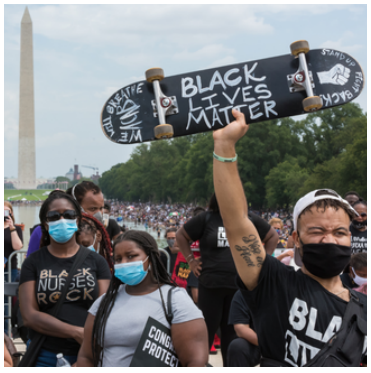
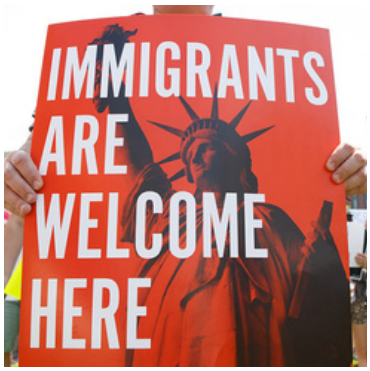
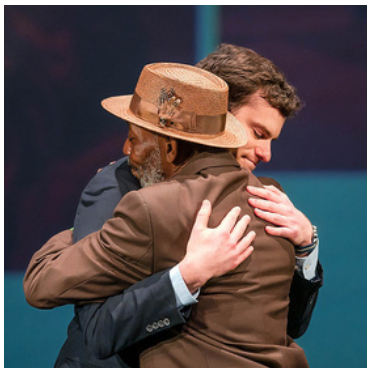
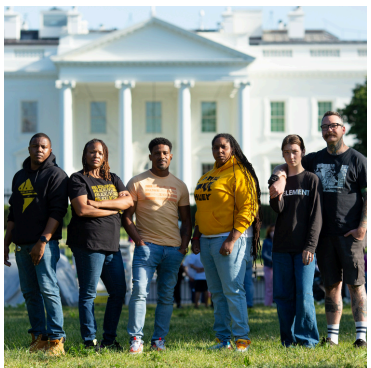
ACLU District of Columbia

2023-2024 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 2023 to 2024 (with a handful of updates where major developments occurred in early 2025). 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-D.C. attorney on each case served as the lead attorney for our office. Where an ACLU-D.C. 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-D.C.):

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, public education, and litigation.

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.

Cases come to the ACLU-D.C. through direct outreach from community members who report violations of their rights; 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-D.C. staff alone, but many more are handled in partnership with pro bono co-counsel who are not employed by the ACLU-D.C. These lawyers receive no pay from either the ACLU-D.C. 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-D.C. likewise could not function without the support of our members and donors. If you're not yet a member, *please join.* If you are, *please renew*. 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-D.C. used to publish a yearly litigation report and then moved to a periodic report format so that each report could 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. Our previous report, covering 2016-22, was published in 2023, and discussed 144 matters.

Covering 2023-24, the current report is (predictably) shorter but nonetheless documents a number of significant victories and new large-scale institutional reform cases we have filed in pursuit of three of the ACLU-D.C.'s strategic priorities: criminal justice reform, antidiscrimination, and the First Amendment. (Our fourth strategic priority, D.C. statehood, is much less amenable to progress through litigation as opposed to other forms of advocacy.)

ACLU OF THE DISTRICT OF COLUMBIA
LEGAL STAFF

Current

Scott Michelman, *Legal Director*
Arthur B. Spitzer, *Senior Counsel*
Michael Perloff, *Senior Staff Attorney**
Aditi Shah, *Staff Attorney*
Simone Wallk, *Harvard Law Review Fellow/Attorney*
Ameerah Adetoro, *Paralegal/Intake Coordinator*

Recent (involved in cases covered by this report)

J. Holden, *Dunn Fellow/Attorney (2023-24)*
Elaine Stamp, *Paralegal/Intake Manager (2016-24)*
Laura K. Follansbee, *Harvard Public Service Venture Fund Fellow/Attorney (2022-23)*
Tara Patel, *Dunn Fellow/Attorney (2021-23)*
Jada Collins, *Intake Specialist (2021-23)*
Megan Yan, *Liman Fellow/Attorney (2020-21)*
Shana Knizhnik, *Dunn Fellow/Attorney (2016-18)*

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 are also listed in the Appendix.

** Michael served as Interim Legal Director for three months in 2024 during Scott's sabbatical.*

EXECUTIVE SUMMARY

This docket report covers the cases (and a handful of selected non-litigation matters of import) that we handled at any point in 2023 or 2024.

As of this writing at the outset of the second Trump administration, we are preparing (or, in a few instances, have already filed) litigation across a range of issues—from immigration to freedom of speech to antidiscrimination to the rule of law itself—as Trump races to fulfill his starkly anti-civil liberties campaign promises. These new cases will be documented in our next report.

With the rightward lurch of the Supreme Court over the past several years, some may be tempted to discount the courts as guardians of our rights. This report, I hope, provides something of a counternarrative—not to the well-founded concern that the most anti-civil liberties President of the modern era will be up to his old tricks (along with frightening new ones), but to the view that ACLU litigation cannot be effective in response.

Although the period covered by this report was one in which Trump was out of office, it should come as no surprise that we have been quite busy in 2023 and 2024. As the ACLU has witnessed throughout its 105-year history, attacks on civil liberties occur in every administration. The old saw among ACLU lawyers that "the battle for civil liberties never stays won" resonates throughout these pages, which shows how the Biden administration, despite making progress in certain respects, also continued or resurrected key anti-civil liberties policies of the Trump administration, especially on immigration. Reflecting the time it takes to vindicate our rights, this report also discusses numerous cases challenging abuses of Trump's *first* term, some of which were not resolved until years after he left office and a few of which remain pending today. Meanwhile, the District of Columbia government has continued to violate the rights of some of our community's most vulnerable residents through its policies and practices on policing and incarceration. And governments at all levels are all too eager to suppress speech they dislike and to try to cleanse public discourse of controversial ideas.

In the face of these threats to our rights, I am pleased to report that we have won significant victories. Despite some truly appalling decisions from the Supreme Court (the erasure of the constitutional right to abortion via the *Dobbs* decision and the invention of presidential criminal immunity in *Trump v. United States* being two prominent examples out of many), fears that Trump's nominees to the federal bench have fundamentally changed the character of the judiciary or that litigation is no longer an effective route to defend and advance civil liberties are misplaced. The vast majority of cases do not reach the Supreme Court. And we expect most lower court judges—including Trump appointees—to adhere to normal judicial procedures, precedent, and established rights. This is particularly true in the federal courts of the District of Columbia, where we have won significant rulings on constitutional and/or civil rights issues from six of the seven judges that Trump appointed to the federal district court and court of appeals. Three of these rulings held unlawful a Trump administration immigration policy.

In sum, our successes over the last two years, as detailed in this report, offer a model for continued vigorous defense of civil liberties going forward. Despite our small staff (currently five litigators and one support professional), we have litigated a docket of significant breadth and scope across the range of civil rights and liberties issues, from free speech to criminal justice reform to antidiscrimination to immigrants' rights. We cannot win all of our cases, of course, but the victories we have achieved have made a real

impact on the contours of our legal rights, on government policies and practices, and most importantly on our clients and the communities we serve.

I count among our major successes over the past two years the following:

Challenging civil rights/liberties violations by federal (or multi-jurisdictional) agencies:

- A preliminary injunction in our challenge to the failure of the federal government's post-conviction supervision system to accommodate individuals with disabilities; the court denied the government's motion to dismiss and ordered relief for our clients (*Mathis v. U.S. Parole Comm'n*, p. 17)
- After obtaining 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 the night of June 1, 2020 (*Black Lives Matter D.C. v. Trump*, p. 30), we obtained a favorable settlement compensating another demonstrator for her injuries resulting from the federal government's use of low-flying military helicopters to intimidate protesters that same night in D.C. (*Dashtamirova v. United States*, p. 30); our Lafayette Square case will continue
- The end of the federal judiciary's policy prohibiting 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); after the injunction we won was affirmed by the D.C. Circuit as to our two clients, the government eliminated the policy as to nearly all 1,100 employees it had covered (*Guffey v. Mauskopf*, p. 32)
- A preliminary injunction in one of our two challenges to the D.C. public transit system's policy against controversial advertisements on D.C. Metro trains and buses (*Wallbuilders v. Washington Metropolitan Area Transit Auth.* and *ACLU v. Washington Metropolitan Area Transit Auth.*, p. 23)
- A series of injunctions against the federal government's use of the COVID pandemic as an excuse to keep migrants out of the country and deny them the ability to seek humanitarian protections from removal; our injunctions halted aspects of the government's policy for months before it finally ended when the federal government's COVID emergency declaration expired (*Huisha-Huisha v. Gaynor*, *P.J.E.S. v. Wolf*, and related cases, pp. 36-39)
- A favorable settlement in our case seeking redress for four Jamaican fishermen, whom the Coast Guard seized at sea, then sank their boat, forced the men to strip naked (supplying them with paper-thin Tyvek coveralls), and chained them to the decks of Coast Guard cutters for 32 days during which the men were prevented from communicating with their families (who spent that time believing their loved ones had drowned at sea) and denied access to shelter, basic sanitation, proper food, and medical care (*Weir v. United States*, p. 44)

Challenging civil rights/liberties violations by the D.C. government:

- Defeating a motion to dismiss in our first-of-its-kind case under federal disability law seeking to reform a municipality's crisis-response system away from reliance on police as first responders to mental health crises (*Bread for the City v. District of Columbia*, p. 5)
- A precedent-setting victory in the D.C. Circuit in our cases challenging the District's practice of retaining cell phones seized from arrestees long after the law enforcement need for the phones has ended; the court of appeals agreed with us that, when police officers take individuals' property after

an arrest, the Fourth Amendment bars them from holding onto it for an unreasonable length of time (*Asinor v. District of Columbia*, p. 7; *Cameron v. District of Columbia*, p. 6)

▪ Relief for our clients in our challenge to D.C.'s practice of holding children in the juvenile justice system for months in a jail-like facility rather than promptly transferring them to the rehabilitative placements to which they are entitled by law: the District transferred our two 16-year-old clients to rehabilitative placements days after a court hearing on our preliminary injunction motion, and we continue to seek relief for a broader class (*K.Y. v. District of Columbia*, p. 9)

▪ A favorable settlement in our challenge to COVID policies and to the response to an extended water outage at St. Elizabeths psychiatric hospital; after a year-long injunction requiring COVID conditions improvements, our settlement required substantive improvements to the hospital's Outbreak/Pandemic Management Plan and agreements with other District hospitals to ensure they can accept St. Elizabeths patients in the event of an emergency (*Costa v. Bazron*, p. 14)

▪ A partial settlement in our challenge to a D.C. public high school's refusal to permit its Arab Student Union to engage in expressive activities at the school concerning the Israel-Hamas war and its effects on the Palestinian people; days before a scheduled hearing on our preliminary injunction motion, the school agreed to allow the club to show one of the films it had asked to screen and to distribute its printed material, including material that the school had previously censored (*Arab Student Union of Jackson-Reed High School v. District of Columbia*, p. 22);

▪ Withdrawal of a D.C. Jail policy we challenged under which Jews in custody could not obtain kosher meal service absent external verification of their religious faith; the District also agreed to provide our client with monetary compensation to settle the case (*Benjamin v. Colbert*, p. 28)

▪ A D.C. Court of Appeals opinion interpreting the D.C. stalking statute to exclude liability for conduct that consists of speech alone, unless that speech falls into an established First Amendment exception such as true threats or fighting words; in so holding, the court adopted the interpretation our amicus brief urged (*Mashaud v. Boone*, p. 29)

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. At this unpredictable moment in our Nation's history, a robust and principled defense of civil liberties is as important as it has ever been, and I hope you will join us, or increase your support, to make our ongoing work possible.

