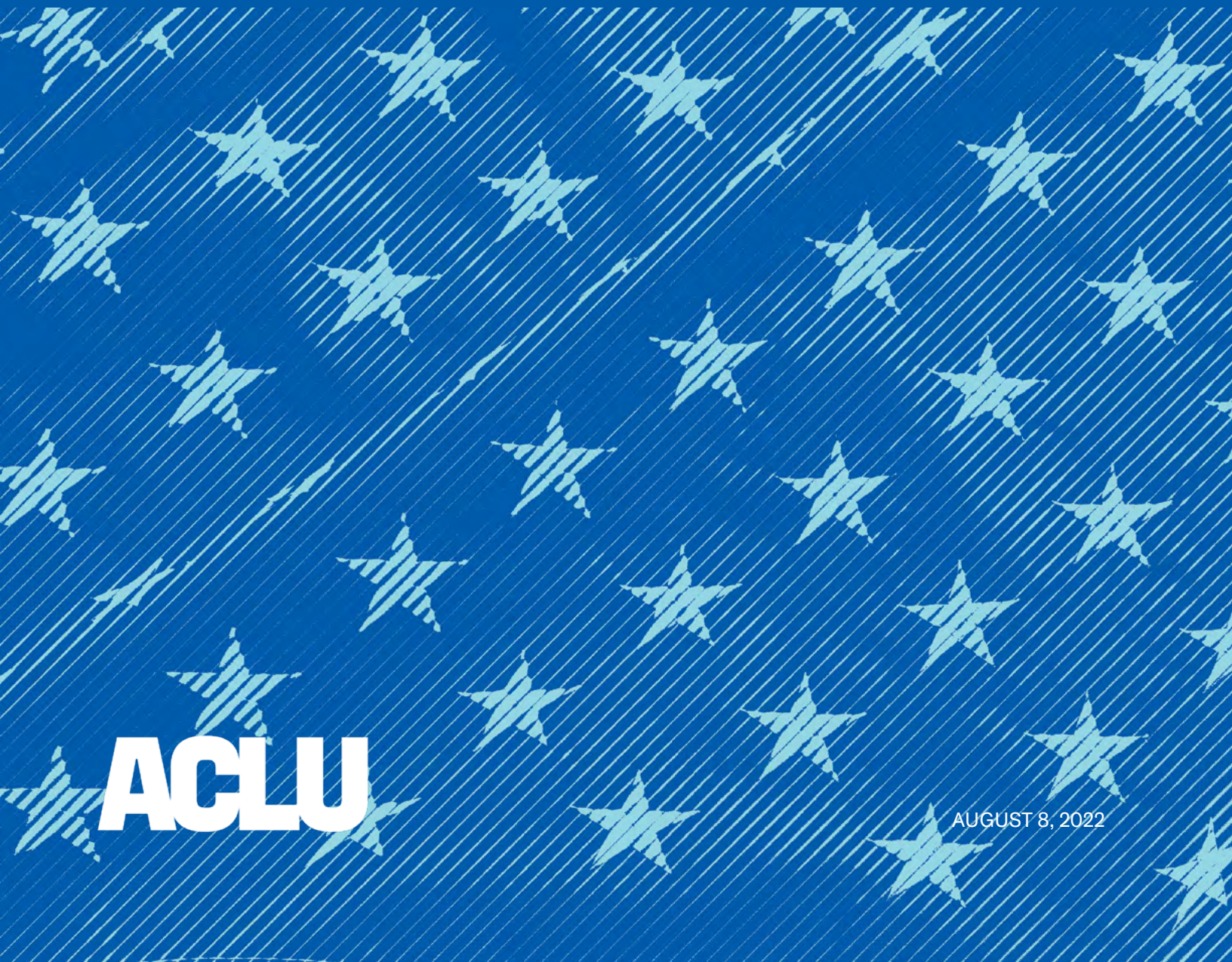
Our New Federalism

Using State Constitutions and Statutes to Advance Civil Rights and Civil Liberties



ACLU

AUGUST 8, 2022

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Introduction

As the federal judiciary has become increasingly hostile to rights protections, the ACLU has, where appropriate, turned to state courts and invoked state rather than federal claims to advance civil rights and civil liberties. This survey features more than 125 cases, filed within the last five years or so across 24 states and the District of Columbia. In these cases, the ACLU, in partnership with its state affiliate offices, has advanced arguments, most often in state courts based on state constitutional and statutory civil rights provisions, seeking protections above and beyond what federal law provides. This list is not exhaustive, but it provides a snapshot of the wide range of claims that we have pursued through state constitutional and civil rights litigation. The cases include:

- Rights of democratic participation, such as the rights to vote, protest, and obtain an education;
- Right to receive health care free from discrimination;
- Right to reproductive freedom, including abortion;
- Privacy rights against search and seizure;
- Rights against cruel punishment, including the death penalty, solitary confinement, and prolonged incarceration of juveniles;
- Challenges to local law enforcement of federal civil immigration laws, including detaining immigrants after their criminal cases have been resolved;
- Protection from the criminalization of poverty through bail, fines and fees, and anti-panhandling ordinances; and
- Right to be free from discrimination on account of transgender identity, sexual orientation, disability, race, and other protected characteristics.

By pursuing state claims, plaintiffs can litigate in state courts, which may be more receptive than federal courts. If cases assert only state claims and no federal claims, the defendants generally cannot "remove" the case to federal court, and the U.S. Supreme Court will have no jurisdiction to intercede if the decision rests on an "independent and adequate" state law ground.

In addition, state claims allow us to pursue arguments where no federal constitutional right exists (such as a right to education) and to argue that state-protected rights are more expansive than the corresponding federal right. The federal Constitution establishes a floor below which states cannot fall, not a ceiling, and state legislatures and courts are free to provide greater protection under their state law than the federal Constitution affords.

State courts are not a panacea, to be sure. Some state supreme courts are unsympathetic to civil rights and civil liberties claims. And state court decisions have immediate effect only in the state in question.

Politics can also complicate matters. Some state court judges must run for re-election, and to that extent may be less likely to protect civil rights and civil liberties where those claims are not likely to be popular. Some state legislatures exercise control over state courts. In addition, many states also make it fairly easy to amend their state constitutions through ballot measures, which have at times been used to overturn constitutional decisions. (For example, California voters approved Proposition 8 in 2008, which reversed

a prior marriage equality victory in the California Supreme Court.)

But, as this survey demonstrates, state courts and state law claims provide a viable alternative in more states than one might think. And as the early marriage equality victories in Vermont, Massachusetts, Connecticut, California, Iowa, New Mexico, and New Jersey demonstrated, a win in one state on state constitutional grounds can pave the way for similar victories in other states—and can pave the way for federal recognition of a right.

The report that follows gives short descriptions of each case, with links to further resources where available. The report covers a lot of ground, but here are a few highlights where the ACLU has successfully used state constitutional provisions and state civil rights statutes to obtain greater protections for individuals than those recognized by federal law.

Due Process

The ACLU of Massachusetts succeeded in obtaining the dismissal of thousands of cases involving misconduct by a lab technician, which the attorney general's office then concealed from criminal defendants. Invoking state and federal due process guarantees, as well as its superintendence authority over state courts, the Massachusetts Supreme Judicial Court ordered the dismissal of thousands of convictions and instructed a committee to propose changes to the state rules of criminal procedure. *Comm. for Pub. Counsel Servs. v. Attorney Gen.*, 108 N.E.3d 966 (Mass. 2018).

Indigent Defense

The ACLU of Northern California, along with ACLU of Southern California and the ACLU of San Diego and Imperial counties, brought a similar case alleging that the state and Fresno County systematically violated that state's constitutional and statutory right to effective assistance of counsel by underfunding the county's public defender system, and secured a settlement that adds $14 million for public defense throughout the state, as well as a commitment for greater funding for the county public defender. *Phillips v. State of California*, 15 CE CG 022101 (Fresno Cnty. Sup. Ct. 2016).

The ACLU of Hawai'i filed an amicus brief arguing that Hawai'i's state-based right to counsel in child custody proceedings should attach as soon as there is any prospect that the parents could lose custody of their children, and the Hawai'i Supreme Court agreed. *In re L.I.*, 482 P.3d 1079 (Haw. 2021).

Bail Reform

In Mississippi the ACLU challenged the practice of detaining criminal defendants who could not afford an attorney or cash bail for up to a year without appointing them counsel, and without formally charging them with a crime. Under state law, the right to counsel attaches early—when the initial appearance should be held—but in practice, this right was not being enforced. A settlement agreement recognized the right to counsel and the right to bail before conviction. The court ordered the counties to appoint public defenders at the time of arrest and prohibited them from detaining arrestees solely because they could not afford cash bail. *Burks v. Scott County*, No. 3:14-cv-745 HTW-LRA (S.D. Miss. 2014).

Equal Protection

In North Carolina, the ACLU secured a temporary restraining order and a court-ordered settlement on the grounds that school officials had violated the Equal Protection Clause of the state constitution when they forbade a transgender boy from using the boys' bathroom. *Doe v. Cleveland County Board of Education*, No. 20-CVS-142 (Sup. Ct. N.C. 2020).

In New York and California, where sexual orientation and gender identity are protected classes, ACLU affiliates challenged discrimination against incarcerated LGBTQ people under state constitution equal protection clauses, and successfully negotiated settlements that protect the rights of incarcerated

LGBTQ individuals. *Faith v. Steuben County*, No. E2019-1208CV (N.Y. Supp. Ct. 2020); *McKibben v. McMahon*, No. EDCV142171JGBSPX, 2019 WL 1109683 (C.D. Cal. 2019).

In Washington and New York, ACLU affiliates successfully used the equal protection clauses of their state constitutions to challenge the exclusion of certain workers from state employment protections. The ACLU of Washington filed an amicus brief in a challenge to Washington's exclusion of dairy workers from the right to overtime pay. And the NYCLU challenged the exclusion of farmworkers from the protections of the New York State Employment Relations Act, which enables workers to unionize. *Martinez-Cuevas v. DeRuyter Bros. Dairy, Inc.*, 475 P.3d 164 (Wash. 2020); *Hernandez v. State*, 173 A.D.3d 105 (N.Y. App. Div. 2019).

The ACLU of Washington invoked the equal protection, due process, and excessive punishment clauses of its state constitution to challenge the suspension of drivers' licenses because of their inability to pay fines and fees for moving violations. *Pierce v. DOL*, No. 20-2-02149-34 (Sup. Ct. Wash. 2021).

Voting Rights

The ACLU and ACLU of Montana secured a preliminary injunction to block laws that end election day registration and block organized ballot collection on rural reservations, arguing that such laws hinder Native American participation in the state's electoral process and thus violate the Montana Constitution. In this case, and a prior similar one, the state courts noted that the Montana Constitution protects the right to vote more strictly than the U.S. Constitution. *Western Native Voice v. Jacobsen*, DV 21-0451 (13th Judicial Dist. Yellowstone Cnty, Mont. Apr. 6, 2022); *Western Native Voice v. Stapleton*, DV 20-0377 (13th Judicial Dist. Ct. Yellowstone Cnty, Mont. Sept. 25, 2020),

Michigan's Constitution enshrines the right to vote by absentee ballot in the 40 days before an election. The ACLU of Michigan filed emergency lawsuits in 2020 to enforce this right in Flint and Detroit. In Flint, the court ordered the clerk to have her office open to the public every day until the election and to process all applications for absentee ballots within 24 hours of receipt. And in Detroit, the clerk agreed to process all applications within 24 hours, extend clerk office hours, and to address the backlog of absentee ballot requests. *Barkey v. Brown*, 20-114457-CZ (Mich. Ct., Genesee Cnty.); *Ganik v. Winfrey*, 2020–0103685-AW (Mich. Cir. Ct., Wayne Cnty.).

Search And Seizure

In a case involving a random, suspicionless search for evidence of train fare evasion on a public train platform, the ACLU of Oregon successfully argued that the stop lacked justification and was therefore unconstitutional under the search and seizure provision of the state constitution. *State v. Valderrama*, Case No. 18CR17532.

The ACLU of Vermont prevailed in challenging the seizure and search of a Black man's vehicle based on the faint odor of burnt marijuana. The Vermont Supreme Court held that the faint odor of marijuana did not establish probable cause. And the court held that the search and seizure provision permitted a private right of action for money damages, permitting a claim based on racial profiling. *Zullo v. State*, 205 A.3d 466 (Vt. 2019).

The ACLU of New Mexico brought a case on behalf of a Black woman alleging racial profiling in violation of the New Mexico constitution's seizure and equal protection provisions after she was pulled over three times in 24 days on the same stretch of road. The case was settled and the plaintiff received $100,000. *Crawford v. Bernalillo County*, No. D-202-cv-2017-08689 (N.M. Dist. Ct. 2020).

Arguing that a government demand for real-time location data was a search under the search and seizure provision of the Massachusetts constitution, the ACLU of Massachusetts filed an amicus brief in a case successfully arguing that real-time warrantless tracking by police pinging a cell phone for the phone's (and its owner's) location was unlawful. *Commonwealth v. Almonor*, 120 N.E.3d 1183 (Mass. 2019).

The ACLU of Minnesota, as amicus curiae, urged the Minnesota Supreme Court to hold that state constitutional privacy protections go beyond federal ones. In *Minnesota v. Leonard,* the court agreed and held an examination of a hotel guest registry conducted by law enforcement officers is a "search" under the Minnesota Constitution and thus officers must have at least reasonable, articulable suspicion before examining such a registry. *Minnesota v. Leonard,* 943 N.W.2d 149 (Minn. 2020).

Capital Punishment

The ACLU has leveraged state law to halt the use of the death penalty in multiple states. The ACLU of Montana challenged the state's execution protocols and achieved a de facto moratorium in 2015. In Washington, the ACLU and ACLU of Washington filed an amicus brief in *State v. Gregory*, which helped to convince the Washington Supreme Court to declare its death penalty unconstitutional under its state constitution. *Smith v. Kirkegard (Batista),* No. BDV-2008- 303; *State v. Gregory,* 427 P.3d 621 (Wash.

COVID-19 in Jails

In Orange County, California, the ACLU and the ACLU of Southern California sued in state court in over COVID-19 risks to vulnerable individuals in that county's jails, and in December 2020, the state court ordered the Orange County sheriff to reduce the detained population by 50 percent. A similar suit in Colorado state court led to a consent decree requiring the director of corrections to implement safety measures to mitigate the spread of COVID-19. *Campbell v. Barnes,* No. 30-2020-1141117 (Orange County Sup. Ct.).

Public Education

Although the U.S. Supreme Court has long refused to address inequities in public schools, state constitutions that guarantee a right to education have proven a fruitful source of protection. The New York Civil Liberties Union filed an amicus brief in case brought by parents of students who attended public schools in eight economically disadvantaged school districts that the court declaring that New York's inadequate funding for small city public school districts failed to provide "a sound basic education," and thus violated the state constitution. *Maisto v. State of New York,* 149 N.Y.S.3d 599 (3rd Dep't 2021).

The ACLU of New Mexico challenged a law that prohibited public school teachers from "disparaging" standardized tests, including because the law prevented teachers from providing critical information to parents and the community, thus interfering with students' state constitutional right to receive "a sufficient education." In response to the lawsuit, the New Mexico Public Education Department agreed to remove the gag rule. *Mackie v. NM Public Education Department,* No. D-101-CV-2016-00813 (1st Judicial Dist. Ct. Santa Fe Cnty. N.M.)

Case Survey

The cases are organized by subject matter and then alphabetically by state within each subject. Many cases touch on more than one subject, but each case appears only once.

Note: Cases are updated through March 2022.

REFERENCE

Links to State Constitutions Discussed in Report

Arizona	https://www.azleg.gov/constitution/
California	https://leginfo.legislature.ca.gov/faces/codesTOCSelected.xhtml?tocCode=CONS
Colorado	https://leg.colorado.gov/colorado-constitution
Georgia	https://advance.lexis.com/container?config=00JAAyNDIyN2JjNC04NzBkLTRiNGQtYj-cyNC04MjIxYTA1ZmI1OGYKAFBvZENhdGFsb2fj2wGx7D8FlWJs9VMmJTXe&crid=d0640321-062b-4c36-967a-2a4912892534&prid=54ad7447-d946-448c-82fa-eab313e37135
Hawai'i	https://lrb.Hawai'i.gov/constitution
Iowa	https://www.legis.iowa.gov/docs/publications/ICP/1023054.pdf
Kansas	https://www.kssos.org/other/pubs/KS_Constitution.pdf
Massachusetts	https://malegislature.gov/laws/constitution
Maine	https://www.maine.gov/legis/const/
Maryland	https://msa.maryland.gov/msa/mdmanual/43const/html/const.html
Michigan	http://www.legislature.mi.gov/(S(r3ss1vbpuxaquphays2jnitl))/mileg.aspx?page=GetObject&objectname=mcl-Constitution
Minnesota	https://www.revisor.mn.gov/constitution/#article_1
Mississippi	https://law.justia.com/constitution/mississippi/
Montana	https://courts.mt.gov/portals/189/library/docs/72constit.pdf
New Jersey	https://www.njleg.state.nj.us/lawsconstitution/constitution.asp
New Mexico	https://nmonesource.com/nmos/c/en/item/5916/index.do#!fragment//BQCwhgziBcw-MYgK4DsDWszIQewE4BUBTADwBdoByCgSgBpltTCIBFRQ3AT0otokLC4EbDtyp8BQk-AGU8pAELcASgFEAMioBqAQQByAYRW1SYAEbRS2ONWpA
New York	https://dos.ny.gov/system/files/documents/2022/01/Constitution-January-1-2022.pdf
North Carolina	https://www.ncleg.gov/Laws/Constitution
Oregon	https://sos.oregon.gov/archives/exhibits/constitution/Documents/transcribed-1857-oregon-constitution.pdf
Pennsylvania	https://www.legis.state.pa.us/WU01/LI/LI/CT/HTM/00/00.HTM
Utah	https://le.utah.gov/xcode/constitution.html
Virginia	https://law.lis.virginia.gov/constitution/
Vermont	https://legislature.vermont.gov/statutes/constitution-of-the-state-of-vermont/
Washington	https://leg.wa.gov/CodeReviser/Pages/WAConstitution.aspx

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Due Process

Arizona

- *State v. Urrea*, 250 Ariz. 282, 478 P.3d 1227 (2021). We filed an amicus brief in this case along with Arizona Attorneys for Criminal Justice, the state affiliate of the National Association of Criminal Defense Lawyers and conducted oral argument before the Arizona Supreme Court. The case involved a successful *Batson* challenge in the trial court, and the issue on appeal following Mr. Urrea's conviction was the scope of remedies under *Batson*. We argued that *Batson* establishes a remedial floor and state courts are free to impose more severe remedies. We also argued that the Arizona Constitution provides elevated protection for the right to a fair trial and an independent protection against racial discrimination in jury selection. *See* Ariz. Const. art II, §§ 13, 23, 24. While the court agreed with us that trial courts must be free to fashion remedies beyond those discussed in *Batson*, the court declined to address the state constitutional issues raised by us, noting that Mr. Urrea did not "preserve the state constitutional arguments advanced by amici."

  Westlaw link

California

- *Stiavetti v. Ahlin*, RG 15-779731 (2019). In this case, family members sued the directors of the Department of State Hospitals and the Department of Developmental Services on behalf of criminal defendants who had been found incompetent to stand trial because of mental illness or developmental disability. The plaintiffs challenge the length of time between when criminal defendants who are found incompetent to stand trial and when they are transferred from county jail into a treatment facility, which in some cases takes more than one year, as a violation of their due process rights under the California and U.S. constitutions. On March 22, 2019, the court ruled that the current length of time that criminal defendants must wait before being transferred from county jail violated their due process rights under California Constitution Article 1, Section 7 ("A person may not be deprived of life, liberty, or property without due process of law") and the 14th Amendment of the U.S. Constitution. The court additionally ordered these agencies to reduce the lengthy transfer delays and reach the 28-day admission standard with the reductions phased in over a three-year period. The court of appeals affirmed the lower court and the petition for review in front of the Supreme Court of California was denied.

