations Department at Mr. Boone's company and to some of Mr. Boone's Facebook friends. Mr. Boone then sued Dr. Mashaud and obtained an Anti-Stalking Order against him. The Superior Court judge ruled that Dr. Mashaud's communications were not constitutionally protected activity because they were matters of private rather than public concern.

In August 2021, the D.C. Court of Appeals reversed that decision, explaining that the First Amendment's protection is not limited to matters of public concern. But the court did not rule that Dr. Mashaud's communications were constitutionally protected activity, and sent the case back to the Superior Court without any guidance on the meaning of that phrase, other than a suggestion that it was relevant whether Dr. Mashaud's conduct "served no legitimate purpose." Mr. Boone petitioned the Court of Appeals to rehear the case en banc to provide such guidance. In October 2021 we filed an amicus brief in support of that petition, noting that there will be approximately 900 requests for anti-stalking orders filed in Superior Court this year, and that Superior Court judges need to know what the law means. We also noted that First Amendment protection is not limited to speech that has a "legitimate purpose," and that much of the #MeToo movement involves "naming and shaming" powerful men who have sexual relations with subordinate women.

In December 2021, the court granted rehearing. In April 2022, we filed an amicus brief on the merits, urging the court to construe the exemption for constitutionally protected activity as excluding from the statute's coverage applications to speech (when speech alone is the basis for liability) unless that speech falls into existing, well-established First Amendment exceptions such as true threats or fighting words. The case was argued in October 2022.

Swann Street kettle

Date filed: March 9, 2021 **Status: Report**

ACLU-DC attorneys: Scott Michelman, Art Spitzer

Co-counsel: Sidley Austin LLP; Wash. Lawyers' Comm. for Civil Rights & Urban Affairs

On the evening of June 1, 2020, MPD deployed significant force in and around Swann Street, a narrow residential street in Northwest D.C. The police ultimately arrested about 200 people who had been protesting police brutality and excessive force in the wake of George Floyd's murder. These protesters

were arrested on a single, common charge—violation of the Mayor's 7:00 p.m. curfew. After funneling the protesters from nearby streets onto Swann Street between 14th and 15th Streets, the police barricaded both ends of the block, "kettling" the crowd. The police on one end of the street advanced and arrested protesters for violating the curfew. They handcuffed the protesters with zip-ties and transported them across the District to the grounds of the MPD Academy in the District's Southwest quadrant. There, many were crammed into holding cells, contrary to federal and D.C. government COVID-19 recommendations; they were not released for hours. On the other end of Swann Street, the police closed in on the crowd, using shields and pepper spray, and a number of protestors fled. Approximately 80 of them took refuge in nearby townhouses, avoiding arrest only because Swann Street residents were willing to shield protestors from the tactics being used by police.

Together with co-counsel, we published the report *Protest During Pandemic* (at acludc.org/swann-street-report) criticizing MPD's tactics: officers never gave a dispersal order, used pepper spray needlessly, ignored the risks of packing people together and confining them during a global pandemic, and chose to arrest them for a minor infraction instead of simply letting them go home.

In 2022, the D.C. Council strengthened the First Amendment Assemblies Act, including its dispersal-order requirement and restrictions on the use of chemical irritants.

Dashtamirova v. United States
Date filed: October 14, 2020 **Status: Open**
ACLU-DC attorneys: *Michael Perloff*, Scott Michelman, Art Spitzer, Annamaria Morales-Kimball (volunteer)

Outraged by the killings of George Floyd and Breonna Taylor, Dzhuliya Dashtamirova came to Washington D.C. on June 1, 2020, to protest police brutality and racism. As Ms. Dashtamirova and other protestors marched around the District, government helicopters hovered overhead. At approximately 9:50 p.m., two helicopters piloted by members of the D.C. National Guard alternated flying low above Ms. Dastamirova and a group of demonstrators marching near Gallery Place and followed them as they fled to Judiciary Square. The helicopters descended beneath the roofs of buildings, with one flying just three stories above the ground. Their rotors generated winds with hurricane-level force and tore signs from buildings, snapped a tree from its roots, and swirled trash and glass shards from broken windows into the air. The attack caused debris to hit Ms. Dashtamirova in the face, stinging her eyes and mouth. It also left her terrified that she would face similar force if she dared to challenge the government again. The military tactic employed on June 1 is known as a "rotor wash" and has been used in Afghanistan, Iraq, and conflict zones around the world. The Trump administration's decision to deploy it against racial justice protestors on American soil constitutes unprecedented attempt to interfere with fundamental constitutional rights. In October 2020, the ACLU-DC filed a formal administrative complaint on Ms. Dashtamirova's behalf, challenging the National Guard's conduct and demanding accountability.

(2023 Update: Having received no response on the administrative complaint, in March 2023 we filed suit in federal court on behalf of Ms. Dashtamirova under the Federal Tort Claims Act.)

Ahmed v. Department of For-Hire Vehicles
Date filed: June 29, 2020 **Status: Victory!**
ACLU-DC attorneys: *Art Spitzer*

Ibrahim Ahmed is a D.C. taxi driver. He was fined $500 by an officer of the D.C. Department of For-Hire Vehicles for allegedly shouting "fuck you" at the officer when he felt the officer treated him in an insulting

way. The ticket was upheld by the D.C. Office of Administrative Hearings. We represented Mr. Ahmed in his appeal to the D.C. Court of Appeals, where in June 2020, we filed a motion for summary reversal, pointing out that it has been clear for many years that "cursing a cop" is constitutionally protected speech. As the Supreme Court has explained, "The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." A month later, the government agreed to nullify the ticket, and we agreed to dismiss the appeal.

United States v. Bolton

Date filed: June 19, 2020 **Status: Amicus**

ACLU-DC attorneys: Art Spitzer, Scott Michelman

Co-counsel: ACLU Speech, Privacy & Technology Project; Knight First Amendment Institute at Columbia University

People who get security clearances to access classified information must promise to undergo "prepublication review" for any publication they author to be sure it doesn't contain classified information. The U.S. government filed this lawsuit in June 2020 seeking to suppress the publication of former National Security Advisor John Bolton's book about his work in the Trump Administration, *The Room Where It Happened*, on the ground that it contained classified information and had not properly completed prepublication review. Even though the book had already been distributed around the world and excerpted on the front pages of major newspapers, the government sought a sweeping injunction against distribution that would bind not just the author but also the publisher, which was not made a party to the suit, as well as distributors and booksellers that the government did not identify. We filed an amicus brief urging the court to deny the government's motion for a temporary restraining order to suppress distribution of the book because such an order would violate the First Amendment. In refusing to enjoin the Pentagon Papers (a classified study of the U.S. involvement in Vietnam) in 1971, the Supreme Court emphasized that any prior restraint against the publication of matters of public concern "bear[s] a heavy presumption against its constitutional validity." And in any event, the cat was out of the bag, so an injunction would not, in fact, prevent any irreparable harm to the government even if the book did contain classified information. (Mr. Bolton also pointed out that he had spent months pursuing prepublication review and had been told the book was fine until a political appointee stepped in at the last minute to deny him the right to publish.) The court denied the government's motion, concluding that because of the widespread distribution, the government would not suffer irreparable harm in the absence of an injunction.

However, the court allowed the lawsuit to go forward, so that the government could deprive Mr. Bolton of all income from his book if it showed that he had not waited for the prepublication review process to finish. After some discovery, the government dismissed the lawsuit.

Black Lives Matter D.C. v. Barr (originally Black Lives Matter D.C. v. Trump)

Date filed: June 4, 2020 **Status: Open**

ACLU-DC attorneys: *Scott Michelman*, Art Spitzer, Michael Perloff, Megan Yan, Kayla Scott (volunteer), Marietta Catsambas (volunteer)

Co-counsel: Arnold & Porter Kaye Scholer LLP, Wash. Lawyers' Comm. for Civil Rights & Urban Affairs, Lawyers' Comm. for Civil Rights Under Law

In the wake of George Floyd's murder in May 2020, civil rights supporters assembled on June 1, 2020, in Lafayette Square, next to the White House, to demonstrate peacefully for an end to racism and brutality

in policing, in the tradition of countless Americans of all backgrounds and ideologies who have sought change within our democratic system. They were met with a violent crackdown. Federal law enforcement officers charged, clubbed, tear gassed, pepper-sprayed, shot with rubber bullets, and violently dispersed the civil rights demonstrators, including children. Demonstrators struggled to breathe amidst the chemical attack. Officers repeatedly hit unarmed, peaceful people with batons and shields. This unprovoked attack by government officers against peaceful protesters—of a degree unprecedented on U.S. soil in the past half-century—occurred suddenly and without warning in the heart of the Nation's capital.

There was no legitimate basis to assault the demonstrators, who posed no threat to anyone or to public safety generally. Although President Trump walked across the Square for a photo op in front of a church about a half-hour after the attack, he was safely in the White House Rose Garden giving a speech when the attack occurred. The Trump administration subsequently gave a variety of shifting and implausible justifications for the attack.

Within days, we and our co-counsel sued President Trump, Attorney General Barr, and numerous other federal officials for the blatant and egregious violation of the demonstrators' First and Fourth Amendment rights to peaceful assembly, petition for redress of grievances, freedom of speech, freedom of the press, and freedom from unwarranted seizures by the government.

During the summer of 2020, we discovered video footage proving that MPD also participated in the attack by shooting tear gas at protestors as they fled. This contradicted public statements of D.C. Police Chief Peter Newsham that MPD had not been involved. We therefore amended the complaint to add MPD officers as defendants; we also added the U.S. Park Police incident commander and individual federal officers we were able to identify from video footage. Our plaintiffs included Black Lives Matter D.C. and eight individual protesters, including two children who were there with their parents; the individuals sought injunctive relief against future attacks and damages on behalf of all the assaulted demonstrators. One of our clients, U.S. Navy veteran Kishon McDonald, testified before a congressional committee investigating the attack in the summer of 2020.

In October 2020, the defendants all moved to dismiss. Among other things, they argued that they had not violated our clients "clearly established" rights and that our clients could not sue federal officers at all for past violations of their constitutional rights. We filed our principal opposition brief in November, arguing that our clients' First Amendment right to freedom of speech and Fourth Amendment right against unreasonable seizure were so flagrantly violated that no reasonable officer could have believed this conduct was lawful. And we urged the court not to abdicate judicial responsibility to provide a remedy for the violation of constitutional rights—a remedy that is critical to avoiding brutality with impunity and to upholding the rule of law.

In June 2021, the court dismissed the constitutional damages claims against all of the federal officials, holding that federal officials cannot be sued for monetary compensation for violating constitutional rights near the White House because of inherent presidential security implications, regardless of whether security actually justified the attack. The ruling permitted First Amendment claims to proceed against District of Columbia officers who deployed tear gas against demonstrators fleeing the federal attack (because the D.C. officers were local rather than federal); on this point, the court agreed with us that the constitutional violations were so blatant that the officers were not immune. But the court also ruled that the Fourth Amendment does not protect against excessive force used to disperse people rather than to detain them. The court also dismissed most but not all of the claims for injunctive relief.

In April 2022, the federal government agreed to implement a series of policy reforms to settle our claims for injunctive relief. In exchange for the plaintiffs' dismissal of these claims, the government's policy changes will: protect the right to demonstrate by providing that Park Police cannot revoke demonstration permits absent "clear and present danger to the public safety," or "widespread violations

of applicable law that pose significant threat of injury to persons or property"; protect demonstrators by requiring Park Police to enable the safe withdrawal of demonstrators if a protest is being dispersed; protect demonstrators by requiring Park Police to provide audible warnings before dispersing a crowd; promote accountability by requiring Park Police to wear clearly visible identification; prohibit discriminatory policing based on race, color, sex, national origin, religion, sexual orientation, gender identity or expression, disability, or viewpoint; and reduce the opportunity for guilt-by-association policing by modifying Secret Service policy to make clear that uses of force and dispersals are not normally justified by the unlawful conduct of some individuals in a crowd. These changes are significant steps to protect protesters' rights so that what happened on June 1, 2020, doesn't happen again.

Meanwhile, we continued to pursue our clients' damages claims in order to hold responsible the officials who ordered and participated in the unconstitutional brutality of June 1, 2020. In May 2022, we appealed the district's court decision dismissing the damages claims against the federal officials. In our briefing to the D.C. Circuit, we argued that the court had ignored Congress's endorsement of claims against federal officials for violating demonstrators' constitutional rights at the headquarters of a branch of government.

(2023 Update: We argued the case on April 4.)

D.C. Public Schools Student Technology Responsible Use Agreement

Date filed: April 20, 2020 **Status: Victory!**

ACLU-DC attorneys: *Scott Michelman*, Art Spitzer

In the early months of 2020, parents of DCPS students (ranging from elementary to high school grades) expressed concerns to us about how the DCPS Student Technology Responsible Use Agreement School Year 2019-20 ("Use Agreement") might chill their children's online speech and subject them to discipline for constitutionally protected speech. For instance, one provision of the Use Agreement required each student to agree that "I will not . . . make discriminatory or derogatory remarks about others online while . . . out of school"; and another required each student to agree that "I will not use social media, messaging apps, group chats, and other websites outside of school in a way that negatively impacts my school community." We identified several constitutional problems with the way the DCPS was regulating student speech: it reached beyond the school environment to ban constitutionally protected out-of-school speech; it imposed vague or unconstitutionally broad restrictions on student communications; and a provision about online impersonation could prohibit some important protected speech, including expression using a gender identity different from a student's sex assigned at birth.

In April 2020, we wrote to DCPS to share our concerns and seek reforms. Given the remote-learning mandate of DCPS in light of the COVID-19 pandemic, combined with the Mayor's stay-at-home order, we warned that provisions governing students' technology were likely to apply to most if not all of students' in-school communications and (given the expansiveness of the Use Agreement) to students' out-of-school communications as well. In May, DCPS responded by promising substantial modifications to its policy addressing each of our areas of concern. All references to "out of school" speech would be eliminated, along with the vague phrases like "negatively impact the community" and "may be hurtful." DCPS also stated that it would clarify the anti-impersonation provision so as not to reach the types of speech that concerned us. We informed DCPS that we were satisfied with these changes.

Refusefacism.org

Date filed: January 22, 2020 **Status: Victory!**

ACLU-DC attorneys: *Art Spitzer*, Scott Michelman

On January 21, 2020, we learned that the Capitol Police were forbidding a group with a permit to demonstrate on the Capitol grounds from carrying signs saying "www.refusefacism.org" because it was, according to the Capitol Police, an advertisement. On January 22, we emailed the General Counsel of the Capitol Police to point out that this was obviously incorrect and that the relevant regulations permitted the signs. Later that day, the Capitol Police relented and changed their position.

District of Columbia v. Johnson

Date filed: July 4, 2019 **Status: Victory!**

ACLU-DC attorneys: Art Spitzer

Co-counsel: Mark Goldstone

ACLU-DC v. U.S. Secret Service

Date filed: June 8, 2020 **Status: Victory!**

ACLU-DC attorneys: Art Spitzer

Gregory "Joey" Johnson was the protestor who prevailed in the landmark 1989 Supreme Court case *Texas v. Johnson*, holding that the First Amendment protects the right to burn the U.S. flag. On Independence Day 2019, he once again burned a U.S. flag, this time on Pennsylvania Avenue right in front of the White House (with advance notice to the U.S. Park Police). As Mr. Johnson lit the flag, no one was in the vicinity except four uniformed Secret Service officers, all at a safe distance away. But immediately after he lit the flag, two officers rushed in, one with a fire extinguisher to douse the burning flag—for no good reason, as no one was in danger, and apparently to interfere with Mr. Johnson's First Amendment activity. Mr. Johnson dropped the flag as the fire extinguisher began spraying; the flag floated toward the second officer, who stomped on the flag to put the fire out but whom the government later claimed was injured by smoke inhalation. Mr. Johnson was arrested and charged with two disorderly conduct offenses. Together with Mr. Johnson's criminal defense counsel, we sent a letter to the D.C. Attorney General in September 2019 explaining that Mr. Johnson's expressive conduct—which, as video of the incident showed, was entirely non-threatening—was protected by the First Amendment, and that the criminal charges were untenable. Less than a week later, the government dismissed the charges.

Later in 2019, we filed a FOIA request for the videos of the incident, which we then sued to enforce after receiving no response. As a result, we obtained the videos along with attorneys' fees, and we dismissed the case in March 2021.

Blades v. United States

Date filed: April 8, 2019 **Status: Amicus**

ACLU-DC attorneys: Art Spitzer

Co-counsel: Reporters' Committee for Freedom of the Press

Jonathan Blades was convicted at trial of assault with intent to kill and related offenses. Jury selection was conducted in a manner common in D.C. Superior Court: after the judge addressed a set of yes-or-no questions to all prospective jurors (such as whether the juror knows the parties or lawyers or there's any reason the juror cannot serve), the judge conducted follow-up questioning of individual prospective jurors at the bench, with a "husher" (a white noise machine) turned on to prevent everyone except the judge, the

lawyers, the defendant, and the court reporter from hearing the dialogue. Mr. Blades objected to this procedure on the ground that it violated his Sixth Amendment right to a public trial, of which jury selection is an important part. The judge overruled his objection. A panel of the D.C. Court of Appeals agreed that a public jury selection process is protected by the Sixth Amendment (as the Supreme Court has said) but affirmed the convictions on the ground that the use of a husher did not make jury selection non-public, where members of the public could see the proceedings and where a transcript could be obtained (for a fee) soon afterward. Judge Beckwith dissented on the ground that the ability to purchase a subsequent transcript is no substitute for a public trial; she argued that a husher should not be allowed during jury selection except when the trial judge finds justification for closing the proceeding under the same strict First Amendment standards that apply to closing the courtroom during other parts of the trial. The trial judge and the majority of the appellate panel expressed concern that requiring prospective jurors to answer questions in public could discourage them from giving fully truthful answers. The dissent's (and Mr. Blades') response is that the same is true of witnesses at trial, and that in specific circumstances a prospective juror (like a trial witness) could request the use of the husher and the court could use it based on a strong enough interest (e.g., a prospective juror in a rape trial who needs to disclose that she was the victim of a sexual assault). Mr. Blades sought rehearing before the entire Court of Appeals. We joined with the Reporter's Committee for Freedom of the Press and 16 other organizations in an amicus brief supporting rehearing, arguing that a husher may be used only if the First Amendment requirements are satisfied. The court denied rehearing. The defendant then sought Supreme Court review, which was also denied.