Scott Michelman, Legal Director
Spring 2025

AMERICAN CIVIL LIBERTIES UNION
OF THE DISTRICT OF COLUMBIA

2023-24 LITIGATION DOCKET

DOCKET STATISTICS

By matter type:	Cases litigated	Amicus briefs filed	Informal advocacy	Total matters
Criminal Justice / Police Practices	5	0	1	6
Criminal Justice / Prisons, Jails and Punishment	8	1	1	10
Due Process and Procedural Rights	0	1	0	1
Equal Protection and Antidiscrimination	5	1	2	8
First Amendment (speech, association, religion, incl protest)	8	3	3	14
Immigrants' Rights	15	0	0	15
National Security / Military / "War on Terror"	4	0	0	4
Rule of Law	0	1	0	1
Transparency	1	1	0	2
Voting	0	0	1	1
All issues	**46**	**8**	**8**	**62**

By resolution, among cases litigated:	Victory!	Closed	Open	Total
Criminal Justice / Police Practices	1	0	4	5
Criminal Justice / Prisons, Jails and Punishment	4	0	4	8
Equal Protection and Antidiscrimination	2	0	3	5
First Amendment (speech, association, religion, incl protest)	3	1	4	8
Immigrants' Rights	5	4	6	15
National Security / Military / "War on Terror"	3	0	1	4
Transparency	0	0	1	1
All issues	**18**	**5**	**23**	**46**

CRIMINAL JUSTICE / POLICE PRACTICES

Bread for the City v. District of Columbia **Status: Open**
Date Filed: July 6, 2023
ACLU-D.C. attorneys: *Michael Perloff*, Scott Michelman
Co-counsel: ACLU Criminal Law Reform Project; ACLU Disability Rights Project; Sheppard, Mullin, Richter & Hampton LLP

When people in D.C. have a physical health emergency, such as a heart attack, calling 911 generally results in a trained medic responding to the scene and providing care. But when people in D.C. call 911 for a mental health emergency, it's generally a Metropolitan Police Department (MPD) officer who responds. MPD training and policies make it more likely that officers will exacerbate mental health emergencies than ameliorate them. Indeed, mental health professionals report that officers in D.C. rarely respond to crises in medically appropriate ways. On many occasions, officers have used unnecessary force against people in crisis.

The District's reliance on police as its default first responders for mental health emergencies is not only unfair and unsafe but also unlawful. Federal disability law prohibits local governments from depriving people with disabilities of equal access to emergency services. Deploying medics for physical health crises but police for mental health ones does just that.

In a first-of-its-kind case seeking reform of a municipality's crisis response system based on federal disability law, Bread for the City, a D.C. non-profit that serves under-resourced community members, sued the District in July 2023 to rectify this injustice, demanding parity between the emergency services provided to physical health and mental health emergencies.

The District moved to dismiss Bread's complaint. In September 2024, the court denied that motion. It held that, based on the allegations in complaint, the District's emergency response program deprived people with mental health disabilities of meaningful access to its benefit of timely and effective emergency services. The case is currently in discovery.

Henry v. District of Columbia
Date filed: September 5, 2023 **Status: Victory!**
ACLU-D.C. attorneys: *Simone Wallk*, *J. Holden, Laura Follansbee,* Art Spitzer

People with mental disabilities disproportionately interact with police and the criminal justice system; they are approximately 44% more likely to be arrested by age 28 than their non-disabled peers.

This suit arises from two interrogations of Mr. Henry conducted by D.C.'s Metropolitan Police Department (MPD), in which MPD officers intentionally exploited Mr. Henry's obvious intellectual disability. For example, instead of promptly reading Mr. Henry his *Miranda* rights, the detectives used an interrogation technique designed to induce waiver by establishing a friendly rapport, and they suggested that they could help Mr. Henry get out of trouble. These tactics yielded an extended pre-*Miranda* conversation about the offenses with which Mr. Henry was charged and an eventual *Miranda* waiver. When the detectives finally did read Mr. Henry his rights, Mr. Henry hesitated when asked if he understood them and stated that he was only saying "yes" to "get through this" so that he could go to sleep. A few days later, two MPD detectives sought to exploit Mr. Henry's disability again by speaking with him at the D.C. Jail without his counsel present.

We sued under federal and D.C. disability rights law for D.C.'s failure to accommodate Mr. Henry's disability during these coercive interrogations. After significant discovery, the District agreed to a monetary settlement to resolve the case in the fall of 2024.

Williams v. Dixon

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

ACLU-D.C. attorneys: *Aditi Shah*, *Tara Patel*, Michael Perloff, Art Spitzer, Scott Michelman, Ausjia Perlow (volunteer)

United States Marshals Service (USMS) policy requires men arriving at Superior Court from pretrial detention at the D.C. Jail to undergo a search that includes the following: While the incarcerated individual is shackled with handcuffs that are connected to a belly chain and leg irons, his pants are pulled down, and through his underwear, a U.S. marshal 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 2022, 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. The court denied the motion in March 2023. We amended the complaint in August 2023 to add claims under the Federal Torts Claims Act. The government again moved to dismiss, arguing lack of FTCA exhaustion; in March 2024, this motion, too, was denied. The case is currently in discovery.

Cameron v. District of Columbia

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

ACLU-D.C. attorneys: *Michael Perloff*, Scott Michelman, Art Spitzer, Simone Wallk, 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 their non-contraband items back upon release unless those items are needed as evidence. But MPD has a different practice for arrested persons' cell phones. MPD keeps cell phones for months or sometimes years, long after MPD has any conceivable need for it, even if the owner is never charged with a crime and even when there is no reason to think the phone is evidence. MPD policy says if it 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. Moreover, when an individual is not charged with a crime, D.C. lacks an effective process for the owner to seek the return of the phone. The result is that MPD just keeps phones until it feels like giving them back. 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 appealed. The case was consolidated on appealed with our *Asinor* case, discussed next.

In August 2024, the D.C. Circuit reversed, holding—in an opinion of national significance—that, when police officers take a person's property after an arrest, the Fourth Amendment bars them from holding onto it for an unreasonable period of time.

We are now litigating our Fourth Amendment (and related D.C. law) claims arising back in the district court. The case is stayed for settlement discussions.

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

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. Oyoma Asinor (a documentarian) and Bryan Dozier (a photojournalist) were covering the event when they 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 appealed. The case was consolidated on appealed with our *Cameron* case, discussed previously.

In August 2024, the D.C. Circuit reversed, holding—in an opinion of national significance—that, when police officers take a person's property after an arrest, the Fourth Amendment bars them from holding onto it for an unreasonable period of time.

Back in the district court, the case is stayed for settlement discussions.

D'Quan Young Freedom of Information Act request

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

ACLU-D.C. attorneys: *Michael Perloff*, J. Holden, Art Spitzer, Scott Michelman

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. In April 2021, the ACLU-D.C. 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-D.C. is continuing to press for full compliance.

CRIMINAL JUSTICE / PRISONS, JAILS AND PUNISHMENT

Crowe v. Federal Bureau of Prisons
Date filed: December 20, 2024 **Status: Open**
ACLU-D.C. attorneys: Art Spitzer, Aditi Shah, Scott Michelman
Co-counsel: ACLU Criminal Law Reform Project; Jenner & Block LLP

In 2018, President Trump signed into law the bipartisan First Step Act, which was designed to reform extreme criminal sentencing laws, reduce the population in federal prisons, and encourage people in prison to take advantage of educational, training, and rehabilitative programs by earning credits towards time off their sentences. The statute unambiguously provides that the Bureau of Prisons *shall* move people out of prison—into halfway houses, home confinement, or supervised release—when they meet certain requirements and when their earned credits are equal to their remaining sentences.

Instead of following the law, BOP adopted a regulation providing that it *may* move people out of prison when their earned credits are equal to their remaining sentences; because BOP is not applying credits as directed by statute, thousands of people who are legally entitled to be back in their communities and with their families remain in prison.

On December 20, 2024, we filed this class action lawsuit, asking a federal court to order BOP to obey the law. In January 2025, we moved for a preliminary injunction.

K.Y. v. District of Columbia
Date filed: October 28, 2024 **Status: Open**
ACLU-D.C. attorneys: Aditi Shah, Scott Michelman
Co-counsel: Public Defender Service for the District of Columbia

This case is about the District of Columbia's failure to meet the treatment needs of children in its custody and instead needlessly and unlawfully extending the time these children spend in jail-like settings.

The D.C. juvenile delinquency system is designed to be centered on rehabilitation over punishment and to provide rehabilitative services in the "least restrictive settings necessary." In line with these principles, when a child is adjudicated delinquent, the Family Court may commit the child to the custody of the D.C. Department of Youth Rehabilitation Services ("DYRS"), which then becomes responsible to care for the child and to meet the child's rehabilitative needs via an appropriate placement.

DYRS's placement process has entirely broken down. DYRS delays each child's assessment and the development of each child's individualized treatment plan, and sometimes never conducts assessments or creates plans at all. These failings result in delays to each child's placement in a facility that can meet the rehabilitative and treatment needs of the child. These delays last for months, and in the meantime, the children awaiting placement languish at the Youth Services Center ("YSC")—a jail-like facility that is crowded, violent, and harmful to children at a critical time in their development. As DYRS Director Sam Abed has explained at a D.C. Council Committee roundtable, YSC is "not a treatment facility, it's a detention center." It is "akin to a jail in the adult system." YSC thus does not, and cannot, provide the type of rehabilitative services and programming that the children need and to which they are legally entitled.

In addition to harming children by delaying their rehabilitative programming and leaving them stuck in the jail-like conditions of YSC, the District's failures also unlawfully prolong children's detention, as they extend the overall time that children are held in restrictive settings. This results in children being separated from their communities and families for longer than necessary and compounds the known harms of detention on children's emotional and neurological development.