  ACLU Page
  Court Order

- *Sanchez v. California Department of Transportation* (Cal. Superior Court, Alameda County). Claims against state agency for illegally seizing and destroying possessions of unhoused persons encamped on agency's rights-of-way. In addition to federal constitutional claims, asserted claims under the California Constitution's search and seizure provisions (Cal. Const. Art. I § 13); Due Process guarantee (Art. I § 7), as well as state-law statutory and common-law causes of action. The result was a comprehensive settlement agreement under which the agency agreed to make systemic changes to its procedures for dealing with the personal property of persons encountered during sweeps; established a fund to compensate persons whose property had been unlawfully seized; and paid over $3 million in attorney's fees.

  ACLU Page

- *Hernandez v. California Dep't. of Motor Vehicles* (Cal. Superior Court, Alameda County). Writ of mandate to compel DMV to end its practices of suspending drivers' licenses for alleged failures to pay traffic fines and failures to appear on traffic citations. Claims asserted under federal and state constitutional procedural due process clauses.

Resulted in changes to agency's procedures and attorney's fees.

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Massachusetts

- *Comm. for Pub. Counsel Servs. v. Attorney Gen.*, 480 Mass. 700 (2018). In this case, the court dismissed with prejudice thousands of cases involving misconduct by a former state chemist, Sonja Farak, which the attorney general's office then concealed from criminal defendants. Citing state and federal due process guarantees, the Massachusetts Supreme Judicial Court held that this concealment of exculpatory evidence warranted the drastic remedy of dismissal with prejudice. The court also recommended that an advisory committee draft a "Brady checklist" defining what exculpatory evidence is to amend Rule 14 of the Massachusetts Rules of Criminal Procedure. The Supreme Judicial Court's decision in the Farak litigation resulted in the dismissal of roughly 23,000 drug charges across at least 16,449 criminal cases.

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  Westlaw link

- *Bridgeman v. District Attorney for the Suffolk District*, 476 Mass. 298 (2017). The ACLU of Massachusetts, the Massachusetts public defender agency, and cooperating lawyers sought comprehensive relief for defendants affected by the misconduct of chemist Annie Dookhan when she was employed at the state's Hinton Lab. Among other things, this suit implicated the due process guarantee of article 12 of the Declaration of Rights of the Massachusetts Constitution ("every subject shall have a right to produce all proofs, that may be favorable to him"). The Supreme Judicial Court's decision in the Dookhan litigation resulted in the dismissal of roughly 37,000 drug charges across at least 21,332 criminal cases.

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Michigan

- *Bauserman v. Unemployment Insurance Agency*, SC No. 160813. Michigan's Unemployment Insurance Agency relied on a flawed computer program to falsely accuse thousands of citizens of insurance fraud and wrongfully eliminate their unemployment benefits, providing little recourse for them to challenge these determinations and sending some into bankruptcy and financial ruin. A group of affected citizens are suing the state for violating their rights to due process under the Michigan Constitution, Const 1963, art 1, § 17. The state is argued that there is no remedy in state court for this violation. It has long been an unsettled question whether Michigan law allows the recovery of damages from governmental officials who violate their rights under the state constitution. In May 2021, the ACLU of Michigan, along with the National Lawyers Guild, filed a friend-of-the-court brief urging the Michigan Supreme Court to once and for all hold that in almost all cases, people whose state constitutional rights are violated can recover money damages.

  Amicus brief

Right to Counsel/Indigent Defense

California

- *People for Ethical Operation of Prosecutors & L. Enf't (P.E.O.P.L.E.) v. Spitzer*, 53 Cal. App. 5th 391, 267 Cal. Rptr. 3d 585 (2020), as modified (Sept. 8, 2020). P.E.O.P.L.E. is an association of Orange County taxpayers and residents challenging the Orange County

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District Attorney's and Orange County Sheriff's departments' use of informants to coerce confessions from defendants in criminal cases or otherwise violate their right to an attorney, while failing to disclose evidence of those violations and law enforcement misconduct in criminal cases as unconstitutional under the right to due process under article 1, section 7 of the California Constitution and the guaranty of the right to an attorney and prohibition on the elicitation of incriminating information from criminal defendants after their right to an attorney has attached, in violation of article 1, section 15 of the California Constitution, in addition to federal constitutional claims. Defendants filed a motion to dismiss premised on the plaintiff's purported lack of standing and separation of powers concerns. The court granted the motion, and the plaintiffs appealed. The court of appeals reversed the motion, holding that plaintiffs had standing and separation of powers concerns did not preclude them from bringing suit under public interest and taxpayer standing doctrine because the scheme alleged violations of public rights under the U.S. Constitution that taxpayers and residents had an interest in upholding.

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- *Phillips v. State of California,* No. 15CECG02201. In July 2015, ACLU of NorCal, along with ACLU of SoCal, ACLU of San Diego and Imperial counties, and co-counsel Paul Hastings, filed a writ of mandate in Fresno Superior Court alleging that the state and Fresno County has systematically violated the constitutional and statutory right to effective assistance of counsel by underfunding the county's public defender system. Specifically, the lawsuit alleged violations of the California Constitution's right to counsel, right to due process, and right to a speedy trial (article I, section 15), in addition to federal constitutional claims. The court overruled the defendant's arguments in a demurrer, holding that under the sixth and 14th amendments, the fact that the state had delegated the responsibility of providing counsel to criminal defendants to municipalities did not absolve it of its responsibility to uphold the right to counsel. In January 2020, the parties reached a settlement in which the county agreed to allocate a minimum of $23.5 million to the Public Defender's Office in 2021 and at least $24 million for the next three years. Further, the state of California agreed to expand the mission of the Office of the State Public Defender by including $4 million in the annual proposed budget for 2020–2021 and $3.5 million for the foreseeable future.

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- *Sigma Beta Xi v. County of Riverside,* No. 5:2018cv01399. This class-action lawsuit brought by the ACLU Foundations of Southern California, Northern California, and San Diego and Imperial counties; the law firm of Sheppard, Mullin, Richter & Hampton LLP; and the National Center for Youth Law challenges Riverside County Probation Department's Youth Accountability Team (YAT). Over nearly two decades, more than 13,000 children ages 12–17 were placed into six months of invasive probation through a school-based scheme known as YAT. The lawsuit was filed on July 1, 2018, challenging YAT's design and implementation through three primary claims. First, YAT procedures violate due process, denying youth an understanding of their rights in relation to the program, the collateral consequences of accepting probation, and to assess meaningfully whether YAT probation is in their best interest under both federal and state constitutions (California Constitution article I, section 7). Second, the catch-all provision in section 601 of the Welfare and Institutions Code that creates the school-based offense of "defiance and incorrigibility" is vague under the federal and state constitutions (California Constitution article I, sections 2a, 3). Finally, the program has a disparate impact on students of color and other protected groups through California Government

Code 11135. A settlement was reached on July 24, 2019.

Settlement
Complaint
CA Government Code
Section 601 of the Welfare and Institutions Code

Hawai'i

- *In re L.I.*, 482 P.3d 1079 (Haw. 2021). Before the Hawai'i Supreme Court, the ACLU of Hawai'i filed an amicus brief together with Lawyers for Equal Justice, Legal Aid of Hawai'i, the National Association of Counsel for Children, and the National Coalition for a Civil Right to Counsel to argue that Hawai'i's right to counsel in child custody proceedings involving the state—established in an earlier case, *In re T.M.*, 319 P.3d 338 (2014) (holding that indigent parents have a right to counsel under article 1, section 5 of the Hawai'i Constitution in parental termination proceedings)—should attach as soon as there is any prospect that the parents could lose custody of their children, and that failure to appoint counsel is a structural error requiring reversal and not subject to harmless error analysis. The Hawai'i Supreme Court held that the failure to appoint the other counsel at the time the Department of Human Services (DHS) filed a petition for foster custody was structural error and, further, that the mother should have been appointed counsel at the time DHS filed its petition for family supervision.

  Oral argument link
  Westlaw link

Iowa

- *State v. Anderson/State v. Rose.* This case involved two defendants who were homeless and indigent, and as a result of the deprivation of counsel in their simple misdemeanor cases and their inability to pay the $300 scheduled bond, spent as much time in pretrial detention as the maximum penalty for the misdemeanors charged. We argued that a defendant is entitled to appointed counsel when facing the possibility of any length of jail time, even for simple misdemeanors, and won our efforts to get their convictions thrown out, and the state did not appeal. The next year, the state appellate defender won a case establishing this principal in the Iowa Supreme Court, State v. Young, 863 N.W.2d 249 (Iowa 2015). This case challenged the state's ability to use a prior misdemeanor charge that the plaintiff pled guilty to without counsel as an enhancement for a later charge. The Iowa Supreme Court held that under the right to counsel and the due process clauses of the Iowa State Constitution (article I, sections 10 and 9, respectively), criminal defendants have a right to counsel in simple misdemeanor cases in which any amount of jail time, no matter how short, is a possibility, regardless of whether they can afford an attorney. If a criminal defendant has not been given this right for any charge, that prior charge cannot be used to lengthen their incarceration for a later crime.

Massachusetts

- *Carrasquillo v. Hampden Cty. Dist. Cts.*, 142 N.E.3d 28 (Mass. 002020). The ACLU of Massachusetts submitted an amicus brief and presented oral argument on behalf of amici in a case concerning the shortage of bar advocates available to represent indigent criminal defendants in Hampden County. We argued that low compensation rates for bar advocates violate the right to counsel guaranteed by article 12 of the Massachusetts Constitution ("And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defense by himself, or his council at his election."). The Massachusetts Supreme Judicial Court held that that the shortage of bar advocates risked indigent criminal defendants' constitutional right to counsel, and called upon the State Legislature

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to increase the statutory compensation rates for bar advocates.

Court Docket
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Mississippi

- *Burks v. Scott County,* No. 3:14-cv-745 HTW-LRA (S.D. Miss. 2014). ACLU national, ACLU of Mississippi and the Roderick and Solange MacArthur Justice Center brought suit against four Mississippi counties, challenging their practice of detaining criminal defendants who could not afford an attorney for up to a year without appointing them counsel and without formally charging them with a crime as a violation of the Sixth and 14th amendments of the U.S. Constitution. In Mississippi, the right to counsel attaches when the initial appearance should have been held (see *Grayson v. State* 806 So.2d 241 at 247, interpreting Mississippi Constitution article 3 section 26), but in practice, this appointment of counsel occurred much later. These counties followed a policy by which criminal defendants were not appointed a lawyer until after they were indicted, and, as Mississippi does not limit how long criminal defendants can be held in jail prior to indictment, these individuals could be held in jail for months if they were unable to afford cash bail, as they had no attorney to argue for their release. In a settlement agreement and resulting court order, the U.S. District Court required these four counties to appoint public defenders at the time of arrest and hire a chief public defender to allow public defenders to work independently of judges, and prohibited counties from detaining arrestees accused of felonies solely because they could not afford cash bail (citing *Lee v. Lawson* 375 So.2d 1019, where the right to bail before conviction was recognized as enshrined in the Mississippi Constitution article 3, section 29). This settlement and court order chip away at the unconstitutional practice of wealth-based incarceration in rural Mississippi.

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Pennsylvania

- *Kuren v. Luzerne County,* 146 A.3d 715, 637 Pa. 33 (2016). The ACLU of Pennsylvania brought a class-action lawsuit on behalf of poor criminal defendants against Luzerne County, claiming that gross underfunding of the county Public Defender's Office led to widespread deprivation of poor criminal defendants' rights to adequate counsel. The lawsuit requested emergency relief for the Public Defender's Office because they could not take on some criminal defendants' cases, as they did not have the capacity to handle all of their cases due to underfunding and a resultant understaffing. The Pennsylvania Supreme Court held that criminal defendants had the right to sue counties to compel them to provide adequate funding to their public defender's offices in order to uphold criminal defendants' Sixth Amendment right to counsel. While the plaintiffs also brought their claims under the right to counsel in the Pennsylvania Constitution (article I, section 9), the Supreme Court did not expressly implicate this right in their holding.

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Utah

- *Widdison v. Utah*, 2021 UT 12, 489 P.3d 158 (Utah 2021). The ACLU of Utah recently filed an amicus brief with the Utah Supreme Court arguing that the Utah Constitution's due process clause requires several protections that must be provided by the Utah State Board of Pardons and Parole. In sum, we argued that the Board is required to provide counsel in relation to every hearing in which the length of sentencing is being determined (Utah is an indeterminate sentencing

state) and to provide extra protections when considering any purported criminal behavior for which the person was not convicted, and that the Board is not authorized to "expire" life-top sentences at all, but that even if it is, it cannot do so in all cases. This case is important because the federal courts have essentially said there is no liberty interest in parole, so there is no due process. The Utah Supreme Court ruled the case was moot because after the plaintiff filed an appeal, the Board paroled her.

Westlaw link

Bail, Fines & Fees

California

- *Mata Alvarado v. Los Angeles Superior Court,* BC 628849 (2016). In August 2016, the ACLU of SoCal, along with the Western Center on Law and Poverty, Clare Pastore, Rapkin & Associates LLP, Schonbrun Seplow Harris & Hoffman LLP, and A New Way of Life Reentry Project, brought a case to challenge the Los Angeles Superior Court's (LASC's) policy of unlawfully suspending the driver's licenses of low-income individuals who failed to pay traffic fines. At the time of filing, California statute provided that a person's driver's license could be suspended if they "willfully" failed to pay a traffic fine, but LASC had no process by which to determine whether a failure to pay was "willful" or if it was due to a person's inability to pay. We alleged that this practice violated state statute and the state and federal constitutional guarantees of due process. The Judicial Council subsequently promulgated new statewide rules that required courts to consider, upon the request of a defendant, a defendant's ability to pay traffic fines. On June 27, 2017, Gov. Jerry Brown signed a budget trailer bill that ended the practice of suspending driver's licenses for failure to pay traffic fines. The parties subsequently reached a settlement agreement under which LASC agreed to create new forms and notices informing drivers of their right to an ability-to-pay hearing; to conduct training for judges and clerks; and permit us to review the outcomes of a random sample of ability-to-pay determinations to monitor the settlement.

ACLU Page

Iowa

- *State v. Mathes*, No. 17-1909, 928 N.W.2d 160 (2019). At the invitation of the court, ACLU of Iowa, Iowa Legal Aid, and Fines and Fees Justice Center filed an amicus brief in the case challenging the imposition of fines and fees in dismissed criminal cases as unconstitutional. The Court of Appeals of Iowa had dismissed on procedural ground, holding that Mathes did not have the right of appeal from an order dismissing the criminal charge against her and she did not claim the district court acted beyond its authority. Equally divided, the Iowa Supreme Court affirmed "by operation of law" the appeals court's decision and dismissed the case.

Amicus brief
Westlaw Court of Appeals
Westlaw Supreme Court

Montana

- *Mitchell v. First Call Bail & Sur., Inc.*, 412 F. Supp. 3d 1208 (D. Mont. 2019). This suit was filed against a group of bounty hunters who forcibly entered a residence armed with AR-15s and wearing body armor to collect $115 owed to a bondsman, after one plaintiff accidentally missed a court date for a misdemeanor traffic charge. The bounty hunters kicked in the door and accosted three people, including a 4-year-old, who were asleep in bed. They then "arrested" one and transported him to the county jail. The bounty hunters were charged with aggravated burglary charge, but it was dismissed because the Notice of Bond forfeiture and bail bond agreement authorized the break-in (relying on

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Taylor v. Taintor for a common-law "bondsman privilege."). Plaintiffs sued the bounty hunters and the bail bondsman and insurance companies, arguing that they were all engaged in a joint enterprise under the federal Racketeer Influenced and Corrupt Organizations Act. The court denied the defendants' motion to dismiss and allowed the case to proceed. Later, the court partially granted plaintiffs' motion for summary judgment and declared the provision of a standard bail contract that effectively prevents consumers from suing the bail industry, and the provision that requires consumers to surrender their legal rights, as void and unenforceable. The case was settled on October 7, 2020.

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Pennsylvania

- *Philadelphia Community Bail Fund v. Arraignment Court Magistrates*, 21 EM 2019. The ACLU of Pennsylvania filed a challenge to cash bail directly with the Supreme Court of Pennsylvania—a petition for extraordinary relief under the Court's King's Bench Jurisdiction. The Pennsylvania Constitution gives the Supreme Court of Pennsylvania "general supervisory and administrative authority over all the courts and justices of the peace" (article V, section 10). It also mandates that all prisoners, with very narrow exceptions, "shall be bailable by sufficient sureties" (article 1, section 14). Unless the individual faces a capital offense or life imprisonment, a court may not refuse to release a person facing criminal charges unless "no other condition or conditions can reasonably assure safety of any person and the community" and the "proof is evident or presumption great." On July 8, 2019, the Supreme Court of Pennsylvania appointed a special master to conduct an inquiry into the "petitioners' allegations regarding systemic failures of the First Judicial District to properly conduct cash-bail matters pursuant to current law, as well as any suggestions for action by the court in response to those alleged failures." On July 27, 2020, the court forwarded to the court administrator the special master's report, as well as the filings of the parties, participants, and amici curiae, and relinquished jurisdiction.

  ACLU Page

- *McFalls v. The 38th Judicial District of Pennsylvania*, No. 4 M.D. 2021, 2021 WL 3700604 (Pa. Commw. Ct. 2021). On January 5, 2021, the ACLU of Pennsylvania, the law firm of Langer, Grogan & Diver P.C., and Seth Kreimer, a law professor at the University of Pennsylvania, filed a class-action lawsuit against the Montgomery County court administration for illegally charging defendants duplicative court costs when they are convicted of more than one charge. The case alleges violations of the due process of law guaranteed by the Pennsylvania Constitution's Declaration of Rights, including article I, sections 1, 9, and 11, and violation of the right to equal protection of the laws as guaranteed by the Pennsylvania Constitution article I, sections 1 and 26. In August 2021, the Court denied preliminary objections. The case is now in discovery.

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- *El v. 38th Jud. Dist.* (Pa. Commw. 2021). The ACLU of Pennsylvania, along with the ACLU's Criminal Law Reform Project and the law firm WilmerHale, sued the Montgomery County court system in October 2021, alleging a systemic failure to provide prompt preliminary hearings (*Gagnon I* hearings) for people alleged to have violated conditions of supervised release, mostly by people on probation. We also claimed that the system detained all people alleged to have violated conditions, regardless of whether the violation was purely technical and there was no basis to believe the person was a flight risk or threat to safety. Besides raising substantive and procedural due process claims under the 14th Amendment to the U.S Constitution, we alleged violations of Article 1, sections 1, 9, and 11 of the Pennsylvania Constitution, which require

respondents to potential violators with prompt hearings to determine whether (1) there is probable cause to believe they violated the terms of their supervision, and (2) incarceration pending a final hearing is necessary because the person is a risk of flight or danger to the community. The case is in discovery, with trial scheduled for September 2022.

ACLU Page

Washington

- *Pierce v. DOL,* No. 20-2-02149-34 (Sup. Ct. Wash. 2021). The ACLU of Washington filed a lawsuit on behalf of individuals who had their driver's licenses suspended by the Washington Department of Licensing (DOL) because they were unable to pay fines and fees for moving violations. The lawsuit claims that Washington's law authorizing automatic and mandatory license suspensions for failure to pay moving violation fines violates the state constitution's rights to due process (article I, section 3) and equal protection (article I, section 12), due to the additional punishments it levies on individuals with low or no income. The lawsuit also alleges that license suspension for failure to pay a ticket is an unconstitutionally excessive punishment (article I, section 14). On April 30, 2021, the court granted the plaintiffs summary judgment, ruling that it is unconstitutional for the Department of Licensing to continue to apply the state's current license suspension practices to indigent drivers.

  ACLU Page

- *Lemmon v. Pierce County,* No. 3:21-cv-05390-RSL (2021). The ACLU of Washington and the Terrell Marshall Law Group filed a class-action lawsuit on April 26, 2021, against Pierce County, claiming the county has violated the constitutional rights of thousands of people by referring their court debt to private collection agencies for missed payments and, in the process, punishing indigent people with additional charges despite their inability to pay. Specifically, the lawsuit alleges violation of Washington Constitution article I, sections 3, 12, and 14.