National Park Service regulations
Date filed: October 8, 2018 **Status: Victory!**
ACLU-DC attorneys: *Art Spitzer*, Scott Michelman

In 2018, the Trump administration is proposing to dramatically limit the right to demonstrate near the White House and on the National Mall. Proposed regulations, published by the National Park Service, would close 80 percent of the White House sidewalk and put new limits on spontaneous demonstrations. The Park Service said it was also considering charging fees (they call it "cost recovery") for demonstrations. We submitted 30 pages of comments objecting to the proposed changes. In the fall of 2019, NPS announced it would drop the proposed regulations.

Guffey v. Mauskopf (formerly Guffey v. Duff)
Date filed: May 31, 2018 **Status: Open**
ACLU-DC attorneys: *Scott Michelman*, Art Spitzer, Laura Follansbee, Michael Perloff

The Administrative Office of the U.S. Courts (AO) provides legislative, legal, financial, technology, management, administrative, and program support services to the federal judiciary. AO employees do not, however, decide individual cases or participate in any way with the decision process (in contrast to, for instance, a judge's law clerks). Nonetheless, in 2018 AO Director James C. Duff barred all AO employees—from the human resources specialist to the facilities manager to the budget analyst—from a broad range of political activities that are open to virtually all other federal employees, including expressing personal views publicly or on social media about partisan candidates for office, attending events for political parties or party candidates, joining a political party, and making donations (however small) to parties or partisan candidates. Because many partisan candidates are seeking reelection to offices

they currently hold, the ban on AO employees' speech regarding candidates encompasses in some instances speech about AO employees' own currently serving elected officials.

The month the new Code became effective, we wrote to Director Duff expressing concern about employees' speech rights and asking that nine specific restrictions on political speech and association be rescinded. He replied that the Code was "necessary to maintain the public's confidence in the Judiciary's work"—an interest that he believed "extended beyond" the interest in "prevent[ing] the appearance of corruption in the Legislative and Executive Branches." Because the vague and speculative interests asserted by the agency do not outweigh AO employees' rights to engage in core political speech and associational activity, we sued Director Duff on behalf of two AO employees to enjoin nine restrictions of the new Code on First Amendment grounds. One of our clients was an IT specialist; another assessed whether federal defender offices across the country were well-run. When the new Code became effective, both were chilled from ordinary political activities relating to the 2018 elections.

In August 2018, the court granted our motion for a preliminary injunction, prohibiting the government from enforcing 7 of the 9 restrictions we challenged. The injunction protected the rights of more than a thousand government employees to express their views publicly about partisan candidates for office (including on social media), join political parties, attend candidate events, and make candidate contributions. In April 2020, after further briefing, the court ruled for our clients on the merits, once again enjoining—this time permanently—7 of the 9 challenged restrictions, agency-wide. In the summer of 2020, the government appealed the decision as to the 7 restrictions on which we won, and we cross-appealed as to the 2 restrictions on which we lost.

In August 2022, the U.S. Court of Appeals for D.C. Circuit ruled that all nine of the restrictions we challenged were unconstitutional. The government again argued that if employees engaged in the restricted activities, they would undermine public confidence in the judiciary as a whole or prevent Congress or judges from trusting the work of the AOUSC. The appeals court rejected these arguments, deeming them "too speculative to survive the scrutiny required for a regulation of political speech." The court described the government's fears as "novel, implausible, and unsubstantiated," and noted that "[e]ven with eight decades of AO history to draw from, the AO has excavated no instance of off-duty political conduct by an AO employee that has injured the Judiciary's reputation." The court's opinion specified that the relief it ordered—preventing enforcement of the nine challenged restrictions—applied only to the two plaintiffs in the case, but it observed that "the AO is a government entity with an independent duty to uphold the Constitution" and therefore "[w]e trust that upon receipt of our judgment, it will reconsider the contested restrictions" as to the rest of its 1,100 employees. The government petitioned for rehearing en banc, which was denied.

Ouza, Mayssa

Date filed: November 15, 2017 **Status: Victory!**

ACLU-DC attorneys: Art Spitzer, Scott Michelman

Co-counsel: ACLU Program on Freedom of Religion and Belief; ACLU of Michigan; Hammoud, Dakhlallah & Associates PLLC

Mayssa Ouza is a Muslim attorney who was accepted into the Air Force Judge Advocate General Corps, but then told that she must first be sworn in and comply with usual uniform regulations (meaning without wearing her hijab) before she could ask for a religious accommodation to wear her hijab. On November 15, 2017, we sent a demand letter to the Air Force explaining why this delayed accommodation violated both Department of Defense policy and the Religious Freedom Restoration Act. In February 2018, the Air Force agreed to provide a pre-accession accommodation. Subsequently, Lt. Ouza successfully completed

basic training and officer training while wearing her hijab. She was awarded the "Airman of the Week" honor by her fellow trainees and instructors, who described her as "a true leader who will greatly contribute to the Air Force and anything she pursues."

ACLU v. Washington Metropolitan Area Transit Authority

Date filed: August 19, 2017 **Status: Open**

ACLU-DC attorneys: *Art Spitzer*, Scott Michelman, Megan Yan, Shana Knizhnik

Co-counsel: ACLU Speech, Privacy & Technology Project

The Washington Metropolitan Area Transit Authority (WMATA) operates one of the nation's largest transit systems, the D.C. Metro, which spans more than 90 Metro stations in the District, Maryland, and Virginia as well as hundreds of bus routes. Paid advertising in trains, in and on buses, and in Metro stations, reaches more than 90% of the people who live and work in the area on a daily basis. After many years of accepting advertisements on a wide range of topics, WMATA sought to sanitize its advertising spaces from messages that might give offense. New guidelines banned, among other things, "[a]dvertisements intended to influence members of the public regarding an issue on which there are varying opinions" and "[a]dvertisements that support or oppose an industry position or industry goal without any direct commercial benefit to the advertiser."

In the fall of 2016 and the first half of 2017, WMATA applied these guidelines to reject a series of ACLU ads displaying the text of the First Amendment in English, Spanish, and Arabic; an ad from the women's health care collective Carafem for medical abortion pills; and several ads from the advocacy group People for the Ethical Treatment of Animals (PETA) telling people to "Go Vegan." In June 2017, WMATA accepted and displayed ads for a new book by right-wing provocateur Milo Yiannopoulos, but then removed the ads after riders complained. During the same period of time that WMATA was rejecting or removing these ads, the transit agency was accepting and running ads promoting other controversial and health-related messages and advertising other consumable media on controversial subjects—including ads promoting eating animal-based foods, wearing clothing made from animals, and attending circus performances at which animals are made to perform in unnatural ways; ads for a play about right-wing Supreme Court justice Antonin Scalia and ads for a new movie with sexual content. In August 2017, the ACLU-DC and the National ACLU filed suit in federal district court in Washington on behalf of the ACLU, Carafem, Mr. Yiannopoulos' company Milo Worldwide, and PETA. The suit challenged both the application of WMATA's guidelines to this ideological diverse group of speakers and the constitutionality of the guidelines themselves, which are unconstitutionally viewpoint-discriminatory. We filed this suit to ensure that the influential ad space on Metro isn't reserved only for majority viewpoints and messages associated with a commercial interest, and to ensure that riders have the opportunity to learn about services, products, and even laws that may be important to them — like medical options concerning reproductive choices, controversial books, and the First Amendment itself.

We sought a preliminary injunction on behalf of Milo Worldwide seeking to have its ads restored to WMATA ad space. In March 2018, the court denied a preliminary injunction to post the Milo Worldwide ad because the court thought the ad itself was controversial. In May 2018, the ACLU tried to advertise its own upcoming membership conference on Metro, and Metro refused to display that ad too, on the ground that even an ad about an event rather than a political message could be banned if the advertised event will include controversial views. We sought a temporary restraining order requiring Metro to post our conference ads, because Metro has been inconsistent in applying its Guidelines: sometimes it only looks at the face of an ad, but sometimes (as for our ad) it looks to outside information to find a controversial message. In late May 2018, the Court denied our motion. Although our preliminary

motions were denied, we are continuing to litigate the ultimate issues of whether Metro's policy is arbitrarily applied or unconstitutional. After a stay pending related D.C. Circuit litigation, WMATA moved for judgment on the pleadings in March of 2021, and we await a decision.

In re Search of Information Associated with Facebook Accounts DisruptJ20 [Etc.]
Date filed: September 28, 2017 **Status: Victory!**
ACLU-DC attorneys: *Scott Michelman*, Art Spitzer, Shana Knizhnik
Facebook v. United States
Date filed: June 30, 2017 **Status: Amicus**
ACLU-DC attorneys: Art Spitzer, Scott Michelman
Co-counsel: ACLU Speech, Privacy & Technology Project; Public Citizen Litigation Group

In June 2017, we learned that Facebook had been served with search warrants for the contents of three user accounts that were related to demonstrations planned for Inauguration Day 2017, and that Facebook had been ordered not to tell the users or anyone else about the search warrants. After unsuccessfully challenging the gag order in D.C. Superior Court, Facebook appealed, and the Court of Appeals allowed Facebook to issue a short public notice about the case. On June 30, we filed an amicus brief, together with Public Citizen, arguing that the gag order should be lifted, and that, from the few facts we knew, the search warrants were abusive fishing expeditions, probably connected to the flimsy prosecutions of participants in the mostly peaceful demonstrations that occurred on Inauguration Day 2017. (We filed an amicus brief in the criminal cases also, and challenged the mass arrests of the demonstrators. See separate entry for *Horse v. District of Columbia*, p. 50) In September 2017, on the day before the D.C. Court of Appeals was to hear the Facebook gag order case, the government agreed to drop the gag order.

Facebook then promptly notified the users whose accounts were at risk, and they sought our help directly. We then learned that, following the mass arrests the government carried out on Inauguration Day 2017, the government had obtained search warrants for the *disruptj20* Facebook page and the personal Facebook accounts of political activists Lacy MacAuley and Legba Carrefour. Although the warrants were ostensibly directed at investigating what the government alleged was a "riot" on Inauguration Day, in fact the warrants required Facebook to disclose the entire contents of these accounts for a period of more than 90 days. Among the material required to be disclosed to the government were all private messages, friend lists, status updates, comments, photos, video, and other private information solely intended for the users' Facebook friends and family, even if they had nothing to do with Inauguration Day. The search warrants also sought information about actions taken on Facebook, including all searches performed by the users, groups or networks joined, and all "data and information that has been deleted by the user."

The enforcement of these warrants would reach deeply into the activists' private lives and protected associational and political activity. Government agents would gain access to their communications with friends and family, names and pictures of family members including children, personal passwords, security questions, home addresses, credit card information, intimate messages shared with a romantic partner, medical information including prescription-drug information and psychiatric history and treatment, and discussions of individuals' experiences with domestic violence. Government agents would discover a detailed portrait of individuals' political activities and associations, including their political views and commentary; the pictures and names of individuals who participated in or organized political demonstrations, rallies, dance parties, teach-ins, and other political events; messages reflecting a user's involvement or affiliation with specific political organizations or groups; and political or organizational strategies for political activism—all regarding events unconnected to January 20. The identities of thousands of Facebook users who "liked" the disruptj20 Facebook page, and non-public lists

of intended attendees of events associated with the disruptj20 page—including events, such as a peaceful dance-party protest to call attention to the anti-LGBT stance of the incoming Vice President, that were in no way associated with any alleged "riot" on January 20—would be revealed to the government as well.

In late September 2017, on behalf of the owners of the three targeted accounts, we filed motions in D.C. Superior Court to intervene and to quash the warrants as overbroad under the Fourth Amendment because they would invite extensive invasions of privacy and chill First Amendment-protected political speech and association by subjecting anti-administration political activists to wide-ranging scrutiny by the very administration they were protesting.

On November 9, the court imposed significant limitations on the warrants: The court required Facebook to edit out all third-party identifying information, including the identities of the approximately 6,000 people who liked or followed the DisruptJ20 Facebook page, the names of MacAuley and Carrefour's Facebook friends, and the names of anyone who communicated with MacAuley or Carrefour. In addition, the court limited the date range of photos sought from all three accounts. The court also required the government to submit a search protocol to the court for approval before being allowed to search the DisruptJ20 page. The court also ordered the government not to share or retain any material it could not prove it had probable cause to "seize" for its investigation. However, the court did not protect MacAuley's and Carrefour's private content from government review. The court rejected the ACLU-DC's suggestions that it appoint a neutral third party to review the material and prevent the government from receiving information irrelevant to its investigation, or that the government be required to use a court-approved search protocol for the personal accounts. The court also denied the account holders' request to intervene formally. On November 16, the ACLU-DC sought reconsideration of the court's denial of intervention and its decision not to require a Court-approved search protocol for MacAuley's and Carrefour's Facebook account.

In July 2018, the government dropped the last of the criminal charges against protestors for their Inauguration-Day conduct; accordingly, the warrants we challenged became moot, and MacAuley's and Carrefour's personal information was never disclosed.

Horse v. District of Columbia
Date filed: June 21, 2017 **Status: Victory!**
ACLU-DC attorneys: *Scott Michelman*, Art Spitzer, Michael Perloff, Shana Knizhnik

"J20" Criminal Prosecutions (United States v. Macchio)
Date filed: October 17, 2017 **Status: Amicus**
ACLU-DC attorneys: *Shana Knizhnik*, Scott Michelman, Art Spitzer

On January 20, 2017, Donald Trump was sworn in as President, and many individuals, exercising their First Amendment rights, demonstrated in the streets of Washington, D.C. A few demonstrators committed acts of vandalism but most did not. In response, MPD rounded up and arrested hundreds of people, including many who engaged in no illegal activity. During the demonstrations and then while "kettling" groups of demonstrators for hours, police fired pepper spray, tear gas, and flash-bang grenades at crowds of demonstrators, journalists, and legal observers, frequently without warning or justification. In the course of the roundup and subsequent processing of demonstrators, police held detainees for hours without access to food, water, or access to toilets; cuffed some detainees so tightly as to cause loss of feeling or cuts in the skin; and subjected some of the detainees to excessively invasive searches.

In June 2017, we filed a lawsuit on behalf of four individuals, including a photojournalist and a legal observer, who had been harmed by the police conduct on Inauguration Day. The complaint sought damages for violations of the plaintiffs' constitutional rights to free expression, freedom from

unreasonable searches and seizures, and due process, and also raised claims for assault and battery, false arrest and imprisonment, intentional infliction of emotional distress, and violations of the D.C. First Amendment Assemblies Act. In January 2018, we amended the complaint to add two additional plaintiffs—a mother and her 10-year-old son who were peacefully demonstrating when police charged and knocked the boy down without warning; as he and his mother tried to flee, both were exposed to pepper spray that the police discharged at nonviolent demonstrators.

Defendants—including Police Chief Peter Newsham and more than two dozen supervisory and line-level D.C. police officers—moved to dismiss the case.

Meanwhile, during the first year of our litigation, two of our plaintiffs continued to face criminal charges brought by an overzealous U.S. Attorney's Office, which prosecuted more than 200 demonstrators for allegedly being members of a criminal conspiracy to riot. Defendants potentially faced decades in prison. In October 2017, we filed an amicus brief in support of several motions filed by the first J20 criminal defendants on trial arguing that, when the government is prosecuting individuals based on their presence or membership in a larger group engaged in both protected First Amendment activity as well as unlawful conduct, courts must apply existing evidentiary and procedural rules in the strictest manner, in order to ensure that individuals who only intended to lawfully exercise their First Amendment rights are not wrongfully convicted based on guilt by association. Doing so ensures that the line between unlawful conduct and protected First Amendment expression and association is upheld, and that individuals are not chilled from exercising their rights for fear of criminal prosecution based on the actions of a few. In December 2017, the first six defendants to go to trial were acquitted on all charges. In January 2018, the government dropped the charges against more than two-thirds of the remaining criminal defendants (more than 120 people). In spring 2018, the second trial resulted in one defendant's being acquitted outright and several hung juries. Meanwhile, the court found that the prosecutor had engaged in misconduct by withholding from defendants video evidence that it was constitutionally required to turn over. As a sanction, the court ordered several additional defendants' cases dismissed. The prosecutor then voluntarily dismissed charges against another seven defendants at the end of May 2018. Finally, in July 2018, the government voluntarily dismissed charges against the remaining defendants, including our clients. Ultimately, over the course of two trials and more than a year of litigation against approximately 200 people, the government obtained no jury convictions, lost several defendants as a result of sanctions for misconduct, and voluntarily dismissed its cases against more than 170 defendants.

Back in our civil case, in September 2019, in an oral ruling from the bench, the court denied in large part the defendants' motion to dismiss. The court allowed plaintiffs to proceed with multiple claims under the Fourth Amendment along with claims for violations of due process, assault and battery, false arrest, and intentional infliction of emotional distress. The court dismissed claims under the First Amendment and First Amendment Assemblies Act, as well as claims related to one plaintiff's assault. Of note, the court refused to dismiss the constitutional claims against the District of Columbia government, ruling that plaintiffs had stated a viable claim that D.C. failed to provide the necessary supervision or training to its police officers. The court also ruled that the police officers could not avoid answering the suit on the ground that the constitutional rules applicable to their conduct were unclear. Thus, the court allowed the core of the case will move forward, including at least one claim about each of the types of misconduct our clients experienced that day: mass arrest, excessive force, injurious handcuffing, denial of detainees' basic needs, and intrusive searches.