In October 2024, we sued the District for DYRS's widespread failure to promptly move the children committed to its care into appropriate rehabilitative placements. These failures violate the D.C. Code's mandate that DYRS conduct an initial assessment within 3 days of the child's commitment to DYRS custody and develop an individualized treatment plan within 14 days thereafter—deadlines the agency consistently fails to meet. DYRS's failures also violate the children's constitutional due process rights in two ways. First, placement delays violate due process because they deny children the treatment and rehabilitative services to which they are entitled and which are the entire point of their commitment to DYRS custody. Second, forcing children to languish needlessly for months in YSC subjects them to unconstitutional punishment by extending the overall time they must spend in secure detention settings. The children cannot begin accruing credit toward their release into less restrictive placements unless and until they begin their rehabilitative work at their initial placement.

Our clients' experiences illustrate these systemic failures. At the time we sued, plaintiffs D.J. and K.Y. were both sixteen years old; D.J. had been at YSC awaiting placement for almost two months; K.Y., for four. While they were held at YSC awaiting placement, K.Y. had trouble sleeping at night due to his PTSD. D.J. described it as "sitting on dead time" and "depressing."

Soon after filing the complaint, we moved for a preliminary injunction and class certification to seek prompt relief for all the children committed to DYRS's care and detained at YSC awaiting placement. The court heard oral argument on December 12, 2024, on our request for immediate transfers for K.Y. and D.J., with briefing on class certification to conclude in January. Within five days after the hearing, the D.C. government transferred both boys to their long-overdue rehabilitative placements.

We continue to fight for broader relief for all children held at YSC awaiting placement.

Access to legal materials, religious materials, and counsel at the D.C. jail
Date of first advocacy: March 12, 2024 **Status: Victory!**
ACLU-D.C. attorneys: *J. Holden*, Art Spitzer

The D.C. Department of Corrections (DOC) provides the people in its custody with tablets with educational, religious, and communication applications that give residents the opportunity to access the digital law library, contact attorneys, and read religious as well as secular texts. But for residents on "loss of privileges" status, we learned, many apps are locked, blocking them from accessing the virtual law library, contacting their attorneys, and reading religious materials; additionally, these residents had to make attorney calls in the presence of a case manager, making confidentiality impossible.

In March 2024, we wrote a letter to DOC expressing our concern about this problem. Incarcerated people have a fundamental right of access to the courts, the law library, and religious materials. Access to counsel, to the law library, and to religious materials are not "privileges" that can be stripped from people in custody by putting them on "loss of privileges" status. DOC promptly responded saying that the apps had been blocked due to a technological error and that they would restore access.

Oboh v. D.C. Department of Buildings
Date filed: March 22, 2023 **Status: Amicus**
ACLU-D.C. attorneys: Art Spitzer
Co-counsel: Legal Aid Society of the District of Columbia

Ebosele Oboh was renovating his house in the Brightwood neighborhood without having obtained the necessary permits. The D.C. government issued a stop-work order and fined him $8,856. When Mr. Oboh

didn't respond to the fine notice within two weeks, D.C. imposed a statutory penalty equal to twice the amount of the fine, or $17,712 (for a total of $26,568). Mr. Oboh appealed to the D.C. Court of Appeals.

In February 2023 we filed an amicus brief, arguing that the penalty of $17,712 violates the Eighth Amendment to the U.S. Constitution, which—although best known for prohibiting cruel and unusual punishments—also contains the important prohibition against "excessive fines." Our brief reasons that little if any harm is caused by a failure to respond to a notice by the deadline, and certainly nothing approaching $17,712 worth of harm. Indeed, it makes no sense at all to calculate the penalty for a late response based on the size of the underlying fine—a late response to a fine of $50,000 (which would result in a $100,000 late-filing penalty) is not a thousand times worse than a late response to a fine of $500 (which would result in a $1,000 late-filing penalty). And even a $1,000 late-filing penalty would be unjustifiable and therefore excessive.

Shortly after we filed our brief, the case was settled. We will look for another opportunity to make the same arguments, as the statute creating this penalty remains on the books.

ACLU v. Dep't of Justice (Prison mental health FOIA)
Date filed: March 21, 2022 **Status: Open**
ACLU-D.C. 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 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 2024. 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: Victory!**
ACLU-D.C. 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 acts was to issue an executive order forbidding the Department of Justice to renew contracts with private companies that run federal detention facilities. The GEO Group, a 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 contract extension. 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 California town of fewer than 12,500 residents more than 200 miles from San Diego, to operate the facility; McFarland would then subcontract the operations right back to GEO. The resulting arrangement would not only likely violate the executive order; it would allow a private prison company to 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, 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. So in February 2022, we filed a FOIA lawsuit against the U.S. Marshals Service, seeking information about communications among the Marshals Service, the City of McFarland, 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.

The Marshals Service completed its production of responsive documents in spring 2023, and after reviewing its description of the withheld documents we decided in June 2023 not to challenge the withholdings. After reaching a settlement on attorneys' fees, we dismissed the case in October 2023.

ACLU v. Federal Bureau of Prisons (CARES Act FOIA)
Date filed: November 29, 2021 **Status: Victory!**
ACLU-D.C. 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 federal Bureau of Prisons 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, over an eighteen-month period BOP placed more than 34,000 people—including many elderly or medically vulnerable people—on home confinement. Before doing so, BOP evaluated every person and determined that none of them would pose a threat to public safety while on home confinement. Early in the pandemic, 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 would destroy the successful efforts they have made to reintegrate into society.

After President Biden took office, the ACLU repeatedly urged him to grant clemency to everyone who is on home confinement under the CARES Act and following the rules.

By November 2021, most of the people transferred to home confinement had completed their sentences, but about 8,000 remained on home confinement. Many found employment and have reunited with loved ones. We filed a FOIA request for 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 in November 2021, asking the court to order the records to be produced.

On December 2021, OLC released a new analysis of the CARES Act, concluding that the Trump administration was wrong, and that the law allows individuals on home confinement to remain at home until the expiration of their sentences, even if the COVID emergency ends before that. While this new memo did not affect our FOIA lawsuit, it did dramatically change federal policy for the better.

Through our lawsuit, we obtained a great deal of information about the people who had been placed on home confinement, including the fact that very few had re-offended while at home. That case was settled in April 2023.

In 2022, BOP published proposed regulations regarding the CARES Act, and the ACLU filed comments—making use of the information we had learned from the lawsuit—urging BOP to allow people on home confinement to remain there for the duration of their sentences unless they re-offended. In April 2023, BOP issued its regulation, hinting that it would probably adopt the position we urged that but reserving discretion to make any decision it felt was proper in any individual case. Meanwhile, President Biden announced that the COVID emergency would end on May 11, 2023, meaning that people on home confinement could be ordered back to prison as early as June 10, 2023.

In March 2023, we filed a new FOIA request seeking to learn more about the people who would face the possibility of reincarceration in June and seeking to assess the effectiveness and administration of the CARES Act home confinement program. BOP failed to release the requested records within the statutory time frame, so in May 2023, we filed a second FOIA lawsuit to compel production of those records. We received a satisfactory production and settled the case in November 2023.

After admissions to the CARES Act home confinement program ended, we filed a third FOIA request for a final set of data. When BOP (again) failed to provide the data promptly, we filed a third FOIA lawsuit in March 2024. By August 2024, BOP stated it had provided a spreadsheet with all the information we had requested. We sought clarification of ambiguous or conflicting data.

Then, on December 12, 2024, President Biden—adopting the course we had been advocating for years—commuted the sentences of all 1,499 people still on home confinement under the CARES Act. Soon thereafter, we voluntarily dismissed our final FOIA case.

ACLU v. Dep't of Justice (BOP COVID FOIA)
Date filed: October 21, 2020 **Status: Victory!**
ACLU-D.C. 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-D.C. 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 were released. In November 2022, the Court upheld all but one of BOP's reasons for withholding the remaining documents.

In the ICE case, a dispute arose over whether our request properly sought documents from the Department of Homeland Security Inspector General (we said yes; the government said no). The court ruled in our favor on that point in the spring of 2023. The government is continuing to produce documents.

Costa v. Bazron
Date filed: October 23, 2019 **Status: Victory!**
ACLU-D.C. 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. Despite clear guidance from the Centers for Disease Control and Prevention (CDC), 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. In particular, testing and medical isolation were woefully inadequate or nonexistent. Patients who tested positive for COVID 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, and 32 patients and 47 staff at the Hospital had 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 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 order for relief—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 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.

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 the 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.

DUE PROCESS AND PROCEDURAL RIGHTS

Taylor v. McDonough

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

ACLU-D.C. 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—including the Veterans Administration—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 government. Mr. Taylor filed a claim for benefits in February 2007, and the Department of Veterans Affairs 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").

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.

After a stay pending the Supreme Court's decision in *Arellano v. McDonough*, a case that raised similar questions, in June 2023 the Federal Circuit handed down its final decision, holding that Mr. Taylor is entitled to disability benefits retroactive to the date he would have obtained them if the government had not blocked his application with a secrecy agreement. The judges who voted for this result were divided on the reason Mr. Taylor should prevail. Five judges thought Mr. Taylor should win based on "equitable estoppel," the legal principle that a party should not benefit from its own misconduct. These judges reasoned that, in telling Mr. Taylor he could not seek compensation without violating his secrecy, the government violated its statutory duty to provide veterans with "full information" about available benefits. Six other judges interpreted the Supreme Court's *Arellano* decision as barring the equitable estoppel theory but nonetheless voted for Mr. Taylor because they concluded—just as we had argued—that the constitutional right of access to courts renders the statutory filing-date requirement unconstitutional as applied to Mr. Tayor.

EQUAL PROTECTION AND ANTIDISCRIMINATION

Religious worship discrimination at the D.C. jail
Date of first advocacy: August 2, 2024 **Status: Victory!**
ACLU-D.C. attorneys: *J. Holden*, Michael Perloff

Our allies at the Public Defender Service informed us of concerns that, on certain cell blocks at the D.C. Jail, Christian residents had access to religious services, but Muslim residents did not. We raised this problem with the Director of the D.C. Department of Corrections. He responded within three days that he had investigated the matter, identified "challenges that impeded the regular provision of in-person religious services for Muslim residents," and "implemented measures to ensure that in-person Muslim services are now conducted regularly and without interruption."

Failure to accommodate individuals with disabilities on D.C. buses
Date of first advocacy: December 7, 2023 **Status: Victory!**
ACLU-D.C. attorneys: *Art Spitzer*

Washington Metropolitan Area Transit Authority (WMATA) and D.C. Circulator buses are equipped automated ramps that a driver can extend to help people with disabilities get on and off the bus. A mobility-impaired rider who does not use a wheelchair reported to us that bus drivers had repeatedly refused to lower the ramp for her, saying they would not do so unless a rider is in a wheelchair. In December 2023, we sent letters to WMATA and D.C. Department of Transportation (which ran the Circulator bus) alerting them to the problem and asking to collaborate on an appropriate response. Both responded promptly saying they would investigate the complaints. In February 2024, both entities agreed that the ramps must be lowered for anyone who needs them and promised more monitoring going forward.