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Equal Protection

TRANSGENDER PEOPLE

California

- *Wood v. Crunch Fitness,* No. 37-2018-00019066-CU-CR-CTL. Christynne Wood is a transgender woman who has been a member of Crunch Fitness in El Cajon, California, for approximately 11 years. In 2016, she began her gender transition to female and notified Crunch management and employees of her transition. Thereafter, she was threatened and harassed while using the men's locker room. She reported the incidents to Crunch management and provided medical records verifying her gender identity, along with documentation of her legal gender and name change, but Crunch refused to allow her to use the women's locker room. Wood filed a complaint with the California Department of Fair Employment and Housing (DFEH), which enforces the Unruh Act, the state law against discrimination in business establishments (Civil Code section 51). After DFEH filed suit against Crunch, the ACLU of San Diego intervened in the DFEH case on behalf of Wood individually, with co-counsels ACLU Foundation of Southern California and Nixon Peabody LLP. In November 2021, a settlement was reached on behalf of Wood. Wood will receive a payment and Crunch Fitness has agreed that all its employees will undergo antidiscrimination training, including the identification and prevention of harassment based on gender expression.

  ACLU Page

- *Minton v. Dignity Health,* No. CGC 17-558259. Evan Minton is a transgender man who was scheduled to receive a hysterectomy in August 2016 at Mercy San Juan Medical Center, a hospital in the Dignity Health chain. Two days prior to the appointment, when a nurse called to discuss the surgery, Minton mentioned that he is transgender. The next day, the hospital canceled the procedure. With co-counsel Covington & Burling LLP, the ACLU foundations in California and the national ACLU Foundation filed suit against Dignity Health for unlawfully denying care to a transgender patient. On August 30, 2017, the court dismissed the complaint on the ground that Minton was able to obtain the surgery at another hospital. The Court of Appeal confirmed that it is illegal discrimination for a hospital to deny someone care simply because they are transgender and allowed the lawsuit filed by Minton against Dignity Health to move forward. Defendant's petition for review was denied by the California Supreme Court, and subsequently by the United States Supreme Court.

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Iowa

- *Good v. Iowa Dept. of Human Servs.*, 924 N.W.2d 853 (Iowa 2019) is a case with the LGBTQ & HIV Project challenging the discriminatory exclusion of gender-affirming surgery coverage in Iowa by Medicaid, and seeking to recognize transgender people in Iowa as a protected class under state constitutional equal protection. We won the case in March 2019 under the Iowa Civil Rights Act, with the Iowa Supreme Court declining to reach the state constitutional question.

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- *Covington v. Iowa Dept. of Human Servs.,* No. 19-1197. After the *Good* case was won under the Iowa Civil Rights Act (see above), the Iowa legislature amended the Iowa Code to specifically exclude all transgender people seeking Iowa Medicaid coverage for medical gender confirmation surgery from protection under the law. We brought suit last year with the LGBTQ & HIV Project to challenge that law as a violation of equal protection and other provisions under the state constitution. The district court found in our favor on the Iowa Equal Protection Clause and the Iowa Civil Rights Act claims. The state has appealed and the Iowa Supreme Court is expected to decide the case next adjudicative term.

  Opinion

- *Vroegh v. Iowa Dept. of Corrections,* No. LACL138797 (Iowa Dist. Ct. Polk Co. 2020). With the LGBTQ & HIV Project, the ACLU of Iowa challenged the denial of use of men's restrooms and locker rooms, as well as exclusion from insurance benefits of medically necessary gender confirmation surgery, for a former state employee, both under the Iowa Constitution and the state civil rights act. The district court dismissed our constitutional claims, but we tried our case to the jury and won in 2019, with the final order on post-trial motions denying the state's motion for a new trial/notwithstanding the verdict and granting our motion for attorneys' fees in March 2020. The decision has been appealed to the Iowa Supreme Court, where it is pending. Plaintiffs cross-appealed on denial of liability for the state's third-party insurer.

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Michigan

- *People v. Rogers*, 2021 WL 3435544. Michigan has a statute that enhances punishment for assaults that are motivated by race, religion, national origin, or gender. Although the ACLU generally opposes statutes that enhance punishments, there are many civil rights laws that prohibit discrimination on the basis of sex or gender, and the ACLU believes that they should be

interpreted as protecting LGBTQ people from discrimination. In 2018 a woman named Kimora Steuball was shot and seriously injured by a man who was harassing her for being transgender. The assailant was prosecuted under Michigan's hate crimes law, but the Michigan Court of Appeals ruled that the law does not cover crimes motivated by animus against transgender people. If the decision were to stand, it would likely affect whether people who are fired from their jobs or denied services in stores and restaurants based on their gender identity will be protected by any of Michigan's civil rights laws. In July 2020, the ACLU filed a friend-of-the-court brief asking the Michigan Supreme Court to take the case and rule that assaulting someone because they are transgender is an assault motivated by gender in violation of state law. In November 2020, the Supreme Court vacated the decision of the court of appeals and remanded the case to be decided pursuant to *Bostock*. On remand, the ACLU filed another brief, and the Court of Appeals reversed itself, ruling in August 2021 that the hate crimes law does cover assaults against transgender people.

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Amicus Brief
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- *Rouch World v. Michigan Department of Civil Rights,* 961 N.W.2d 153 (Mich. 2021). In 2019, the Michigan Department of Civil Rights (MDCR) began investigating two companies that were refusing to provide their services to LGBTQ people. The companies sued MDCR in state court, arguing that Michigan's Elliott-Larsen Civil Rights Act (ELCRA) prohibits discrimination based on sex but not based on sexual orientation or gender identity. The Michigan Court of Claims ruled that ELCRA does prohibit discrimination based on gender identity, but that it was bound by a 1993 Michigan Court of Appeals decision to rule that ELCRA does not prohibit discrimination based on sexual orientation. On appeal, the ACLU of Michigan, joined by national and state LGBTQ organizations and cooperating attorneys Leah Litman and Daniel Deacon of University of Michigan Law School, filed a friend-of-the-court brief with the Michigan Supreme Court, urging the court to bypass the Court of Appeals and take up the case immediately to overrule the 1993 decision and hold that discrimination based on sexual orientation and gender identity are both forms of discrimination based on sex prohibited by ELCRA. The Supreme Court granted the request and granted the ACLU permission to participate in oral argument time as an amicus curiae.

ACLU brief
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Minnesota

- *N.H. v. Anoka-Hennepin School District No. 11*, 950 N.W.2d 553 (Minn. Ct. App. 2020). On behalf of a transgender male student, in February 2019 the ACLU of Minnesota along with Gender Justice sued the state's largest school district for refusing to allow him to use the boys' locker room and forcing him to use a separate locker room alone. We asserted unlawful discrimination claims in violation of the Minnesota Human Rights Act (MHRA) and his rights to equal protection and due process under the Minnesota constitution. The Minnesota Department of Human Rights (MDHR) intervened to assert similar statutory claims against the school district. The school district asked the state district court to dismiss the lawsuit for failure to state a claim and, after the court refused to dismiss it, sought review by the Minnesota Court of Appeals. The court of appeals issued a statewide precedential opinion ruling that segregating transgender students from cisgender students in locker room facilities violates the Minnesota Constitution and MHRA. Specifically, the court made the following three important rulings: First, a transgender high-school student who is denied use of a locker room that is available to students of the gender with which the student identifies and to which the student has socially transitioned states a claim upon which relief can be granted of sexual

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orientation discrimination under Minnesota Statute section 363A.13, subdivision 1. Second, the intermediate scrutiny standard applies to an equal-protection claim of sexual orientation discrimination under article I, section 2 of the Minnesota Constitution. Third, a transgender high-school student who is denied use of a locker room that is available to students of the gender with which the student identifies and to which the student has socially transitioned states a claim upon which relief can be granted of an equal protection violation under article I, section 2 of the Minnesota Constitution. The school district did not appeal this ruling. In March 2021, the school district agreed to a settlement which involved $300,000 in monetary relief as well as reforming their policies to be gender-inclusive with MDHR oversight.

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Montana

- *Hobaugh v. The State of Montana,* Cause No. CDV-17-00673 (2017). In October 2017, the ACLU of Montana challenged the constitutionality of the anti-LGBTQ I-183 ballot initiative, which would have put forward a question about preventing transgender and gender-nonconforming Montanans from using public facilities that correspond with their gender identity by restricting access to public facilities in public spaces. The lawsuit asked the court to declare the initiative unconstitutional and prevent the secretary of state from placing it on the ballot. The Montana Supreme Court rejected the ballot initiative's language and fiscal note, voiding all of the signatures that its proponents had gathered. Proponents ultimately failed to submit the required number of signatures to place the initiative on the ballot.

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- *Maloney v. Yellowstone County,* HRB Case Nos. 019002, 019003, 019004; EEOC Case No. 32D-2019-00002C. The Montana Human Rights Act (MHRA) currently does not explicitly outlaw discrimination on the basis of gender identity. This case was brought on behalf of a transgender attorney who was employed by Yellowstone County, which has a self-funded plan with exclusions set by the county commissioners, and was denied transition-related care. The plaintiff claimed that denial of gender-affirming healthcare was discriminatory and unlawful under MHRA, the Montana Constitution, the Federal Constitution, Title VII of the Civil Rights Act, and the Affordable Care Act. The goal of this case was to establish precedent in Montana that discrimination on the basis of sex encompasses gender identity under MHRA, essentially the enabling statute for Montana's constitutional guarantee of equal protection. In August 2020, the hearings officer found in Maloney's favor that a county health care exclusion was discriminatory. The complaint also contained state constitutional claims, but the court did not address these in their decision.

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  Opinion

- *Marquez v. State of Montan*a, DV 21-873. Senate Bill 280 requires a transgender person to obtain a court order indicating that the sex of the person has been changed by "surgical procedure" even though surgery is unwanted, unnecessary or cost-prohibitive for many transgender Montanans. The ACLU, the ACLU of Montana and Nixon Peabody LLP have challenged SB 280 in court, because it violates transgender Montanans' right to equal protection, privacy and due process. On April 21, 2022, a state district court granted a preliminary injunction, holding that a law passed likely violates the rights of transgender Montanans under the Montana Constitution.

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  Opinion

New Jersey

- *Doe v. New Jersey Dep't of Corrections,* Docket No. A-5101-18T1 (App. Div. Jun. 3, 2020). The ACLU of New Jersey brought this lawsuit on behalf of a transgender woman under the pseudonym of Sonia Doe, who was forced to live in men's prisons and experienced related retaliation and discrimination. The lawsuit alleged violations of the equal protection and the right to live freely and to free expression as a woman under article 1, paragraph I of the New Jersey Constitution. It also alleged violation of the cruel and unusual punishments clause of the New Jersey Constitution (article I, paragraph 12). Additionally, the complaint alleged defendants violated their constitutional duty not to retaliate against Doe for the exercise of her rights under article I, paragraphs 1, 6 or 18 of the New Jersey Constitution and deprivation of procedural due process in violation of article I, paragraph 1 of the New Jersey Constitution. Within two weeks of filing, the Department of Corrections announced it would move Doe to the women's prison, in line with her gender identity—a move the ACLU-NJ had asked the court to order. The case has been resolved through a settlement agreement by which the New Jersey Department of Corrections adopted a new policy on transgender, intersex, and nonbinary prisoners and paid $125,000 in damages to Doe, in addition to attorneys' fees.

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New York

- *Dominguez v. NYC,* No. 020841/2019E (Bronx Supreme Court). This suit on behalf of a transgender woman who was harassed, handcuffed, and charged with "false personation" based on her gender identity sought to establish, among other things, that anti-trans discrimination violates the equal protection clause of the New York Constitution (both because it is sex discrimination and because transgender people are a suspect class). Dominguez reached a settlement with the City of New York, which provided money for Dominguez, required the officers of the 44th precinct to be trained, and required the full NYPD to be reminded on how to act compassionately toward trans people.

  ACLU Page

- *Faith v. Steuben County,* No. E2019-1208CV (N.Y. Supp. Ct. 2020). This suit on behalf of a transgender woman who was, in the context of pretrial detention at a local jail, moved from the women's unit to the men's unit, harassed based on her gender identity, and denied gender-affirming medical care (in the form of prescribed hormone therapy), sought to establish that anti-trans discrimination violates the equal protection clause of the New York Constitution (both because it is sex discrimination and because transgender people are a suspect class). In addition, it sought to establish that the denial of HRT to a transgender woman violates the due process protections of the New York Constitution. Faith reached a settlement with Steuben County that provided money for Faith and required the county to presumptively house individuals consistent with their gender identity, require that staff at the jail respect an individual's self-identified gender identity in all other contexts, including name and pronoun use, searches, and access to clothing, toiletry items, and grooming standards consistent with an individual's gender identity, and provide individuals with access to medical care consistent with their gender identity.

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North Carolina

- *Doe v. Cleveland County Board of Education*, Superior Court of North Carolina, Franklin Co. No. 20-CVS-142 (Sup. Ct. N.C. 2020). The ACLU of North Carolina filed a challenge in state court on behalf of John Doe, a trans high school senior with kidney disease who was prevented by school officials from using the boys' bathroom at school, which exacerbated his kidney disease.

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We argued that school officials were in violation of article I, section 19 of the state constitution by prohibiting Doe from using the boys' bathroom as a result of his sex and transgender status, and in violation of article I, sections 2 and 15 of the state constitution by requiring him to miss class time to use a separate bathroom, which deprives him of his constitutional right to a sound basic education. Additionally, we argued that school officials were in violation of the state Persons with Disabilities Protection Act by failing to provide adequate accommodations for his kidney disease and gender dysphoria. We won a temporary restraining order against the district, and the judge entered a permanent injunction against the school district for barring our client from using the boys' bathroom.

SEXUAL ORIENTATION

California

- *McKibben v. McMahon,* No. 5:14-cv-02171, 2019 WL 1109683 (C.D. Cal. 2014). ACLU of Southern California filed suit in October 2014 against Sheriff John McMahon, the San Bernardino County Sheriff's Department, and various governmental actors alleging disparate treatment of gay, bisexual, and transgender inmates housed in the West Valley Detention Center's "Alternative Lifestyle Tank" (ALT). The West Valley Detention Center denied these inmates equal time out of cell and access to religious, educational, rehabilitative, and vocational programming, and regularly subjected them to harassment by deputies and custody specialists. We focused primarily on equal protection and Government Code Section 11135 theories (for discriminatory treatment), but also alleged violations of the Bane Act and of Government Code Section 815.6. Defendants moved to dismiss both the Bane Act and 815.6 claims for failure to state a claim; they prevailed on 815.6 but lost on the Bane Act motions. After some discovery and extensive settlement negotiations, we reached agreement with the county, and the district court issued an order approving a class settlement on February 28, 2019, which included extensive "injunctive" commitments to improve the county's policies and practices. These include renaming the former ALT; clarifying intake procedures to ensure that GBTI individuals can choose to live in general population and that housing based on gender identity will be an option for transgender people; enhanced safety procedures; training for staff; improvements to healthcare access; creation of a Prison Rape Elimination Act—Gay Bisexual Transgender Intersex Committee; and performance of a PREA compliance pre-audit. We believe this package of changes can serve as a model for other jurisdictions of best practices for addressing the needs of incarcerated LGBTQI people. The settlement also included $850,000 in damages to be allocated among the approximately 600 individuals who, according to county records, spent time in the ALT between fall 2012 and spring 2018, with incentive awards to our named plaintiffs and attorneys' fees. Finally, it provides for a three-year information reporting and monitoring period.

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North Carolina

- *M.E. v. T.J.*, No. 18A21, 2022-NCSC-23. The ACLU of North Carolina filed an appeal in the North Carolina Court of Appeals challenging the denial of certain domestic violence protections to people in same-sex dating relationships. We argued that the state constitution requires at least heightened scrutiny to be applied to sex-based discrimination, including discrimination arising from sexual orientation and gender identity, and won a lengthy decision establishing this precedent. After the defendant filed an appeal based on a series of procedural arguments, the North Carolina Supreme Court affirmed the Court of Appeals' decision that people in same-sex dating

relationships cannot be excluded from domestic violence protections.

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EMPLOYMENT-RELATED ISSUES

New York

- *Hernandez v. State of New York*, 173 A.D.3d 105 (N.Y. App. Div. 2019). This suit challenged the exclusion of farmworkers from the protections of the New York State Employment Relations Act as a violation of a number of provisions of the New York Constitution, including equal protection (article 1, section 11), due process (article 1, section 6), freedom of association (article 1, sections 8-9 and 11), and the constitutional protection of labor rights (article 1, section 17). In a decision in May 2019, a New York appellate court agreed with us and invalidated the statutory exclusion.

  ACLU Page

Virginia

- Shiyanbade v. Executive Health Group, PC, No. 3:19-cv-00726 (E.D. Va. 2019). The ACLU of Virginia filed an employment discrimination claim under the Virginia Human Rights Act (VHRA) on behalf of two Black women who claim they were fired from a medical practice because of their race. The VHRA protects employees of small businesses with 6–14 employees from being fired because of their race, color, religion, national origin, sex, pregnancy, childbirth, or related medical conditions. The case was dismissed in 2020.

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- *Carline v. Garden Creations.* The ACLU of Virginia filed an employment discrimination complaint under the Virginia Human Rights Act (VHRA) on behalf of a woman who was fired from her job as a horticulturalist shortly after reporting sexual harassment from a male co-worker. The VHRA protects employees of small businesses with 6–14 employees from being fired because of their race, color, religion, national origin, sex, pregnancy, childbirth, or related medical conditions. The parties reached a settlement.

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Washington

- *Martinez-Cuevas v. DeRuyter Brothers Dairy, Inc.*, 475 P.3d 164 (Wash. 2020). Washington State excludes farmworkers from the right to overtime pay. The ACLU of Washington filed an amicus brief in this case, which alleges disparate impact of this exclusion, as the majority of farmworkers are Latinx, and thus argues that the court apply strict scrutiny. The Washington Supreme Court held that the exclusion from the right to overtime pay violated the equal protection clause of the Washington Constitution (article 1, section 12), reading the Washington Constitution's privileges or immunities or equal protection clause as more expansive than that of the 14th Amendment.

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Washington, D.C.

- *Barber v. District of Columbia*. The ACLU-DC filed suit under the D.C. Human Rights Act alleging disability discrimination against a D.C. employee who used medical marijuana in compliance with D.C. law for a severe back condition. D.C.'s Department of Public Works refused an accommodation to the employee, whose job required her to sweep leaves and snow, not to operate machinery, and who used medical marijuana only while off-duty and never came to work impaired. Under the Americans with Disabilities Act, the DCHRA does not exclude

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disability claims involving drugs that are illegal under federal law. After filing, D.C. provided an accommodation; our claims for back pay and compensatory damages remain pending.

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OTHER

California

- *Villafana v. County of San Diego,* 57 Cal.App.5th 1012 (Cal. Ct. App. 2020), 271 Cal. Rptr. 3d 639. San Diego County's "Project 100%" (P100) program is likely the only welfare policy in the country requiring virtually every applicant for cash aid benefits to submit to an unannounced home search and interrogation by law enforcement investigators when their applications raise no basis for suspecting fraud. P100 harms families not only because of the privacy violations resulting from the home searches, but also because applicants do not know when the searches will occur, and therefore go days or weeks thinking that they must remain at home at all times, lest they be denied crucial benefits. Applicants experience anxiety and stress and have reported feeling as though they are under house arrest. On June 26, 2018, the ACLU Foundation of San Diego and Imperial Counties filed suit with Fish & Richardson P.C. in San Diego Superior Court challenging P100 under California Government Code section 11135, which prohibits state-funded programs and activities from discriminating by intent or disparate impact on the basis of race, gender, and other protected categories. (We previously challenged P100 under the Fourth Amendment and California Constitution, but lost.) We lost a motion to dismiss in the trial court and the Court of Appeal affirmed the dismissal. The California Supreme Court denied our petition for review on March 17, 2021.

  However, while the lawsuits were ultimately unsuccessful, our proactive communication efforts led to news coverage of the legal battles that kept the program in the public eye and became an important tool for political advocacy. The ACLU legal and advocacy teams worked with coalition partners to press newly elected members of the County Board of Supervisors to take up the fight to dismantle P100. Eventually, two board members brought a motion to eradicate the program, and our organizers managed to get hundreds of people to provide electronic comments in support of the motion, along with dozens of people who waited nearly 14 hours to provide live telephonic testimony. In the end, the board voted to abolish the policy unanimously, in a 5-0 decision.