The court referred the parties to mediation in the fall of 2019.

In April 2021, our clients agreed to settle the case for a payment of $605,000, an agreement that the government would not oppose the arrested plaintiffs' motion to expunge their arrest records, and policy changes to speed up processing during mass arrests and to require that officers be reminded of the First

Amendment Assemblies Act prior to mass demonstrations. Taken together with a simultaneous settlement in a separate class-action case alleging many of the same constitutional violations, the District agreed to pay a total of $1.6 million to settle the civil claims arising from the actions of D.C. police on Inauguration Day 2017. Under Chief Newsham's leadership from 2017 to 2020, the D.C. police department and its officers were sued repeatedly, by the ACLU-DC and others, for unconstitutional responses to protests and for other constitutional violations; in late 2020, Chief Newsham announced he would leave MPD to take a lower-paying position in the Virginia suburbs.

The 2022 amendments to the D.C. First Amendment Assemblies Act strengthened protections for demonstrators under D.C. law in several of the areas implicated by the events of Inauguration Day 2017, including regarding dispersal orders, mass arrests, individualized probable cause, and chemical irritants.

Pondexter-Moore, Schyla

Date filed: November 3, 2016 **Status: Victory!**

ACLU-DC attorneys: *Shana Knizhnik*, Scott Michelman, Art Spitzer

Schyla Pondexter-Moore, a community housing activist, received a barring notice banning her from attending meetings of the D.C. Housing Authority (DCHA) for 60 days after she was ejected from a DCHA meeting for disruption. D.C. law requires DCHA meetings law to be open to the public. On November 3, 2016, we sent a letter on behalf of Ms. Pondexter-Moore to DCHA and the D.C. Attorney General denouncing the barring notice as unconstitutional and demanding that it be rescinded. We argued that the order was a prior restraint in violation of the First Amendment and also violated due process as it was issued without prior notice or opportunity to be heard. A day later, DCHA lifted its ban.

Although Ms. Pondexter-Moore's meeting access was restored, we remained concerned about the process and content of barring notices—notices telling people that they cannot enter a certain DCHA property for a certain period of time—which we feared DCHA was issuing too often and without a clear process for challenging them. So we followed up with a letter asking DCHA to reform its process. In December 2017, we reached a settlement with DCHA to change the barring notice form. The new form informs barred individuals, as well as their friends and family who are DCHA residents, of their right to challenge and/or seek a temporary lift of a barring notice. DCHA also agreed to publish news about the updated form and the due process rights available to barred individuals in its monthly newsletter.

Sandvig v. Barr

Date filed: June 29, 2016 **Status: Victory!**

ACLU-DC attorneys: Art Spitzer, Scott Michelman

Co-counsel: ACLU Speech, Privacy & Technology Project; ACLU Racial Justice Project

Section 1030(a)(2)(C) of the Computer Fraud and Abuse Act (CFAA), at least as interpreted by the Department of Justice, made it a crime to use a website in violation of the site's Terms of Service—and therefore probably would have made criminals of us all. And some uses prohibited by CFAA are necessary to enforce antidiscrimination laws. For instance, "testers" seeking to determine whether an employment-opportunity website discriminates based on race need to submit made-up job applications in order to determine whether two individuals of different races who are equally qualified would be treated differently. In June 2016 we and the National ACLU's Project on Speech, Privacy and Technology sued to challenge sec. 1030. We represented academics and a media organization who wish to conduct "testing" or related investigative work to determine whether online websites are treating users differently based on membership in a protected class.

In September 2016, the government moved to dismiss the case, and in March 2018, the court granted the motion to dismiss in part and denied it in part. It ruled that the statute did not actually prohibit most of the activities that our clients engage in or wish to engage in, and therefore does not violate their First Amendment rights. However, one activity—the plan to create fictitious user accounts on employment sites—was prohibited by the statute, the court said; as to that activity, the court ruled that the complaint properly alleged a First Amendment violation and denied the government's motion to dismiss.

After discovery, both sides moved for summary judgment, and in March 2020 the court ruled that the CFAA does not criminalize mere terms-of-service violations on consumer websites and that our clients' research plans are therefore not crimes under the statute.

While this ruling was technically in favor of the government because it denied us relief, it was in effect a complete victory for us, because the reason we lost was that the court interpreted the statute to avoid the First Amendment problem we identified. But it was just one judge's opinion, and there was no court order preventing the government from prosecuting our clients if they continued to disagree with the court. So we filed an appeal.

Then in June 2021 the Supreme Court ruled in *Van Buren v. United States* that the law did not apply to a person who had authorized access to a computer system but then used that system in an improper way—for example, by violating its terms of service. The Court mentioned our case as an example. With our victory now confirmed, we dismissed our appeal.

Sharpe, John

Date filed: January 1, 2016 **Status: Victory!**
ACLU-DC attorneys: Art Spitzer
Co-counsel: Mike Will

Naval officer John Sharpe was denied a promotion and was eventually discharged from the service in 2009 for making public comments in 2004 and 2005 critical of the Commander-in-Chief and the Gulf War. We agreed to help Mr. Sharpe ask the Board for the Correction of Naval Records to set aside the reprimand since his critical comments merited First Amendment protection. In February 2016, the Board for Correction of Naval Records found that the actions against Mr. Sharpe were unjustified and recommended to the Secretary of the Navy that Sharpe's record be corrected to deem that he continued to serve without interruption. The Board did not reach the question whether Sharpe had a constitutional right to say what he said. In April 2016, the Assistant Secretary for Manpower and Reserve Affairs approved the Board's recommendation.

U.S. Telecom Ass'n v. Federal Communications Commission

Date filed: September 21, 2015 **Status: Amicus**
ACLU-DC attorneys: Art Spitzer
Co-counsel: ACLU Speech, Privacy & Technology Project; Electronic Frontier Foundation

An association of telecommunications companies challenged a 2015 FCC order that designated Internet Service Providers (ISPs) as "common carriers." The effect of this designation is that the ISPs are required to carry all internet traffic without discrimination—a policy known as "net neutrality." In September 2015, we filed an amicus brief, together with the National ACLU and the Electronic Frontier Foundation, supporting the government and arguing that net neutrality does not infringe any ISP's First Amendment rights. In June 2016, the D.C. Circuit upheld the FCC order by a 2-1 vote, agreeing with us on the First Amendment issue in seven of the opinion's 115 pages. Several parties sought rehearing, which was denied

in May 2017. Seven petitions for certiorari filed by various parties were all denied by the Supreme Court in November 2018.

Matal v. Tam

Date filed: July 1, 2015 **Status: Amicus**

ACLU-DC attorneys: Art Spitzer, Scott Michelman

Co-counsel: ACLU Speech, Privacy & Technology Project; ACLU of Oregon; NYU Law School Technology Law & Policy Clinic

Pro-Football, Inc. v. Blackhorse

Date filed: March 6, 2015 **Status: Amicus**

ACLU-DC attorneys: Art Spitzer

Co-counsel: ACLU Speech, Privacy & Technology Project; ACLU of Virginia

Iancu v. Brunetti

Date filed: March 1, 2019 **Status: Amicus**

ACLU-DC attorneys: Art Spitzer

Co-counsel: ACLU Speech, Privacy & Technology Project

In a trio of amicus briefs, we argued to the Supreme Court and courts of appeals that federal laws permitting the Patent and Trademark Office (PTO) to deny registration of (or cancel) trademarks based on their offensiveness violated the First Amendment. Our position prevailed in each.

In *Matal v. Tam*, an Asian-American dance rock band from Portland, Oregon, named "The Slants"—a name chosen to "re-appropriate" a term that has been used disparage Asian-Americans—applied to register its name as a trademark. The PTO recognized that the band's use of the name was intended as a response to racism rather than a racist comment, but nevertheless denied the band's application for trademark protection under Section 2(a) of the Lanham Act, which prohibits registration of a mark that "may disparage . . . persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt or disrepute." The band's First Amendment challenge to this provision reached the Supreme Court, and we filed an amicus brief arguing that Section 2(a) violates the First Amendment because it requires discrimination based on the viewpoint expressed by a proposed trademark, and also because it is unworkably vague. In 2017, the Supreme Court unanimously agreed with us that the provision violates the First Amendment and reaffirmed the "bedrock First Amendment principle" that "[s]peech may not be banned on the ground that it expresses ideas that offend."

Pro-Football v. Blackhorse arose out of the PTO's decision to cancel the registration of the Washington football team's trademark, "Redskins," based on Section 2(a) of the Lanham Act. Our amicus brief to the U.S. Court of Appeals for the Fourth Circuit took the same position as our brief in *Matal v. Tam*. After the Supreme Court ruled in *Matal*, the government stopped defending the PTO's application of the Lanham Act here.

In *Iancu v. Brunetti*, Erik Brunetti sought federal registration of the trademark FUCT. The PTO denied his application under a provision of federal law prohibiting the trademarks consisting of "immoral[] or scandalous matter." Brunetti brought a First Amendment challenge, and the case reached the Supreme Court. Our amicus brief supported his view, which is that the government can't use its intellectual property registration system to disfavor certain ideas. In June 2019, the Court held, consistent with our position and with *Matal*, that the "immoral or scandalous" bar discriminates on the basis of viewpoint because it permits registration of marks when their messages accord with, but not when their messages defy, society's sense of decency or propriety. Choosing favored viewpoints is impermissible under the First Amendment.

Armstrong v. Thompson

Date filed: May 1, 2015 **Status: Victory!**
ACLU-DC attorneys: Art Spitzer
Co-counsel: Sidley Austin LLP

We represented on appeal Karen Thompson, a Treasury Department employee who blew the whistle on a supervisor (Armstrong) who had improperly accessed law enforcement databases multiple times for personal reasons. As a result, another agency withdrew its offer of employment to Armstrong, who then sued Thompson for "intentional interference with prospective employment relations," and was awarded more than $500,000 by a Superior Court jury. In April 2016, the D.C. Court of Appeals agreed with us that Mr. Armstrong was a public official, and Ms. Thompson's speech was therefore protected by the First Amendment. Armstrong sought Supreme Court review, which was denied in October 2016.

Dhiab v. Obama

Date filed: April 15, 2015 **Status: Amicus**
ACLU-DC attorneys: Art Spitzer
Co-counsel: ACLU National Security Project

This case involved videotapes of Mr. Dhiab, a Guantanamo detainee, being forcibly extracted from his cell and force-fed. The tapes were viewed by the court as part of his habeas corpus case, and when various news media moved to intervene to seek release of the videotapes, the district court granted the motion and ordered the tapes released with some redactions. The government appealed, and in April 2015, we joined with the Reporters Committee for Freedom of the Press in filing an amicus brief in the D.C. Circuit. Our brief focused on the public's interest in seeing the tapes and on why the Government's argument that release might cause anti-American actions abroad did not justify suppression under the First Amendment. In May 2015, the court of appeals dismissed the appeal for lack of jurisdiction, because the district court had not yet issued a final order.

On remand, the district court issued a final order as to some of the tapes, and the government again appealed. We again filed an amicus brief with the Reporters Committee, making similar arguments.

In March 2017, the court of appeals unanimously reversed the district court's earlier order to have certain redacted tapes released, agreeing that the tapes were properly classified and that national security considerations overrode any First Amendment or common-law right of public access that might otherwise exist. Beyond that, the judges disagreed. Judge Randolph concluded that the right of access didn't apply to habeas corpus proceedings at all. Judge Williams concluded that it probably didn't apply to materials filed under seal and never relied upon by the court in adjudicating the case. Judge Rogers concluded that the right of access at least probably existed here, but was outweighed. With regard to our argument that suppression of the videos violated the First Amendment, the court ruled that the government was not suppressing speech, just not releasing its own videotapes.

Hodge v. Talkin

Date filed: January 31, 2014 **Status: Amicus**
ACLU-DC attorneys: *Art Spitzer*, Adam R. Pulver (volunteer)

This case challenges a federal statute that prohibits demonstration activity on the Supreme Court grounds. The district court assumed that the plaza in front of the courthouse was a "nonpublic forum" (an area where the government has greater leeway in banning speech), but nevertheless held the ban on

demonstration activity there to be unconstitutionally unreasonable. The government appealed. We filed an amicus brief in the D.C. Circuit in January 2014, arguing that the plaza, and courthouse plazas generally, are not "nonpublic forums," but rather traditional public forums, where demonstrations can be regulated as to time, place, and manner, but not banned. But in August 2015, the court held that the plaza is a nonpublic forum where the government can regulate speech as long as the regulations are reasonable and do not discriminate based on viewpoint. The blanket prohibition is, by definition, viewpoint-neutral, and the court found that the regulation reasonably served the purposes of "preserving decorum in the area of a courthouse and assuring the appearance (and actuality) of a judiciary uninfluenced by public opinion and pressure." The plaintiffs sought review by the Supreme Court, which the Court denied in May 2016.

In Re Applications of United States for Nondisclosure Order

Date filed: April 16, 2014 **Status: Closed**

ACLU-DC attorneys: Art Spitzer

Co-counsel: ACLU National Security Project

In March 2014, we learned from the media that U.S. Magistrate Judge John Facciola had invited Twitter and Yahoo to respond to government requests for "gag orders" prohibiting them from telling "any person" that they had received grand jury subpoenas seeking certain information, presumably about their customers. He also ordered the government to file public, redacted copies of its gag order applications. Soon afterward, we learned that the government had appealed those orders to Chief Judge Roberts of the federal district court, who had instructed Twitter and Yahoo not to file anything on the public record and also relieved the government of any obligation to file public, redacted copies of its gag order applications. In April 2014, we moved to intervene and unseal, arguing that Judge Facciola had properly exercised his inherent authority to invite briefing on the government's gag order applications and that the documents in the case should be made public pursuant to the First Amendment and common law right of access to court materials, subject to appropriate redaction of any information that would actually compromise a grand jury investigation. Chief Judge Roberts then granted the government's applications for gag orders against Twitter and Yahoo. Those opinions and orders were sealed.

In May 2014, we filed a motion asking Chief Judge Roberts to unseal his opinions and orders. He held a non-public hearing on our motion and later filed a slightly redacted version of his opinions and orders on the public record. But he never ruled on our motion to unseal the government's original application or its appeal before he retired in March 2016.

In January 2017, the matter was reassigned to (new) Chief Judge Howell, who directed the government to file a "report" regarding its position on the pending motions, and "confirming that the nondisclosure order barring Yahoo! from notifying the subscriber or customer of the existence of the issued grand jury subpoena has lapsed." The government filed its report on January 25, and we responded on February 2, urging the court to unseal a version of the government's original Application and Proposed Order, subject only to narrow redaction of information protected by Federal Rule of Criminal Procedure 6(e). The government did not object to such relief. On February 6, the court denied our motions, but nevertheless ordered the government to "post on the public docket the application for a nondisclosure order and the Orders accompanying the April 28, 2014 Memorandum Opinion, with any material protected by Federal Rule of Criminal Procedure 6(e) redacted"—which is what we wanted. The government did so in late February 2017.

Competitive Enterprise Institute v. Mann (formerly Mann v. National Review)
Date filed: November 30, 2013 **Status: Amicus**
ACLU-DC attorneys: Art Spitzer
Co-counsel: Reporters Comm. for Freedom of the Press; Levine Sullivan Koch & Schulz

Kandrac v. The Washington Travel Clinic PLLC
Date filed: September 30, 2014 **Status: Amicus**
ACLU-DC attorneys: Art Spitzer
Co-counsel: Reporters Committee for Freedom of the Press

A Strategic Lawsuit Against Public Participation (SLAPP) is a term for a legal action that is of little merit but is filed anyway for the purpose of stopping someone from engaging in (usually constitutionally protected) speech by burdening them with the expenses of a lawsuit and the fear of being ordered to pay damages. In 2010, the D.C. Council passed, with our support, an Anti-SLAPP Act that provides a special procedure for people engaged in advocacy on public interest issues to have a court dismiss SLAPP suits quickly.

In the *Mann* case, Michael Mann, a Penn State University professor of meteorology and co-author of the well-known "hockey-stick graph" about global warming, sued the Competitive Enterprise Institute and the National Review magazine for defamation when they published articles accusing him of "molesting" the data. The defendants moved to dismiss the case under the Anti-SLAPP Act. The Superior Court denied the motion, and the defendants appealed; Professor Mann moved to dismiss the appeal on the ground that there was no final judgment. In the D.C. Court of Appeals, we filed an amicus brief jointly with the Reporters Committee for Freedom of the Press and many media groups arguing that immediate appeals of decisions denying motions to dismiss under the anti-SLAPP statute are critical to the effective functioning of that law, and also arguing that the statements at issue were constitutionally protected opinion. In December 2016, the court ruled that it had jurisdiction to consider the appeal, but that a reasonable jury could conclude that some of the statements were false and made with "actual malice," and so it remanded the case to the Superior Court for further proceedings. The defendants unsuccessfully sought rehearing en banc and then Supreme Court review, which was denied in 2019 over a dissent by Justice Alito.

In *Kandrac*, we filed another D.C. Court of Appeal amicus brief, jointly with the Reporters Committee for Freedom of the Press and 23 media entities, arguing that the denial of a special motion to dismiss under the D.C. Anti-SLAPP statute is subject to immediate appeal. Now that the issue has been decided in *Mann*, we assume the court will proceed to the merits in *Kandrac*.

Davis v. Billington
Date filed: December 19, 2009 **Status: Victory!**
ACLU-DC attorneys: Art Spitzer
Co-counsel: ACLU National Security Project; Goodwin Procter LLP

Colonel Morris Davis was the chief military prosecutor at Guantanamo Bay until he resigned in 2007, convinced that military tribunals could not provide fair trials. He became an outspoken critic of the military tribunal system. In 2008, he became an Assistant Director at the Congressional Research Service (CRS) of the Library of Congress. In 2009, he published an op-ed in the Wall Street Journal and a Letter to the Editor in the Washington Post criticizing the Obama administration's decision to resume using military tribunals for some Guantanamo detainees. The Director of CRS admonished Davis for publishing those pieces; when Davis did not agree to cease such public speech, he was terminated. In December 2009,

we sued the Library and the Director of CRS for violating Davis' First Amendment rights. After years of litigation, including an appeal on the issue of qualified immunity, the case was settled in May 2016. Col. Davis received $100,000, and his discharge was changed to a voluntary resignation.