Mathis v. U.S. Parole Commission
Date filed: May 6, 2024 **Status: Open**
ACLU-D.C. attorneys: Scott Michelman, Laura Follansbee, Michael Perloff
Co-counsel: ACLU Criminal Law Reform Project; Public Defender Service for the District of Columbia; Latham & Watkins LLP

This case challenges the failure of the federal government's post-conviction supervision system to accommodate individuals with disabilities as required by federal law.

For many, a criminal sentence does not end after leaving custody. Instead, it extends for years—and sometimes a lifetime—in the form of either "parole" or "supervised release." People subject to these forms of supervision are required to comply with myriad and onerous conditions even after they have returned to their communities. Even "technical" violations of release conditions, meaning non-criminal conduct like missing appointments with supervision officers, can land a person back in jail.

People with disabilities, who are over-represented among the supervision population, are set up to fail in the federal government's supervision system for residents of the District. To meaningfully participate in their supervision, many people with disabilities require accommodations. For instance, people with disabilities may be unable to fully comprehend the dozens of complex requirements of supervision or physically move throughout the city to attend the numerous appointments, meetings, and programs that supervision requires. Absent accommodations, it is exceedingly difficult for many people with disabilities to comply with their supervision requirements. People with disabilities thus face a

heightened risk of sanctions—including the imposition of additional and more onerous conditions, the extension of their term of supervision, and even incarceration. Among all individuals on supervision in D.C., 10% faced violation proceedings for exclusively technical violations in 2021 or 2022; among individuals whom the supervision agency classified as having a mental disability, the proportion was almost twice as high (18%).

The Rehabilitation Act of 1973 requires the government to affirmatively provide reasonable accommodations to ensure that people with disabilities have meaningful access to the benefits of the supervision system—foremost among them, the opportunity to be released from supervision upon successfully completing the supervision term. The United States Parole Commission and the Court Services and Offender Supervision Agency ("CSOSA")—the two federal agencies that dictate the conditions of supervision and the consequences of non-compliance for D.C. residents—flout this mandate because they systematically fail to assess people's accommodation needs and to provide reasonable accommodations. The result is discrimination on the basis of disability at each stage of supervision: when setting conditions of supervision, when enforcing the conditions of supervision, when re-incarcerating people for failing to comply with these conditions, and again when releasing people to the very same conditions that, absent accommodation for their disability, they could not follow to begin with.

In May 2024, we filed this case on behalf of W. Mathis, K. Davis, and a class of similarly situated people, to require the Commission and CSOSA to implement a system to affirmatively assess people's accommodation needs and provide the reasonable accommodations they need to have an equal opportunity to succeed on supervision. Our clients' experiences on supervision illustrate these systematic violations. Mr. Mathis was a 70-year-old Black military veteran whose congestive heart failure made it difficult for him to travel throughout the city to his multiple supervision appointments each week. His heart condition also led to numerous hospitalizations and medical appointments at the Veterans Affairs hospital, and Mr. Mathis was punished—and even incarcerated—for missing supervision appointments on dates when he received medical treatment at the hospital. He was then released on the same supervision conditions he had struggled to meet due to his disability, without any accommodations. Mr. Davis is a middle-aged Black man who lives with chronic pain and mobility limitations stemming from third-degree burns, as well as anxiety, depression, and posttraumatic stress disorder. His disabilities make it difficult for him to get to required meetings and otherwise navigate his parole requirements, which include multiple weekly appointments and drug tests. He was arrested after he did not contact his supervision officer for a period of less than two weeks, despite the fact that he made it to every single drug testing appointment and tested negative every time. While serving a 12-month prison sentence for technical violations related to his disabilities, Mr. Davis missed a necessary surgery for his burns.

Right after filing the case, we sought a preliminary injunction requiring the government to provide our clients with accommodations while the case proceeds. The agencies opposed relief and moved to dismiss the case entirely. They argued, among other things, that our clients hadn't faced discrimination because other factors also contributed to their "technical" violations, and also that the Rehabilitation Act cannot be enforced in court because Congress hadn't specifically stated that it could be.

In September 2024, the court granted the preliminary injunction and denied the government's motion to dismiss. The court held that it had authority to enforce the Rehabilitation Act under its inherent power to enjoin violations of federal law. On the merits, the court held that the Rehabilitation Act is violated when the government's failure to accommodate a disability causes obstacles that impede access to a government program or benefit; it doesn't matter that other factors may also contribute to plaintiffs' larger "downstream" harms (like incarceration for failure to comply with conditions of release). As the court explained, Mr. Mathis and Mr. Davis had a valid claim "the moment their disabilities made it harder for them—compared to their nondisabled counterparts—to participate in the Government's supervision

programs without reasonable accommodations." Accordingly, the court ordered the Commission and CSOSA to assess what accommodations our clients need and to provide them.

Tragically, Mr. Mathis passed away while the case was ongoing. We continue to litigate on behalf of Mr. Davis, and we have also asked the court to certify a class action. Even though Mr. Mathis did not live to see it, we hope others will benefit from his courageous decision to assert his right to fair treatment.

Sonmez v. Washington Post

Date filed: March 22, 2023 **Status: Amicus**

ACLU-D.C. attorneys: *Art Spitzer*

A "SLAPP" is a "Strategic Lawsuit Against Public Participation"—a meritless case, usually filed by a well-resourced plaintiff to deter an ordinary person from exercising political or legal rights. Most states, and the District of Columbia, have enacted "anti-SLAPP" laws to make it easier for defendants to get such lawsuits dismissed quickly and to recover their legal fees from the abusive plaintiffs.

This lawsuit was filed by a Washington Post reporter, Felicia Sonmez, against the Washington Post. The Post calls it a SLAPP. We filed an amicus brief explaining why it is not.

On two occasions, the Post removed Ms. Sonmez, for a time, from covering stories about sexual misconduct and the #MeToo movement after she made public statements referencing her status as a sexual assault victim and expressing solidarity with victims of sexual offenses. Her lawsuit claimed that the Post's action discriminated against her based on her sex and status as a sexual assault victim. The Post moved to dismiss her case as a SLAPP, arguing its editorial decisions are protected by the First Amendment.

The D.C. Superior Court dismissed her case, ruling that Ms. Sonmez had not plausibly alleged discrimination. In the court's view, however, the lawsuit was not a SLAPP, because the Post had not shown that the reporter's legal claims arose out an "act in furtherance of the right of advocacy on issues of public interest," which is what the D.C. Anti-SLAPP Act requires. Ms. Sonmez appealed the dismissal of her case, and the Post appealed the decision that her lawsuit wasn't a SLAPP.

In our amicus brief, we explained that the fundamental mischief addressed by anti-SLAPP statutes is the bullying conduct of wealthy business entities against activists who cannot afford the expenses and risks of litigation. It is therefore ironic that the Washington Post seeks to use the Anti-SLAPP Act to protect itself from an employment discrimination suit brought by an individual employee. The Act was not designed to discourage or punish the filing of discrimination claims by employees of media corporations, based on the internal assignment decisions of their employers.

The case was argued before the D.C. Court of Appeals in November 2023.

(Update: In January 2025, the court decided the case. It entirely agreed with—and quoted approvingly—our analysis of the anti-SLAPP issue, ruling that the Post's internal decisions about which reporter assignments were outside of the Act's coverage. The court also ruled that the case should proceed to discovery about whether the Post's reasons for not assigning Ms. Sonmez to certain stories at certain times were discriminatory or were based on editorial judgment protected by the First Amendment.)

Neloms v. District of Columbia

Date filed: December 19, 2022 **Status: Open**

ACLU-D.C. attorneys: *Laura Follansbee*, *J. Holden*, *Aditi Shah*, 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 incompatible with the parents' need to work from home. A few weeks after the school closure ended, the DMV issued 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 use personal leave and pay for 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.

In May 2023, the DMV moved to dismiss the cases, arguing that because Ms. Neloms and Mr. Horsley did not receive responses from the two D.C. Equal Employment Opportunity (EEO) counselors whom they emailed for help, they had not fulfilled their obligation under D.C. regulation to "consult" an EEO counselor before filing. In the DMV's view, Ms. Neloms and Mr. Horsley were required not just to contact, but to have a conversation with, a counselor in order to "consult" them. We argued in response that the DMV's interpretation was an incorrect reading of the regulation's text and would be deeply unfair, enabling D.C. to deprive discrimination plaintiffs of their right to file cases simply by instructing their EEO counselors not to respond when contacted. In June 2023, OHR rejected the DMV's interpretation of the regulation and denied the motion to dismiss.

OHR has commenced its investigation of our complaint. We have provided our position statement on the merits and identified witnesses.

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

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.

After significant discovery, the court stayed the case for settlement discussions, which are ongoing.

Barber v. District of Columbia

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

ACLU-D.C. 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-D.C. 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-D.C. 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 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. After significant discovery, the District agreed to settle this lawsuit and compensate Ms. Barber.

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-D.C.), 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.

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

Ukrainian sunflower demonstration
Date of first advocacy: May 6, 2024 **Status: Victory!**
ACLU-D.C. attorneys: *Scott Michelman*, Art Spitzer

In late April 2024, a group of supporters of Ukraine—including the Ukrainian Ambassador to the United States—gathered across the street from the Russian embassy to plant sunflowers, a pro Ukrainian symbol, on the garden patch between the sidewalk and the street, with permission of the adjacent homeowner. This informal event has occurred each year since the Russian invasion of Ukraine. Unlike in previous years, an MPD officer stopped them from planting, although no city regulation prohibits this.

Concerned about this suppression of expressive activity for no legitimate reason, we contacted the office of the D.C. Council Chair and the General Counsel of MPD asking for both an explanation and assurance that if the group tried to plant again, they would not be obstructed. The MPD lawyer agreed to look into the matter. Although he never told us why the original planting was obstructed, the MPD lawyer agreed that the planting was permissible and assured us that MPD would not interfere with it. We relayed this news to the group, who planted their flowers the last weekend in May.

Arab Student Union of Jackson-Reed High School v. District of Columbia
Date filed: April 24, 2024 **Status: Open**
ACLU-D.C. attorneys: *Art Spitzer*, Scott Michelman, Simone Wallk, Ellie DeGarmo (volunteer)

The Supreme Court has long recognized that public school students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." The District of Columbia recognized the same when it promulgated the D.C. Student Bill of Rights, which provides that "[e]ach student shall have the right to exercise his or her constitutional rights of free speech, assembly, and expression without prior restraint, so long as the exercise of these rights does not substantially interfere with the rights of others." We filed this case to enforce these guarantees.