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Michigan

- *Does 11-18 v. Department of Corrections,* 323 Mich App 479. This lawsuit was filed in state court on behalf of young men who had been sent to adult prisons in Michigan when they were under the age of 18 and were sexually assaulted by adult male prisoners and female prison guards. The state moved to dismiss the case, arguing that prisoners are not protected by Michigan's civil rights law, known as the Elliott-Larsen Civil Rights Act (ELCRA), because in 1999 the Michigan legislature amended ELCRA to specifically remove prisoners from the protections of that law. The trial court denied the state's motion to dismiss, because the 1999 amendment had been struck down as unconstitutional in an earlier case and the state had not appealed that ruling. The Michigan Court of Appeals reversed by a vote of 2-1, holding that the state was not bound by the earlier ruling and the 1999 amendment to ELCRA was not unconstitutional. In February 2016, the ACLU of Michigan helped lead a coalition of 10 civil rights organizations in filing a friend-of-the-court brief in the Michigan Supreme Court, urging review and reversal of the Court of Appeals' decision. We argued that targeting an

unpopular group of people (in this case, prisoners) for removal from the general coverage of our state's civil rights laws was unconstitutional and dangerous. We also argued that once a law is struck down as unconstitutional and that ruling becomes final, the state is bound by that ruling if it participated in the previous case. In March 2016, the Michigan Supreme Court decided the appeal on other grounds, but vacated the parts of the Court of Appeals' decision that we challenged in our brief. In March 2018, a different panel of the Court of Appeals adopted the dissenting opinion from the prior panel's decision, ruling that the exclusion of prisoners from ELCRA was unconstitutional under Michigan Constitution article 1, section 2. The case settled for $80 million.

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Montana

- *GoesAhead v. Reed Point School District,* DV 2018-19. In January 2017, four Indigenous Montana parents were denied entry to a basketball game by staff at a Reed Point high school because they were not white. Unfortunately, the court held that there was no racial discrimination.

ACLU Page

Voting & Elections

VOTER REGISTRATION

Kansas

- *Belenky v. Schwab*, No. 2013-cv-01331 (3rd Judicial Dist. 2016). The ACLU of Kansas brought this challenge to the secretary of state office's practice of maintaining a bifurcated election system that restricted rights of voters who registered using the federal form or motor voter process under the Kansas Constitution's equal protection clause ("all men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness," Kansas Constitution Bill of Rights section 1) and separation of powers provision ("the legislative power of this state shall be vested in a house of representatives and senate," Kansas Constitution article 2, section 1). The district court granted our motion for summary judgment, finding the bifurcated system was unconstitutional.

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Massachusetts

- *Chelsea Collaborative, Inc. v. Secretary of the Commonwealth*, 480 Mass. 27 (2018). The ACLU and the ACLU of Massachusetts brought a lawsuit challenging the state's 20-day advance voter registration requirement under article 3 of the Massachusetts Constitution. Unlike the U.S. Constitution, the state constitution expressly guarantees that all citizens 18 years of age or older who are Massachusetts residents "shall have a right to vote." We lost at the Massachusetts Supreme Judicial Court, but the state legislature followed up by enacting an automatic voter registration law.

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New York

- *League of Women Voters of NY v. New York State Board of Elections,* 2020 NY Slip Op 07135, 189 A.D.3d 409. This suit brought by the ACLU and NYCLU challenges New York's requirement that voters register at least 25 days before an election. The key claim is that the registration deadline is an unnecessary and/or unreasonable burden on the right to vote expressed in article II, section 1 of the New York Constitution. The lower court denied the plaintiff's request for a preliminary injunction to enjoin the New York State Board

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of Elections and the New York City Board of Elections from enforcing the requirement. The appellate court affirmed the decision.

ACLU Page
Westlaw link

FELON DISENFRANCHISEMENT

Iowa

- *LULAC of Iowa et al. v. Schultz*, No. 14-0585 (Iowa Supreme Court). The ACLU of Iowa filed a state challenge to an agency policy which purged based on a comparison to the Systematic Alien Verification Entitlement ("SAVE") program administered by the United States Department of Homeland Security. The Court held the agency exceeded its authority. The state appealed but dropped its appeal after we completed briefing.

  Opinion

- *Chiodo v. Section 43.24 Panel,* No. 14-0553 (Iowa Supreme Court). The Iowa Supreme Court interpreted the text of the Iowa Constitution's felony disenfranchisement provision, which prohibits "a person convicted of any infamous crime" from voting, Iowa Const. art. II, §5, does not apply to "aggravated misdemeanors," which are punishable by up to two years imprisonment (and thus are common law felonies). ACLU of Iowa appeared as amicus.

  Amicus Brief
  Opinion

- *Griffin v. Pate,* 884 N.W.2d 182 (Iowa 2016). The ACLU of Iowa built on the ruling in *Chiodo* (above) to challenge Iowa's "infamous crimes" disenfranchisement policy, arguing the constitution provided only for the disenfranchisement of a very narrow group of felony offenses, rather than to all felonies. We lost in a narrow 4-3 decision, but the public education around the case was critical to changing hearts and minds in the state, leading only a few years later to an executive order creating a system of automatic voting rights restoration for most felonies following completion of sentence.

  ACLU Page
  Opinion
  Westlaw link
  Executive Order

VOTER ID

Pennsylvania

- *Applewhite v. Commonwealth,* 2014 WL 184988, Pa. Commw., January 17, 2014. The ACLU of Pennsylvania brought this case challenging the constitutional validity of Pennsylvania's voter ID law, which required voters to provide certain types of photo ID in order to vote. After a three-week trial in July 2013, the court ruled that the law imposed an undue burden on voters that violated the Pennsylvania Constitution.

  ACLU Page

BALLOT COLLECTION

Montana

- *Western Native Voice v. Stapleton,* DV 20-0377. Montana's Ballot Interference Protection Act severely restricts the collection of ballots by third parties. This law had detrimental effects on Native American voters living in rural reservations. On behalf of Western Native Voice and Montana Native Vote, two organizations focused on increasing voter turnout in the Native American community, the ACLU of Montana brought this case in state court under Montana's constitutional right to vote, free speech, and free association provisions. The court held that the

law was unconstitutional and ordered the law permanently enjoined.

ACLU Page
Opinion

- *Western Native Voice v. Jacobsen*, DV 21-0451. The American Civil Liberties Union, ACLU of Montana, and Native American Rights Fund (NARF) challenged two new Montana laws that hinder Native American participation in the state's electoral process. The first, HB 176, ends election day registration, which reservation voters have relied upon to cast votes in Montana since 2005. The second, HB 530, blocks organized ballot collection on rural reservations. (Similar to the measure that a Montana court struck down last year after listening to "cold, hard data" on its detrimental impact on the Native vote). The case alleges that these laws violate the right to vote (also called the right to suffrage) and the right to free speech enshrined under the Montana constitution's Declaration of Rights, Mont. Const., Art. II § 13, the Equal Protection Clause of the Montana Constitution, Mont. Const., Art. II § 4, is void for vagueness in violation of the right to due process of law contained in Montana's Declaration of Rights, and the rights of persons not adults, Mont. Const., Art. II § 15. On April 6, 2022, a Montana court ordered a preliminary injunction blocking both state laws. In doing so, the court rejected the state's argument that the plaintiffs' claims were barred by the U.S. Supreme Court case *Brnovich v. Democratic National Committee*, 141 S. Ct. 2321 (2021), explaining, "that case is irrelevant given it held two laws passed in Arizona did not violate a federal statute under a federal legal standard."

ACLU Page
Opinion

ABSENTEE BALLOTS

Iowa

- *LULAC of Iowa v. Pate*, No. 20-1249 (Iowa Supreme Court). Along with the League of Women Voters, the ACLU of Iowa filed an amicus brief in this voting rights case arguing that absentee voting, like the right to vote at the polls, should be recognized as a fundamental right, subject to strict scrutiny. The state had argued that absentee voting was not protected at all, as opposed to voting at the polls, and only rational basis review applied. In its decision, the Iowa Supreme Court affirmed the denial of a temporary injunction, applying the Anderson-Burdick standard, but declined to adopt the state's suggested framework to deprive absentee voting of any heightened constitutional protection at all.

Amicus Brief
Opinion

Maine

- *Alliance for Retired Americans v. Dunlap*, 2020 ME 123, 240 A.3d 45 (2020). The law firm of Perkins Coie filed this lawsuit challenging several provisions of Maine's election law as violating the federal and state constitutions in light of the pandemic and USPS delays. The ACLU of Maine filed an amicus brief explaining that Maine's safety clause requires heightened scrutiny in light of the safety risks of limiting absentee ballots during a pandemic. The safety clause of the Maine Constitution (article 1, section 1) provides: "All people are born equally free and independent, and have certain natural, inherent and unalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness." The Maine Constitution provision on absentee voting (article II, section 4) states: "The Legislature under proper enactment shall authorize and provide for voting by citizens of the State absent therefrom in the Armed Forces of the United States or

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of this State and for voting by other citizens absent or physically incapacitated for reasons deemed sufficient." The court denied relief, but affirmed that it has the authority and important responsibility to construe the Maine Constitution. In doing so, "we are not bound by any of the interpretations which other courts may have made of their own Constitutions. Nor do we follow such interpretations except to the extent that the reasoning upon which they rest is convincing to us when applied to our Constitution." The Supreme Court has recognized that Maine is "free, pursuant to [its] own law, to adopt a higher standard" than that required by the federal Constitution. The dissent would have granted injunctive relief and stated the court should be looking to the Maine Constitution "as the prime guarantor of the liberties of Maine's people." (quoting Tinkle, *The Maine State Constitution* (2d ed. 2013)).

ACLU Page
Westlaw

Michigan

- *Barkey v. Brown,* 20-114457-CZ (Mich. Cir. Ct., Genesee Cnty.); *Ganik v. Winfrey,* 2020–0103685-AW (Mich. Cir. Ct., Wayne Cnty.). Michigan voters overwhelmingly passed Proposal 3 in 2018, which enshrined in Michigan's Constitution the right to vote by absentee ballot in the 40 days before an election, either at home by mail or in person at the voter's local clerk's office. In the weeks leading up to the August 2020 primary election, however, the city clerk's office in Flint remained closed to the public, preventing voters from exercising their constitutional right to obtain and cast their absentee ballots in person. In addition, Flint voters who had requested their absentee ballots by mail were not receiving them, despite a state law requirement that clerks issue absentee ballots immediately upon receiving a voter's request. In July 2020, the ACLU of Michigan filed an emergency lawsuit against the Flint city clerk to prevent the disenfranchisement of thousands of Flint voters. Following a two-day hearing, Judge Celeste Bell ruled that the city clerk was violating her clear legal duties under the Michigan Constitution and state election law, and ordered the clerk to have her office open to the public every day until the election and to process all applications for absentee ballots within 24 hours of receipt. In mid-October 2020, we filed a similar lawsuit against the Detroit city clerk to compel her office to clear a backlog of thousands of requests for absentee ballots that had yet to be processed in the weeks leading up to the November 2020 general election.

  ACLU Page

- *League of Women Voters of Michigan v. Benson,* No. 353654 (Mich. Ct. Appeals). The ACLU of Michigan filed this lawsuit challenging a statute that requires all mailed-in ballots to arrive in the clerk's office no later than Election Day, despite Michigan voters having approved a 2018 amendment to the Michigan Constitution that provides a constitutional right to vote by mail at any point during the 40 days before an election. The challenge argues that this amendment (Proposal 3) now provides a right to have your vote counted if your ballot is postmarked by Election Day. The lawsuit took on heightened importance as mail-in voting skyrocketed during the COVID-19 pandemic just as the ability of the U.S. Postal Service to process and deliver mail in a timely manner plummeted. Unfortunately, in July 2020, the Court of Appeals, by a vote of 2-1, rejected the ACLU's claims, and the Michigan Supreme Court, by a vote of 4-3, refused to consider their appeal.

  ACLU Page

- *Black v. Benson,* No. 20–000096-MZ (Mich. Ct. Claims). In May 2020, Michigan Secretary of State Jocelyn Benson mailed every registered voter in Michigan an application to vote by mail in the August and November elections. After the ACLU and coalition partners successfully advocated for the passage of Proposal 3 in 2018, it is now a constitutional right to vote by mail in

Michigan. And in the midst of a pandemic, it is especially important to encourage voters to cast their ballot without crowding into polling places on Election Day. Opponents, however, brought a series of lawsuits challenging Benson's authority to mail the applications. In June 2020, the ACLU of Michigan joined the League of Women Voters in filing a friend-of-the-court brief arguing that the Secretary of State has that authority as part of her constitutional duty to ensure that all voters have an equal opportunity to vote by mail. In August 2020, Judge Cynthia Diane Stephens agreed with our analysis and dismissed the lawsuits.

Opinion

Pennsylvania

- *Adams Jones v. Torres,* No. 717 MD 2018 (Pa. Cmwlth.). The ACLU of Pennsylvania, the ACLU Voting Rights Project, and the Lawyers Committee for Civil Rights Under Law filed this challenge to the nation's earliest deadline for absentee ballots, alleging that it posed an unconstitutional burden on the fundamental right to vote guaranteed by the Pennsylvania Constitution (article VII, sections 1 and 14); and discriminated between voters in violation of the state constitution's Equal Protection guarantees (article I, sections 1, 5, and 26). The case was dismissed as moot after the Pennsylvania General Assembly passed legislation in 2019 extending the return deadline to election day.

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  ACLU Page 2

CHALLENGE TO FAKE LEGISLATIVE AUDIT

Pennsylvania

- *Costa v. Corman,* No. 310 MD 2021 (Pa. Cmwlth.)*; Commonwealth v. Dush,* No. 322 MD 2021 (Pa. Cmwlth.). The ACLU of Pennsylvania, the ACLU's Voting Rights Project, and law firm Schnader, Harrison, Segal & Lewis represent eight voters and organizations Common Cause PA, Make the Road, and League of Women Voters PA in challenging an illegitimate legislative subpoena from Pennsylvania State Senate Republicans seeking private personal information about the state's 9 million voters. The subpoena is part of an effort to conduct a so-called "audit" of the 2020 election, an effort aggressively promoted by former President Trump. The requested information includes voters' driver's license numbers and the last four digits of their social security numbers. We argue that the request for these two data points is unnecessary and dangerous, exposing millions of people to potential financial fraud and identity theft, and opening the door to outside interference with the Commonwealth's voter registration database. Pennsylvania has guarded privacy interests under article I, sections 1 and 8 of the state constitution more zealously than have the federal courts, and the defendants cannot justify access to voters' personal private information. The Commonwealth Court denied summary relief in January 2022, indicating a need for more factual development.

  ACLU Page

GERRYMANDERING / REDISTRICTING

Ohio

- *League of Women Voters of Ohio v. Ohio Redistricting Commission,* Slip Opinion No. 2022-Ohio-65 (Ohio 2022). The ACLU and the ACLU of Ohio brought a lawsuit on behalf of the League of Women Voters of Ohio, the Ohio chapter of the A. Philip Randolph Institute, and several individuals in the Ohio Supreme Court challenging Ohio's maps for state House and Senate districts that give extreme and unfair advantage to the Republican Party. The lawsuit alleged the maps violate the Ohio Constitution, which was amended in 2015, to include that "[n]o general assembly district plan shall be drawn primarily to favor or disfavor a political party," Ohio Const. art. XI, §

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6(A), and that the number of seats held by a party in the Ohio General Assembly "shall correspond closely to the statewide preferences of the voters of Ohio" over the previous decade, *id.* § 6(B). The U.S. Supreme Court has held that partisan gerrymandering claims are non-justiciable in federal court but also acknowledged that it is the providence of state courts to address partisan gerrymandering. *See Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019).

In January 2022, the Ohio Supreme Court held that in drawing the district plans the state Redistricting Commission did not attempt to draw a district plan that meets either the proportionality standard or the command that no plan shall be drawn primarily to favor a political party as required by Article XI of the Ohio Constitution. It ordered that the state Redistricting Commission be reconstituted and adopt a new plan in conformity with the Ohio Constitution.

ACLU Page
Opinion

Pennsylvania

- *League of Women Voters v. Commonwealth*, 645 Pa. 1 (2018). The ACLU of Pennsylvania and ACLU national filed an amicus brief in this case, arguing that the speech and association clauses in the Pennsylvania Constitution obligate the Commonwealth to function as a neutral referee in administering elections, and that partisan gerrymandering substantially burdens fundamental rights and triggers strict scrutiny in Pennsylvania. The Pennsylvania Supreme Court struck down the 2011 congressional map as unconstitutional and enjoined the map for 2018 elections. The court ordered that the Pennsylvania General Assembly submit a new congressional plan to the court with the governor's approval. After unsuccessful attempts to do so, the Pennsylvania Supreme Court released a new congressional map, which it directed be used in the 2018 elections.

  Amicus Brief
  Westlaw

BALLOT INITIATIVES

Michigan

- *Citizens Protecting Michigan's Constitution v. Secretary of State,* 280 Mich App 273. In an effort to end the extreme partisan gerrymandering that threatens to undermine the legitimacy of our system of representative government, the ballot committee Voters Not Politicians submitted more than 425,000 signatures to put a constitutional amendment on the November 2018 ballot. The purpose of the initiative was to give responsibility for drawing legislative districts to an independent citizens redistricting committee. In May 2018, an organization funded by the Michigan Chamber of Commerce filed a lawsuit to prevent the initiative from appearing on the ballot, arguing that the proposed constitutional amendment was a "revision" of Michigan's Constitution rather than an amendment. When the case reached the Michigan Supreme Court, the ACLU of Michigan filed a friend-of-the-court brief in favor of ballot access. In July 2018, the Michigan Supreme Court agreed and, by a vote of 4-3, ordered the state to put the initiative on the November 2018 ballot. The initiative passed.

  ACLU Page
  Westlaw link

- *In re Request for Advisory Opinion Regarding Constitutionality of 2018 PA 368 & 369*. In 2018, Michigan citizens collected enough signatures to place initiatives on the ballot that would raise the minimum wage and guarantee paid sick time. But instead of allowing citizens to vote on these important measures in the November 2018 election, the Michigan Legislature adopted them into law in order to keep them

off the ballot—and then proceeded to gut them as soon as the election was over. This cynical move, which was unprecedented in Michigan history, was challenged in the Michigan Supreme Court through a request by the legislature for an advisory opinion about whether the "adopt and amend" strategy is constitutional. In June 2019, the ACLU of Michigan filed a friend-of-the-court brief arguing that it is not. We were joined on the brief by the League of Women Voters of Michigan and the American Association of University Women of Michigan. We argued that the legislature, by adopting a ballot measure into law before it could be voted on by the people and then immediately gutting it through amendment, violated provisions of the Michigan Constitution that reserve various powers of direct democracy for the people. Unfortunately, the Michigan Supreme Court declined to take up the case.

ACLU Page
Westlaw link

- *League of Women Voters of Michigan v. Secretary of State*, No. 160907 (Mich. Sup. Ct.). The ACLU of Michigan filed an amicus brief in a lawsuit challenging the constitutionality of a mean-spirited anti-petitioning law that put a cap on the number of signatures that can be collected from any one congressional district (thereby diluting the ability of Black voters to place initiatives on the ballot), and would require paid petition circulators to register with the state before they can start collecting signatures. In February 2019, the ACLU of Michigan submitted a 12-page letter arguing that the new law violates the Michigan Constitution, the First Amendment, and the Voting Rights Act. In May 2019, Attorney General Dana Nessel issued a formal opinion adopting our analysis and declaring the new statute unconstitutional. We argued that the cap violates the Michigan Constitution's direct democracy provisions, which set a statewide signature threshold for ballot access. Seeing that the Attorney General was not defending the statute's constitutionality in court, the Michigan Legislature intervened. The Michigan Supreme Court held that the Legislature had standing to appeal, but, finding that the lead plaintiff had dropped their ballot initiative, the court mooted the case and vacated the lower court judgments.

  Court Syllabus
  Westlaw link

- *Hardy v. Secretary of State,* 936 N.W.2d 454 (Mich. 2019). The ACLU of Michigan filed a friend-of-the-court brief in the Michigan Supreme Court arguing that the state, by creating hypertechnical traps for the laypeople who often draft recall petitions, was subverting the democratic right to recall elected representatives enshrined in the Michigan Constitution. After State Rep. Larry Inman was indicted, a group of citizens circulated petitions to recall him from office, which is a right of the people specifically enumerated in the Michigan Constitution. The Bureau of Elections refused to consider the petitions because they contained a typo. State law requires the "reasons for recall" on a petition to be the same as the reasons approved in advance by Board of State Canvassers, but the typo created a discrepancy in text, not in meaning. In December 2019, the Michigan Supreme Court ruled that the typo could not be used as a reason to reject the petitions. Ultimately, not enough petition signatures had been collected, and Inman was not recalled.