Moss v. United States Secret Service
Date filed: October 5, 2006 **Status: Closed**
ACLU-DC attorneys: Art Spitzer
Co-counsel: ACLU Speech, Privacy & Technology Project; ACLU of Oregon; Tonkon Torp LLP

During President George W. Bush's visit to Jacksonville, Oregon, during the 2004 presidential election campaign, groups of pro- and anti-Bush demonstrators gathered near a hotel where he was having dinner. The pro-Bush group was left alone, but the peaceful anti-Bush group was attacked by police with clubs and pepper spray and pushed two blocks further away; many were arrested. Together with co-counsel, we sued local, state and federal officials for violating the constitutional rights of the demonstrators. After the district court and the court of appeals denied the Secret Service agents' motion to dismiss, the Supreme Court heard the case and in May 2014 reversed on the ground that the agents were entitled to "qualified immunity" because their conduct did not violate clearly established law. The case returned to the district court for further proceedings against the state and local defendants. In May 2015, we moved for class certification, and the district court certified a class on the false arrest claim but not on the excessive force claim. After several years of further litigation, the case was finally settled in early 2018.

Initiative and Referendum Institute v. United States Postal Service
Date filed: June 1, 2000 **Status: Victory!**
ACLU-DC attorneys: Art Spitzer
Co-counsel: Pillsbury Winthrop Shaw Pittman LLP

In June 2000, we filed a lawsuit under the First Amendment challenging a new regulation that prohibited "soliciting signatures on petitions" on any U.S. Postal Service property, including outdoor sidewalks and parking lots. In 2003, the federal district court in D.C. upheld the regulation, as newly interpreted by the Postal Service to prohibit only the actual signing of petitions. We appealed, and in 2005 the court of appeals reversed, holding that Post Office sidewalks adjoining public streets (perimeter sidewalks) are public forums and that the regulation was not a valid restriction on such sidewalks. The court also held that if such perimeter sidewalks were a significant portion of all USPS sidewalks (which we think they are), then the whole regulation would be unconstitutional on its face; the court did not rule on whether sidewalks that only lead from the parking area to the front door of a post office are also public forums. In response, the Postal Service amended the regulation to permit the collection of signatures on perimeter sidewalks and then argued that the regulation, as limited to non-perimeter sidewalks, was constitutional. The district court upheld the revised regulation, and we again appealed. In July 2012 the court of appeals upheld the new regulation, ruling that Post Office sidewalks that are not adjacent to a public street are not "traditional public forums." We then spent four years litigating our motion for an award of attorneys' fees and reached agreement with the Postal Service to settle our claim in early 2017.

IMMIGRANTS' RIGHTS

Americans for Immigrant Justice v. U.S. Dep't of Homeland Security
Date filed: October 13, 2022 **Status: Open**
ACLU-DC attorneys: Art Spitzer
Co-counsel: ACLU National Security Project; ACLU of Arizona; ACLU of Florida; ACLU of Texas; Milbank LLP

ACLU v. U.S. Dep't of Homeland Security (ICE counsel access FOIA)
Date filed: September 28, 2022 **Status: Closed**
ACLU-DC attorneys: Art Spitzer
Co-counsel: ACLU National Security Project; Milbank LLP

As of September 2022, more than 25,000 immigrants were held in nearly 185 ICE detention centers nationwide. For such detained immigrants, access to counsel can mean the difference between freedom and the ability to remain in the United States on the one hand and prolonged detention and deportation on the other. Detained immigrants with legal representation are almost seven times more likely to be released from custody while their cases are being adjudicated. Detained immigrants who are represented by counsel are more than 10 times more likely to win their immigration cases than those who are not represented.

Although immigrants are not provided with counsel by the government, they do have a right to counsel if they can find one. That task is made exponentially harder by the systemic barriers to communication in ICE detention centers. ICE limits detained immigrants' access to counsel in many ways: by barring access to legal telephone calls, including by withholding from detained immigrants the option to schedule telephone calls in advance; by exacting prohibitive costs for telephone calls; by denying or arbitrarily delaying in-person legal visits; by failing to provide confidential settings for legal telephone calls and in-person visits; and by making video conferences or email unavailable as methods of communication with counsel, even at detention centers that are in remote locations far from lawyers' offices.

In September 2022, we filed a FOIA case seeking ICE detention center policies and directives regarding access to counsel for individuals held in ICE detention centers, as well as internal documents about deficiencies in compliance with those policies.

In October 2022, we sued to challenge the government's failure to ensure compliance with constitutional requirements, federal law, and ICE's own policies regarding access to counsel. We represent five non-profit organizations that provide free legal services to immigration detainees at the Florence Correctional Center in Florence, Arizona; the Krome Service Processing Center in Miami, Florida; the Laredo Processing Center in Laredo, Texas; and the River Correctional Center in Ferriday, Louisiana. (We then dismissed the FOIA case, as we will better be able to obtain relevant information via discovery.)

In November, we filed a motion for a preliminary injunction, seeking urgent relief.

(2023 Update: In February 2023, the court granted relief at one facility (Florence) and denied relief at others on various grounds, including uncertainty about the plaintiffs' standing to represent detainees at the other facilities. Also in February, the government moved to have the case dismissed or broken into four separate cases and transferred to federal courts in the states where the facilities is located. We opposed those motions and also amended our complaint to add as plaintiffs individual detainees in each facility.)

ACLU of Florida v. ICE

Date filed: April 25, 2022 **Status: Open**

ACLU-DC attorneys: Art Spitzer

Co-counsel: Citizens for Responsibility & Ethics in Washington; ACLU of Florida

Glades County Detention Center in Moore Haven, Florida, houses immigration detainees under contract with ICE. It has been the subject of multiple civil rights complaints and federal investigations concerning inhumane treatment, abuse, and medical neglect. Together with partners in Florida and D.C., we filed this case against ICE and the National Archives and Records Administration to challenge the unlawful deletion of the Glades facility's surveillance video in violation of federal law and an ICE contractual requirement to retain footage for at least three years. Despite a prior administrative complaint about this violation, ICE has failed to take any action to correct these abuses or recover video footage. The destroyed video footage could be critical to substantiate reports of abuse against individuals detained at Glades. In March 2022, ICE transferred all remaining individuals out of Glades County Detention Center and announced it would limit its use of the facility, citing "persistent and ongoing concerns related to the provision of . . . medical care." The defendants moved to dismiss our case in June 2022; a decision remains pending.

Escalante v. U.S. Immigration and Customs Enforcement

Date filed: March 1, 2022 **Status: Victory!**

ACLU-DC attorneys: Art Spitzer

Co-counsel: ACLU National Prison Project; ACLU Immigrants' Rights Project

Shaikh v. U.S. Immigration and Customs Enforcement

Date filed: January 31, 2022 **Status: Victory!**

ACLU-DC attorneys: Art Spitzer

Co-counsel: ACLU National Prison Project; ACLU Immigrants' Rights Project

Since March 2020, COVID-19 has posed a deadly threat to the people locked in ICE detention facilities. In spring 2022, more than 5% of the people in ICE detention were infected with COVID-19, and there were likely even more COVID-positive detainees due to insufficient testing. During the four months between November 2021 and February 21, 2022, ICE had provided only 1,436 boosters to people detained in ICE detention facilities, despite holding between 18,800 to 22,000 people at any given time. ICE lacked policies or procedures to ensure that eligible people held in its 200-plus detention facilities were identified and provided a booster shot.

In January 2022, we filed a lawsuit (*Shaikh*) on behalf of five people in ICE detention facilities who were medically vulnerable to severe illness and death in the event of COVID-19 infection, demanding that they be given COVID-19 booster shots. By February 24, ICE had provided booster shots to each of our plaintiffs, so we voluntarily dismissed the case. But many medically vulnerable detainees remained in ICE detention facilities and had not received booster shots.

So on March 1, 2022, we filed a class action lawsuit (*Escalante*), on behalf of people detained by ICE who are medically vulnerable to severe illness and death in the event of COVID-19 infection. Each of the four named plaintiffs had been diagnosed with medical conditions such as diabetes, hypertension, and tuberculosis, and each had requested and been denied COVID-19 booster shots. The lawsuit demanded that ICE provide booster shots to the plaintiffs and to all medically vulnerable ICE detainees nationwide. Along with the complaint, we filed an application for a Temporary Restraining Order asking that our clients be given booster shots immediately. In addition to a claim that ICE is violating the constitutional rights of our clients, the complaint also asserted a claim of disability discrimination on

behalf of class members with disabilities. On March 11, 2022, we voluntarily dismissed this case because all of our plaintiffs had received their booster shots, and it seemed that ICE had finally developed a working system for providing booster shots to detainees.

ACLU v. U.S. Department of Homeland Security (ICE deaths-in-custody FOIA)
Date filed: October 7, 2021 **Status: Closed**
ACLU-DC attorneys: Art Spitzer
Co-counsel: ACLU Nat'l Prison Project; Robbins, Russell, Englert, Orseck & Untereiner

ICE holds thousands of immigrants in detention facilities across the United States. It is required to report all deaths of detainees in its custody, to investigate those deaths, and to release those investigatory reports. The COVID-19 pandemic has been a serious problem in ICE detention facilities; in 2020, ICE reported its highest annual death toll in immigration detention in fifteen years. Nevertheless, the number of deaths is likely much higher than reported by ICE, because multiple media reports have noted that ICE officially "releases" individuals from custody when they are on their deathbeds in hospitals, thereby avoiding reporting their deaths to the public, investigating or reporting the circumstances of their deaths, and paying for their medical costs. In July 2021, the ACLU submitted FOIA requests seeking records relating to ICE's treatment of hospitalized detainees and detainees released from custody prior to their death. When no records had been received as of October 2021, we filed sued seeking production of the requested records.

We then learned that the ACLU of Southern California had coincidentally filed a nearly identical FOIA lawsuit. They were happy to litigate it there, so we voluntarily dismissed our case in June 2022.

P.J.E.S. v. Wolf
Date filed: August 14, 2020 **Status: Open**
ACLU-DC attorneys: Art Spitzer, Scott Michelman
Co-counsel: ACLU Immigrants' Rights Project; ACLU of Texas; Texas Civil Rights Project; Oxfam America

J.B.B.C v. Wolf
Date filed: June 9, 2020 **Status: Victory!**
ACLU-DC attorneys: Art Spitzer, Scott Michelman
Co-counsel: ACLU Immigrants' Rights Project; ACLU of Texas; Center for Gender & Refugee Studies, Oxfam America

G.Y.J.P. v. Wolf
Date filed: June 9, 2020 **Status: Victory!**
ACLU-DC attorneys: Art Spitzer, Scott Michelman
Co-counsel: ACLU Immigrants' Rights Project; ACLU of Texas; Texas Civil Rights Project; Center for Gender & Refugee Studies, Oxfam America

Texas Civil Rights Project v. Wolf
Date filed: July 24, 2020 **Status: Closed**
ACLU-DC attorneys: Art Spitzer, Scott Michelman
Co-counsel: ACLU Immigrants' Rights Project; ACLU of Texas; Center for Gender & Refugee Studies, Oxfam America

In June 2020, we filed *J.B.B.C. v. Wolf*, the nation's first legal challenge to the Trump administration's order using the COVID-19 pandemic as an excuse to restrict immigration based on an unprecedented and unlawful invocation of the Public Health Service Act (Section 265 of Title 42 of the U.S.C., often

shortened in reporting about these cases to the "Title 42" policy). The order authorized the summary removal of unaccompanied children in contravention of federal immigration law providing the opportunity to seek humanitarian protection from being deported into danger, and without due process—even if the child is seeking humanitarian protection in the United States and shows no signs of having COVID-19. The "Title 42" order also authorized the summary removal of adults seeking protection in the United States. The illegality of the "Title 42" policy was especially clear in cases involving minors who arrive unaccompanied by an adult, because they are entitled to special legal protections. On June 24, 2020, in an oral ruling from the bench, the court agreed that the administration likely exceeded its authority in ordering the expulsion of children and asylum seekers under the public health laws. Accordingly, the court blocked the removal of our client J.B.B.C., a 16-year-old refugee fleeing persecution in Honduras. We added a second plaintiff but the government immediately stopped trying to expel him. We voluntarily dismissed the case in August 2020.

In *G.Y.J.P. v. Wolf* (a companion case to *J.B.B.C*), we sued on behalf of a 13-year-old girl from El Salvador who came to the United States to join her mother after gangs threatened her life because her mother, who had been a police officer, had refused to cooperate with the gangs and had fled to the United States, where she was granted legal protection and now lives here lawfully. Nevertheless, G.Y.J.P. was quickly returned to El Salvador under the new policy, without legal process. The government moved to dismiss our case, arguing that the plaintiff's return to El Salvador made the case moot. In December 2020, the court denied the government's motion, explaining that whether or not it could order the plaintiff returned, it could still order meaningful relief by striking down the challenged policy and preventing her from being expelled under it should she reach the United States again. The plaintiff was subsequently returned to the U.S. and reunited with her mother. We voluntarily dismissed *G.Y.J.P.* in January 2021.

In *Texas Civil Rights Project v. Wolf*, we filed a lawsuit and an emergency motion on July 24, 2020, when we learned of the imminent expulsion of a group of juvenile refugees who were being held at a hotel in McAllen, Texas. But by the time we filed, all but one had already been deported. The one remaining juvenile was transferred to the custody of the Office of Refugee Resettlement, which is what's supposed to happen. We voluntarily dismissed the case on August 6.

Although these cases obtained relief for individuals, none prevented the "Title 42" policy from continuing because the cases became moot. So in August 2020, we filed another challenge, *P.J.E.S. v. Wolf*, this time on behalf of a 16-year-old boy from Guatemala who fled to the United States after he and other family members were threatened with death because of his father's political opinions. In addition, gang members threatened to kill him when he refused to join their gang. To prevent the government from mooting this case, we filed the case as a class action and moved for class certification at the time of the complaint, asking to have the case recognized as a class action on behalf of all unaccompanied noncitizen children who are or will be detained in U.S. government custody and whom the government will seek to expel under its new "public health" policy. On August 20, we moved for a preliminary injunction. As in the earlier cases, the government quickly exempted P.J.E.S. from the expulsion process and argued that the case was therefore moot. But the district court agreed with us; in November 2020, it provisionally certified the class and granted a preliminary injunction prohibiting the government from expelling members of the class, because the Trump administration's policy was probably illegal (as also found in the *J.B.B.C.* case). The government appealed. On January 29, 2021, a panel of three judges stayed the preliminary injunction (i.e., allowed the government to resume expelling the class of unaccompanied minors we represent). But on January 30, the Biden administration suspended the expulsion policy for unaccompanied minors, pending a reassessment of the policy. In July 2021, the administration exempted unaccompanied noncitizen children (i.e., our class) from the Title 42 policy. The government then asked

the D.C. Circuit to vacate the preliminary injunction on mootness grounds, and we opposed. In 2022, the D.C. Circuit remanded to the district court to consider whether the case had become moot.

Back in the district court, the government moved to dismiss the case as moot, and we asked the court to hold that motion in abeyance pending developments in *Huisha-Huisha v. Gaynor*, discussed next.

Huisha-Huisha v. Gaynor
Date filed: January 12, 2021 **Status: Open**
ACLU-DC attorneys: Art Spitzer, Scott Michelman
Co-counsel: ACLU Immigrants' Rights Project; ACLU of Texas; Refugee & Immig. Ctr. for Educ. & Legal Servs., Ctr. for Gender & Refugee Studies, Oxfam America

This is our fifth case challenging the Trump administration's policy (known as "Title 42") of expelling refugees without any of the protections required by the immigration laws, on the ground that they might have COVID-19 infections. (See prior entry for *P.J.E.S. v. Wolf* and associated cases.) The earlier cases involved minors who arrived unaccompanied by an adult; this class action challenges the policy's application to family units. The named plaintiffs are three parents and their minor children, all of whom fled their countries to seek safety in the United States and were then detained by the Department of Homeland Security, awaiting expulsion. Once again, we argued that the public health laws do not authorize the government to expel refugees from the country without observing the standards and procedures required by the immigration laws.

In September 2021, the court certified a class action and issued a preliminary injunction halting the government's expulsion policy. The court agreed that the government's policy was not authorized by statute and that class members would face "real threats of violence and persecution" if returned to their home countries. The government appealed.

In March 2022, the D.C. Circuit affirmed in significant part, holding that the public health laws do authorize the government to expel refugees from the country without observing the procedures required by the immigration laws, but that, under a provision of the immigration laws that the public health laws do not supersede, the government cannot remove refugees to a country where their "life or freedom would be threatened" on account of their "race, religion, nationality, membership in a particular social group, or political opinion," or to a country where they will likely be tortured. As a result, people crossing the border cannot be immediately expelled but must be given an opportunity to show that returning them to their home country would expose them to these consequences—and if they do make that showing, then the government would have to find some other country that is willing to accept them, which might not be quick or easy. The court of appeals also remanded the case to the district court for it to decide, in the first instance, whether the expulsion rule is invalid because it is arbitrary and capricious. The court broadly hinted that it likely is, because "this is March 2022, not March 2020," and the "order looks in certain respects like a relic from an era with no vaccines, scarce testing, few therapeutics, and little certainty."

Less than a month after the D.C. Circuit's opinion, CDC issued an order terminating the expulsion policy as unnecessary and concluding that "less restrictive means are available to avert the public health risks" associated with COVID-19. However, the termination order was preliminarily enjoined on May 20, 2022, in a different lawsuit filed in another state by Louisiana and other states, on the ground that CDC had improperly failed to conduct notice-and-comment rulemaking before rescinding the policy. The government appealed that injunction.