The Arab Student Union is a recognized student club at Jackson-Reed High School, a D.C. public school that is one of the most diverse high schools in the country. After the start of the Israel-Hamas war in October 2023, the club and its members repeatedly tried to engage in expressive activities at the school concerning the war and its effects on the Palestinian people—showing a documentary film, putting up posters, distributing literature, presenting a cultural program—but were stopped at every turn by the school administration. Specifically, the school denied the club permission to hold voluntary lunchtime meetings to screen a film critical of the Israeli government, and the school refused even to consider alternative films proposed by the club. The school censored handouts the club sought to distribute and prohibited it from distributing certain materials entirely. And the school prevented the club from holding a cultural event and then curtailed what it could say at such an event. The school thus treated the Arab Student Union's speech differently from that of other student clubs.

Representing the club, we sued D.C. and the principal of the school for violating the Arab Student Union's (and its members') First Amendment rights and their rights under the federal Equal Access Act and the D.C. Student Bill of Rights. We sought a court order that the students be allowed to show their film before the end of the school year and more generally to be permitted to express their views with their fellow students like any other student club at the school.

A hearing on our motion for a preliminary injunction was scheduled for May 10, 2024; days before that hearing, we were able to reach an agreement with D.C. that allowed the club to show one of the movies it had requested and to distribute its printed material, including one of the pages that had been censored. The principal also agreed to send an email to all faculty and administrators reiterating that the standards for expressive activities apply equally to all student groups.

The lawsuit remains ongoing to ensure that the Arab Student Union and all student groups can exercise their First Amendment rights in D.C. Public Schools.

Wallbuilders v. Washington Metropolitan Area Transit Authority
Date filed: December 12, 2023 **Status: Open**
ACLU-D.C. attorneys: Art Spitzer, Scott Michelman
Co-counsel: ACLU Speech, Privacy & Technology Proj.; Steptoe LLP; First Liberty Inst.
ACLU v. Washington Metropolitan Area Transit Authority
Date filed: August 19, 2017 **Status: Open**
ACLU-D.C. attorneys: *Art Spitzer*, Scott Michelman, Megan Yan, Shana Knizhnik
Co-counsel: ACLU Speech, Privacy & Technology Project

The Washington Metropolitan Area Transit Authority (WMATA) operates the D.C. Metro, which is one of the nation's largest transit systems, spanning 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 late 2016 and early 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 medication 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 book by right-wing provocateur Milo Yiannopoulos, but then removed the ads after riders complained. Meanwhile, WMATA was accepting and running ads promoting other controversial and health-related messages and shows 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-D.C. 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 an implicit controversial message. In late May 2018, the Court denied our motion. Although our preliminary motions were denied, we continued to litigate the ultimate issues of whether Metro's policy is arbitrarily applied or unconstitutional.

In March 2021, WMATA moved for judgment on the pleadings, which we opposed. After a two-year wait, in July 2023, the court dismissed one claim and one unessential defendant and rejected the rest of WMATA's motion. The case is now in discovery.

In December 2023 we filed another case challenging the WMATA Guidelines on behalf of WallBuilder Presentations, a Texas-based nonprofit organization that describes itself as "dedicated to presenting America's forgotten history and heroes, with an emphasis on the moral, religious, and constitutional foundation on which America was built." They submitted two advertisements about the religiosity of the Founders to the Washington Metropolitan Area Transit Authority for display on Metrobuses; WMATA rejected the ads on the ground that they violated its prohibition on ads "intended to influence members of the public regarding an issue on which there are varying public opinions." It is also likely that the ads violated WMATA's prohibition on ads "that promote or oppose any religion, religious practice or belief."

Our new case cited examples of ads about controversial issues that WMATA has accepted—such as recent ads urging people to get Covid vaccinations and ads demanding transparency in hospital prices. WMATA has also accepted ads with religious content, such as an ad for The Book of Mormon musical, which harshly lampoons the Mormon Church and religion in general—in support of our claim that WMATA's guidelines inevitably lead to discrimination based on advertisers' viewpoints and are necessarily applied in an arbitrary and unreasonable manner. Among are co-counsel in this second case is First Liberty, a conservative Texas nonprofit legal organization that represents clients claiming infringements of their religious rights. The ACLU is often on the other side of cases from First Liberty, but we share the view that speakers with religious opinions have the same free speech rights as other speakers.

The Wallbuilders case was assigned to a different judge than our first WMATA case. In May 2024, the court granted our motion for a preliminary injunction and ordered WMATA to run the WallBuilders advertisements it had unconstitutionally rejected. The court ruled that "the utterly undefined use of the phrase '[a]dvertisements intended to influence . . . regarding an issue on which there are varying opinions,' coupled with the lack of any definitions or official guidance and WMATA's inconsistent application of Guideline 9, makes clear that Guideline 9 is not a reasonable restriction on speech." WMATA did not appeal that decision and allowed the ads to run on Metrobuses for many months.

In June 2024, we moved for summary judgment. In November 2024, WMATA opposed that motion and filed its own motion for summary judgment, attaching a brand new set of "internal procedures and interpretive aids" for its advertising guidelines, which it relied on to argue that the guidelines could no longer be deemed vague. In response, we sought, and the court granted, discovery about the development and meaning of these new "interpretive aids."

Banks v. Hoffman

Date filed: October 27, 2023 **Status: Amicus**

ACLU-D.C. attorneys: Art Spitzer, Scott Michelman

Co-counsel: Davis Wright Tremaine LLP

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 a costs of a lawsuit. In December of 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.

One of the provisions of the Anti-SLAPP Act limits the discovery (that is, court-ordered exchange of information among the parties in a lawsuit) that can occur when the Anti-SLAPP Act's protections are invoked. This is because discovery can be costly and time-consuming, so that even speakers who should obtain dismissal of a SLAPP might be chilled from speaking in the first place if they knew they could be forced to undergo discovery before dismissal.

In this case, the D.C. Court of Appeals ruled that the discovery limitations of the Anti-SLAPP Act were invalid because they modified D.C. court procedures in a manner inconsistent with the D.C. Home Rule Act of 1973, by which Congress granted the District limited powers of self-government.

Together with other public interest groups, we filed an amicus brief in support of reconsidering this decision, in the hope that the court will restore the discovery protections for speakers hit with SLAPPs.

In January 2024, the court granted the petition for rehearing. In April 2024, we joined with other public interest groups once again to file an amicus brief on the merits discussing the importance of the Anti-SLAPP Act and its protections for public advocacy.

United States v. Trump

Date filed: October 25, 2023 **Status: Amicus**

ACLU-D.C. attorneys: Scott Michelman, Art Spitzer

Co-counsel: ACLU Speech, Privacy & Technology Project

In August 2023, former President Donald Trump was indicted in federal court on criminal charges related to his efforts to overturn the results of the 2020 Presidential election. The indictment alleged, among other things, that Trump conspired to defraud the United States by interfering with the counting and certification of the election results in several states and to obstruct the congressional proceedings to certify the election results on January 6, 2021, when a large group of Trump supporters stormed the U.S. Capitol.

On October 17, 2023, the court hearing the criminal case issued a gag order prohibiting Trump from "making any public statements, or directing others to make any public statements, that target (1) the Special Counsel prosecuting this case or his staff; (2) defense counsel or their staff; (3) any of this court's staff or other supporting personnel; or (4) any reasonably foreseeable witness or the substance of their testimony." Trump moved to stay the order pending appeal, and briefing followed.

On October 25, we submitted for filing an amicus brief urging the court to reconsider the gag order. Although much that Trump has said publicly has been patently false and has caused great harm, the First Amendment requires that an order restricting the speech of a criminal defendant—whether Trump or anyone else—must be precisely defined and narrowly tailored to protect the impartial administration of justice. In light of this basic principle, we argued that the October 17 order was too vague and too broad. The order was too vague because it left the meaning of the key word "target" unclear. For instance, one could "target" another with respectful but vigorous political advocacy, or "target" them for physical

violence or death. The order failed to specify which it meant, and so an ordinary person couldn't know what was prohibited by the order. The order was also too broad, because its prohibition of "target[ing] . . . any reasonably foreseeable witness or the substance of their testimony" effectively barred Trump from discussing major topics relevant to the 2024 presidential campaign, including the events of January 6, 2021, the results of the 2020 election, and Trump's own conduct in relation to both. Particularly in light of how much has already been said publicly about these topics, barring Trump from discussing them would not imminently threaten the fairness of Trump's criminal proceedings. Finally, our brief suggested how the court could narrow its order to prohibit speech that is unprotected by the First Amendment and/or that poses an imminent danger to the administration of justice—like speech threatening, harassing, or soliciting others to threaten or harass court staff or witnesses.

Free speech regarding pending prosecutions is not limited to Trump. When Rep. Harold Ford, Tennessee's first Black congressman, was prosecuted for bribery in the 1980s, the trial court imposed a gag order like the one at issue here, and it was rightly struck down on appeal, in order to permit Rep. Ford to opine on subjects of public importance, including the fairness of his prosecution itself. The same First Amendment principles apply to everyone regardless of political party. That Donald Trump exhibited little regard for the Constitution or the rule of law during his Presidency does not lessen courts' duty to uphold those foundational principles of a free society. Indeed, in highly charged and closely watched cases like this one, scrupulous observance of the First Amendment is, if anything, especially important.

The district court denied our motion for leave to file our amicus brief, and it issued an order explaining, but not modifying, the gag order. Trump appealed.

After expedited consideration, the D.C. Circuit issued an opinion on December 8, 2023, that "agree[d] with the district court that some aspects of Mr. Trump's public statements pose a significant and imminent threat to the fair and orderly adjudication of the ongoing criminal proceeding, warranting a speech-constraining protective order," but held that the district court's order "sweeps in more protected speech than is necessary" and therefore must be narrowed to comport with the First Amendment. The appeals court accordingly vacated the order except insofar as it "prohibits all parties and their counsel from making or directing others to make public statements about known or reasonably foreseeable witnesses concerning their potential participation in the investigation or in this criminal proceeding" and "to the extent it prohibits all parties and their counsel from making or directing others to make public statements about—(1) counsel in the case other than the Special Counsel, (2) members of the court's staff and counsel's staffs, or (3) the family members of any counsel or staff member—if those statements are made with the intent to materially interfere with, or to cause others to materially interfere with, counsel's or staff's work in this criminal case, or with the knowledge that such interference is highly likely to result."

We are pleased that the appellate court applied a rigorous First Amendment standard to safeguard speech about the judicial process and that it narrowed the gag order to enable the open discussion of matters of great public concern. We think the modified order reflects an appropriate balance of Trump's free speech rights with the court's legitimate need to protect the judicial process from a defendant who has demonstrated his eagerness to interfere with it.