  Westlaw link

Montana

- *Montana Association of Counties v. State of Montana,* 2017 MT 267. The ACLU of Montana and co-counsel filed this suit directly with the Montana Supreme Court to challenge a Montana constitutional initiative passed in 2016 that purported to expand victims' rights. The case argued that the initiative violated the state constitution's "single vote, multiple amendment" prohibition and "single subject" requirement, which provide the controlling procedure by which—and only by which—a citizen's initiative

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can amend the constitution (article XIV, section 11; article V, section 11(3)). In November 2017, the Montana Supreme Court ruled that the initiative violated the separate-vote requirement and was therefore void in its entirety.

ACLU Page
Westlaw link

QUALIFICATIONS FOR OFFICE

Colorado

- *Bailey v. City of Aurora*, 2021CV30919 (Arapahoe County District Court). Our client, Candice Bailey, a Black woman and activist in racial justice issues in the city, wants to run for a seat on the Aurora City Council, but the Aurora City Charter forbids her candidacy. Two decades ago, she was convicted of a felony and served time in prison. The City Charter specifies that persons who have a felony conviction are not eligible to be candidates in city elections and are ineligible to serve on the city council. This lawsuit, brought by the ACLU of Colorado, relies on a provision of the original 1876 Colorado Constitution, which states that when an imprisoned person completes their sentence, they are automatically "invested with all the rights of citizenship" (article VII, section 10). We contend that the right to run for public office is one of the "rights of citizenship" and that the Aurora Charter provision violates the state constitution. We also allege that preventing Bailey from running for or holding elective office in the City of Aurora violates her rights to equal protection of the laws as guaranteed by article II, section 25 of the Colorado Constitution. The court denied Aurora's motion to dismiss and issued an injunction requiring Aurora to allow Bailey's candidacy.

  ACLU Page

Georgia

- *Palacios v. Kemp,* 1835339-OSAH-SECSTATE-CE-6-Beaudrot. The ACLU of Georgia sued Brian Kemp, Georgia Secretary of State, in Superior Court of Fulton County, appealing his decision to remove from a ballot Maria Palacios, a Latina who has lived in Georgia since 2009 and became a United States citizen in 2017. The question was whether. Palacios legally satisfied the Georgia Constitution's requirement that she be a "citizen[] of the state for at least two years" "[a]t the time of their election," which was November 6, 2018 (article I, section 1). We argued that Palacios met this requirement because the phrase "citizen of a state" means resident or domiciliary, as has been held in 11 other states that also uses this phrase. The state argued that the phrase means "a U.S. citizen and a resident of the state." The superior court ruled in favor of the state and the Supreme Court of Georgia declined review.

  ACLU Page

Abortion

California

- *Chamorro v. Dignity Health,* CHC 15-549626 (Cal. Super. Ct. Dec. 28, 2015). Rebecca Chamorro lives in Redding and was a patient at Dignity Health's Mercy Medical Center, the only hospital in Redding with a labor and delivery ward. She decided with her doctor that he would perform a tubal ligation during her scheduled C-section in late January 2016. But the hospital refused her doctor's request to perform the procedure, citing religious directives written by the United States Conference of Catholic Bishops that classify sterilization procedures as "intrinsically evil." For Chamorro, there are no hospitals within a 70-mile radius of her home that have birthing facilities and do not follow these directives. After Dignity Health refused to comply with a letter demanding that it authorize the tubal ligation, the ACLU

Foundations in California, ACLU Foundation, and Covington & Burling filed suit on behalf of Chamorro and Physicians for Reproductive Health, arguing that it violates California law to withhold pregnancy-related care, including but not limited to tubal ligation, for other than medical reasons. The court denied an emergency motion to prevent Dignity Health from using the religious directives to interfere with Chamorro's care so that her doctor can perform the procedure during her scheduled delivery, but the case continued through the litigation process. An amended complaint was filed February 29, 2016, after which Dignity Health moved to dismiss. By order filed August 1, 2016, the court dismissed all but one of our claims, allowing us to proceed on the claim that Dignity Health is engaging in an unlawful business practice. The case is now in discovery.

ACLU Page

- *PPH v. Reynolds*, No. EQCE083074 (Iowa Dist. Ct. Polk Co.). ACLU of Iowa and Planned Parenthood brought this case challenging the state's six-week abortion ban. It came on the heels of the 72-hour waiting period case, where fundamental right status was recognized. The district court preliminarily enjoined the act upon it taking effect, and permanently enjoined it in 2019. The state did not appeal.

  Westlaw link

- *PPH v. Reynolds*, No. EQCE084508 (Iowa Dist. Ct. Polk Co.). The ACLU of Iowa and Planned Parenthood brought this case challenging a law prohibiting organizations that provide abortions, "promote" abortions, or associate with entities that do from receiving state-administered federal sex education funding. The district court preliminarily enjoined the law in 2019. The district court granted the plaintiff's motion for summary judgement, finding that the law violated Planned Parenthood's right to equal protection under the Iowa Constitution and thus that the law was unconstitutional. Unfortunately, the Supreme Court of Iowa disagreed and reversed.

  District Court Summary Judgment Order
  Iowa Supreme Court Order

- *PPH v. Reynolds*, No. EQCE081855 (Iowa Dist. Ct. Johnson Co.). The Iowa legislature passed a 24-hour mandatory delay/2-trip law in 2020, requiring a waiting period before a woman can obtain an abortion, which the ACLU of Iowa challenged along with Planned Parenthood. We won a motion for summary judgment at the district court, which held that the law violated the Iowa Constitution and permanently enjoined its enforcement. The state appealed, arguing that the Iowa Supreme Court should reverse the 2018 case finding abortion is a fundamental right to which strict scrutiny applies. We expect a decision by the end of June 2022.

  Opinion

Maine

- *Mabel Wadsworth Women's Health Center v. Mayhew*, Civ. No. PORSC-CV-2015-527 (Me. Super. Ct. 2017). The ACLU of Maine brought this case challenging a ban on using MaineCare (the state-funded health insurance program) for abortions, arguing the ban violated statute and the Maine Constitution's rights to safety and equal protection. The Safety Clause of the Maine Constitution provides: "All people are born equally free and independent, and have certain natural, inherent and unalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness" (article I, section 1). The equal protection clause of the Maine Constitution provides: "Discrimination against persons prohibited. No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of that person's civil

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rights or be discriminated against in the exercise thereof" (article I, section 6-A).

ACLU Page
Opinion

Montana

- *Weems v. State,* ADV 2018-73. The ACLU of Montana and the Center for Reproductive Rights filed this case on January 30, 2018, challenging the constitutionality of a Montana law restricting the provision of abortion care to physicians and physician assistants. Advanced practice registered nurses (APRNs) are prohibited from providing abortion care under threat of felony criminal prosecution, despite the demonstrated safety of abortion and the proven ability of APRNs to provide early abortion with the same safety and efficacy as physicians and physician assistants. The district court granted plaintiffs' motion for preliminary injunction preventing enforcement of the statute under the Montana Constitution's right to privacy (article 2, section 10). The Montana Supreme Court affirmed the lower court's decision.

  ACLU Page

- *Planned Parenthood of Montana v. State of Montana*, DA 21-0521. The ACLU of Montana, the National Women's Law Center and the Center for Reproductive Rights filed an amicus brief in support of Planned Parenthood, in their case challenging four new laws attacking forced pregnancies. These laws were enacted during the 2021 legislation session and violate Montana's constitutionally protected right to privacy. The brief argues that the Montana Supreme Court in *Armstrong v. State*, which the Montana Attorney General now seeks to overturn, correctly held that "the explicit right to privacy in the Montana Constitution protects personal decision-making free from unwarranted government interference, including the right to choose abortion." Moreover, the Armstrong holding is in alignment with the high court rulings of other states that also have explicit rights to privacy in their constitutions or strong traditions of protecting rights. Further, overruling *Armstrong* would threaten to unravel privacy protection beyond abortion.

  ACLU Page

Fourth Amendment Analogs

UNLAWFUL STOPS

Iowa

- *State v. Scottize Brown*, 930 N.W.2d 840 (Iowa 2019). The ACLU of Iowa brought this case seeking to ban pretext stops, arguing that under article I section 8 of the Iowa Constitution, the state analog to the Fourth Amendment, such stops are unconstitutional. The ACLU of Iowa submitted an amicus brief on behalf of itself and other civil rights groups. Unfortunately, the court upheld pretext stops in a 4-3 decision.

  ACLU Page
  Westlaw link

Massachusetts

- *Commonwealth v. Buckley*, 478 Mass. 861 (2018). The ACLU of Massachusetts filed an amicus brief in a case addressing whether pretextual traffic stops violate article 14 of the Declaration of Rights of the Massachusetts Constitution, which provides that "[e]very subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions." The Supreme Judicial Court held that regardless of whether it is pretextual, a stop is lawful if the officer observed a traffic violation.

  ACLU Page
  Amicus Brief
  Westlaw link

New Mexico

- *Crawford v. Bernalillo County,* No. D-202-cv-2017-08689 (N.M. Dist. Ct. 2020). The ACLU of New Mexico brought this case under the New Mexico state constitution's Fourth Amendment analog for improper pretext. The case involves a Black woman, an ICE agent on assignment in New Mexico, who was pulled over three times in 24 days on the same stretch of road. The complaint alleged unlawful seizure under article II, section 10 of the New Mexico State Constitution and violation of equal protection under article II, section 18 of the New Mexico State Constitution. The case was settled with the plaintiff receiving $100,000.

  ACLU Page
  Press release with link to complaint

Oregon

- *State v. Rosa Giovanna Valderrama,* No. 18CR17532 (Cir. Ct. 2018). The ACLU of Oregon argued in a motion to suppress that the state constitution's search and seizure provision (article I, section 9) prohibited random, suspicion-less fare searches on public train platforms. The court held that the search in question was an unlawful search under article I, section 9 of the Oregon Constitution.

  ACLU Page
  Opinion

SEIZURE & SEARCH

Arizona

- *State v. Mixton*, 250 Ariz. 282, 478 P.3d 1227 (2021). The ACLU of Arizona filed an amicus brief along with the Electronic Frontier Foundation in this case. The court of appeals had broadened the protections of the Arizona Constitution article II, section 8 (the state's Fourth Amendment analog), which provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." That court held that the federal third-party doctrine, at least as applied to obtain Mixton's identity here from an internet provider, is unsupportable. The Supreme Court of Arizona held that article II, section 8 and the Fourth Amendment did not require law enforcement to secure a search warrant to acquire IP addresses or subscriber information that is voluntarily offered to internet service providers as part of their service.

  Court of Appeals Opinion
  Supreme Court of Arizona Opinion

California

- *Center for Genetics and Society v. Bonta* (Cal. Superior Court, County of San Francisco). Representing various groups, we are challenging California's DNA collection statute—which authorizes law enforcement to collect and retain individuals' DNA upon arrest–with respect to arrestees who are not charged with, or who are not convicted of, a criminal offense. After going back and forth between the trial court and the appellate court, all that is currently left of the lawsuit is challenging the expungement provisions of the DNA collection statute; i.e. the provisions that fail to automatically expunge an arrestees DNA records from the government database once the government has decided not to move forward with a prosecution. We had originally challenged the law in federal court but were unsuccessful. This suit now relies on state constitutional provision, including the right to privacy found in Article 1 Section 1.

  Opinion

- *Harris v. City of City of Fontana* (Cal. Superior Court, County of San Bernardino). Action for writ of mandate, asserted exclusively under provisions of the California Constitution, to prevent City from enforcing ban on personal cultivation of marijuana in plaintiff's residence, which was expressly permitted by statute enacted

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as Proposition 64. Claims included violation of supremacy clause (preempting local ordinances in matters regulated by state); unreasonable search and seizure; violation of right to privacy; violation of prohibition against compelled self-incrimination (by requiring plaintiff to declare he was cultivating marijuana, a federal crime). Result: after trial, writ of mandate issued barring enforcement of most of the provisions of the local ordinance.

Case information

Colorado

- *State v. Tafoya*, 20SC009 (S. Ct. of Colorado). Without a warrant, Colorado police surreptitiously recorded the activities around a suspect's home using a remotely operated pole-mounted video camera for three months. The ACLU, ACLU of Colorado, and Electronic Frontier Foundation filed an amicus brief on January 25, 2021. Our brief argues that the significant privacy and property interests implicated by modern pole cameras—which can tilt, pan, and zoom to collect detailed information about the activities people conduct on and around their property, all while evading detection—trigger protection under the both the Fourth Amendment to the U.S. Constitution and the analogous provision in the Colorado Constitution, Article II, Section 7. Specifically, we argued that both provisions require police to obtain a warrant before conducting long-term, continuous pole camera surveillance of the area surrounding a person's home. In September 2021, the court ruled that the warrantless pole-camera surveillance in this case violated the Fourth Amendment, without mentioning the Colorado Constitution.

  Amicus Brief
  Opinion

Iowa

- *State v. Burns*, S20-1150 (S. Ct. of Iowa). In the course of a criminal investigation, Iowa police secretly collected DNA from a straw that the defendant in this case had used at a restaurant, then warrantlessly extracted and sequenced that DNA. The ACLU, ACLU of Iowa, and the Electronic Frontier Foundation filed a brief on March 30, 2021. We argued in our brief that such a search requires a warrant under the Fourth Amendment to the U.S. Constitution and Article I, Section 8 of the Iowa Constitution. This is so because of the substantial property and privacy interests in the entirety of a person's genetic makeup, and also because the involuntariness with which we shed DNA makes our genetic material an ill fit for the "abandonment doctrine" that courts have applied to discarded objects such as garbage left out for collection. The Iowa Supreme Court has recognized greater privacy protections under state law than exist under the U.S. Constitution—our brief argues that the court should apply those protections to our unavoidably shed DNA regardless of how, or whether, it resolves the Fourth Amendment question. The case is now pending before the Iowa Supreme Court.

  Amicus Brief

Maine

- *Gaul v. York County*, Civ. No. cv-19-164 (York County, July 2019). This case seeks to enforce the Maine Constitution's prohibition against unreasonable seizure as applied to a case of unnecessary custodial arrest; it is an attempt to overcome *Atwater v. Lago Vista,* 532 U.S. 318 (2001), under the Maine Constitution. The applicable constitutional provision is Maine Constitution article 1, section 5. On January 12, 2021, the trial court granted in part and denied in part the defendants' motion for summary judgment. We anticipate taking the remaining

issue (the lawfulness of the county's jail strip search policy) to trial.

ACLU Page

Massachusetts

- *Commonwealth v. Almonor*, 120 N.E.3d 1183 (Mass. 2019). The ACLU of Massachusetts filed an amicus brief in this case about real-time, warrantless cell phone tracking. We argued that a government demand for real-time location data constitutes a search implicating article 14 of the Declaration of Rights of the Massachusetts Constitution, which provides that "[e]very subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions." The court agreed that it was a search. This case built on *Commonwealth v. Augustine*, 467 Mass. 230, 241 (2014), an ACLU and ACLU of Massachusetts case that established state constitutional protections for cell site location information. This was a precursor to the U.S. Supreme Court's decision in *Carpenter*, and is an example of how state court decisions recognizing rights under state constitutions can set the stage for subsequent federal court decisions recognizing analogous rights under the U.S. Constitution.

  ACLU Page
  Westlaw link

- *Commonwealth v. Johnson*, 477 Mass. 1112 (2017). The ACLU of Massachusetts filed an amicus brief challenging the police's warrantless search of Jamie Johnson's GPS location data on the grounds that it violates article 14 of the Declaration of Rights of the Massachusetts Constitution, which provides that "[e]very subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions." Johnson's probation had ended over a year prior to the search and was therefore no longer wearing the device when its data was searched. The court held there was no expectation of privacy in regard to the data transmitted by the GPS.

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  Westlaw link

Minnesota

- *Minnesota v. Leonard*, 943 N.W.2d 149 (2020), Court No. A17-2061 (Minnesota Supreme Court). On August 14, 2015, local police officers arrived at the Ramada Hotel in Bloomington, Minnesota, and requested the hotel clerk produce the hotel's registry, kept pursuant to Minnesota Statute section 327.10 and open to inspection by all law enforcement pursuant to Minnesota Statute section 327.12. Using the information gleaned from the hotel registry, the officers investigated one of the registered guests, John Thomas Leonard, an out-of-state resident who had pre-paid for a room with cash and rented for only about six hours. Leonard was arrested, charged, and ultimately convicted of two counts of check forging. In the lower courts, Leonard principally argued that all the evidence seized from his hotel room should be excluded on the basis that Minnesota's hotel registry statutes, on which the investigation into his hotel room was instigated, violated his privacy rights under the Fourth Amendment and the Minnesota Constitution.

  On appeal to the Minnesota Supreme Court, the ACLU of Minnesota submitted an amicus brief arguing that state constitutional privacy protections (article 1, section 10), go beyond the Fourth Amendment and should be applied in this case. In a 4-3 decision, the Court held that under the Minnesota Constitution, law enforcement officers must have at least a reasonable, articulable suspicion to search a hotel guest registry. In so doing, the Court importantly extended the protections of the Minnesota Constitution beyond those of the Fourth Amendment to the United States Constitution as it relates to a person's reasonable expectation of privacy and searches conducted by law enforcement. Specifically, the court reasoned

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that "[a]n examination of a hotel guest registry conducted by law enforcement officers is a search within the meaning of Article I, Section 10 of the Minnesota Constitution because an individual's presence at a hotel is sensitive information in which there is an expectation of privacy that society is prepared to recognize as reasonable." As such, "law enforcement officers must at least have reasonable, articulable suspicion to search the sensitive location information in a guest registry."

Westlaw link

- *State v. Pauli*, A19-1886 (S. Ct. Minn.). In this case, the ACLU, ACLU of Minnesota, and Electronic Frontier Foundation filed an amicus brief on April 22, 2021, arguing that the contents of our email communications—as well as other electronic files stored in accounts operated by third-party providers—must receive protection under the Fourth Amendment and the corresponding provision of the Minnesota Constitution (article I, section 10). We also argued that people do not lose their reasonable expectation of privacy in such files when they agree to third-party providers' mandatory terms of service, which are written to protect providers from liability, rather than to define the scope of our constitutional rights in a digital age. The case is currently pending before the Minnesota Supreme Court.

  Amicus Brief

New Mexico

- *Gutierrez Sanchez v. Sunland Park* (Third Judicial District Court). The ACLU of New Mexico brought this racial profiling case under the New Mexico State Constitution's Fourth Amendment analog (article II, section 10) for improper expansion of the scope of stop, as well as a New Mexico statute prohibiting racial profiling. This case involved a documented immigrant who was pulled over for broken taillight and detained for an hour while local police waited for CBP to come to the scene and do a dog sniff around his car.

  ACLU Page

Pennsylvania

- *Commonwealth v. Pacheco*, No. 42 MAP 2020 (S. Ct. of Pa.). In the course of a drug investigation, police obtained a court order under a provision of Pennsylvania's state wiretap act relating to pen registers. The order required a cell phone provider to track and locate the suspect's phone, and the tracking data gave investigators evidence that he was transporting heroin between Georgia and New York. The intermediate appellate court held that the investigators needed a warrant for the real-time tracking, but that the court order—despite being issued under a less protective statute authorizing lesser process—nevertheless met the Fourth Amendment's warrant standards. The ACLU, ACLU of Pennsylvania, and the Electronic Frontier Foundation filed a brief on September 21, 2020, arguing that people have a reasonable expectation of privacy in their real-time cell phone location information. We advanced this argument both under the Fourth Amendment and, independently, under Article I, Section 8 of the Pennsylvania Constitution, which the state supreme court has previously held to be more protective than the Fourth Amendment.

  ACLU Page

- *Commonwealth v. Green*, No. 6 MAP 2021 (S. Ct. of Pa.). This case raises the question of what procedures are necessary to ensure that digital searches of the personal and private information in electronic devices adhere to constitutional protections against general and overbroad searches. A criminal defendant challenged a warrant authorizing the seizure of all his electronic devices, as well as a subsequent search of them for "evidence relating to the possession and/or distribution of child pornography." The warrant did not place any limits whatsoever on how that search

could be conducted, nor on the police's use or retention of non-responsive information. The ACLU and ACLU of Pennsylvania, along with others, filed a brief on April 7, 2021, which argued that search warrants permitting broad and unlimited searches of digital devices violate the particularity requirements of both the Fourth Amendment to the U.S. Constitution and Article I, Section 8 of the Pennsylvania Constitution. It also sought to educate the court about possible approaches—including search protocols imposed by a magistrate, post-search court review, use restrictions, and more—to ensuring that warrants authorizing electronic device searches are appropriately cabined and fall within constitutional bounds. The Pennsylvania Supreme Court ruled in December 2021 that the search warrant was not overbroad because it sufficiently described the items for which there was probable cause.