Meanwhile, in August 2022, back in the district court in our case, we filed a motion for partial summary judgment, asking the district court to rule that the policy is arbitrary and capricious and to order the government to stop enforcing it. The court granted our motion on November 15, 2022. It held that the

Title 42 process was arbitrary and capricious because the CDC had failed to consider, as it was required to do, the harm its policy would impose upon migrants and measures that might have accomplished the CDC's health goals (such as testing, vaccinations, and outdoor processing). Additionally, the CDC lacked evidence that the Title 42 policy would be effective in preventing the spread of COVID-19, especially in light of the fact that it applied to only one-tenth of one percent of the people crossing the land border from Mexico. The court therefore vacated the policy and enjoined its application to the plaintiff class. The court agreed to delay the effectiveness of its order through December 21, in order to give the government time to prepare for the transition back to enforcement of the regular immigration laws.

In December, the government appealed. A coalition of states (including the plaintiffs in the Louisiana litigation) moved to intervene and for an emergency stay of the district court's injunction—which the district court and the D.C. Circuit both denied. The states then asked the Supreme Court for a stay, which it granted in late December, leaving the government's inhumane policy in place. The Supreme Court also agreed to consider the question whether the states had a right to intervene in our case.

(2023 Update: We filed our brief in the Supreme Court on the intervention question, and argument was scheduled for March 1. But the Biden administration announced that the COVID-19 public health emergency, which had been in effect since early 2020, would expire on May 11, 2023. Because the Title 42 policy is based on the existence of that emergency, it will automatically expire on the same date. In February 2023, the Supreme Court removed the case from its argument calendar, and the case is expected to be dismissed as moot soon after May 11.)

Samma v. Department of Defense
Date filed: April 28, 2020 **Status: Open**
ACLU-DC attorneys: Art Spitzer
Co-counsel: ACLU National Security Project; ACLU of Southern California

This class action lawsuit, on behalf of thousands of members of the U.S. Army, Navy, Marine Corps and Air Force, challenges a 2017 Trump administration policy of denying non-citizens serving in the U.S. Armed Forces the expedited path to citizenship that such patriots have had since at least the Civil War. "I took an oath to protect this country and I'm doing my best to live up to the values of the Army," said Ange Samma, who currently serves on active duty as a soldier in South Korea and is one of the six named plaintiffs in this case. "It's been frustrating and heartbreaking not to obtain my citizenship as promised, but I will continue to honor my commitment. It's what I would expect any American soldier to do." Non-citizen enlistment is integral to maintaining U.S. military readiness; it has been government policy since the George W. Bush administration to recruit non-citizens with essential skills such as medical training or knowledge of foreign languages and cultures.

In August 2020, the court ruled in our favor, certifying the case as a class action and issuing a permanent injunction ordering the Pentagon to process all certificates of honorable service within 30 days after a servicemember requests one, so that servicemembers' naturalizations can move forward. The government appealed.

The appeal has been held in abeyance while the Biden administration considers policy changes. Meanwhile, however, the government has been mostly, but not fully, complying with the preliminary injunction. In summer 2021, we asked the court to intervene, which it declined to do because, essentially, the government said it was doing its best. We continue to notify the government of problems as they arise and lobby for broader reforms.

Nora v. Wolf

Date filed: April 14, 2020 **Status: Closed**

ACLU-DC attorneys: Scott Michelman, Art Spitzer, Michael Perloff

Co-counsel: ACLU Immigrants' Rights Project; ACLU of Texas; Public Citizen Litigation Group; Center for Gender and Refugee Studies

Together with our co-counsel, we filed suit on behalf of 26 asylum seekers—12 adults and their 14 minor children—unlawfully trapped in life-threatening conditions in Mexico, while waiting for their asylum proceedings in the U.S. to conclude. Plaintiffs all fled violence and persecution in their home countries and sought refuge here. But the Department of Homeland Security (DHS) sent them back across the border to the notoriously dangerous Mexican border state of Tamaulipas pursuant to DHS's Remain in Mexico policy—which the government called by the Orwellian name Migrant Protection Protocols (MPP)—first implemented in late January 2019.

Under MPP, DHS returned to Mexico certain non-Mexican asylum seekers who arrived at the United States' southern border, pending adjudication of their immigration cases. In July 2019, DHS expanded MPP to the Mexican border state of Tamaulipas, sending immigrants back to Tamaulipas notwithstanding widespread recognition, including by the U.S. State Department, of the extreme violence that migrants face there. Tamaulipas has been under a State Department "Do Not Travel" Advisory since at least 2018 and is known as one of the most violent and lawless regions in the world. Our clients were assaulted, kidnapped, and raped by members of organized groups that control Tamaulipas and act with impunity. Plaintiffs live in constant fear of additional such attacks, afraid to go out except when absolutely necessary. For example, Defendants returned Plaintiff Nora (a pseudonym) and her three-year-old son to Tamaulipas even after she described how, in Tamaulipas, she was repeatedly raped her in front of her son, and her rapists threatened to kill him if she resisted. Plaintiff Jonathan (a pseudonym) and his young son were returned to Tamaulipas notwithstanding Jonathan's brutal torture in Tamaulipas by cartel members.

Our lawsuit sought a declaration that the government acted unlawfully under the Administrative Procedure Act by expanding MPP to Tamaulipas and violated plaintiffs' rights under the Due Process Clause of the U.S. Constitution by returning them to Tamaulipas where they faced terrible danger. Ruling on our request for preliminary relief in June 2020, the court granted one of our clients a new screening to determine whether she faced persecution if returned to Tamaulipas, but it deferred the request for broader relief until final judgment on the full record, which the court ordered to occur on an expedited basis. Unfortunately, the court did not proceed quickly and permitted the government to move to dismiss in the meantime.

In September, we filed an emergency motion for relief as to two client families in especially grave danger. The court denied our motion on the grounds that we asked for different emergency relief than we had originally.

With the government's motion to dismiss still pending, we moved in February 2021 for summary judgment on our APA claim, asking for our clients to be allowed into the U.S. Later that month, the court denied the government's motion to dismiss and ordered the government to respond to our summary judgment motion. The case was then repeatedly delayed as the Biden administration reviewed the entire Remain in Mexico policy.

While the case was pending, our clients were eventually able to enter the United States, and we voluntarily dismissed the case in May 2022. Meanwhile, the Biden administration decided to end the Remain in Mexico policy, and in *Biden v. Texas*, 142 S. Ct. 2528 (2022), the Supreme Court upheld that decision.

U.T. v. Barr

Date filed: January 15, 2020 **Status: Open**

ACLU-DC attorneys: Scott Michelman, Art Spitzer

Co-counsel: ACLU Immigrants' Rights Project; National Immigrant Justice Center; Center for Gender & Refugee Studies; Human Rights First

The United States has a longstanding commitment to protect people fleeing persecution. Congress has guaranteed that noncitizens who arrive at or are physically present in the United States may apply for asylum, subject to three narrow exceptions. One exception is that noncitizens may be denied the opportunity to apply for asylum in the United States and instead be removed to seek protection elsewhere pursuant to a "safe third country" agreement. That exception applies only if strict statutory requirements are met, including that the asylum seeker would have a full and fair opportunity to seek asylum in the "safe third country" and would not face persecution or torture there. For years, our only safe third country agreement was with Canada.

In the summer of 2019, the United States signed three new "asylum cooperative agreements" (ACAs) with Guatemala, Honduras, and El Salvador—impoverished, unstable countries that are among the most dangerous places in the world, with extremely high murder rates, rampant gender-based violence, and virtually no ability to receive asylum seekers. Indeed, all three countries *generate* large numbers of refugees due to epidemic levels of violence and instability typically seen in war zones. Thus, the new ACAs opened the door for the U.S. government to send vulnerable asylum seekers to countries with barely functioning asylum systems that cannot adequately protect them. The result was a deadly game of musical chairs that left many desperate asylum seekers without a safe haven, in violation of U.S. and international law. In November 2019, the government issued written guidance implementing its ACA with Guatemala and began sending non-Guatemalan asylum seekers there.

Together with co-counsel, we sued to challenge the government's use of its new agreements to unlawfully slam our nation's doors on people fleeing horrific violence. One of the asylum-seekers we represent (all of whom have been granted court permission to proceed under pseudonyms) is U.T., a gay man from El Salvador who fled for the U.S. after being threatened by an MS-13 gang member. He fears he will be attacked or killed for his sexual orientation if he tries to live openly as a gay man in his home country. He traveled through Guatemala en route to the U.S. and was subjected to homophobic harassment in Guatemala, where the U.S. now proposed to send him. Another client is M.H., a Honduran mother who fled to the U.S. with her young daughter. Her common-law husband and her sister-in-law worked in the transportation business in Honduras and were forced to pay local gangs in order to work. They were both murdered. Fearing for their safety, M.H. and her daughter fled to the U.S., only to be sent back into danger.

After we briefed summary judgment, the policy was functionally put on hold and so was the case. The stay has been extended into 2023.

Las Americas Immigrant Advocacy Center v. Wolf

Date filed: December 5, 2019 **Status: Open**

ACLU-DC attorneys: Art Spitzer, Scott Michelman

Co-counsel: ACLU of Texas, ACLU Immigrants' Rights Project

Congress has mandated that asylum seekers, including those subject to "expedited removal" proceedings, have the opportunity to access and confer with counsel and third parties while they prepare for screenings to determine if they qualify for asylum or other protections from removal. These screenings, known as

"credible fear interviews," are the critical first step for many asylum seekers; if no "credible fear" is found, asylum seekers can be summarily sent back to the countries they are fleeing.

But the Trump administration adopted policies that effectively denied all access to counsel and third parties, and therefore, all but guaranteed that many asylum seekers would be erroneously sent back to countries where they face death or horrific violence. Previously, individuals who crossed the border seeking asylum were transferred to ICE detention centers, at which immigrants have access to a telephone and the ability to meet with attorneys and other individuals to prepare for asylum screening. The new programs—known as Prompt Asylum Claim Review (PACR) and the Humanitarian Asylum Review Process (HARP)—require the detention of asylum seekers not in ICE facilities but in Customs and Border Protection (CBP) facilities. These facilities, known as "hieleras" ("iceboxes") for their freezing temperatures, are legal black holes in which migrants have no meaningful way to obtain or consult with an attorney before their hearings. Since the PACR/HARP programs were launched in the El Paso area, over 500 asylum seekers were sent to the hieleras and ordered back to their country of origin without the opportunity to access counsel to help them. DHS stated that it intends to expand PACR/HARP to other parts of the border.

PACR/HARP detainees were granted an approximate 30-minute window in which to attempt to contact counsel or family members by telephone. Detainees reported being unable to reach any attorneys from a list provided by CBP, which detainees have described as a "list of ghosts." Even if detainees can reach someone, the agency does not provide a system to locate people in custody or any means to reach them by telephone, so no one can call the detainees back or enter the facility to assist asylum seekers through their immigration process.

In December 2019, we challenged PACR/HARP in federal court on behalf of two Salvadoran families and one Mexican family who sought asylum in the U.S., were put into the program, and were ordered quickly removed back to their home countries, where they faced grave threats. Las Americas, a non-profit organization that provides legal services to immigrants detained by the federal government in the El Paso area, is also a plaintiff in the case. We sought a court order declaring PACR/HARP illegal and blocking the removal of asylum seekers until they are granted adequate opportunity to access counsel.

Both sides moved for summary judgment and the case was argued in February 2020. In November 2020, the court granted judgment to the government, ruling that it had jurisdiction to consider the challenge to the detention conditions but that the conditions did not conflict with federal immigration law, federal administrative law, or the Constitution. We moved for reconsideration in late 2020 and also filed an appeal. In January 2021, a report from the Inspector General of the Department of Homeland Security showed that the government knew its policies were undercutting the asylum process.

The Biden administration has paused the programs, and the case has been put on hold in both courts while the government decides what to do.

I.A. v. Barr
Date filed: August 21, 2019 **Status: Victory!**
ACLU-DC attorneys: Art Spitzer, Scott Michelman
Co-counsel: ACLU Immigrants' Rights Project; National Immigrant Justice Center

As part of our nation's commitment to the protection of people fleeing persecution, and consistent with our international obligations, it is longstanding federal law that a person cannot be denied asylum merely by virtue of having traveled through a third country on the way to the United States. But in July 2019, the Attorney General and the Acting Secretary of Homeland Security promulgated a rule that bars virtually all noncitizens fleeing persecution from obtaining asylum if they passed through another country on their

way here, no matter the conditions or purpose of their journey through that country or their prospects for protection, rights, or permanent legal status there. The rule contains no exception for unaccompanied children. Together with co-counsel, we challenged the rule in D.C. federal court in August 2019 on behalf of a group of individual asylum seekers who endured past persecution and on behalf of the Tahirih Justice Center, which serves immigrant survivors of gender-based violence. We asked the court to enjoin the rule as violating federal immigration statutes and administrative law. Another ACLU case filed in California in July 2019 challenging the same rule resulted in an injunction against the rule's application in California and Arizona only. Our case sought to secure nationwide relief. In June 2020, the Court granted judgment in our favor and held that the rule was not lawfully promulgated under the Administrative Procedure Act. The Court therefore vacated the rule. The government appealed. After the change in administrations in January 2021, the government stopped defending the rule, but asked the appeals court to vacate the district court's opinion invalidating the rule on the ground that it had become moot. The D.C. Circuit denied that motion in February 2022.

Make the Road New York v. McAleenan
Date filed: August 6, 2019 **Status: Victory!**
ACLU-DC attorneys: Scott Michelman, Art Spitzer
Co-counsel: ACLU Immigrants' Rights Project; American Immigration Council, Simpson Thacher & Bartlett LLP

We filed this lawsuit in August 2019 to challenge the Trump administration's new rule that massively expands fast-track deportations (called "expedited removal") without a fair legal process such as a court hearing or access to an attorney. The expanded expedited removal rule targets immigrants nationwide who cannot prove they have been continuously in the United States for at least two years. Prior to the rule, expedited removal was limited to people apprehended within 100 miles from the border; to those who arrived by sea; and to those who had been in the U.S. for 14 days or fewer. Under the new rule, hundreds of thousands of people living anywhere in the U.S. are at risk of being separated from their families and expelled from the country separated from their families and expelled from the country with very limited opportunity to challenge their removal. We challenged the expansion of expedited removal as a violation of due process, federal administrative law, and federal immigration law. The case was filed on behalf of several organizations that serve immigrant communities.

On September 27, 2019, minutes before the new rule was set to go into effect, the district court (then-Judge Ketanji Brown Jackson) issued a thorough, 126-page opinion granting our motion for a preliminary injunction against the rule. Among the court's key conclusions: the court has the power to hear the case, our clients have legal standing to challenge the government's actions, and the Administration failed to follow procedures required by federal law in implementing the new rule and "engaged in arbitrary and capricious decisionmaking." As the court wrote, "it is the very definition of arbitrariness in rulemaking if an agency refuses to acknowledge (or fails to obtain) the facts and figures that matter prior to exercising its discretion to promulgate a rule."

The government appealed, and in June 2020, the D.C. Circuit reversed the grant of the preliminary injunction. Importantly, the appeals court agreed that the district court had the power to hear the case and that our clients had standing to bring it. However, the appeals court ruled that the district court's injunction relied on administrative-law requirements that don't apply to an expansion of expedited removal. The case was returned to the district court where we could continue to seek relief based on our other legal claims against the rule.

With the change in administration in 2021, the program was put on hold and so was our case. In March 2022, the Biden administration abandoned the new rule. Although the injunction we won was vacated, we succeeded in stopping the implementation of the rule until the change in administrations.

Grace v. Barr (formerly Grace v. Sessions)
Date filed: August 7, 2018 **Status: Victory!**
ACLU-DC attorneys: Scott Michelman, Art Spitzer
Co-counsel: ACLU Immigrants' Rights Project; Center for Gender and Refugee Studies

In the summer of 2018, Attorney General Jeff Sessions and the United States Citizenship and Immigration Services implemented new policies governing asylum claims—particularly claims based on domestic violence and gang-related violence—by immigrants placed in summary "expedited removal" proceedings. "Expedited" proceedings afford immigrants far fewer rights than regular immigration proceedings, but Congress nonetheless required that in such proceedings, migrants be given a fair chance to establish eligibility for asylum and related protections. Specifically, immigrants in expedited removal who express fear of return to their home countries must receive a screening interview, called a "credible fear" interview, to assess whether there is "a significant possibility" that the person will be entitled to asylum. People who pass this low "credible fear" screening are entitled to be taken out of expedited removal and given full trial-type immigration court hearings on their asylum claims, following by administrative appellate review and federal court review. Congress intended the credible fear standard to be low, so that asylum seekers would be given the benefit of the doubt and no one with a potentially meritorious asylum claim would be sent back to danger. But the government's new policies unlawfully elevated the credible fear standard far above the low threshold Congress enacted.

The new policies unlawfully changed the credible fear standard in three main ways. First, they imposed a presumption that individuals fleeing domestic violence and gang-related violence cannot demonstrate credible fear, even though Congress requires each case to be heard on its own facts. Second, the new policies required an asylum seeker alleging persecution by a non-state actors (for example, a gang or spouse) to show that the government in the asylum-seeker's country "condoned the private actions or at least demonstrated a complete helplessness to protect the victims." Third, the new policies required asylum officers to apply the law of "the circuit where the alien is physically located during the credible fear interview," whereas previously they had applied the law of the circuit most favorable to applicants.