Molina v. Book

Date filed: September 7, 2023 **Status: Closed**

ACLU-D.C. attorneys: Scott Michelman

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

Two attorneys who served as legal observers at a 2015 protest in St. Louis sued police officers who shot tear gas at the observers after they left the protest—and even though the observers had complied with

police orders and wore bright green hats bearing the words "Legal Observer." One of the observers' legal claims was for retaliation against them for their First Amendment activity. The district court ruled that the observers' case could proceed to trial, but in early 2023, the U.S. Court of Appeals for the Eighth Circuit reversed, granting judgment to the officers on most of the claims.

The Eighth Circuit ruled that written words are not presumptively entitled to First Amendment protection when they are printed on clothing but instead are protected only if "everyone" would understand them to express a particularized message—here, a "pro-protest" message. On that basis, the court deemed the words emblazoned on petitioners' hats—"National Lawyers Guild Legal Observer"—wholly unprotected by the First Amendment. The court further ruled that the officers were entitled to "qualified immunity," meaning complete protection from the lawsuit, because it was not "clearly established" that people have a constitutional right to unobtrusively observe and record the police in public.

In September 2023 we petitioned the Supreme Court to review the case and correct these errors. The appeals court's First Amendment ruling gives the government license to stifle or retaliate against speech simply because a written message appears printed on clothing and its substantive meaning is arguably unclear. And the doctrine of qualified immunity is problematic for the enforcement of constitutional rights generally. Under that rule, when a person sues officials for violating the Constitution, the official gets off the hook if the law was not "clearly established." This doctrine makes it 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 well-established enough 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 with very similar facts. The practical effect is that public officials—especially members of law enforcement—routinely get away with unconstitutional misconduct, simply because no one else has committed that precise kind of misconduct before. That is what happened here. We urged the Court to reconsider the entire doctrine of qualified immunity in light of new scholarship demonstrating that the entire legal basis for the Court's original creation of qualified immunity half a century ago was flawed.

In February 2024, the Supreme Court denied certiorari.

Remote court access post-COVID

Date of first advocacy: August 11, 2023 **Status: Victory!**

ACLU-D.C. attorneys: *Art Spitzer*

Co-counsel: ACLU Speech, Privacy & Technology Project

Courts have recognized that public access to court proceedings not only informs and educates those who are able to attend but also helps ensure the integrity of the proceedings by enabling the public and press to oversee the work of the courts and report on any irregularities. But until recent years, the only access Americans had to court proceedings was physical. To attend a trial or a hearing, a person would have to travel to the courthouse and sit in the courtroom. Thus, only a tiny fraction of the public could attend: as a practical matter, only those who lived nearby, who did not have to work for a living (or could take time off for the purpose), and who were physically mobile, were able to access the proceedings. And if the courtroom was full, then even a person who managed to be physically present would be excluded.

When the onset of the COVID pandemic necessitated the physical closure of courtrooms, the federal courts acted swiftly and commendably to enable judicial proceedings to go forward using modern technology—and to continue the nation's tradition of public access to court proceedings—by providing telephonic access to hearings. As a result, public access to the courts was finally brought into the electronic age. The result was a dramatic expansion of public access: for the first time, members of the public located

anywhere had audio access to federal judicial proceedings in places outside their own districts, and indeed anywhere across the country. And members of the public took advantage of this new access; some cases had hundreds of people listening on the public call-in line.

When the government's COVID emergency declaration ended in May 2023, the Judicial Conference of the United States (the body, chaired by the Chief Justice, by which the judicial branch governs itself) considered whether to revert to pre-pandemic rules about court access. We wrote to the Conference in August 2023 to urge it to build on its steps to expand public access, rather than limiting access to in-person attendees. We argued that remote public access should be available in all civil and bankruptcy proceedings. There is no principled way to distinguish certain types of public hearings from others, such that some are available to all remotely, and others are available only to some in person.

In September 2023, the Judicial Conference agreed to extend remote access to civil proceedings except when a witness is testifying.

Benjamin v. Colbert
Date filed: August 10, 2023 **Status: Victory!**
ACLU-D.C. attorneys: *Laura Follansbee*, *J. Holden*, Scott Michelman, Art Spitzer

This case is about the right of incarcerated Jewish people to keep a kosher diet in accordance with their religious beliefs, without having to provide external verification of their faith.

We sued three officials of the D.C. Department of Corrections (DOC) on behalf of Riley Benjamin for their refusal to provide Mr. Benjamin and Jews in their custody with kosher meals absent external verification of their Jewish faith. DOC's external verification practice requires confirmation of a person's faith from a synagogue, rabbi, or through a letter of conversion before providing a religious dietary accommodation. DOC's practice places an undue burden on these individuals, infringing on their religious rights under the federal Religious Freedom Restoration Act. We understand that Christian or Muslim individuals are not required to provide external faith verification to receive religious accommodations.

The lawsuit, filed as a class action, primarily sought a court order to prohibit DOC officials from requiring Jewish people in their custody to provide external verification of their religion to obtain kosher meals. The lawsuit asked the court to require DOC to supply kosher meals to Jews who request them based on their sincere desire to maintain kosher dietary practices as a part of the practice of their faith. We also sought compensation for the denial of Mr. Benjamin's kosher meal requests.

Two weeks after we filed the lawsuit, DOC revised its policy so that it no longer requires external verification of faith. The new policy requires DOC officials to supply kosher meals to Jewish individuals whose requests are based on a sincerely held religious belief. DOC also began providing Mr. Benjamin with kosher meals. As a result, we withdrew our request for emergency court action.

In the spring of 2024, the District agreed to a satisfactory settlement to compensate Mr. Benjamin, and we dismissed the case pursuant to the settlement agreement.

Student video deletion at public charter school
Date of first advocacy: March 27, 2023 **Status: Victory!**
ACLU-D.C. attorneys: *Tara Patel*, *Laura Follansbee*, Scott Michelman

A middle school student at a D.C. public charter school called the D.C. International School recorded a video on her phone of a fight between two students. School administrators required her to show them the video and then required her to delete it. These actions, and the school's speech policy generally, raised First Amendment concerns.

We reached out to the school to ask them to change their policy to address its overbreadth. Specifically, the policy barred student speech that "threatens to, attempts to cause, or does cause . . . emotional distress to self or others." This prohibition covers a wide range of behavior and speech, some of which is protected under the First Amendment. For instance, a student could vigorously disagree with another students' political leanings and cause emotional distress, or a student could comment on a peer's poor quality of work on a group project and cause emotional distress. There are many things that can be done or said by students that unintentionally, or even intentionally, hurt other students' feelings but which are nonetheless protected by the First Amendment. We were concerned not only that the policy gave the school broad power to punish students for protected speech but also that it could create particular problems for students with certain developmental disabilities, who might have added trouble discerning the effect that their speech might have on others. We recommended that the policy be made more precise in specifying the behavior that it attempts to curb as it relates to emotional distress (i.e., bullying, which schools may prohibit consistent with the First Amendment). After productive discussions, in May 2023, the school agreed to make significant and satisfactory changes to its policy.

Mashaud v. Boone
Date filed: October 4, 2021 **Status: Amicus**
ACLU-D.C. 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 their 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 states that it "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"; instead, it sent the case back to the trial court without explaining what that phrase meant, other than a suggestion that it was relevant whether Dr. Mashaud's conduct "served no legitimate purpose." Both parties asked 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 request. We noted that courts receive approximately 900 requests for anti-stalking orders per year and judges need to know what the law means. We also argued 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 women they supervise. 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 meaning that the statute cannot impose liability for conduct that

consists of speech alone, unless that speech falls into an established First Amendment exceptions such as true threats or fighting words. The case was argued in October 2022.

In June 2023, the court, by a vote of 6 to 2, adopted our theory about the meaning of the exemption and ordered Mr. Boone's lawsuit to be dismissed.

Dashtamirova v. United States
Date filed: October 14, 2020 **Status: Victory!**
ACLU-D.C. 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. Dashtamirova 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 gale 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 protest 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-D.C. filed a formal administrative complaint on Ms. Dashtamirova's behalf, challenging the National Guard's conduct and demanding accountability.

Having received no response to the administrative complaint, in March 2023 we filed suit in federal court on behalf of Ms. Dashtamirova under the Federal Tort Claims Act, in the hopes that future protestors do not face similar invasions of their rights.

We negotiated a settlement with the United States under which it agreed to pay compensation to Ms. Dashtamirova. We hope this result and the public outcry over the attack will send a strong message that the government should not use military tactics against protesters.

Black Lives Matter D.C. v. Barr (originally Black Lives Matter D.C. v. Trump)
Date filed: June 4, 2020 **Status: Open**
ACLU-D.C. attorneys: *Scott Michelman*, Art Spitzer, Michael Perloff, Megan Yan, J. Holden, Simone Wallk, 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 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. We 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 argued 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 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 nonetheless 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: (i) 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"; (ii) protect demonstrators by requiring Park Police to enable the safe withdrawal of demonstrators if a protest is being dispersed; (iii) protect demonstrators by requiring Park Police to provide audible warnings before dispersing a crowd; (iv) promote accountability by requiring Park Police to wear clearly visible identification; (v) prohibit discriminatory policing based on race, color, sex, national origin, religion, sexual orientation, gender identity or expression, disability, or viewpoint; and (vi) 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. 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.

On June 23, 2023, the court of appeals affirmed the dismissal of our constitutional damages claims, concluding that "national security concerns regarding the safety of the President and the area surrounding the White House" provided an adequate reason to dismiss our claims seeking damages. While two of the judges on the three-judge panel made clear that they thought the injured protesters ought to be able to sue, they agreed that the Supreme Court's recent decisions had essentially made it impossible for people to sue federal officials for damages when those officials violate constitutional rights.

In November 2023, we sought permission from the trial court to add additional claims against the federal officers along with claims against the United States government. In March 2024, the court granted our motion in part, and so in April 2024 we filed our Fourth Amended Complaint to add the claims allowed by the court: two claims against the United States under the Federal Tort Claims Act for the actions of its officers, and two claims on behalf of BLM-DC based on the D.C. First Amendment Assemblies Act. We also continued to pursue constitutional claims against the D.C. officers who participated in the attack on the demonstrators. In August 2024, the federal government moved to dismiss our new claims, and we moved for permission to proceed as a class action to obtain compensation for as many of the civil rights demonstrators as we can.

Guffey v. Mauskopf (formerly Guffey v. Duff)
Date filed: May 31, 2018 **Status: Victory!**
ACLU-D.C. 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 9 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 AO. 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 sought rehearing by the full court of appeals, which was denied in January 2023. Later that year, the government paid to settle our claim for attorneys' fees following our victory.

Meanwhile, in response to the decision, the AO undertook a review of its Code. Finally, in February 2024, the AO eliminated all the restrictions we challenged, as to nearly all employees of the agency. The new Code provides that all but a handful of AO employees are free to engage in the types of everyday political activity at issue in our case, so long as the employees do not do so using government resources, while at work or on work time, or while identifying themselves with their employer.