ACLU Page

- *Interest of Y.W.-B.*, 265 A.3d 602, 628 (Pa. 2021). A mother challenged an order by a state trial court compelling her to allow social workers from the Philadelphia Department of Human Services to enter her home to conduct an inspection based on an anonymous report that the mother brought her child with her to protest the Philadelphia Housing Authority and may not have fed the child during the eight-hour protest. The ACLU of Pennsylvania filed a joint amicus brief with Community Legal Services of Philadelphia on behalf of the mother arguing that the standard adopted by the intermediate appellate court for allowing child-welfare home inspections—probable cause that "a child is in need of services"—does not sufficiently protect parents' rights under the Fourth Amendment and Pennsylvania Constitution and that adopting such a broad standard would have a disparate impact on families of color. The Pennsylvania Supreme Court held that "the Fourth Amendment (and our own Article I, Section 8) applies to searches conducted in civil child neglect proceedings, which have the same potential for unreasonable government intrusion into the sanctity of the home" as searches conducted in criminal investigations. The court ruled that the order compelling the home inspection violated the Fourth Amendment and article I, section 8 of the Pennsylvania Constitution because it was not supported by probable cause to believe that the mother's children had been abused or neglected or that evidence of such abuse would be found inside the mother's home.

  Opinion
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- *Commonwealth v. Barr*, 266 A.3d 25, 30 (Pa. 2021). The Pennsylvania Supreme Court ruled that the odor of marijuana, by itself, does not provide probable cause for police to search a vehicle following the passage of Pennsylvania's Medical Marijuana Act, which allows thousands of Pennsylvania residents to legally use medical marijuana. The court held that odor could be one factor in the totality of circumstances analysis in determining whether probable cause exists to believe that a crime has been committed. We joined an amicus brief by the Defender Association of Philadelphia arguing that, given the number of people who are registered medical marijuana users under the law, the smell of marijuana can no longer be considered evidence of illegal activity and that police officers regularly use the smell of marijuana as a pretext for searches, particularly of people of color. The Supreme Court of Pennsylvania held that there was no other evidence besides the odor of marijuana that gave rise to the officers' suspicions and therefore upheld the trial court's decision granting the motion to suppress. While the case was pending, the Pennsylvania Supreme Court held in a different case (*Commonwealth v. Alexander*, 243 A.3d 177 (2020)) that article I, section 8 of the Pennsylvania Constitution requires both a showing of probable cause and exigent circumstances to justify a warrantless search of an automobile.

  Opinion

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Vermont

- *Zullo v. State*, 205 A.3d 466 (Vt. 2019). The ACLU of Vermont challenged a vehicle seizure and search based only on the faint odor of burnt marijuana under article 11 of the Vermont Constitution, which the Vermont Supreme Court has interpreted to provide greater protection than the Fourth Amendment. Article 11 provides the right to "free[dom] from search or seizure," though the court has read in the "unreasonable" standard from Fourth Amendment jurisprudence. The Vermont Supreme Court ruled on the following issues of first impression: (1) the state is not immune from constitutional claims; (2) article 11 is self-executing and allows a private right of action for money damages; (3) such a claim requires a showing that the officer either violated clearly established law or acted in bad faith (which allows a claim based on racial profiling); and (4) the faint odor of burnt marijuana, standing alone, does not establish probable cause.

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  Press release
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- *State v. Walker-Brazie and Lena-Butterfield*, No. 2019-388. The ACLU of Vermont represented a couple challenging the denial of their suppression motion under article 11 of the Vermont Constitution. A Border Patrol agent discovered the evidence (marijuana and mushrooms) during a warrantless and consent-less vehicle search after a roving patrol stop, and it was introduced in a state criminal proceeding. The Vermont Constitution, unlike the U.S. Constitution, states that when "any officer" is "required to search suspected places," they must have a warrant (or consent). There is no automobile exception to article 11's warrant requirement, and we argued—and the Vermont Supreme Court agreed—that evidence found by Border Patrol agents on roving patrol in a manner that violates the state constitution is not admissible in a state criminal proceeding, regardless of whether the search comported with the Fourth Amendment.

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  Press release
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Washington

- *State v. Villela*, 450 P.3d 170 (Wash. 2019). The ACLU of Washington filed an amicus brief in this case, in which a driver was arrested for DUI and his car impounded and searched. We argued that a statute requiring impounds of vehicles following the driver's arrest for DUI was unconstitutional under article 1, section 7 of the Washington Constitution. The court agreed and found that it is unconstitutional because there is no consideration of less invasive alternatives to impound.

  Amicus Brief
  Opinion

- *State v. Mayfield*, 192 Wash. 2d 871 (Wash. 2019), 434 P.3d 58. In this case, a man argued he was unlawfully seized when a police officer prolonged his detention by questioning him and asking repeatedly for consent to search, when Mayfield felt he had no choice but to agree. The court of appeals rejected his claim that his state constitutional privacy rights, article I section 7, were violated because Mayfield's brief was not structured around certain criteria, known as a Gunwall analysis, and affirmed his conviction. We filed an amicus brief with other amici in September 2018, arguing that requirement of this specific form of analysis, when a State Constitutional right to privacy is asserted and claims have been supported, poses a substantial risk to privacy protections in Washington State. On February 7, 2019, the Washington Supreme Court issued an Opinion agreeing that the Gunwall analysis was not required and ruling that exceptions to suppression of evidence found in violation of state constitutional privacy protections must be narrowly construed, thus the

evidence found in Mr. Mayfield's case should be suppressed.

Amicus Brief
Opinion

AUTOMATIC LICENSE PLATE READERS

California

- *ACLU v. County of Los Angeles,* BS 143004. The ACLU Foundation of Southern California and Electronic Frontier Foundation filed this case against the Los Angeles Police Department and Los Angeles Sheriff's Department challenging their refusal to disclose a week's worth of data collected by their automatic license plate reader systems (ALPRs). The trial court held that the agencies could refuse to disclose the data both because each scan of a license plate is an investigation into that vehicle, making the data exempt as records of law enforcement investigations, and because the harm to law enforcement from releasing the data (by undermining ALPRs as an investigative tool and revealing police "patrol patterns") substantially outweighed any public benefit from revealing the extent of intrusion into privacy or any abuses under the Public Records Act's "catchall" exemption. The Court of Appeal affirmed the trial court's holding that the data is exempt as records of law enforcement investigations but did not reach its holding on the catchall exemption. The California Supreme Court granted review, and in September 2017, held that ALPR data are not exempt as records of investigations because they are not targeted to particular crimes or suspects, and holding that potential harms from disclosure raised under the catchall provision could likely be addressed through redaction of the data. The court remanded to the trial court to consider what kind of redaction would be appropriate. Following extensive negotiation, we reached a settlement under which the police and sheriff's departments must turn over de-identified license plate data they indiscriminately collected on millions of law-abiding drivers in Southern California. The data will provide information about how the agencies are using ALPRs systems throughout the city and county of Los Angeles and educate the public on the privacy risks posed by this intrusive technology.

Westlaw link

Massachusetts

Commonwealth v. McCarthy, 484 Mass. 493, 142 N.E.3d 1090 (2020). The ACLU of Massachusetts filed an amicus brief in an appeal asking the Massachusetts Supreme Judicial Court whether the state constitution protects data collected by Automated License Plates Readers (ALPRs). The argument relies on article 14 of the Declaration of Rights of the Massachusetts Constitution, which provides that "[e]very subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions." The court held that the expectation of privacy extended to his public movements, but not to the ALPR data.

Westlaw link

Virginia

- *Neal v. Fairfax Cty. Police Dep't*, 299 Va. 253, 849 S.E.2d 123 (2020). The ACLU of Virginia challenged Fairfax County Police Department's use of Automatic License Plate Readers (ALPRs) under Virginia's Government Data Collection and Dissemination Practices Act ("Data Act"), arguing that the collection and storage of ALPR data without suspicion of any criminal activity (a practice referred to as the "passive use" of ALPRs) violated state law. Summary judgment was granted in favor of the defendants in November 2016. We appealed to the Supreme Court of Virginia, which held that pictures/data associated with the license plate numbers could be considered personal information under the data act. The case was remanded to determine

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whether the ALPR database qualified as an information system.

- Following a two-day bench trial in December 2018, the Circuit Court ruled in our favor that the ALPR passive data collection practices violates the Data Act. But the court arbitrarily granted only 11% of our fee petition. Fairfax County appealed the merits ruling, and we appealed the fee award. Both parties' Petitions for Appeal to the Supreme Court of Virginia were granted. The Supreme Court held that while license plate numbers stored in the ALPR database were not personal information under the Data Act, pictures and data associated with the numbers were. The case was remanded to determine whether the ALPR database qualified as an "information system"—rather than dealing directly with investigations and intelligence gathering—and thus would not be exempt under the law. On this matter, the case again went before the Supreme Court, where the court held that the ALPR was not an information system.

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OTHER

Michigan

- *Hart v. State,* 946 N.W.2d 285 (2020). The ACLU of Michigan was invited to file an amicus brief in a lawsuit about whether the state can be held liable for damages when it fails to remove someone from the sex offender registry as required by law, leading to the person's unlawful arrest, conviction and year-long imprisonment. In a terrible miscarriage of justice, Anthony Hart was arrested, convicted of failing to register, and sent to prison for over a year, even though he should not have been on the registry in the first place. After the mistake was discovered, he was released from prison, and he sued the State of Michigan for violating his rights, alleging violations of Michigan Constitution under article 1, sections 11 (search and seizure) and 17 (due process). The Michigan Court of Appeals ruled against him, holding that the Michigan State Police could not have foreseen that their failure to remove people from the registry could result in their wrongful conviction and imprisonment. The Michigan Supreme Court granted review of Hart's case, and the ACLU of Michigan filed a friend-of-the-court brief on his behalf, detailing the history of the registration law and explaining why it was entirely foreseeable that the state's errors would lead to wrongful arrests and convictions. Unfortunately, in July 2020, the Michigan Supreme Court dismissed the appeal, thus allowing the Court of Appeals decision to stand.

  Westlaw link

Utah

- *Porter v. Daggett County*, No. 2:18-cv-00389 (D. Utah 2018). This is a consolidated lawsuit on behalf of Dustin Porter, Steven Drollette, and Joshua Asay seeking damages and injunctive relief for a pattern of severe cruelty against them while they were incarcerated at the Daggett County Jail. The plaintiffs describe being shocked with a Taser for guards' entertainment, attacked by police dogs, physically assaulted, threatened with a gun, and denied medical and mental health care, among other instances of abuse. The complaints pressed a claim that article 1, section 9 of the Utah Constitution, which says that "[p]ersons arrested or imprisoned shall not be treated with unnecessary rigor" (the "Unnecessary Rigor Clause"), is more protective of prisoners than the Fourth Amendment under the facts of the cases. In a February 22, 2022, summary judgment decision, the District Court interpreted state precedent to reason that federal qualified immunity doctrine should apply to state constitutional claims in state constitutional claims. The court did not identify any state or federal precedent to support this novel application. The court then ruled that with respect to the claim against the sheriff overseeing the jail at the

time of the events, there was no case law clearly establishing that failing to train or oversee guards violates the Unnecessary Rigor Clause. Accordingly, the court dismissed that claim against the former sheriff. The court did note, however, that "tasing an inmate or subjecting an inmate to dog bites could violate the Unnecessary Rigor clause," which leaves open the possibility of recovering on this claim against the remaining individual defendants, who have defaulted.

ACLU Page

Freedom From Self-Incrimination

Oregon

- *State v. Pittman,* 479 P.3d 1028, 367 Or. 498 (Or. 2021). In a criminal case, the ACLU of Oregon, ACLU national, and the Electronic Frontier Foundation filed an amicus brief arguing that the Oregon state constitution (article 1, section 12) prohibited the compelled provision of one's iPhone passcode. The Oregon Supreme Court reversed the decision of the trial court, holding that a person cannot be compelled to provide incriminating, testimonial evidence, and under the circumstances of this case, the trial court's order compelling defendant to unlock the cell phone violated article I, section 12.

Westlaw link

Free Speech

ANTI-PANHANDLING ORDINANCES

Massachusetts

- *Massachusetts Coalition for the Homeless v. City of Fall River,* 486 Mass. 437 (2020), 158 N.E.3d 856. On behalf of individuals and an organizational client, the ACLU of Massachusetts challenged the city of Fall River's application of Massachusetts General Law chapter 85, section 17A, a statute we alleged to be facially unconstitutional due to its content- and identity-based restrictions. The statute targeted people experiencing homelessness, by asking that those who solicit from cars on behalf of themselves be "punished by a fine of fifty dollars and for each subsequent offense shall be punished by a fine of one hundred dollars." Yet the statute's prohibitions exempted the sale of newspapers and certain nonprofits, so the definition of criminality turned on the identity of the speaker and content of the speaker's message. We alleged that the statute violated the free speech guarantee of article 16 of the Declaration of Rights of the Massachusetts Constitution, which provides: "The liberty of the press is essential to the security of freedom in a state: it ought not, therefore, to be restrained in this commonwealth. The right of free speech shall not be abridged."

  The Massachusetts Supreme Judicial Court held that the statute was an unconstitutional content-based restriction on speech under both article 16 and the First Amendment to the U.S. Constitution, and that it had to be invalidated in its entirety.

  ACLU Page
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SPEECH AT WORK

New Mexico

- *Duffin v. D'Antonio* (May 2019). The ACLU of New Mexico brought this case pursuant to the New Mexico Constitution's First Amendment analog (article II, section 17) on behalf of three women district attorneys who were fired for refusing to take down women's empowerment signs and signs that read "no mansplaining" in their offices. The

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attorneys also faced discrimination from their male colleagues.

ACLU Page

- *Mackie v. NM Public Education Department,* No. D-101-CV-2016-00813. The ACLU of New Mexico brought this case under the New Mexico Constitution First Amendment analog (article II, section 17) on behalf of secondary education teachers who were reprimanded for speaking out against mandatory standardized testing for students. The case also included claims of denial of due process of law and violation of New Mexico public school students' fundamental right to education. In May 2016, the New Mexico Public Education Department agreed to begin the process of removing the gag rule from the books, and officially removed the regulation in August of the same year.

  ACLU Page

Oregon

- *Klein v. Oregon Bureau of Labor and Industries*, 289 Or. App. 507 (2017). The ACLU of Oregon filed an amicus brief in this case supporting Oregon's application of its public accommodation laws to a baker who refused to make a wedding cake for a lesbian couple. The original brief was filed in 2015. In 2019, the Oregon Supreme Court granted, vacated, and remanded the case for reconsideration in light of *Masterpiece Cakeshop v. Colorado Civil Rights Commission,* 584 U. S. ____ (2018), in which the U.S. Supreme Court used the free exercise clause of the First Amendment to uphold the right of Jack Phillips, the owner of the Masterpiece Cakeshop in Lakewood, Colorado, to refuse to custom-design a cake for a same-sex wedding. We filed an amicus brief in September 2019 arguing that *Masterpiece* should not disturb the court's decision to uphold the application of Oregon's non-discrimination laws to the bakers (decision pending).

  The Oregon Court of Appeals issued an opinion largely affirming its previous decision, but reversing a small portion of its opinion as it relates to certain communications the bakers made about their discrimination. The court also reversed on the damages amount. The key takeaway, however, is that the court affirmed that the baker violated Oregon's non-discrimination law when it refused to make a lesbian couple a wedding cake.

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RELATED TO PROTEST

Hawai'i

- *In re Investigation of KAHEA*, No. CAAP-20-0000110. This case involves an investigation by the Hawai'i attorney general against KAHEA: The Hawaiian-Environmental Alliance, a nonprofit organization, for its involvement and support of demonstrations against the proposed Thirty Meter Telescope on top of Mauna Kea. Specifically, the case seeks to quash a subpoena seeking KAHEA's bank records under the pretense that expenditures made in support of the demonstrations—some of which involved acts of civil disobedience—did not serve KAHEA's charitable purpose, because the acts of civil disobedience by third parties were illegal. The case became more complicated by the attorney general's suggestion that the matter became moot when, after the order granting the subpoena was stayed, the AG nevertheless obtained a warrant for KAHEA's bank records. The ACLU of Hawai'i filed an amicus brief at the trial court level in support of quashing the subpoena, arguing that the investigation was retaliatory and interfered with KAHEA's First Amendment rights. Later, we filed an amicus brief in the Hawai'i Supreme Court in support of mandamus, arguing that the lower court committed flagrant and manifest abuse of discretion by completely disregarding

three important constitutional issues raised in the special proceeding that prompted the Petition.

Finally, as KAHEA appealed the motion to quash up to the Hawai'i Supreme Court, we filed a third amicus brief arguing that the trial court had reversibly erred by ignoring the freedom of speech, freedom of association, and privacy issues raised by the subpoena. The Supreme Court held oral argument on May 20, 2021, and issued its opinion on September 21, 2021. Although the court declined to quash the entire subpoena, it affirmed that "KAHEA's opposition to development on Mauna Kea falls squarely within the heartland of the First Amendment's protections," and further narrowed the scope of the AG's subpoena.

Oral argument link
Amicus Brief
Westlaw link

Vermont

- *Bombard v. Riggen,* No. 21-CV-176. Gregory Bombard was stopped, seized, and later arrested because a state trooper believed Bombard displayed his middle finger toward the officer. Bombard asserts the initial stop not only violated his rights to be free from unreasonable seizure and false arrest, but that giving the middle finger to protest a police officer's actions is free expression protected by the First Amendment of the U.S. Constitution and article 13 of the Vermont Constitution. Vermont's article 13's language regarding "a right to freedom of speech… concerning the transactions of government" presents an opportunity to seek a ruling that SCOTUS's recent decision in *Nieves v. Bartlett,* 587 U.S. ___ (2019), which largely bars First Amendment retaliatory arrest cases where probable cause is found, will not be followed in Vermont.

  ACLU Page

Washington, D.C.

- *Horse v. District of Columbia,* No. 1:17-cv-01216. The ACLU-DC raised a variety of constitutional, statutory, and common law claims against the District of Columbia and 30 individual police officers for mass arrests, wanton use of pepper spray, and unlawful conditions of confinement as applied to six demonstrators, journalists, and/or legal observers on Inauguration Day 2017. Five of our 16 claims were brought under the D.C. First Amendment Assemblies Act (FAAA), which goes beyond the First Amendment itself in setting specific limits regarding the use of chemical irritants, mass arrests, and conditions of confinement, and which requires the issuance of audible dispersal orders in certain circumstances. We asserted both that the FAAA contains an implied right of action and that the FAAA was enforceable via a cause of action for negligence per se. Although most of our constitutional claims survived the motion to dismiss, the court rejected our arguments that the FAAA was enforceable. Because this decision was not reported in any form, and is in any event nonbinding, we may try again to invoke the FAAA in an appropriate case. Notwithstanding the dismissal of the FAAA claims, we ultimately reached a favorable settlement for compensation, policy changes, and expungement. Taken together with a simultaneous settlement in a separate class-action case alleging many of the same constitutional violations, the District agreed to pay a total of $1.6 million to settle the civil claims arising from the actions of D.C. police on Inauguration Day 2017.

  ACLU Page

- *Asinor v. District of Columbia,* No. 1:21-cv-02158. In July 2020, the D.C. Council amended the D.C. First Amendment Assemblies Act (FAAA) to ban D.C. police from using chemical irritants and explosive munitions, such as flash bang grenades, to disperse demonstrations. Yet on August 29, 2020, Metropolitan Police Department officers sprayed chemical irritants and deployed flash grenades against a crowd of people near the

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White House who were protesting brutality and racism in policing. Journalists Oyoma Asinor and Bryan Dozier, who were present to cover the event, were hit by the irritants and terrified by the explosions. The ACLU-DC sued to enforce their rights under the FAAA, asserting in the alternative that the FAAA is enforceable via a claim for negligence per se and that the FAAA contains an implied private right of action. Defendants' motion to dismiss these claims is pending.