On August 7, 2018, we filed a lawsuit in federal court challenging these new policies on behalf of 12 immigrants—adults and children who fled their home countries after suffering pervasive sexual abuse, kidnapping, beatings, shootings, the murder of family members, and/or death threats. They all received negative credible fear determinations under the new policies even though they would have demonstrated credible fear under a proper application of the immigration laws. Four of our plaintiffs had already been deported. Two of our clients were at risk of immediate deportation on the night of August 9, and so on August 8, we filed motions for a temporary restraining order and preliminary injunction to protect our clients. Without an injunction, plaintiffs and thousands of other immigrants like them desperately seeking safety would be unlawfully deported to places where they were at serious risk of being raped, kidnapped, beaten, and killed. On August 9, during the court hearing on our motion to stay the deportation of two of our clients, we learned that the government was already in the process of deporting them, contrary to the government's prior assurances. The judge ruled from the bench that our clients must be returned to the United States immediately and that the plane with our clients should either be turned around in midair or returned to the United States upon landing with our clients aboard. The court also granted the stay of

further efforts to remove our clients. The government complied with the order and returned on our clients to the United States on the evening of August 9.

In December 2018, the court ruled largely in our favor and issued a permanent injunction against most of the problematic policies we challenged, including the presumption against credible fear claims relating to domestic and gang violence, the heightened credible fear standard, and the instruction to asylum officers to rely only on the law of the circuit in which they were located. The court further vacated the determinations that our clients lacked credible fear and ordered that any of our clients who had already been deported because of the unlawful asylum policies must be returned to the United States so that they can receive new proceedings under the proper legal standard.

The government appealed, challenging both the substance of the ruling and the federal courts' jurisdiction to hear the case. In July 2020, the appeals court affirmed in part and reversed in part. Importantly, the court held that the challenged agency policies were reviewable in court, and that the government's new rules—including its heightened standard—were unlawful under federal administrative law because the government had changed its previous rules without explaining or acknowledging these changes. But the court reversed the district court's order regarding the presumption against credible fear claims relating to domestic and gang violence, because, according to the appeals court, the challenged policies did not bar these claims and still required each case to be reviewed on its merits.

The case was remanded to the district court for further proceedings, but in June 2021, Attorney General Garland vacated former Attorney General Sessions' 2018 policies and ordered immigration judges to use the pre-Sessions rules.

Damus v. Nielson

Date filed: March 15, 2018 **Status: Open**

ACLU-DC attorneys: Art Spitzer

Co-counsel: ACLU Immig. Rights Proj.; Covington & Burling; Ctr. for Gender & Refugee Studies; Human Rights First; ACLUs of Mich., N.J., N.M., Ohio, Pa., S. Cal. and Tex.

In March 2018, we filed this class action lawsuit against the Trump administration's "no-parole" rule requiring the detention of asylum-seekers fleeing persecution, torture, or death in their countries of origin. Previously, asylum-seekers were eligible for supervised release while awaiting the adjudication of their asylum claims. We contended this new practice was improperly intended to deter asylum-seekers from coming to the U.S., knowing they would likely be detained in poor conditions for years. The no-parole rule applied to all asylum-seekers, even those who had gone through a "credible fear screening," which meant that a U.S. asylum officer had determined that their fear of persecution was credible and that they had a significant possibility of receiving asylum.

In July 2018, the court granted provisional class certification and a preliminary injunction blocking this policy. The court noted that "in the past, individuals deemed to have a 'credible fear' of persecution and thus a significant possibility of being granted asylum were overwhelmingly released" on parole. Relying on "irrefutable" statistics, the court found that "individualized parole determinations are likely no longer par for the course." The court therefore prohibited the government "from denying parole . . . absent an individualized determination" that the asylum applicant "presents a flight risk or a danger to the community."

The government's compliance was poor. In April 2019, we moved to hold the government in contempt for failing to obey the injunction by continuing to deny parole improperly in many cases. In July 2019, we moved for summary judgment. In 2020, the court ordered more quality control for the L.A. field office but denied broader relief. The case is now stayed for settlement talks.

Almaqrami v. Pompeo (formerly P.K. v. Tillerson)

Date filed: August 3, 2017 **Status: Open**

ACLU-DC attorneys: Art Spitzer, Scott Michelman

Co-counsel: ACLU Immigrants' Rights Project; Jenner & Block LLP; National Immigration Law Center; American-Arab Anti-Discrimination Committee

The diversity visa program awards immigrant visas to nationals of countries that historically have sent low numbers of immigrants to the United States. Each year, a very small fraction of applicants from these countries are randomly selected to receive immigrant visas if they otherwise qualify for immigration. Federal law requires consular officials to issue those visas to the first 50,000 (but only the first 50,000) lottery winners who are eligible and not otherwise barred. However, the visas must be issued by September 30, or the winners lose their slots.

In March 2017, President Trump banned nationals of Iran, Syria, Sudan, Yemen, Somalia, and Libya from entering the United States (this was the "Muslim Ban," which the ACLU and other groups separately challenged; the first and second versions of this ban were struck down by the courts; the third was ultimately upheld by the Supreme Court). Although entry into the United States and the issuance of visas (which confers eligibility for future entry) are distinct, the State Department adopted a policy directing consular officials to deny diversity visas to nationals from these countries. As a result, lottery winners from those countries lost their rare chance at a U.S. immigrant visa.

In August 2017, together with co-counsel, we filed a class-action lawsuit on behalf of diversity lottery winners and their family members seeking to enjoin the State Department's unlawful refusal to process visa applications from those countries. In March 2018, the court dismissed the case as moot on the ground that the version of the Trump administration's travel ban that purportedly justified the State Department's refusal to process the visa applications had been withdrawn and superseded by a new version. However, the plaintiffs' visa applications were still not being processed, so we appealed the dismissal in May 2018. In August 2019, the federal court of appeals, agreeing with us that the trial court still has the power to grant relief, reversed the dismissal of the case. Back in the trial court, the defendants once again moved to dismiss the case in April 2020.

The case is now stayed while the D.C. Circuit considers similar issues in a separate case argued in September 2022.

Zadeh v. Trump

Date filed: February 3, 2017 **Status: Victory!**

ACLU-DC attorneys: Art Spitzer, Scott Michelman

Co-counsel: ACLU of Minnesota; Fredrikson & Byron P.A.; Apollo Law LLC; Univ. of Minn. Center for New Americans; Immigrant Law Center of Minn.; Advocates for Human Rights; Cohen Milstein Sellers & Toll PLLC

This lawsuit challenged the "Muslim Ban" Executive Order and sought emergency relief on behalf of a U.S. citizen married to a Somali citizen and a U.S. permanent resident married to an Iranian citizen. Both spouses had obtained immigrant visas to join their husbands, but their immigration had been halted by the Executive Order. Two days after we filed, the government filed papers stating that injunctions already issued by federal courts in New York, California, and Washington State applied to our clients, and their spouses were on their way to the U.S. They arrived soon afterward, and on March 8 we voluntarily dismissed the case.

ACLU of Southern California v. Citizenship and Immigration Services
Date filed: June 15, 2013 **Status: Closed**
ACLU-DC attorneys: Art Spitzer
Co-counsel: ACLU of Southern California; Jones Day

We were co-counsel with the ACLU of Southern California in a lawsuit filed in D.C. challenging the denial of a FOIA request to the Citizenship and Immigration Services agency for records regarding the "Controlled Application Review and Resolution Program"—a program under which lawful immigrants from Muslim, Arab, Middle Eastern and South Asian nations appeared to have great problems obtaining citizenship and other important immigration benefits. The lawsuit was filed in June 2013. Hundreds of documents were disclosed during settlement negotiations. In late 2014 the parties cross-moved for summary judgment as to the records still in dispute. In September 2015, the district court sustained some of the agency's withholdings under a FOIA exemption for records that would disclose techniques, procedures, or guidelines for law enforcement investigations or prosecutions. With respect to about 80% of the withheld documents, however, the court denied the agency's motion for summary judgment, ordering it to provide additional explanation. After further negotiations, the government produced additional documents, we withdrew our demand for others, and the case settled in July 2016.

NATIONAL SECURITY / MILITARY / "WAR ON TERROR"

ACLU v. Dep't of Homeland Security (CP3 / "Domestic Extremism" FOIA)
Date filed: June 16, 2022 **Status: Open**
ACLU-DC attorneys: Art Spitzer
Co-counsel: ACLU National Security Project

The government has long infringed on Americans' fundamental rights and liberties under the guise of national security.

In 2021, the Department of Homeland Security (DHS) announced new measures to address domestic violent extremism, with a focus on violent white supremacy. It established a Center for Prevention Programs and Partnerships ("CP3"). In its press statement, DHS described this effort as a "whole-of-society" approach, including collaboration across every level of government, the private sector, non-governmental organizations, and communities.

The ACLU has previously explained that in responsibly addressing white supremacist (or any other) violence, policymakers need to ensure that the broad powers federal agencies already have (or claim to have) do not violate people's civil rights, civil liberties, or privacy, as they often have in the past. For example, the Obama administration launched a program that cast unwarranted suspicion on Muslims by utilizing a deeply flawed approach: it called on social service providers and community members to identify potentially "extremist" individuals based on vague and broad criteria that encompassed lawful speech and association. Under the guise of community outreach, the FBI also targeted mosques for intelligence gathering and pressured law-abiding American Muslims to become informants against their own communities. The Trump administration followed this model and created the Office of Targeted Violence and Terrorism Prevention, raising the same acute concerns for communities of color and immigrants who were targets of that administration's xenophobic and racist policies.

DHS's latest effort appears to use similar frameworks and methods such as "threat assessments" intended to detect "risk factors for radicalization to violence," without clear guidelines, definitions, or safeguards to protect civil rights and civil liberties.

The ACLU filed a FOIA request about the new CP3 program, including DHS's plan to safeguard civil liberties, civil rights, and privacy (if it has one). Having received no response, we sued in June 2022 to compel a response. We are now receiving an ongoing rolling production of responsive records.

ACLU v. Department of Justice (Afghan Bank FOIA)
Date filed: April 6, 2022 **Status: Open**
ACLU-DC attorneys: Art Spitzer
Co-counsel: ACLU National Security Project

On February 11, 2022, President Biden issued an executive order seizing $7 billion of currency reserves belonging to the country of Afghanistan that were being held in the United States. Subsequently, the Treasury Department ordered the Federal Reserve to transfer half of those assets into an account in the name of the Afghan Central Bank "for the benefit of the Afghan people and for Afghanistan's future." The other $3.5 billion will reside in a frozen account at the Federal Reserve, potentially available to satisfy default monetary judgments obtained against the Taliban by certain families of victims of the September 11 attacks. The President's seizure reflects a novel and apparently unprecedented use of emergency powers. Yet the administration has provided no clear explanation of its legal justification for these measures. In February 2022, the ACLU submitted a Freedom of Information Act request to the

Department of Justice seeking records regarding the legal justification for these actions, which we seek to promote transparency regarding the government's use of emergency powers. (The ACLU is not taking a position on the proper use of the seized funds.) When no records had been released after almost two months, we filed this lawsuit, which has thus far resulted in the release of some records.

Chebli v. Kable

Date filed: April 6, 2021 **Status: Victory!**
ACLU-DC attorneys: Art Spitzer
Co-counsel: ACLU National Security Project; ACLU of Michigan

Ahmad Chebli, a native-born U.S. citizen of Lebanese descent, was pressured by the FBI to become an informant within his community. When he refused, he was placed on the No-Fly List, which interferes with his work, prevents him from traveling to see family and friends, and bars him from traveling to Mecca to perform the religious pilgrimage obligation of Hajj. The government rebuffed all of Mr. Chebli's requests to learn the (asserted) reasons for his inclusion on the List and to have his name removed. We sued in April 2021 for violations of Mr. Chebli's due process rights, his First Amendment right to refuse to become an FBI informant, and his right under the Religious Freedom Restoration Act to practice his faith without undue government interference. Less than a month after we sued, the government informed Mr. Chebli that he "no longer satisf[ied] the criteria for placement on the No Fly List" and that he was therefore removed. No further information was provided about why he was on the list in the first place, or what had changed (other than that he had filed a lawsuit). We voluntarily dismissed the lawsuit in May 2021.

Hassoun v. Searles

Date filed: July 10, 2020 **Status: Victory!**
ACLU-DC attorneys: Art Spitzer, Scott Michelman
Co-counsel: ACLU National Security Project; ACLU Immigrants' Rights Project; University of Chicago Law School; Roderick & Solange MacArthur Justice Center

This case challenges the U.S. government's unlawful indefinite detention of Adham Amin Hassoun in violation of federal statutory authority and Mr. Hassoun's due process and equal protection rights. The government claimed that Mr. Hassoun was a threat to national security but did not produce any credible evidence to support that claim. Instead, the government asserted the power to simply hold him in administrative detention without due process—potentially for the rest of his life. The government's basis for the detention was a set of allegations contained in unsworn "letterhead memoranda" written by one federal agency, the FBI, to another, the Department of Homeland Security. The government claimed that the courts lack the power to review this determination.

During habeas corpus proceedings before a New York federal court, it became clear that the government's case against Mr. Hassoun consisted of statements of unidentified jailhouse informants laundered through multiple levels of hearsay and assembled into an ominous narrative. When given the opportunity to put on its evidence its court, the government refused, moving instead to cancel the evidentiary hearing. The hearing was cancelled and on June 29, 2020, the court ruled that Mr. Hassoun's detention was unlawful and ordered him released. The government appealed, and because of the federal statute that it has invoked to hold Mr. Hassoun, its appeal went to the D.C. Circuit.

In July 2020, we joined with National ACLU attorneys and other co-counsel to represent Mr. Hassoun in the court of appeals. On July 22, 2020, the parties informed the court that Mr. Hassoun was no longer in U.S. custody. The appeal was subsequently dismissed as moot. We are not free to say more.

Weir v. United States
Date filed: June 12, 2019 **Status: Open**
ACLU-DC attorneys: Art Spitzer
Co-counsel: ACLU Nat'l Security & Human Rights Projects; Stroock & Stroock & Lavan

ACLU v. U.S. Coast Guard (Coast Guard seizure FOIA)
Date filed: May 14, 2019 **Status: Victory!**
ACLU-DC attorneys: Art Spitzer
Co-counsel: ACLU Nat'l Security & Human Rights Projects

Plaintiffs Robert Dexter Weir, Patrick Wayne Ferguson, David Roderick Williams, and Luther Fian Patterson are Jamaican fishermen. In September 2017, the Coast Guard stopped their fishing boat in the Caribbean Sea, seized the men, and removed them from their boat, which the Coast Guard sank. Coast Guard officers then forced the men to strip naked—supplying them with paper-thin Tyvek coveralls—before chaining them to the decks of four Coast Guard cutters for 32 days before bringing them ashore in Miami. During their 32-day detention, the men were prevented from communicating with their families or anyone else on the outside, all the while being denied access to shelter, basic sanitation, proper food, and medical care. The Coast Guard also refused to notify their families that they were alive, leading their relatives to believe they had drowned at sea. Initially, the United States charged each of the men with conspiracy to distribute marijuana, but there was no evidence of marijuana on the boat. The men later pleaded guilty to providing the Coast Guard with false information about their destination because they were advised that it was the quickest and surest way to get back to their homes and families in Jamaica. The men were each sentenced to 10 months imprisonment. After serving their sentences and spending a further two months in federal immigration detention, the men were returned to their homes and families in Jamaica. As a result of their abusive detention by the Coast Guard, the men suffered and continue to suffer physical and psychological trauma. The men also returned to their families financially ruined due to the Coast Guard's confiscation of their driving and fishing licenses and destruction of their fishing boat and equipment.

Plaintiffs filed a federal lawsuit (*Weir*) under admiralty and maritime tort law to recover damages for their unduly prolonged and inhumane detention, the physical and psychological trauma they suffered and continue to suffer, and the destruction of their property. Plaintiffs also seek declaratory and injunctive relief against the Coast Guard so that they can once again freely work as fishermen in international waters near Jamaica without exposure to Defendants' unlawful policy and practice.

We also filed a separate FOIA lawsuit to learn more about the Coast Guard's protocol regarding the sinking of ships in international waters suspected of having drugs. We received the Coast Guard's final production in January 2021 and dismissed the case.

The Coast Guard moved to dismiss the damages case on the ground that it involved "political questions" regarding U.S.-Jamaican relations that courts can't review. In January 2021, the court denied most of that motion. As of 2022, the case is in discovery.

Ullah v. CIA (Gul Rahman torture FOIA)
Date filed: November 29, 2018 **Status: Closed**
ACLU-DC attorneys: Art Spitzer
Co-counsel: ACLU National Security Project

In November 2002, the CIA tortured Afghan citizen Gul Rahman to death. The CIA covered up his death for years and hid information about the whereabouts of his body from his grieving family. According to declassified CIA documents released as a result of a related ACLU lawsuit, CIA personnel subjected Rahman to abuses including forced nudity, "auditory overload," "rough treatment," cold showers, and sleep and food deprivation. A CIA autopsy concluded that Rahman, weakened by cold, hunger, and other forms of cruel, inhuman, and degrading treatment, died of hypothermia in a CIA-run facility. In November 2018, we sued on behalf of Rahman's family to demand that the government release records concerning the specific disposition and location of his body, as well as any policies the CIA follows if a detainee dies in U.S. custody. In May 2019, the government released about half the documents we sought and claimed that the rest could legally be withheld. In January 2020, the court granted summary judgment to the government, ruling that the government's remaining withholdings were justified on national security grounds.

ACLU v. CIA (Haspel FOIA)
Date filed: November 29, 2018 **Status: Closed**
ACLU-DC attorneys: Art Spitzer
Co-counsel: ACLU National Security Project

In May 2018, the ACLU submitted a FOIA request seeking records related to the CIA's campaign to support Gina Haspel's nomination as CIA director and to her potential conflict of interest in serving as the classification authority over her own actions in the CIA's program of prisoner torture and abuse. After the CIA failed to turn over any documents, we sued in November to demand release of the records. After vigorous litigation, the CIA eventually released 161 documents, most in redacted form. In February 2022. the court upheld its right to withhold 225 documents based on various FOIA exemptions for national security and internal deliberations.