Ultimately, then, our victory in this case led to the restoration of political speech rights for over a thousand government employees.

IMMIGRANTS' RIGHTS

Las Americas Immigrant Advocacy Ctr. v. U.S. Dep't of Homeland Security ("Las Americas II")
Date filed: June 12, 2024 **Status: Open**
ACLU-D.C. attorneys: Art Spitzer, Scott Michelman
Co-counsel: ACLU Immigrants' Rights Project; Jenner & Block LLP; National Immigrant Justice Center, Center for Gender & Refugee Studies, Texas Civil Rights Project

On June 3, 2024, President Biden suspended entry into the United States across the southern border, with limited exceptions, thus effectively denying refugees entering from Mexico the ability to seek asylum, unless they enter at an official border crossing after making an appointment on the internet.

On June 12, we sued to challenge this new asylum ban, as we had challenged a similar ban imposed by President Trump. The new policy violates federal law, which allows noncitizens arriving in the United States "whether or not at a designated port of entry" to seek asylum. The new policy also unlawfully raises the standard a refugee must meet to obtain temporary protection from being sent home to face torture. And rather than being asked about fear of return, a person must affirmatively "manifest" a fear of persecution or torture, without being asked. We are asking the court to rule that the new rules are contrary to law, arbitrary and capricious, and procedurally invalid.

Both sides moved for summary judgment, which is pending.

(Update: Immediately after his inauguration, President Trump completely prohibited refugees arriving at the southern border from applying for asylum, even when they had appointments to appear for that purpose at ports of entry. The next day we filed emergency papers challenging that action.)

M.A. v. Mayorkas
Date filed: June 23, 2023 **Status: Open**
ACLU-D.C. attorneys: Art Spitzer
Co-counsel: ACLU Immigrants' Rights Project; National Immigrant Justice Center, Center for Gender & Refugee Studies

After various attempts by the Trump administration to prevent refugees from exercising their rights to seek asylum, the Biden administration began trying to do the same thing.

As part of the nation's longstanding commitment to protect people fleeing persecution, Congress has provided that any noncitizen who is physically present or arrives in the United States may apply for asylum. Even when it created the "expedited removal" process permitting rapid removal of certain noncitizens who enter without permission, Congress sought to ensure the U.S. would not wrongfully return people to potential persecution. Accordingly, Congress established a screening process called the "credible fear interview," in which people avoid removal by showing only a "significant possibility" that they could establish eligibility for asylum after a full hearing in immigration court.

In May 2023, the administration issued a new immigration regulation dramatically departing from the process that Congress created for credible-fear screening; its effect was to virtually eliminate access to asylum for most non-Mexicans who enter the U.S. at the southern border without permission. Under the new regulation, non-Mexican adults and families who do not enter the U.S. through approved channels at the southern border must show, at their credible fear interviews, that they are not *in fact* barred from asylum—a far stricter showing than the "significant possibility" standard enacted by Congress. The new regulation also applies a new, stricter screening standard for claims to other forms of immigration protection (such as under the Convention Against Torture). And the new regulation reduces the time

between a person's apprehension and the credible fear interview to just 24 hours, leaving almost no time for noncitizens to consult with anyone or to meaningfully prepare for these often life-or-death interviews.

In June 2023, we sued to challenge the new regulation's application to credible fear interviews. (Other parts of the new regulation were challenged in a separate ACLU lawsuit filed in California.) The complaint asserts that the new regulation violates the Immigration and Nationality Act and the procedural and substantive requirements of the Administrative Procedure Act.

The case was stayed in early 2024 while the parties discuss settlement.

Florence Immigrant & Refugee Rights Project v. U.S. Dep't of Homeland Security
(formerly Americans for Immigrant Justice v. U.S. Dep't of Homeland Security)

Date filed: October 13, 2022 **Status: Open**

ACLU-D.C. attorneys: Art Spitzer

Co-counsel: ACLU National Security Proj.; ACLUs of Ariz., Fla. and Tex.; Milbank LLP

ACLU v. U.S. Dep't of Homeland Security (ICE counsel access FOIA)

Date filed: September 28, 2022 **Status: Closed**

ACLU-D.C. 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 these people, access to counsel can make a huge difference both to their freedom and their ability to remain in the United States. If they have legal representation, detained immigrants are almost seven times more likely to be released from custody while their cases are being adjudicated and more than 10 times more likely to win their immigration cases.

Although the government does not provide lawyers, immigrants have a right to counsel if they can find one. That task is made much harder by systemic barriers to communication in ICE detention centers. ICE limits detained immigrants' access to counsel by barring phone calls (or making them exorbitantly expensive), by denying or delaying in-person legal visits, by failing to provide confidential settings for calls and visits with lawyers, and by making video conferences or email unavailable to communicate with counsel, even at detention centers in remote locations far from lawyers' offices.

In September 2022, we filed a FOIA case seeking ICE policies regarding access to counsel at ICE detention centers, as well as ICE documents about compliance problems 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 represented 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; 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.

In February 2023, the court granted relief at one facility (Florence)—ordering ICE to create spaces where detainees could meet confidentially with their lawyers—but denied relief at others on various grounds, including uncertainty about plaintiffs' standing to represent detainees at other facilities. The government then moved to have the case dismissed or split into four separate cases and transferred to federal courts in the states where the facilities are located. We opposed, but the court granted the motion to split the case and transferred the portions involving the facilities in Florida, Louisiana, and Texas to federal courts in those states. The ACLU-D.C. is no longer involved in the transferred cases.

In August 2023, we filed an amended complaint regarding the ICE facility in Florence, Arizona. The government moved to dismiss that complaint and we opposed; briefing concluded in October 2023.

ACLU of Florida v. ICE
Date filed: April 25, 2022 **Status: Closed**
ACLU-D.C. 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. 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. In September 2023, the court denied the government's motion to dismiss the case. The National Archives then investigated the possibility of recovering content from tapes that had been overwritten and determined that no recovery was possible. Because there are no longer any ICE detainees at Glades and no plans to re-house them there, we agreed to dismiss the case in February 2024.

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

Texas Civil Rights Project v. Wolf
Date filed: July 24, 2020 **Status: Closed**
ACLU-D.C. 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-D.C. 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

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

In the spring of 2020, the Trump administration began 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. Code, which led news outlets to call this Trump's "Title 42" policy, even though Title 42 is a massive collection of diverse federal laws). Trump's "Title 42" order authorized the summary removal of immigrants in contravention of federal immigration law providing the opportunity to seek humanitarian protection from being deported into danger, and without due process—even for immigrants who show no signs of having COVID. The policy's illegality was especially clear as to minors who arrive unaccompanied by an adult, because they are entitled to special legal protections.

On June 9, 2020, we challenged the policy in two cases—one on behalf of J.B.B.C., a 16-year-old fleeing persecution in Honduras, and one on behalf of G.Y.J.P., a 13-year-old from El Salvador who came to the U.S. to join her mother. Although G.Y.J.P.'s mother had legal protection in the U.S. and lived here lawfully, G.Y.J.P. was quickly returned to El Salvador under the new policy, without legal process.

On June 24, the court in *J.B.B.C.* agreed that the new policy was likely unlawful; accordingly, the court blocked the removal of our client. We added a second plaintiff to this case, but the government stopped trying to expel him. We voluntarily dismissed *J.B.B.C.* in August 2020.

The government moved to dismiss *G.Y.J.P.*, arguing that the plaintiff's return to El Salvador made the case moot. In December 2020, the court denied the motion, explaining that whether or not it could order the plaintiff returned, it could still order meaningful relief by striking down the policy and preventing her from being expelled under it should she reach the U.S. 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.

Meanwhile, on July 24, 2020, we filed a third case (*Texas Civil Rights Project v. Wolf*) seeking emergency relief, after 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 resulted in some relief for individuals, none blocked the Title 42 policy more broadly 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 Guatemalan refugee who fled to the U.S. after he was threatened with death because of his father's political opinions and because he refused to join a gang. To prevent the government from mooting this case, we moved to have the case certified 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 Title 42. As in earlier cases, the government 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 (just as the court ruled in *J.B.B.C.*) the government's policy was probably illegal. The government appealed.

On January 29, 2021, the appeals court stayed the injunction (i.e., allowed the government to resume expelling unaccompanied minors under Title 42). But the next day the Biden administration suspended the expulsion policy for unaccompanied minors. Although our injunction was in place for only about two months prior to the stay, the policy was never reinstated as to unaccompanied minors.

Ultimately, the government's COVID emergency declaration expired in May 2023, and the entire Title 42 immigration policy (as to adults as well as minors) ended with it. In November 2023, the parties agreed that the preliminary injunction was no longer necessary and stipulated to the dismissal of *P.J.E.S.* without prejudice. To learn about our case against the application of Title 42 to families (not just minors), see *Huisha-Huisha v. Gaynor*, next.

Huisha-Huisha v. Gaynor
Date filed: January 12, 2021 **Status: Victory!**
ACLU-D.C. 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. (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 challenged 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 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 without the procedures required by the immigration laws, but that, under a provision of immigration law 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, the government cannot expel them unless it finds some other country to accept them. 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 hinted that it likely is, because "this is March 2022, not March 2020," and the "order looks . . . 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, the government terminated the expulsion policy as unnecessary, because "less restrictive means are available to avert the public health risks." However, the termination order was preliminarily enjoined in May 2022, in a different lawsuit filed in another state by Louisiana and other states, on the ground that government had failed to comply with notice-and-comment requirements of administrative law. 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 court to order the government to stop enforcing the policy because it was arbitrary and capricious. The court granted our motion on November 15, 2022, because the government 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 government's health goals (such as testing, vaccinations, and outdoor processing). Additionally, the government lacked evidence that its policy would be effective in preventing the spread of COVID, 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 (for example, it didn't apply to tourists or commercial truck drivers). The court therefore vacated the policy and enjoined its application to the plaintiff class. The court delayed the effectiveness of its order through December 21, in order to give the government time to prepare for the transition back to enforcement of regular immigration laws.

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.

After we filed our brief in the Supreme Court on the intervention question, the President announced in February 2023 that he intended to let the COVID public health emergency expire on May 11, which would automatically terminate the public health justification for the Title 42 program. The Supreme Court thereupon removed the case from its March argument calendar. After the public health emergency expired on May 11, the district court's opinion was vacated, and the case dismissed, as moot. Nonetheless, our case succeeded in enjoining the Title 42 policy for fifteen months, from September 2021 to December 2022, and the Title 42 policy ended in May 2023.

Samma v. Department of Defense
Date filed: April 28, 2020 **Status: Open**
ACLU-D.C. 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 was serving 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; the Pentagon would be unable to meet its recruitment goals without enlisting non-citizens with essential skills such as medical or technical 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 but obeyed the injunction.