ACLU Page

CAMPAIGN FINANCE

Oregon

- *Multnomah County v. Mehrwein,* SC No. S066445. In this case, the ACLU of Oregon filed an amicus brief supporting campaign finance limits. The ACLU of Oregon often relies on the Oregon state constitution speech provision (article I, section 8), which has been viewed as more protective of speech than the First Amendment. We argued that constitutional protection for free expression must be balanced with Oregon Constitution's equal protection of free suffrage interests in Article II, section 8. Thus, despite this strong protection for political expression, some limits on campaign contributions and expenditures, and transparency therein, are also necessary to ensure free and fair elections. The Oregon Supreme Court en banc held that limitations on campaign contributions are not facially unconstitutional, and remanded the case to determine whether a $500 campaign contribution limit was unconstitutionally low under the First Amendment of the U.S. Constitution.

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OTHER

Kansas

- *State v. Hayes*, 120741 (Ks. Ct. App. 2020). This appeal was filed challenging the overbroad and vague probation conditions applied to individuals in Wichita, Kansas, who are identified as gang members. ACLU of Kansas argued that the probation conditions were invalid under the state constitution's speech ("all persons may freely speak, write, or publish their sentiments on all subjects," Kansas Constitution Bill of Rights section 11) and federal due process protections. The court found the constitutional issues were not properly preserved for appeal by the trial court defense counsel and affirmed.

  ACLU Page

Massachusetts

- *Spaulding v. Natick School Committee,* MICV2018-01115 (Mass. Superior Court). This case challenged, under the state constitution as well as the First Amendment, the school committee's content-based policies governing what could be said during the public comment portion of school committee meetings. The court declared the prior policies unconstitutional in multiple ways and final judgment incorporated a negotiated rewrite of the policies. The free speech provision of Article 16 of the Massachusetts Declaration of Rights, as amended by Amendment Article 76, has been interpreted to provide greater protection than the First Amendment in certain circumstances, although the court did not rely on that distinction in this case.

  ACLU Page
  Court Order

- *Jess v. Summer Hill Estates Condominium Trust,* 2080CV00117 (Mass. Superior Court). In this case, the ACLU of Massachusetts secured a judgment allowing Margery Jess to post a "Black Lives Matter" sign in the common area outside

her condominium or in her window or on her door. The final judgment also mandated revisions to the condominium rules. Previously, the association allowed the posting of certain patriotic messages in the common areas with prior approval, but it would not allow Jess to post a BLM sign in the common areas and it forbade all signs in windows or doors, which are owned exclusively by unit owners. We argued that the condominium's policies violated the doctrine of equitable reasonableness, as informed by Article 16 of the Massachusetts Constitution, and the state trial court agreed. The Massachusetts Supreme Judicial Court previously ruled that the state constitutional free speech provision may apply to some private actors, relying in part on a New Jersey decision holding that that the free speech provision of the New Jersey Constitution applies in some situations to private actors.

ACLU Page
Opinion

New Jersey

- *Arias v. New Jersey Dep't of Corr.*, No. A-5284-17T4, 2019 WL 5491344 (N.J. Super. Ct. App. Div. 2019). The ACLU of New Jersey brought this challenge to prison discipline for filing a grievance using state corollaries to the First Amendment. John Arias, an inmate in state prison, had been found guilty by the Department of Corrections of making false allegations in a grievance he filed. The court reversed this decision because there was no substantial credible evidence in the record identifying the specific lie or false statements made or supporting the conclusion that the statements were false or lies.

  Westlaw link

North Carolina

- *In re: Custodial Law Enforcement Recording Sought by City of Greensboro*, 853 S.E.2d 151 (N.C. 2021). The ACLU of North Carolina challenged a Guilford County District Court gag order allowing Greensboro City Council members to view an incident of police brutality caught on a body-cam video but prohibiting them from discussing anything they saw in the video with their constituents. We argued that the gag order constitutes an unconstitutional prior restraint on the elected officials' speech under article I, section 12 of the North Carolina Constitution, which provides: "The people have a right to assemble together to consult for their common good [and] to instruct their representatives . . ." We lost at the North Carolina Court of Appeals and, after another round of briefing, the case is now pending at the North Carolina Supreme Court, with a decision expected sometime this year.

  Westlaw link

Pennsylvania

- *J.S. by M.S. v. Manheim Twp. Sch. Dist.*, 263 A.3d 295 (Pa. 2021). In this case, the Pennsylvania Supreme Court held that the Manheim Township School District failed to show that a student's Snapchat messages created a material and substantial disruption of school or constituted a terroristic threat. The ACLU of Pennsylvania filed an amicus brief with the Education Law Center (ELC) in support of the student, J.S., who was expelled for sending two private Snapchat messages to another student joking that a third student fit the profile of a school shooter. We joined with ELC to argue that (1) due process requires that students have the opportunity to question witnesses in an expulsion hearing; (2) the court should adopt a subjective, speaker-based intent standard when determining whether a statement is a true threat in noncriminal cases; and (3) the court should rule that Pennsylvania law (under both article I, section 7 and statutory authority) prohibits schools from punishing students for off-campus speech if it is otherwise constitutionally protected. The majority opinion sidestepped the due process question and instead held that, in the school setting, a court should assess whether an expression is a true threat

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by considering the totality of the circumstances, primarily focusing on the subjective intent of the speaker. Relying on the U.S. Supreme Court's decision in *Mahanoy Area School District v. B.L.*, 141 S. Ct. 2038 (2021), the court also held that the school district failed to establish that J.S.'s speech caused a substantial disruption, or impacted the rights of others, so as to permit the school district to punish J.S. for his nonthreatening off-campus speech.

Westlaw link

Washington

- *OneAmerica Votes v. State,* No. 100248-3. The ACLU of Washington filed an amicus brief in this case before the Washington Supreme Court, urging the court to find that a state law prohibiting noncitizen involvement in campaign finance decisions "in any way," including regarding local ballot measures, violates the state constitution provisions on free speech and the right to petition. The amicus brief discusses Washington's history of considering noncitizens to be members of the community protected by local laws, which distinguishes it from federal court rulings on financial contributions to candidate campaigns by "foreign nationals."

  ACLU Page
  Amicus Brief

Religious Freedom

FUNDING OF RELIGIOUS SCHOOLS

Montana

- *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246 (2020). The Montana Supreme Court struck down the Montana State Legislature's tax credit program as a violation of Montana's constitutional provisions (article V, section 1, and article X, section 6) that prohibit state aid to religious schools, relying exclusively on state authority. The case was then brought to the U.S. Supreme Court, where the ACLU of Montana and ACLU national along with other civil rights and religious freedom organizations filed an amicus brief in support of the Montana Supreme Court decision. Unfortunately, the U.S. Supreme Court reversed the prior decision, holding that the Montana no-aid provision discriminated based on religious status, and thus was subject to strict scrutiny.

  ACLU Page
  SCOTUSblog case page

New Jersey

- *ACLU of New Jersey v. Hendricks*, 233 N.J. 181, 183 A.3d 931 (2018). The ACLU of NJ, ACLU national, and Americans United for Separation of Church and State filed a lawsuit to stop the state from awarding more than $11 million in taxpayer funds to two higher education institutions (an Orthodox Jewish yeshiva and a Presbyterian seminary) dedicated solely to religious training and instruction in 2013. The lawsuit challenges the funding under the state constitution and the New Jersey Law against Discrimination. In May 2018, the New Jersey Supreme Court remanded the case to the Secretary of Higher Education for fact finding on questions related to the nature of the educational training by the seminary and yeshiva. During administrative proceedings, both educational institutions involved eventually decided to stop seeking funding from the state.

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OTHER

Massachusetts

- *Caplan v. Town of Acton*, 479 Mass. 69 (2018). The ACLU of Massachusetts filed an amicus brief in

the state appeals court in support of plaintiffs who argued that section 2 of article 18 of the Massachusetts Constitution, also known as the "Anti-Aid Amendment," prohibits public funding of active houses of worship. The constitution states that the grant of public funds cannot be used "for the purpose of founding, maintaining or aiding any church, religious denomination or society." The case was vacated and remanded.

Westlaw link

Michigan

- *Lenawee Cty. Health Dep't v. Eicher,* No. 19-6392-CE (Lenawee Cty. Cir. Ct.). The ACLU of Michigan is representing an old order Amish community that local officials are threatening to expel from the county unless they abandon their religious beliefs requiring a lifestyle of self-toil in which they do not use electricity, hydraulic power, running water, and other modern technology. In October 2019, Lenawee County filed lawsuits against every Amish family in the county, asking a court to kick the Amish off their own property and demolish their homes. The ACLU of Michigan is representing the Amish families to defend their right to adhere to their religious beliefs while not harming anyone else. In December 2019, we filed counterclaims against the County for violating the Amish families' rights to religious liberty under the Michigan Constitution as well as the Fair Housing Act.

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  Press release and court filings

Cruel Punishment

DEATH PENALTY

Arizona

- *Jewish Community Relations Council of Greater Phoenix v. Arizona,* No. CV2022001875000. The ACLU of Arizona filed this case on February 15, 2022, on behalf of an organizational plaintiff and two individual plaintiffs challenging the use of cyanide gas—the primary method used to exterminate Jewish people and members of other minority groups by the Nazis during the Holocaust—as a method of execution under the prohibition against cruel and unusual punishment in the Arizona Constitution. While the protection against cruel and unusual punishment in the Arizona Constitution is likely no broader than its federal counterpart, taxpayers in Arizona have standing "in an appropriate action to question illegal expenditures made or threatened by a public agency" (*Smith v. Graham Cty. Cmty. Coll. Dist.*, 123 Ariz. 431, 432 (App. 1979)), and "to challenge a legislative act that expend[s] monies for an unconstitutional purpose" (*Bennett v. Napolitano,* 206 Ariz. 520, 527, paragraph 30 (2003)).

  Press Release

Montana

- *Smith v. Kirkegard (Batista),* No. BDV-2008-303. The ACLU of Montana challenged the constitutionality of the state's lethal injection protocol twice. In response to the success of the first challenge, a new protocol was written, which we challenged again. The second challenge enjoined the state from using the new lethal injection protocol as written. The district court noted that "[s]crupulous adherence to statutory mandates is especially important here given the gravity of the death penalty." As a result of the second lawsuit, there is a de facto moratorium on the death penalty in Montana. While this

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case was decided on statutory grounds, we remain optimistic that, on appeal to the Montana Supreme Court, our constitutional protections against cruel and unusual punishment and guarantee of individual dignity will prevent administration of the death penalty in Montana.

ACLU Page

Pennsylvania

- *Cox v. Pennsylvania,* Nos. 102 EM 2018 & 103 EM 2018. The ACLU of Pennsylvania and ACLU national filed a friend-of-the-court brief asking the Supreme Court of Pennsylvania to hold the state's capital punishment system in violation of the state constitution, given the vast disparities across the commonwealth in the quality of representation for capital case defendants who are unable to pay. Pennsylvania is the only state in the country that fails to provide any state funding toward the representation of defendants who are too poor to pay for private attorneys. As a result, the responsibility to fund public defense is relegated to the counties, resulting in the highest disparity in capital sentences between counties of any state in the country. In September 2019, the Supreme Court declined to exercise special jurisdiction to address a constitutional challenge to the state's death penalty, but left the door open for questions about the cruelty of capital punishment to be brought in individual cases.

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  Filings on Supreme Court of PA page

Washington

- *State v. Gregory*, 427 P.3d 621 (Wash. 2018). On October 11, 2018, the Supreme Court of Washington found that the death penalty in Washington violates the cruel punishment clause of the state constitution (article 1, section 14). The ACLU of Washington and ACLU national joined a number of civil rights organizations, attorneys, and retired Washington State judges in filing an amicus brief in this case. The court ruled unanimously that a rigorous statistical analysis showing significant racial disparity in application of the death penalty, combined with other indicators supporting the validity of the statistical results, demonstrated the death penalty was arbitrary, unfair, and racially biased and therefore unconstitutional.

  Opinion
  Amicus Brief
  Supplemental Amicus Brief

JUVENILES

Iowa

- *Bonilla v. Iowa Bd. of Parole*, 930 N.W.2d 751 (Iowa 2019). The ACLU of Iowa and ACLU national filed this case challenging Iowa parole procedures as applied to juveniles sentenced to life with parole sentences, and looking to affirmatively require right to counsel, an independent psychological evaluation, and some other protections to juvenile offenders in that process. Without reaching our as applied challenge, the Iowa Supreme Court made the very important holding that juvenile offenders have a liberty interest in parole proceedings entitling them to additional due process protections under the 14th Amendment and article I, section 9 of the Iowa Constitution. The court also recognized in dicta that juveniles are entitled to receive any rehabilitation/programming that is required as a condition of parole.

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  Westlaw link

- *State v. Zarate*, 908 N.W.2d 831 (Iowa 2018). The Iowa General Assembly amended Iowa Code § 902.1 in the 2015 legislative session in response to the Iowa Supreme Court's decision the previous year in *State v. Lyle*, 854 N.W.2d 378, 400 (Iowa 2014), which held it was unconstitutional to require juveniles convicted of Class A felonies

to serve a mandatory minimum period of incarceration before becoming eligible for parole. The amended § 902.1 was challenged in *Zarate*, and the ACLU of Iowa filed an amicus brief arguing the amended statute fails to create a constitutionally adequate factor analysis scheme and invites arbitrariness in juvenile sentencing in violation of Article 1, Section 17 of the Iowa Constitution. The Iowa Supreme Court held that Iowa Code § 902.1(2)(a)(1), which gives the district court the sentencing option of life imprisonment without the possibility of parole for juvenile offenders convicted of first-degree murder, is unconstitutional, but that the sentencing factors listed in Iowa Code § 902.1(2)(b)(2)(a)–(v), are constitutional under the Iowa Constitution.

Amicus Brief
Opinion
Westlaw link

Montana

- *Keefe v. Kirkegard,* No. DV 17-76. Judge Greg Pinski set a resentencing hearing in this case for January 24, 2018, where the District Court found Steven Keefe, who was sentenced to life without parole at age 17, to be "irreparably corrupt." The Supreme Court of Montana ordered a new resentencing hearing because the District Court failed to apply the *Miller* factors (*Miller v. Alabama*, 567 U.S. 460, 478 (2012)). In its opinion, the court maintained that sentencing juveniles to life without parole was unconstitutional under the Eighth Amendment of the U.S. Constitution and article II, section 22 of the Montana Constitution.

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New Jersey

- *State v. Comer,* 226 N.J. 205 (2016); No. 084509 (2022). James Comer was initially sentenced for a felony murder conviction when he was 17 years old to 75 years in prison, with more than 68 without parole. The court did not factor in his youth at the time of his sentencing. The ACLU's motion argued that the sentence was effectively life without parole, and thus was cruel and unusual under both the Eighth Amendment of the U.S. Constitution and article I, paragraph 12 of the New Jersey State Constitution. The New Jersey Supreme Court held in *Comer I* that sentencing judges must factor in the youth of a young person (through the *Miller* factors) when imposing long sentences, and the court remanded the case resentencing consistent with the opinion. On remand, the trial court resentenced Comer to 30 years; the ACLU of New Jersey successfully challenged the mandatory nature of that sentence on appeal. In *Comer II*, the New Jersey Supreme Court ruled that young people sentenced to lengthy sentences could apply for resentencing after 20 years.

  ACLU Page: Comer I
  ACLU Page: Comer II
  2017 New Jersey Supreme Court Opinion (Comer I)
  2022 New Jersey Supreme Court Opinion (Comer II)

Oregon

- *State v. Link,* No. S066824. In this juvenile sentencing case, the ACLU of Oregon partnered with ACLU national to file an amicus brief arguing that the Eighth Amendment and the Oregon state constitutional analog (article I, section 16) prohibit application to juveniles of a sentence of mandatory minimum life without parole for at least 30 years. The Oregon Supreme Court held that the defendant did not receive a life-without-parole sentence because after serving 30 years of his "life sentence," defendant can convert it to a sentence with the possibility of parole and *Miller*'s individualized-sentencing requirement does not apply to his sentence. The court declined to reach defendant's arguments under the Oregon Constitution (rather than the Eighth

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Amendment), finding that it was not preserved in the intermediate appellate court.

Westlaw link

COVID-19

California

- *Campbell v. Barnes*, No. 30-2020-1141117 (Orange County Sup. Ct.). The ACLU and ACLU of SoCal sought habeas and mandamus relief to protect medically vulnerable people and people with disabilities detained in the Orange County Jail and at imminent risk of serious illness and death during COVID. The case was brought under Article I, Section 17 of the California Constitution, the state analog to Eighth Amendment, and under Government Code 11135, the state analog of the ADA (California disability law says that the ADA is the floor, and state law can be more protective than federal disability law). In December 2020, the Orange County Superior Court judge granted our petitions for writs of mandamus and habeas, and ordered the sheriff to submit a plan to reduce the jail's density by 50%. The judge found that the sheriff's actions and inactions violated the state constitutional and statutory claims that we brought. In June 2021, the judge discharged the writs of habeas corpus and mandamus, finding that the county had complied with the December order, as jail population was down.

  ACLU Page

Colorado

- *Winston v. Polis*, No. 2020CV31823 (Denver District Court); No. 21CA0079 (Colorado Court of Appeals). In this class action based entirely on the state constitution's prohibition of cruel and unusual punishment (article II, section 20), plaintiffs sued the governor of Colorado and the director of the Department of Corrections alleging a host of issues regarding Colorado's response to the COVID-19 pandemic. Plaintiffs reached an agreement with the director of corrections, which the court memorialized in a consent decree. Because the governor had the power to grant additional relief that was beyond the authority of the director of corrections, including reducing the prison population or, later in the case, prioritizing vaccinations for prisoners, litigation continued against the governor. The district court granted the governor's motion to dismiss, ruling that the governor is not a proper party and that the court had no jurisdiction to order the governor to act. On July 1, 2021, hearing the plaintiffs' expedited appeal, the Colorado Court of Appeals reversed, holding that the governor is a proper party and that the court has jurisdiction to adjudicate plaintiffs' claims and to order appropriate relief.

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  Opinion

Hawai'i

- *In the Matter of Individuals in Custody of the State of Hawai'i*, No. SCPW-20-0000509. The Hawai'i Office of the Public Defender filed several mandamus petitions challenging the conditions of confinement in Hawai'i jails and prisons during COVID-19. As result of these petitions, the court issued a number of orders that resulted in a decrease of the jail and prison population by almost 20% since February 2020. Together with ACLU national and the Hawai'i Disabilities Rights Center, the ACLU of Hawai'i filed several amicus briefs. We devoted the majority of our briefing toward getting the justices to interpret the state constitutional corollary as more protective than the federal corollary.

- In resolving the most recent proceeding on October 12, 2021, three of five justices of the Hawai'i Supreme Court issued separate concurring/dissenting opinions in which they, among other things: (1) reaffirmed "the importance of interpreting state constitutions to provide greater rights than under the federal constitution" and argued that "[w]e should interpret and give life to our constitutional

prohibition against 'cruel or unusual punishment' in this light" (McKenna, J., concurrence and dissent); (2) stated that "article I, section 12 of the Hawai'i Constitution provides more expansive protections than the Eighth Amendment" (Eddins, J., concurrence and dissent); and (3) expressed a desire for the court to "expound on what constitutes 'cruel or unusual punishment' under the Hawai'i Constitution…[w]ith an eye toward future claims of cruel or unusual punishment under article I, section 12 of the Hawai'i Constitution" (Wilson, J., concurrence and dissent).

Westlaw link

Massachusetts

- *Comm. for Pub. Counsel Servs. v. Chief Justice of the Trial Court*, 484 Mass. 431 (2020), as amended, 484 Mass. 1029 (2020). The ACLU of Massachusetts joined other defense organizations in filing this case in March 2020 to ask the Massachusetts Supreme Judicial Court to protect people in Massachusetts prisons, houses of corrections, and jails during the pandemic. Exercising its superintendence authority, the court concluded that "the situation is urgent and unprecedented, and that a reduction in the number of people who are held in custody is necessary." Although the court declined to issue some of the requested relief, it announced a rebuttable presumption of release for pretrial detainees who were not held on dangerousness grounds and who were not charged with certain offenses. The court also ordered the collection of data, which the ACLU of Massachusetts published on a website that became a resource to advocates. According to the data reported by government officials, more than 5,000 people were released from custody following this litigation.