Doe v. Mattis
Date filed: October 5, 2017 **Status: Victory!**
ACLU-DC attorneys: Art Spitzer
Co-counsel: ACLU National Security Project

In mid-September 2017, U.S. military forces in Iraq detained a U.S. citizen and designated him as an "enemy combatant." In October, after approximately three weeks during which the U.S. military did not disclose publicly his name or the place of his detention, did not provided him with access to a court or to counsel, and ignored our letter to them expressing concern over this detention of a U.S. citizen without charge or counsel, we and the National ACLU filed a petition for habeas corpus claiming violations of the Non-Detention Act (prohibiting the detention of a U.S. citizen except pursuant to an Act of Congress) and the U.S. Constitution (guaranteeing, among other things, the rights to counsel and due process). The habeas petition sought a court order permitting ACLU attorneys to meet with the "John Doe" detainee, forbidding interrogation of the detainee until the habeas petition is resolved, and requiring that the detainee be charged with a crime in regular federal court or released.

In December, the court ordered the government to allow us to speak by telephone with Mr. Doe, at which time he requested our representation. Based on press reports that the government was seeking to transfer Doe to the custody of another country, we sought an order blocking any such transfer on the ground that the government hadn't shown that it had any right to detain him in the first place. In January 2018, the court ordered the government to provide us with notice 72 hours before transferring him to a different country. Three months later, the government attempted to transfer John Doe to Country X (the name of which was redacted for security reasons), and we immediately challenged the transfer. In April 2018, the court blocked the transfer, and the government appealed. In May 2018, the D.C. Circuit agreed with us that the government did not have legal authority to involuntarily transfer a U.S. citizen to another country without judicial review.

In June, the government notified us that it intended to release Doe in Syria, into an area that the government itself had described as "exceedingly dangerous." We challenged that release. The court heard argument in July 2018, but the parties asked the court to withhold a decision while they sought to achieve a negotiated settlement. After extensive negotiations, the government finally released our client, with his consent, in another country in late October 2018. The country's name has not been released to protect his privacy. While the court never addressed the question whether our client's detention was legal, this case still established an important precedent that the government cannot transfer American citizens to a different country without due process or their consent.

We and the New York Times then sought to unseal the court records after the client was released. In June 2019, DOJ agreed to unseal everything in the D.C. Circuit opinion except one government official's name.

ACLU v. Dep't of Justice (Bureau of Prisons Afghan detention FOIA)
Date filed: April 14, 2016 **Status: Closed**
ACLU-DC attorneys: Art Spitzer
Co-counsel: ACLU National Prison Project; David Sobel

In December 2014, the government declassified and released the Executive Summary of the Senate Select Committee on Intelligence's report on the CIA's post-9/11 torture program. Among other things, it described a CIA detention facility in Afghanistan code-named COBALT, where detainees were kept under horrific conditions. The report stated that a team from the BOP visited COBALT in November 2002 to provided assessments, recommendations, and training for the staff.

In January 2015, together with the ACLU National Prison Project, we filed a FOIA request seeking records from the BOP relating to COBALT. BOP responded that it found no records. We filed an administrative appeal and the Justice Department determined that BOP conducted an adequate search. It seemed implausible that BOP had no records of a team trip to Afghanistan and related meetings and reports. If BOP has records that are classified, it's supposed to say so, not deny their existence. Therefore, in April 2016, we sued to seek the documents under FOIA.

In response to our lawsuit, BOP conducted a more thorough search. A declaration by a senior BOP lawyer explained that instructions for the trip were given orally, and that the CIA forbade the two officers who went to Afghanistan from creating any records about the visit. One of the officers emailed a supervisor that "we were not even allowed to speak with a supervisor about what was going on."

After the release of these documents, we settled the case.

ACLU v. Dep't of Homeland Security ("Countering Violent Extremism" FOIA)
Date filed: February 10, 2016 **Status: Victory!**
ACLU-DC attorneys: Art Spitzer
Co-counsel: ACLU National Security Project

Filed in February 2016, this FOIA lawsuit sought records related to the federal government's Countering Violent Extremism (CVE) program—an expanding set of measures about which little had been publicly disclosed. The premise of the program was that the adoption of extreme or "radical" ideas places individuals on a path toward violence, and that observable "indicators" exist by which to identify those who are "vulnerable" to "radicalization" or being recruited by terrorists. The CVE initiatives implemented in three pilot U.S. cities were aimed almost exclusively at American Muslim communities.

The lawsuit alleged that, based on publicly available information, the CVE initiative posed real risks to the freedoms of speech, religion, and association, and to the right of Muslims to freedom from discrimination. In response to our suit (filed together with the National ACLU), government agencies produced more than 20,000 pages of documents, which we made available and searchable online. They underscored our key criticisms of the programs. The case was closed in May 2021.

ACLU v. CIA (Senate Select Committee on Intelligence FOIA)
Date filed: November 30, 2013 **Status: Closed**
ACLU-DC attorneys: Art Spitzer
Co-counsel: ACLU National Security Project

We filed this FOIA lawsuit in November 2013, seeking release of the 6,300-page report of the Senate Select Committee on Intelligence (SSCI) about the CIA's post-9/11 rendition, detention, and interrogation program, as well as a copy of the CIA's official response to that report and a copy of the so-called "Panetta Review," an internal CIA response that reportedly contradicted the CIA's official response.

The CIA moved to dismiss, claiming that the report was a congressional document and therefore not subject to FOIA. We argued that it had become an agency document when it was transmitted to various executive agencies for them to use as they pleased. The litigation was then held in abeyance for months while the Senate Committee and the CIA fought amongst themselves about what could be released. In December 2014, the Committee released the report's lengthy Executive Summary, Findings, and Conclusions, along with the CIA's official response. Litigation resumed, and in May 2015 the district court ruled that the rest of the report remained a congressional document and not subject to FOIA. Regarding our request for the "Panetta Review," the court credited the CIA's assertions that it was actually a series of draft documents that were protected by the deliberative process privilege. It therefore granted the government's motion to dismiss (as to the report) and its motion for summary judgment (as to the review).

We appealed, with amicus support from former U.S. Sen. John D. Rockefeller IV, a recent former chair of the SSCI. In May 2016, the court of appeals held that Senator Feinstein's 2014 letter transmitting the report to the President and the heads of several executive agencies, urging them to use the report "as you see fit," did not relinquish the congressional control of the report that had been specified in a 2009 agreement with the CIA. The report therefore never became an "agency record" subject to FOIA, and the court of appeals affirmed the district court's decision denying our FOIA request. Our petitions for rehearing and certiorari were denied.

In December 2016, President Obama formally added the report to his collection of presidential documents that will be preserved under the Presidential Records Act, thereby assuring that it will be

permanently preserved even if the Senate destroys all copies in its own possession, as some Republican Senators threatened to do if they regained control of the Senate. Meanwhile, it remains classified.

In re Opinions & Orders Addressing Bulk Collection of Data Under the Foreign Intelligence Surveillance Act

Date filed: November 7, 2013 **Status: Closed**

ACLU-DC attorneys: Art Spitzer; Scott Michelman

Co-counsel: ACLU National Security Project; Knight First Amendment Institute; Yale Law School Media Freedom and Information Access Clinic

In re Opinions & Orders of This Court Containing Novel or Significant Interpretations of Law

Date filed: October 21, 2016 **Status: Closed**

ACLU-DC attorneys: Art Spitzer; Scott Michelman; Michael Perloff

Co-counsel: ACLU National Security Project; Knight First Amendment Institute; Yale Law School Media Freedom and Information Access Clinic; **Gibson Dunn & Crutcher LLP**

The Foreign Intelligence Surveillance Court (FISC) is a special court created by Congress to authorize (or deny) U.S. intelligence agencies the right to conduct domestic surveillance activities in the name of national security. In general, the court's activities are conducted in secret. The Foreign Intelligence Surveillance Court of Review (FISCR) is a special court created by Congress to review the decisions of the FISC in certain circumstances.

In November 2013, we filed a motion before the FISC seeking access to that court's opinions and orders regarding the bulk collection of information about U.S. citizens' communications, which had been disclosed by the Edward Snowden leaks. In response, the government released some opinions in redacted form. Claiming both First Amendment and common law rights of access, we asked the court to review those redactions and make its own decision about what to release.

In January 2017, the court ruled that we had no standing to seek unsealing of the opinions and the court therefore lacked jurisdiction to consider our motion. We sought rehearing en banc, and it was granted. In November 2017, the FISC issued its first-ever public en banc decision, holding by a 6-5 vote that we did have standing to seek access to the court's opinions under the First Amendment. The FISCR affirmed in March 2018 on standing (while making clear we could still lose on the merits).

On remand, the government argued that Congress had given the FISC jurisdiction to adjudicate only government applications for foreign intelligence collection and a limited set of other matters (such as challenges to subpoenas), so our application was outside the court's jurisdiction. We argued that the FISC, like all courts, had inherent authority and ancillary jurisdiction over its own records.

In February 2020, the court held that it did have jurisdiction over our motion for access, but denied the motion on the ground that we had no First Amendment right to FISC materials, reasoning that neither history nor logic supported such a right. We sought review of that decision in the FISCR, but in April 2020 the FISCR ruled that it lacked jurisdiction to hear our appeal.

Meanwhile, in the USA FREEDOM Act of 2015, Congress directed the FISC to release any opinions and orders issued after June 2, 2015, containing "novel or significant interpretations of law." In October 2016, we filed a second motion with the FISC, asking it to release its opinions and orders that were issued between September 11, 2001, and June 2, 2015, and that contained "novel or significant interpretations of law." In September 2020, the FISC dismissed our motion, concluding that exercising jurisdiction would be inconsistent with the April 2020 FISCR decision in our earlier case. We sought review in the FISCR, which dismissed the petition for the same reason, and also denied our request to

certify the jurisdictional question to the Supreme Court on the ground that "this case does not present a question of law as to which instructions from the Supreme Court are desired."

In April 2021, we sought Supreme Court review, arguing that all federal courts have inherent power to release their own opinions. In November 2021, the Court denied our petition without comment. Justice Gorsuch, joined by Justice Sotomayor, dissented, writing, "If these matters are not worthy of our time, what is?"

ACLU v. CIA (Drones FOIA)

Date filed: September 1, 2011 **Status: Closed**
ACLU-DC attorneys: Art Spitzer
Co-counsel: ACLU National Security Project

This Freedom of Information Act case sought documents regarding the CIA's use of drones in the war on terrorism. The CIA asserted that it would compromise national security even to disclose whether it had any relevant documents ("Drones? What drones?"). In September 2011 the district court accepted that response and dismissed the case. We appealed, and demonstrated to the court of appeals, as we had to the district court, that senior government officials had repeatedly acknowledged our use of drones. In March 2013 the court of appeals reversed. Chief Judge Garland wrote, "In this case, the CIA asked the courts . . . to give their imprimatur to a fiction of deniability that no reasonable person would regard as plausible." On remand, the district court granted summary judgment for the CIA on June 18, finding that all of its responsive documents (except the one redacted legal memorandum it had already released) were properly classified, contained no segregable non-classified material, and had not been officially disclosed in the past. We appealed, but in April 2016 the court of appeals affirmed in an unpublished memorandum.

Slahi v. Obama

Date filed: April 9, 2010 **Status: Victory!**
ACLU-DC attorneys: Art Spitzer
Co-counsel: ACLU National Security Project; Freedman Boyd Hollander Goldberg Urias & Ward P.A.; Duncan Earnest LLC; Seton Hall Law School; Linda Moreno, P.A.

In 2009, the ACLU joined forces with existing habeas corpus counsel for Guantanamo detainee Mohamedou Ould Slahi, who had been subjected to the worst treatments meted out to Guantanamo prisoners. We assisted at a merits hearing and with briefs addressing several issues, including questions of when the armed conflict with al-Qaida began and the scope of military detention authority, given that Mr. Slahi was allegedly "captured on the battlefield" while showering in his own home in Mauritania. In April 2010, the district court found that the government had not shown that Mr. Slahi had provided purposeful and material support for al-Qaida or had remained part of al-Qaida after 1992 (before which he had been active with the mujahideen in Afghanistan, when the United States was supporting them). The court issued a writ of habeas corpus and ordered Mr. Slahi released.

The government appealed. In November 2010, the court of appeals held that intervening decisions had "cast serious doubt on the district court's approach to determining whether an individual is 'part of' al-Qaida." It therefore vacated and remanded for a new determination. In February 2013, the government filed with the court hundreds of pages of factual allegations that it asserted justified Mr. Slahi's continued detention. But the habeas case did not move forward. In June 2015 we filed a motion asking the court to order the government to provide our client with a long-overdue Periodic Review Board hearing, the purpose of which is to determine whether he currently presents a threat to the security of the United States

or can safely be released. The court ruled in our favor, and Mr. Slahi's Periodic Review Board meeting was held in June 2016. The PRB cleared Mr. Slahi for release, specifically mentioning his good behavior in custody, his strong family ties, and a resilient support network in Mauritania.

In October 2016, Mr. Slahi was finally released from custody and repatriated to Mauritania. His book about his experiences, *Guantanamo Diary*, has been translated into many languages and published in more than 25 countries. A film adaptation, *The Mauritanian*, was released in 2021.

Meshal v. Higgenbotham

Date filed: November 10, 2009 **Status: Closed**
ACLU-DC attorneys: Art Spitzer
Co-counsel: ACLU National Security Project; Seton Hall Law School; Yale Law School Allard K. Lowenstein International Human Rights Clinic

Our complaint in this case alleged that Amir Meshal, a U.S. citizen born and raised in New Jersey, was detained for about four months in 2007 by Kenyan and Ethiopian authorities at the behest of the United States Government. During that time, he was repeatedly interrogated by FBI agents, but was never charged with any crime, never allowed to see a lawyer, and never given access to U.S. consular assistance. Believing that this treatment violated Mr. Meshal's rights under the Fourth and Fifth Amendments and the Torture Victim Protection Act, our lawsuit sought compensatory damages on his behalf. After we learned who the FBI agents were, the defendants moved to dismiss the case. In June 2014, the district court dismissed it, stating, "This Court is outraged by Mr. Meshal's appalling (and, candidly, embarrassing) allegations of mistreatment by the United States of America . . . . [But] [o]nly the legislative branch can provide United States citizens with a remedy for mistreatment by the United States government on foreign soil; this Court cannot." We appealed, but the D.C. Circuit court affirmed the district court's dismissal in October 2015. We filed a petition for certiorari in May 2016. After the Supreme Court held it for a year pending the outcome of another case about the power of the federal courts to hear cases seeking damages against federal officials, the Court denied review in June 2017.

OTHER CIVIL LIBERTIES ISSUES: PRIVACY, REPRODUCTIVE FREEDOM, STATEHOOD, TRANSPARENCY

District of Columbia v. Terris, Pravlik & Millian

Date filed: February 4, 2022 **Status: Amicus**

ACLU-DC attorneys: Art Spitzer

Co-counsel: Public Citizen Litigation Group

The D.C. FOIA includes a provision requiring city agencies to make certain categories of information available online, without a written request—including, for example, minutes of their meetings, staff manuals and instructions that affect members of the public, statements of policy, and budget-related documents during the budget development process. This provides an effective and efficient way for members of the public to learn about the government's activities and operations. But agencies don't always comply with this requirement, and the Mayor says the requirement has no teeth because individuals have no right to go to court to enforce it and the courts have no authority to order agencies to comply with it.

This case arose when a law firm asked for D.C. budget documents that should have been posted online. When the Mayor's office refused to provide them, the law firm sued. The Superior Court ruled that it did have power to enforce the law and ordered the Mayor to publish the budget documents. The Mayor (represented by the D.C. Attorney General) appealed, arguing that budget documents are exempt from FOIA, that they are subject to "Executive Privilege," that no one has standing to enforce the publication requirement, and that the courts have no authority to order agencies to obey the publication requirement. In February 2022, we filed an amicus brief, authored by Public Citizen and also joined by the D.C. Open Government Coalition, the Reporters Committee for Freedom of the Press, the D.C. Fiscal Policy Institute, and the Washington, D.C. Professional Chapter of the Society of Professional Journalists. The brief argues that FOIA does authorize private lawsuits to enforce the publication provision, and that the courts do have authority to order agencies to comply with it. The appeal was argued in September 2022.

Fraternal Order of Police v. District of Columbia

Date filed: October 20, 2020 **Status: Amicus**

ACLU-DC attorneys: Art Spitzer

Co-counsel: Lawyers' Comm. for Civil Rights Under Law, Public Defender Service for D.C., Wash. Lawyers' Comm. for Civil Rights and Urban Affairs, Law4BlackLives DC

In July 2020, the D.C. Council enacted legislation requiring the Mayor to "publicly release the names and [body-worn camera] recordings of all officers who committed the officer-involved death or serious use of force" "[w]ithin 5 business days after an officer-involved death or the serious use of force." The D.C. Fraternal Order of Police (FOP) sued to block that legislation, claiming that it violated the separation of powers (arguing that only the Mayor has the power to supervise the police) and infringed the substantive due process privacy rights of officers. We filed an amicus brief in support of the law. In July 2021, the Superior Court dismissed the case and FOP appealed. We again filed an amicus brief. In March 2023, the D.C. Court of Appeals affirmed the dismissal. The court explained that the Mayor, as head of the Executive Branch, does not have exclusive authority to direct the activities of executive agencies such as the MPD. The court also rejected FOP's privacy argument: referring to our brief, the court "agree[d] with amici that '[t]he right to decide how to treat information about public police activities belongs to the

government and is not a right belonging to individual officers,' much less a fundamental right of FOP members."