The challenged policy was rescinded in June 2021, and the appeal was held in abeyance for nearly four years while the Biden administration considered policy changes. When no policy changes were forthcoming by summer 2024, we asked the court of appeals to set a briefing schedule, which it did, and briefing ended in October 2024. In December, the court asked for briefing on whether the case had become moot. (Update: Supplemental briefs were filed, and the case was argued, in January 2025.)

U.T. v. Barr
Date filed: January 15, 2020 **Status: Open**
ACLU-D.C. 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 in January 2020 to challenge the government's use of its new agreements to unlawfully slam our nation's doors on people fleeing persecution. 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. En route to the U.S., he traveled through Guatemala, where he was subjected to homophobic harassment and where the U.S. proposed to send him. Another client is M.H., a Honduran mother who fled to the U.S. with her young daughter because they feared for their safety after M.H.'s common-law husband and her sister-in-law were murdered by gangs in Honduras.

After we briefed summary judgment, in February 2021 the asylum cooperative agreements at issue in this case were terminated, and President Biden signed an Executive Order directing the Attorney General and the Secretary of Homeland Security to review and determine whether to rescind the rule we had challenged. The court stayed the case pending that review. As of January 2025, it remains stayed.

Las Americas Immigrant Advocacy Center v. Wolf ("Las Americas I")
Date filed: December 5, 2019 **Status: Victory!**
ACLU-D.C. 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 persecution. Previously, individuals who crossed the border seeking asylum were transferred to ICE detention centers, at which immigrants have phone access 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)—

required 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, were legal black holes in which migrants had no meaningful way to obtain or consult with an attorney before their hearings. After 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 intended 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 could reach someone, the agency did not provide a system to locate people in custody or any means to reach them by telephone, so no one could 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 Immigrant Advocacy Center, a non-profit organization that provides legal services to immigrants detained by the federal government in the El Paso area, was 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 our 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 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. In response, the Biden administration paused the PACR/HARP programs; both our motion for reconsideration and our appeal were likewise paused while the government decided what to do about the programs.

In July 2024, the Department of Homeland Security formally rescinded the challenged policies along with all related guidance, and the removal orders against our clients were formally cancelled. In August 2024, we voluntarily dismissed the appeal and the district court case as moot.

Damus v. Nielson
Date filed: March 15, 2018 **Status: Open**
ACLU-D.C. 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 (including monthly reporting) but denied broader relief. The case is now stayed for settlement talks.

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

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

ACLU-D.C. 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 those visas to be issued to the first 50,000 lottery winners who are eligible and not otherwise barred. 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 U.S. (this was the "Muslim Ban," which the ACLU and other groups separately challenged; the first two versions of the ban were struck down by the courts; the Supreme Court ultimately upheld the third). Although entry into the U.S and the issuance of visas (which confers eligibility for future entry) are distinct, the State Department denied diversity visas to nationals from the countries to whom the ban applied. As a result, some lottery winners lost their rare chance at a U.S. immigrant visa.

In August 2017, we filed a class-action lawsuit on behalf of diversity lottery winners and their family members 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 superseded by a new version. However, the plaintiffs' visa applications were still not being processed, so we appealed the dismissal. 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.

In January 2021, President Biden directed the Secretary of State to develop a plan for providing diversity visas to people whose visas had been blocked by the Trump Muslim Ban, and we agreed to hold the lawsuit in abeyance. However, the State Department concluded that it had no authority to disregard the statutory prohibition on issuing these visas after the end of the fiscal year for which the lottery was held. Then in June 2024, the D.C. Circuit Court of Appeals ruled that the courts had no power to order the State Department to issue visas after the statutory deadlines for doing so had passed. We concluded that further litigation would be unavailing. In January 2025, we dismissed the case on behalf of our clients.

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-D.C. 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: Victory!**
ACLU-D.C. 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.) In April 2022, having received no records, we filed this lawsuit to obtain them. The government produced its responsive records by early 2023, and in March 2023 we informed the court that we were satisfied with the production. In September 2023 the case was settled for a small payment of attorneys' fees.

Weir v. United States
Date filed: June 12, 2019 **Status: Victory!**
ACLU-D.C. 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-D.C. 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 were 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 suffer physical and psychological trauma. The men also returned to their families financially ruined due to the Coast Guard's destruction of their fishing boat and equipment and their trauma-induced fear of going to sea.

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 the destruction of their property. Plaintiffs also sought declaratory and injunctive relief against the Coast Guard so that they could 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 FOIA 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.

After full discovery, and with the assistance of a mediator, the United States agreed to pay a total of $97,500 to the plaintiffs to settle the case. The plaintiffs received their compensation in May 2024.

OTHER CIVIL LIBERTIES ISSUES:
RULE OF LAW, GOVERNMENT TRANSPARENCY, VOTING RIGHTS

Voting Rights Project detail
Date: Oct.-Nov. 2024
ACLU-D.C. attorneys: Michael Perloff
Co-counsel: ACLU Voting Rights Project

In response to a wave of litigation that needed to be filed or prepared in the lead-up to the 2024 election, we detailed senior staff attorney Michael Perloff to the National ACLU's Voting Rights Project for eight weeks. While there, he assisted with vote-counting litigation in Arizona, vote-purging litigation in Wisconsin, voter registration litigation in South Carolina, and preparations for cases (if needed) to maximize ballot access in Nevada and Wisconsin. He also contributed to a couple of VRP's longer term projects, including Alabama redistricting litigation and research in advance of the development of the next decennial census.

Trump v. United States
Date filed: April 8, 2024 **Status: Amicus**
ACLU-D.C. attorneys: Scott Michelman, Art Spitzer
Co-counsel: National ACLU

In August 2023, then-former President Donald Trump was indicted in federal court on criminal charges related to his efforts to overturn the results of the 2020 Presidential election. The indictment alleged, among other things, that Trump conspired to defraud the United States by interfering with the counting and certification of the election results in several states and to obstruct the congressional proceedings to certify the election results on January 6, 2021, when a large group of Trump supporters stormed the U.S. Capitol.

Seeking to have the charges dismissed, Trump claimed that, as a former President, he is immune from criminal prosecution for acts while in office. Both the trial court and the appeals court rejected this view. The Supreme Court granted review. Together with the National ACLU, we urged the Court to reject the dangerous proposition that an elected head of state is above the criminal law—a position at odds with history, constitutional structure, and the rule of law.

Our brief argued that, while it has long been presumed that while prosecuting a sitting President may be barred, prosecution after he leaves office is permitted. This assumption was reflected, famously, in President Ford's pardon of President Nixon following the Watergate scandal. Indeed, at his second impeachment trial, even former President Trump himself suggested the possibility of criminal prosecution of a former President. In drafting the Constitution, the Framers carefully provided certain immunities, including for members of Congress attending sessions in the House or Senate chambers. But the Framers explicitly provided no immunities for the president. The separation of powers, and the rule of law on which it depends, would be undermined if Presidents were above criminal accountability. The United States does not have a king, and former presidents have no claim to being above the law. A functioning democracy depends on our ability to critically reckon with the troubling actions of government officials and hold them accountable. If the President is free, as counsel for Trump argued in court, to order the assassination of his political opponents and escape all criminal accountability even after he leaves office, then our constitutional system contains a fatal flaw that would-be tyrants will exploit—at the cost of our freedoms and the rule of law.

In July 2024, the Supreme Court ruled (6-3) that presidents are entitled to absolute immunity from criminal prosecution for actions taken within their core constitutional authority, and to presumptive immunity from prosecution for all official acts, but are not entitled to immunity for unofficial acts. After Donald Trump won the 2024 presidential election, the government dismissed the case, so we will not find out which (if any) of the charges were based on unofficial acts. The dismissal was "without prejudice," however, so it is not impossible that some charges will be re-filed after January 20, 2029.

Connell v. CIA

Date filed: May 25, 2023 **Status: Open**

ACLU-D.C. attorneys: Art Spitzer, Scott Michelman

Co-counsel: ACLU National Security Project

Sometimes, in a Freedom of Information Act case, the mere disclosure that the government has, or doesn't have, documents responsive to a request would disclose facts that the government is entitled to keep secret. For example, in the mid-1970s, the D.C. Circuit ruled that the CIA could refuse to confirm or deny that it had any records relating to a ship called the Hughes Glomar Explorer (which turned out to be a ship the CIA was using to try to salvage a sunken Soviet submarine) because the mere disclosure that it had such records would reveal that the ship had a connection to the CIA. From that case, a response to a FOIA request of "we cannot confirm or deny that we have any responsive records" has come to be called a "Glomar response."

Because a Glomar response completely defeats a FOIA request, without requiring the government to explain why the content of relevant documents are covered by one of the FOIA's exemptions, it provides a tempting opportunity for abuse by agencies that want to keep secrets. And the CIA has been using it more and more. We agreed to litigate this appeal of the CIA's invocation of Glomar to ask the D.C. Circuit to help curb the agency's overuse of this magic word.

Plaintiff James G. Connell III, a lawyer representing a detainee at Guantanamo Camp VII (a site for "high-value detainees"), made a FOIA request for records regarding the CIA's operational control of Camp VII. The CIA produced three responsive records, but then said "Glomar" as to anything else. The district court upheld the CIA's response and dismissed the case.

Our appeal argues that the CIA has not shown that it is logical or plausible to believe that its Glomar response is necessary to protect agency secrets. Additionally, we argue, prior official statements about Camp VII, including in a congressional report that the CIA vetted, have disclosed that the CIA did have some operational control of Camp VII, thereby undermining the claim that disclosing the existence of responsive documents would reveal a secret. We asked the court of appeals to order the CIA to disclose that it does have relevant documents, so that the FOIA litigation can move to the next step, where the CIA can argue why specific documents or parts of documents are exempt from disclosure because they contain classified information or other legitimate secrets.

In August 2024, the D.C. Circuit ruled against us, concluding that there had been no "official acknowledgement" by *the CIA itself* that it had operational control of Camp VII, and as a result it was "plausible" that revealing the existence or nonexistence of records about the CIA and Camp VII "could reveal intelligence sources and methods information."

In November 2024, we asked the Supreme Court to hear the case, to correct the erroneous view by the court of appeals that, when evaluating a Glomar response, it must ignore all evidence that does not come from the agency to which the FOIA request was directed.

District of Columbia v. Terris, Pravlik & Millian

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

ACLU-D.C. attorneys: Art Spitzer

Co-counsel: Public Citizen Litigation Group

The D.C. FOIA includes a provision requiring District 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 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.

APPENDIX: PRO BONO CONTRIBUTORS TO ACLU-D.C. LEGAL WORK, 2023-24

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**We are also grateful to Sidley Austin LLP for their Sidley Fellows program, which each year provides us with the services of 1-2 talented incoming first-year associates for ten-week periods to support our work, at no cost to the ACLU-D.C. Several of the volunteer individual attorneys listed above were Sidley Fellows.*

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National Immigration Law Center
Oxfam America
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Texas Civil Rights Project
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