Trump v. Mazars USA, LLP
Date filed: March 4, 2020 **Status: Amicus**
ACLU-DC attorneys: Art Spitzer, Scott Michelman
Co-counsel: National ACLU; Munger, Tolles & Olson LLP

The House of Representatives subpoenaed President Trump's financial records as part of inquiries into foreign interference with the 2016 presidential election. Trump moved to quash the subpoena, claiming the House lacked a valid legislative aim and instead sought these records to harass him, expose personal matters, and conduct law enforcement activities beyond its authority. The ACLU's amicus brief to the Supreme Court argued that Congress has the constitutional authority to investigate the executive branch, which includes the right to demand documents from the president or other members of the executive branch. Ruling otherwise would undermine the checks and balances central to our constitutional system; if Congress had the authority to investigate Watergate and Whitewater, it can investigate Trump.

In July 2020, the Supreme Court rejected Trump's broad position, but sent the case back to the lower courts for a closer look at whether the information Congress was seeking could be obtained elsewhere and whether the subpoenas could be narrowed.

In July 2022, the court of appeals rejected Trump's remaining objections, and in September 2022 his accounting firm (Mazars USA) turned the records over to Congress.

Castañon v. United States
Date filed: June 10, 2019 **Status: Amicus**
ACLU-DC attorneys: Art Spitzer
Co-counsel: Arent Fox LLP

Residents of the District of Columbia have no voting representation in Congress, just a non-voting delegate. Legal and political efforts to rectify this gross injustice have so far failed. In this 2018 case, several D.C. residents filed suit challenging the lack of congressional representation as a violation of equal protection of the laws and due process. In June 2019, we joined the League of Women Voters, DC Vote, Neighbors United for D.C. Statehood, and the Washington Lawyers' Committee for Civil Rights and Urban Affairs in an amicus brief arguing that there is no rational basis to deny D.C. residents the rights to voting representation and political equality, and the court has a duty to protect the fundamental right to vote. The district court rejected the claims in March 2020, essentially reasoning that the Constitution assigns Representatives and Senators to States, and the Constitution can't be unconstitutional. The plaintiffs appealed directly to the Supreme Court. In October 2021, the Supreme Court affirmed in a two-sentence order.

Thurgood Marshall Academy student bag searches
Date filed: October 13, 2018 **Status: Victory!**
ACLU-DC attorneys: *Scott Michelman*, Art Spitzer

Once a year, on an unannounced date, Thurgood Marshall Academy, a D.C. Charter school, requires all students to be wanded with a metal detector and have their bags rifled through for weapons and drugs. A student approached us about this invasion of her privacy; she was particularly concerned about school

officials looking through personal hygiene items and over-the-counter medications. We approached the school administration with our concerns. In March 2019, they agreed to a compromise: they will provide cheap, metal-free bags for students to put private items for screening; bags will be wanded not rummaged through, and the school will ignore small quantities of over-the-counter medications. That resolved the matter.

Knight First Amendment Institute v. Dep't of Defense ("Prepublication review" FOIA II)
Date filed: May 11, 2018 **Status: Victory!**
ACLU-DC attorneys: Art Spitzer
Co-counsel: ACLU Speech, Privacy & Technology Project; Knight First Amendment Institute at Columbia University

ACLU v. CIA ("Prepublication review" FOIA I)
Date filed: June 6, 2016 **Status: Open**
ACLU-DC attorneys: Art Spitzer
Co-counsel: ACLU National Security Project

"Prepublication review" refers to the policy under which many agencies require past and current employees and contractors who have security clearances to submit any written materials that involve information learned during their government service for agency review and clearance before public release. Under this policy, government agencies look at materials that are proposed for public release to make sure they don't contain protected information. We have litigated two cases to enforce FOIA requests for documents about prepublication review.

First, the National ACLU sent FOIA requests to 19 federal agencies seeking records about the standards governing prepublication review and the way those standards are applied. Most disclosed no documents. In June 2016 we sued to enforce our rights under FOIA. In response, the agencies produced thousands of documents over a period of years as the parties worked to narrow their disagreements on what disclosures were required. Nonetheless, the government continued to withhold the names of current and/or former CIA employees who had been granted an exemption from the Agency's prepublication process "based on an established record of prepublication review compliance." Believing these names might show favoritism toward employees whose publications were favorable to the agency, we asked the court to order the CIA to disclose these names. In November 2021, the court refused to do so, ruling that disclosure was barred because the statute creating the CIA provides that "the Agency shall be exempted from . . . any other law which require[s] the publication or disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency[.]" The court closed the case in December 2021 (other than to consider our application for attorneys' fees), and we filed a notice of appeal. However, the government contended that our appeal was late, and we are currently litigating the question whether the court can extend the time for our appeal.

In a second set of FOIA requests, the ACLU and the Knight First Amendment Institute at Columbia University sought records about the prepublication review process that had occurred for publications by high-ranking government officials including Hillary Clinton, Donald Rumsfeld, Leon Panetta, and Valerie Plame Wilson. We filed suit in May 2018 to enforce our rights under FOIA to learn more about the government's pre-publication review processes. Over the next four years, the government produced various documents and withheld others. After the parties were able to resolve their differences regarding certain withholdings and attorneys fees, we voluntarily dismissed the case in November 2022.

National Family Planning & Reprod. Health Ass'n v. Dep't of Health and Human Servs.
Date filed: May 2, 2018 **Status: Closed**
ACLU-DC attorneys: Art Spitzer
Co-counsel: ACLU Reproductive Freedom Project

In May 2018, we filed this lawsuit on behalf of the National Family Planning and Reproductive Health Association to challenge the Trump administration's plans to drastically alter the application criteria for the Title X Family Program, which issues grants for programs that provide family planning services. Signed into law in 1970 with broad bipartisan support, the Title X Family Planning Program has been providing patients, particularly low-income patients who would otherwise lack care, high-quality contraceptive services and preventive care, including breast and cervical cancer detection, screening and treatment for sexually transmitted diseases, and HIV testing. In 2015, services provided by health centers that received Title X funding helped avert 822,300 unintended pregnancies. Without the services provided by Title X-funded health centers, the U.S. unintended pregnancy rate would have been 31 percent higher. In February 2018, the Department of Health and Human Services issued guidance shifting the grant-making process away from its core mission of making contraception and related clinical services available to individuals regardless of their ability to pay, instead adopting "scoring criteria" for grant applicants favoring ideologically driven priorities (like abstinence-only messaging and religious affiliation) that are contrary to and impermissible under Title X's statute and regulations. We moved for a preliminary injunction; the government moved to dismiss the case. In July 2018, the court ruled that the new scoring criteria don't count as a final agency action since the criteria are only advisory and are therefore not subject to judicial review; in the alternative, the court concluded that the new rules were consistent with the statute. We appealed. In November 2019, the appeals court ruled that the case had become moot in light of the fact that the clinics that had previously received funding were continuing to receive funding.

J.D. v. Azar (formerly Garza v. Hargan)
Date filed: October 13, 2017 **Status: Victory!**
ACLU-DC attorneys: Art Spitzer, Scott Michelman, Shana Knizhnik
Co-counsel: ACLU Reproductive Freedom Proj.; ACLU Prog. on Freedom of Religion & Belief; ACLUs of N. Cal. & S. Cal.; Sidley Austin LLP (for certiorari opposition)

On October 13, 2017, we filed an emergency lawsuit in federal court on behalf of a young immigrant ("Jane Doe") in a Texas shelter whom the Trump administration was preventing from obtaining an abortion in violation of her constitutional rights. When immigrant minors come to the U.S. unaccompanied by an adult, the federal Office of Refugee Resettlement (ORR) determines how to house and care for them. Many are sent to privately operated shelters, as Jane Doe was. But under the Trump administration's ORR, shelters were not allowed to release residents to access abortion services. Instead, federal officials forced Jane Doe to have a medically unnecessary sonogram against her will and blocked her from travelling to medical visits, even after she received judicial authorization for an abortion and secured private transportation and funding for it. Our evidence in support of emergency relief for Jane Doe documented efforts by ORR Director Scott Lloyd to personally coerce young women to carry their pregnancies to term instead of having an abortion, and to personally force them to go to religiously affiliated "crisis pregnancy centers." In one case, a young woman was sent to an emergency room after she'd taken the abortion pill to try to prevent her from completing the abortion.

On October 18, 2017, a federal court granted our motion for a temporary restraining order (TRO) prohibiting the government from interfering with Jane Doe's access to her abortion provider. The government sought an emergency stay of that order from the appeals court.

Late on October 20, a three-judge panel of the D.C. Circuit set aside key parts of the TRO and sent the case back to the district court to see if Jane Doe could find a sponsor to whom ORR could transfer custody before the end of October (thereby avoiding the question whether the government had to allow her to get an abortion while in government custody). Judge Millett dissented, arguing that "[f]orcing her to continue an unwanted pregnancy just in the hopes of finding a sponsor that has not been found in the past six weeks sacrifices [Jane's] constitutional liberty, autonomy, and personal dignity for no justifiable governmental reason."

On October 22, we petitioned all 10 judges of the D.C. Circuit to rehear the case, because the 10-day delay imposed by the panel permitted the government to continue blocking Jane Doe's access to abortion pending the complex and multi-step sponsorship process that almost certainly could not be completed by the end of October. Meanwhile, with every day that passed, Jane Doe moved closer to the stage of her pregnancy at which Texas law prohibited abortion entirely.

On October 24, the full D.C. Circuit Court of Appeals overruled the panel and permitted the TRO to go into effect. On October 25, Jane Doe obtained an abortion.

On November 3, as we continued to fight to certify a class and obtain a broader injunction against the government's no-abortion policy as to all unaccompanied immigrant minors in its custody, the Solicitor General of the United States asked the Supreme Court to review the D.C. Circuit's order refusing to stay the TRO for Jane Doe. Remarkably, the government also asked the Supreme Court to consider sanctions against attorneys on the case for not having told the government in advance when Jane Doe would be obtaining her abortion—a client confidence that we were under no obligation to reveal.

On December 15, we returned to court seeking another TRO prohibiting the government from blocking two more young women in ORR custody (known as Jane Roe and Jane Poe in court papers) from abortions. The district court granted the TRO on the evening of December 18. Within an hour, the government filed an appeal and sought a stay regarding Jane Roe from both the court of appeals and the U.S. Supreme Court. The government did not seek a stay regarding Jane Poe, and she was able to obtain her abortion. We opposed the government's stay application in the D.C. Circuit and were preparing to file our opposition in the Supreme Court when the government abruptly declared on December 19 that Jane Roe was 19 years old and therefore did not belong in ORR's custody at all. Jane Roe maintains that the government is wrong about her age, but after a tense evening of negotiations, the government decided to release Jane Roe from custody entirely, subject to her later appearance in immigration proceedings. The government then dismissed its appeal and stay requests, and Jane Roe was able to obtain an abortion.

In the course of the TRO litigation, the court ordered the government to release (at the ACLU's urging and over the government's objection) ORR's written reasoning for denying Jane Poe's abortion. That document revealed that ORR Director Scott Lloyd had determined that an abortion was "not in her best interest" despite that fact that the pregnancy was the result of rape, that her mother and the person who was to serve as her sponsor threatened to beat her if she had an abortion, and that she was contemplating self-harm if she did not obtain the abortion.

On January 11, 2018, the ACLU amended its complaint to add yet another unaccompanied immigrant minor in ORR custody in yet another state (other than the locations where Janes Doe, Roe, and Poe were held) who sought but was refused access to abortion by ORR. The ACLU sought another TRO for the new plaintiff (known as Jane Moe in court papers), already in her second trimester of pregnancy. On January 14, ORR released Jane Moe from its custody, into the care of a private sponsor.

On March 30, 2018, the district court certified the class we had sought and granted a preliminary injunction prohibiting the government from interfering with unaccompanied minors' access to abortion, including medical visits, court hearings, counseling and other pregnancy related care. The injunction also prohibited the government from disclosing unaccompanied minors' pregnancies and abortion decisions to their parents and others. The government appealed.

While that appeal was pending, on June 4, 2018, the Supreme Court denied the government's earlier request to sanction ACLU attorneys for not having told the government in advance when Jane Doe would be getting her abortion. Because Jane Doe had her abortion back in October, the Supreme Court vacated as moot the D.C. Circuit's October 2017 en banc order to deny the stay for the temporary restraining order for Jane Doe, but the Court declined the government's request to order all claims for injunctive relief dismissed.

In June 2019, the D.C. Circuit affirmed both class certification and the injunction barring the government from obstructing unaccompanied minors' access to abortion. The court vacated and remanded for further factual development the part of the injunction regarding disclosure. The government agreed not to disclose minors' pregnancy and abortion information while it worked out a new policy to govern abortion access for immigrant minors in government custody.

In September 2020, the parties reached a settlement: The government adopted a new policy under which it would not interfere with immigrant minors' access to abortion and related services and would adopt strict limits on disclosure of minors' pregnancy and abortion information. The government agreed to provide us with two weeks' notice of any change it intended to make to its new policy. The government agreed to post Spanish and English versions of a Know-Your-Rights notice about this new policy in government-funded shelters for immigrants. And the government agreed to pay our attorneys' fees for the litigation. In exchange, we voluntarily dismissed the case.

ACLU v. Trump

Date filed: July 10, 2017 **Status: Victory!**

ACLU-DC attorneys: Art Spitzer

Co-counsel: ACLU Voting Rights Project

Having lost the popular vote in the 2016 election, President Trump made baseless claims of voter fraud and created an "election integrity commission" to investigate, led by Kansas Secretary of State Kris Kobach, whom the ACLU has successfully sued numerous times over his voter suppression policies. The commission sought sensitive voter data without disclosing how it would use or protect that data.

Together with the National ACLU, we sued over the commission's practice of meeting in secret, in violation of the Federal Advisory Committee Act. In response to our lawsuit, the commission took steps toward course correction by creating a website, disclosing the introductory email and agenda from its telephonic meeting, and pledging to make documents available.

Eventually the administration disbanded the commission in early 2018. The case remained open until 2020 so that we could make sure the voter information received by the commission was destroyed. Once that was certified to the court, we voluntarily dismissed our case.

Ass'n of Independent Schools of Greater Washington v. District of Columbia
Date filed: September 6, 2016 **Status: Victory!**
ACLU-DC attorneys: Art Spitzer
Co-counsel: Dechert LLP

Saint Paul's Nursery School v. Office of the State Superintendent of Education
Date filed: December 17, 2015 **Status: Victory!**
ACLU-DC attorneys: *Art Spitzer*

The D.C. Office of the State Superintendent of Education (OSSE), which licenses daycare centers, nursery schools and preschools in D.C., decided to require the schools it licenses to institute a program of random drug and alcohol testing for their teachers and staff. OSSE argued that the drug testing is necessary for employees like nursery school and preschool teachers as they are in "safety sensitive positions" that are entrusted with the care and custody of children and youth.

In two cases, we challenged that policy under the Fourth Amendment, which generally does not permit blanket searches without individualized suspicion. Our first challenge was on behalf of a church-affiliated nursery school whose license OSSE attempted to revoke. In May 2016, the D.C. Office of Administrative Hearings blocked that move; it ruled that the statute under which OSSE purported to require random drug testing had to be interpreted to exclude nursery school teachers in order to save its constitutionality. OSSE did not appeal.

Nonetheless, OSSE continued to apply its policy to all other schools, on threat of losing their licenses, so in September 2016, we sued in federal court on behalf of an association of schools. In April 2018, the Court ruled that private nursery-school teachers in D.C. have a significant expectation of privacy, that the Defendant's interests did not justify a random, suspicionless drug testing policy, and enjoined enforcement of that policy. Again, OSSE did not appeal.

APPENDIX: VOLUNTEER ATTORNEYS ON CASES REPORTED IN THIS DOCKET

(excluding other ACLU affiliates and the National ACLU)

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Annamaria Morales-Kimball
Frederick Mulhauser
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Joe Sandman
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Law firms

Apollo Law LLC
Arent Fox LLP
Arnold & Porter Kaye Scholer LLP
Ballard Spahr LLC
Brown Gaines LLC
Cohen Milstein Sellers & Toll PLLC
Covington & Burling LLP
Crowell & Moring LLP
Dechert LLP
Duncan Earnest LLC
Ehlert Appeals
Faegre Drinker Biddle & Reath LLP (and Tritura)
Fredrikson & Byron P.A.
Freedman Boyd Hollander Goldberg Urias & Ward P.A.
Gibson Dunn & Crutcher LLP
Goodwin Procter LLP
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Hogan Lovells LLP
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Jenner & Block LLP
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Law Office of David E. Coombs
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Morgan, Lewis & Bockius LLP
Morris E. Fischer LLC
Munger, Tolles & Olson LLP
Patrice M. Scully
Pillsbury Winthrop Shaw Pittman LLP
Relman, Dane & Colfax PLLC
Riley Legal
Robbins, Russell, Englert, Orseck & Untereiner LLP
Sidley Austin LLP
Steptoe & Johnson LLP
Simpson Thacher & Bartlett LLP
Stroock & Stroock & Lavan LLP
Tonkon Torp LLP
Williams & Connolly LLP
WilmerHale

Nonprofits and Academic Institutions

A Better Childhood, Inc.
Advocates for Human Rights
American-Arab Anti-Discrimination Committee
American Immigration Council
Center for Gender & Refugee Studies
Citizens for Responsibility & Ethics in Washington
Electronic Frontier Foundation
Federal Public Defender for the Middle Dist. of Tenn.
Knight First Amendment Inst. at Columbia Univ.
Human Rights First
Immigrant Law Center of Minnesota
Law4BlackLives DC
Lawyers' Committee for Civil Rights Under Law
Legal Aid Society of the City of New York
NAACP Legal Defense Fund
National Immigrant Justice Center
National Immigration Law Center
NYU Law School Technology Law & Policy Clinic
Oxfam America
Poverty & Race Research Action Council
Public Defender Service for the District of Columbia
Public Citizen Litigation Group
Refugee & Immig. Ctr. for Educ. & Legal Servs.
Reporters' Committee for Freedom of the Press
Roderick & Solange MacArthur Justice Center
Seton Hall Law School
Texas Civil Rights Project
University of Chicago Law School
Univ. of Minnesota Center for New Americans
Wash. Lawyers' Comm. for Civ. Rts. & Urban Affairs
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