  ACLU Page

Michigan

- *Wayne County Inmates v. Wayne County Sheriff*, 947 N.W.2d 431 (Mich. 2020). During the COVID-19 crisis, jails and prisons have failed to take basic measures to protect incarcerated people from catching the deadly coronavirus. Social distancing in jail is impossible, quarantining and contact tracing procedures have been lax or nonexistent, and jails have failed to take simple hygiene measures like ensuring that people had sufficient soap and cleaning supplies. In a lawsuit brought by other organizations against the Wayne County Jail, we filed a friend-of-the-court brief asking the Michigan Court of Appeals and the Michigan Supreme Court to review a lower court's decision denying relief, arguing that the rights of inmates under the Michigan Constitution should be construed more broadly than the Sixth Circuit was construing their rights under the United States Constitution. Unfortunately, the appellate courts refused to act.

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Oregon

- We have filed several amicus briefs in cases involving incarcerated people seeking release during the COVID-19 pandemic. In those briefs, we argue that keeping the individual incarcerated, when social distancing is not possible, violates article I, section 13 of the Oregon Constitution, which prohibits treating arrested or confined persons with "unnecessary rigor." This provision presents a real opportunity for decarceration and more humane treatment of those swept into the criminal justice system.

  ACLU Page

Washington

- *In Re the Personal Restraint Petition of Robert Williams*, 496 P.3d 289 (2021). The Washington

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Supreme Court held that the "Washington Constitution is more protective than the federal constitution in the context of prison conditions. and accordingly," under the state's cruel punishment clause, prisoners challenging conditions of confinement did not have to show the "subjective deliberate indifference" of prison officials as is the Eighth Amendment requirement in federal court. An amicus brief from the ACLU and other organizations urged the court to reject the subjective standard, and the court responded with an objective standard grounded in the impact on the prisoner: "(1) the conditions create an objectively significant risk of serious harm or otherwise deprive a person of the basic necessities of human dignity and (2) the conditions are not reasonably necessary to accomplish a legitimate penological goal." Applying that standard, the court decided that the petitioner's then-current conditions of confinement were cruel under the state constitution and ordered that the Department of Corrections must remedy the conditions or release him.

Opinion
Westlaw link

OTHER

North Carolina

- *Dewalt v. Hooks*, No. 19-CVS014089 (Superior Court, Wake County). The ACLU of North Carolina is challenging the state's policy of holding incarcerated people in prolonged or indefinite solitary confinement. This practice subjects people to serious psychological and physical harm in violation of Article I, Section 27 of the state constitution, which bans "cruel or unusual punishments." This is a case of first impression under the North Carolina Constitution. The trial court denied our motion for class certification. The case is now pending before the North Carolina Supreme Court, with a decision expected sometime this year.

ACLU Page

Washington

- *Kitcheon v. City of Seattle*, No. 19-cv-25729. In October 2019, the ACLU of Washington filed a lawsuit against the City of Seattle for its "Encampment Abatement Program." The program consists of prohibiting camping on virtually all public property; training and using hundreds of police officers to force houseless people to leave under threat of arrest; destroying houseless people's belongings in "sweeps"; fencing off public property to prevent homeless access; and arresting on criminal trespass charges those who venture onto such property after it has been fenced off. The city engages in this conduct despite the severe lack of shelter space for the thousands of Seattleites who have no choice but to live, sleep, and attempt to survive outside. For the millions of dollars that the city has spent implementing this program, it could have housed nearly the entirety of King County's chronically homeless population. The lawsuit alleges that the city's program violated the plaintiffs' rights under article I, section 7 of the Washington State Constitution to be free from disturbance of their private affairs and invasion of their homes without authority of law and cruel punishment in violation of article I, section 14 of the Washington State Constitution.

Complaint

Right to Education

California

- *Mark S. v. State* (Cal. Superior Court, Contra Costa County). In Pittsburg Unified School District, students of color, particularly those with disabilities, are disproportionately

excluded from school through suspension and expulsion. Black students and English learners are also disproportionately identified as having disabilities, or more severe disabilities. Both practices impact students' fundamental interest in education and are actionable as disparate impact discrimination under the state constitution and state statutory civil rights law. Moreover, federal and state law requires, and educational experts recommend, that students with disabilities are integrated with their non-disabled peers in general education classrooms to the greatest extent possible. *See, e.g.,* Individuals with Disabilities Education Act, 20 U.S.C. § 1400(c)(5). Yet the District unlawful segregates students identified as having disabilities into special education classrooms and out of District schools. Additionally, the District refuses to provide these students with access to evidence-based academic instruction aligned with the basic statewide standards. The effect is that students with disabilities, who are overwhelmingly also students of color in the District, are relegated to a second-class education from their earliest years which causes devastating long-term harm to their education and development into adulthood. We seek to hold the District accountable for its deficiencies in delivering high-quality instruction and related services to students of color, including those identified as having disabilities. We also seek to hold the State of California accountable for its role in allowing these violations to occur unchecked and abrogating its duty to ensure all California students receive equal educational opportunity.

ACLU Page

- *Cruz et al v. State of California,* No. RG 14727139. With Public Counsel, Arnold & Porter, and Carlton Fields, the ACLU of SoCal filed a class-action lawsuit in 2014 to prevent certain school districts from robbing students of the proper—and legally required—instructional time. The lawsuit alleged violation of provisions of the California Constitution, including violation of the equal protection clauses (article I, section 7(a) and article IV, section 16(a)), violation of plaintiffs' right to receive basic educational services (article IX, section 1), and denial of privileges and immunities (article I, Section 7(b)). After winning a temporary restraining order proscribing the challenged practices at one high school, we drafted legislation to prohibit these same practices at other schools, which was signed into law in October 2015. Thereafter, we entered into a settlement with the defendants. The settlement was approved by the court on April 26, 2016. We worked to ensure that the settlement and the new legislation are properly implemented and placed know your rights materials and a sample complaint form prominently on our website.

  ACLU Page

Maryland

- *Bradford v. Md. State Bd. of Education,* No. 24C9430058. In 1994, Baltimore City schoolchildren and their parents/guardians teamed up with the ACLU in filing *Bradford v. Md. State Bd. of Education* in the Circuit Court for Baltimore City, seeking to enforce the Maryland state constitutional guarantee of a "thorough and efficient" education. Partial summary judgment was granted in plaintiffs' favor and, subsequently, the parties entered into a consent decree that changed the governance system for the Baltimore City Public School System and provided some funding increases. There was follow-up litigation to enforce the consent decree, and, eventually, school funding changes were implemented statewide through legislative actions taken upon recommendation of the Thornton Commission. But the state has failed to apply the agreed-upon inflation escalator to raise annual funding levels as needed to meet per-child costs as set forth in the funding formula. As a result of the gross inequities experienced by Baltimore schoolchildren, we went back to court in early 2019, seeking additional relief through the Bradford litigation. In January 2020, the court forcefully rejected the State of Maryland's attempt to dismiss the case. Among other things,

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the court rejected the state's claim that the courts could not review the adequacy of school funding. The case has since continued in active litigation, with added assistance from the NAACP Legal Defense Fund, and is now in the final phases of expert discovery.

ACLU Page

- *Rozon v. Prince George's County Public Schools,* No. CAL 19-19310. Working with the Office of the Public Defender's Juvenile Protection Division, the Howard Law School Civil Rights Clinic, and a private law firm, we sued the Prince George's County School System under the Maryland state constitutional guarantee of a free public school education, challenging fees—and the lack of adequate fee waivers for children living in poverty—for summer school courses in Prince George's County Public Schools. More than 65% of PGCPS students struggle with poverty, and numerous students would have failed the school year if they did not take summer courses, but fees charged for the courses made it very difficult for them to enroll. After we filed suit, an agreement was reached with the school system to waive fees for the plaintiffs and similarly situated students, allowing them to enroll in the summer of 2019, while the matter was being litigated. Then, due to the COVID-19 pandemic, the county provided summer school only remotely, and it agreed to waive all fees for all students. Thus, both parties agreed to dismiss the challenge as moot. State legislation to address this issue has also been introduced, since numerous school systems charge fees for summer school, raising the issue as a statewide concern.

  ACLU Page

Michigan

- *Council of Orgs. & Others for Educ. About Parochiaid v. Michigan,* 931 N.W.2d 65 (Mich. Ct. App. 2018); leave to appeal granted, 929 N.W.2d 281 (2019). The ACLU of Michigan represents parent and community groups in a lawsuit challenging the Michigan Legislature's appropriation of over $5 million to "reimburse" private and parochial schools for complying with mandates that all schools in Michigan must abide by. We are arguing that the funding violates a provision of the Michigan Constitution that prohibits the state from funding private schools (article 8, section 2). We won at the trial court, where the judge granted a permanent injunction against disbursing the funds, concluding that statute violated the constitutional provision. We then lost in the Michigan Court of Appeals by a vote of 2-1. The Michigan Supreme Court granted plaintiffs' application to appeal. In December 2020, the Michigan Supreme Court held that it was equally divided—three judges for affirmance and three for reversal—and the decision of the court of appeals was affirmed.

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New York

- *Maisto v. State of New York,* No. 528550 (Appellate Division, Third Department). NYCLU filed an amicus brief in this school funding case that presents the question whether the state's level of funding results in the denial of an "opportunity to a sound basic education" to students of high-need, low-wealth districts. The plaintiffs brought the action under the Education Article of the New York Constitution, which states: "The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated" (article XI, section 1). The brief argues that the resources made available to a school district and the performance of the district's students and schools must be viewed as interdependent in order to evaluate the constitutional sufficiency of a school district's provision of a sound basic education.

  ACLU Page

Montana

- *Yellow Kidney v. Montana Office of Public Instruction*, DV 21-0398. In July 2021, the ACLU, the ACLU of Montana, and the Native American Rights Fund (NARF) filed a class-action lawsuit on behalf of five Indian nations and 18 individual plaintiffs challenging the state of Montana's failure to fulfill its constitutional mandate to teach public school students the history and culture of the first peoples of Montana in consultation with local tribes.

  ACLU Page

Washington

- *A.D. v. Office of Superintendent of Public Instruction,* No. 17-2-03293-34. The ACLU of Washington brought this lawsuit against the state Office of the Superintendent of Public Instruction (OSPI) on behalf of students with special education needs who have been wrongfully disciplined for behavior related to their disabilities. The lawsuit alleges that the state's special education students have been denied their right to a basic education guaranteed by article IX, section 1 of the Washington State Constitution, as well as in violation of state law. The suit asks that OSPI, which is the primary public agency responsible for overseeing K-12 public education in Washington, ensure that they remain in school instead of being pushed out. The Thurston County Superior Court granted the defendants' motion for summary judgment. The case was settled prior to a ruling on the appeal.

  ACLU Page

Immigration

Colorado

- *Cisneros v. Elder*, No. 18CV30549, 2018 WL 7142016, at *1 (Colo. Dist. Ct. Dec. 06, 2018); *vacated* No. 19CA0136, 2020 WL 5352093 (Colo. App. Sept. 3, 2020). In *Cisneros v. Elder*, the ACLU of Colorado obtained a permanent injunction against the sheriff of El Paso County on behalf of two classes of detainees who, now or in the future, will be named in ICE detainers and ICE administrative warrants. The court held that the sheriff's practice of holding persons in jail on the basis of ICE detainers violated three provisions of the Colorado Constitution: the right to bail guaranteed by article II, section 19; the prohibition against unreasonable seizures, for carrying out arrests without legal authority, in violation of article II, section 7; and the right to procedural and substantive due process guaranteed by article II, section 25. The sheriff appealed, and while the appeal was pending, the Colorado General Assembly codified the district court's holding and enacted a statute forbidding Colorado law enforcement from detaining people at ICE's request. As a result, the sheriff's appeal was dismissed as moot.

  ACLU Page

- *Canseco Salinas v. Mikesell*, No. 18CV30057 (Teller County District Court). This lawsuit challenged the Teller County sheriff's practice of refusing to release persons on bond when ICE had sent an immigration detainer to the jail. Although Salinas was prepared to post his bond, he knew that posting the money would not result in his release, because of an ICE detainer the sheriff would honor. ACLU attorneys filed suit and sought a preliminary injunction on the basis of the same state constitutional arguments that had, at the time, resulted in a well-reasoned preliminary injunction in an ACLU class action, *Cisneros v. Elder*, filed in a neighboring county (see above). In this case, however, the court denied the ACLU's motion for preliminary injunction. The client then

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posted bail, was taken into ICE custody, and the parties agreed the case was moot.

ACLU Page

- *Nash v. Mikesell*, No. 19CV30051 (Teller County District Court). This lawsuit, based on the taxpayer standing of six Teller County residents, challenges the Teller County Sheriff's Office's participation in a 287(g) agreement with ICE, the only one in Colorado. The argument is that the sheriff exceeds the limits of his state constitutional authority by enforcing federal immigration law and by relying on the 287(g) agreement to keep people in custody after they have resolved their criminal cases and are otherwise entitled to release pursuant to the state constitution. The district court dismissed the case on standing grounds, and in May 2020, the ACLU of Colorado appealed. In early 2022, the Court of Appeals reversed and sent the case back to the district court for litigation on the merits.

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  Opinion

Massachusetts

- *Commonwealth v. Lunn*, 477 Mass. 517 (2017). The ACLU of Massachusetts filed an amicus brief in this case addressing whether local and state officials may hold people on ICE detainers. The Massachusetts Supreme Judicial Court ruled that they may not, though it did not rely on the state constitution to reach this holding. It held "that Massachusetts law provides no authority for Massachusetts court officers to arrest and hold an individual solely on the basis of a federal civil immigration detainer, beyond the time that the individual would otherwise be entitled to be released from State custody."

  ACLU Page
  Westlaw link

Montana

- *Ramon v. Short*, 2020 MT 69, 399 Mont. 254, 263, 460 P.3d 867, 872. When Agustin Ramon tried to pay his bond to secure his release from jail pending trial, he was informed that because of an ICE detainer, the jail could not release him. The trial court denied a request for a preliminary injunction that would prevent local law enforcement from honoring ICE/CBP detainers brought on behalf of noncitizens. The Montana Supreme Court reversed this decision, holding that neither Montana statutory law nor common law gave local law enforcement the authority to make civil immigration arrests. The court also held that the public interest exception to mootness applied because the case implicated question of fundamental rights under the Montana Constitution.

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  Westlaw link

New York

- *People ex rel Wells v. DeMarco*, 168 A.D.3d 31, 88 N.Y.S.3d 518 (N.Y. App. Div. 2018). This habeas action argued that the Suffolk County Sheriff's Office lacked authority under New York criminal procedure law (or any other state law) to comply with ICE detainers that ask local officers to hold immigrants after they would otherwise be released from custody. The suit, which the NYCLU filed and argued before the Appellate Division in the first instance, sought the release of a person whom the Suffolk County jail was holding for ICE after he should have been released from custody. The appeals court held that it is illegal under state law for local law enforcement agencies in New York to make immigration arrests at the request of federal immigration officials.

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  State law

Virginia

- *McClary v. Jenkins*, 299 Va. 216, 848 S.E.2d 820 (2020). We filed this case in the Culpeper County Circuit Court in November 2018, arguing that the Culpeper Sheriff's Office's practice of entering into a 287(g) agreement with ICE (and the Board of Supervisors' funding of that agreement) violated the Virginia Constitution because the constitution creates the office of the sheriff (article 7, section 4) and prohibits the sheriff from taking any action not prescribed by the Virginia General Assembly. The General Assembly has never authorized (and has, in fact, explicitly rejected) legislation giving sheriffs the authority to enforce federal civil immigration law under a 287(g) agreement. We lost at the circuit court on a demurrer, and the Supreme Court of Virginia affirmed the dismissal, holding that taxpayers did not have standing to challenge local government actions concerning enforcement of federal immigration laws.

  ACLU Page
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Other

RIGHT TO BODILY INTEGRITY

Michigan

- *Mays v. Governor,* 506 Mich. 157 (Mich. 2020), 954 N.W.2d 139. The ACLU of Michigan joined with the Natural Resources Defense Council and Great Lakes Environmental Law Center in filing an amicus brief in one of the class actions for damages filed in the wake of the Flint water crisis. We argued that there is a right to bodily integrity under the Michigan Constitution (article I, section 17). A divided Michigan Supreme Court affirmed the court of appeals' decision that the plaintiff's argument that exposure to contaminated water in this case amounted to a violation of bodily integrity plead a cognizable claim, but declined to address monetary damages. A $600 million settlement soon followed.

  Amicus Brief
  Westlaw link

AUTHORITY OF STATE VS. LOCAL

California

- *Harris v. City of Fontana,* No. CIVDS1710589. In November 2016, California voters approved Proposition 64, which allows adults 21 and older to possess up to one ounce of marijuana and cultivate up to six marijuana plants inside their residences out of public view. While the new law allows cities to regulate cultivation, they must do so reasonably and cannot prohibit it entirely. As did other cities, the City of Fontana adopted an ordinance that is so restrictive as to operate as a de facto ban on cultivation. With co-counsel O'Melveny & Myers LLP, the ACLU Foundations in California and the Drug Policy Alliance filed suit against Fontana on June 5, 2017, arguing that the ordinance is preempted by Proposition 64 and otherwise violates the California Constitution provision that cities may not make or enforce local laws that conflict with general laws (article 11, section 7). The court heard argument on our motion for a writ of mandate to invalidate the ordinance on October 5, 2018. In a decision issued November 2, the court largely struck down the ordinance due to conflicts with Proposition 64.

  Drug Policy Alliance Case Page

- *Los Alamitos Community United v. City of Los Alamitos,* No. 30-2018-00987018. Along with Latham & Watkins and the National Day Laborer Organizing Network, the ACLU Foundations of California sued the City of Los Alamitos for passing an ordinance purporting to exempt the city from the California Values Act, which limits state and local involvement in federal deportation programs. The city filed a demurrer (motion

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to dismiss) and motion to strike parts of our complaint. On August 24, 2018, the court denied the demurrer. The court then related our case to *City of Huntington Beach v. the State of California*, No. 30-2018-00984280-CU-WM-CJC, which also addressed the key legal issue of whether a charter city can opt out of the California Values Act under the home rule provision of the California Constitution. In that case, the court ruled in favor of Huntington Beach, and the case is currently on appeal. The parties in the Los Alamitos case agreed to stay their case pending appellate resolution of the Huntington Beach case. We also intervened in the appeal in the Huntington Beach case on behalf of our Los Alamitos plaintiffs and residents from Huntington Beach. The case settled in May 2020 with the repeal of the local ordinance.

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Michigan

- *Sheffield v. Detroit City Clerk*, 962 N.W.2d 157, 508 Mich. 851 (Mich. 2021). For two years, a democratically elected commission to revise Detroit's city charter worked with community groups to adopt more progressive policies for the city, and they presented their proposed charter to Gov. Gretchen Whitmer in March 2021 with the intent that it be placed on the ballot for approval or rejection by Detroit's voters in the August 2021 election. However, the governor raised objections to parts of the proposed charter, and opponents of the charter took the position that it could not go on the ballot without the governor's approval. A trial court judge in Wayne County and the Michigan Court of Appeals agreed, ordering the charter removed from the ballot. The dispute then went before the Michigan Supreme Court, and in June 2021, the ACLU of Michigan joined the Sugar Law Center in filing a friend-of-the-court brief on behalf of Wayne State law professors who argued that the Michigan Constitution allows the charter to be put before the voters regardless of whether the governor has approved. In July 2021, the Supreme Court agreed with our position and reversed the decisions of the lower court. Detroit voters ended up choosing not to approve the new charter.

  Amicus Brief
  Westlaw link

AID IN DYING

New Mexico

- *Morris v. Brandenburg*, 2016-NMSC-027, 376 P.3d 836, 837. This case was brought under the Constitution of New Mexico's due process provisions and its First Amendment analog to establish physician aid in dying. The case alleged the New Mexico Constitution's guarantee to protect life, liberty, and seeking and obtaining happiness (article II, section 4) and its substantive due process protections (article II, section 18) protected a terminally ill patient's right to have a physician prescribe a medication that she could use to end her life. The New Mexico Supreme Court held that a statute criminalizing assisting suicide also prohibited physician aid in dying, which was not a fundamental right, and thus the statute did not violate the due process clause.

  Westlaw link

RIGHT TO TRAVEL

California

- *NAACP v. City of Palo Alto* (Cal. Superior Court, Santa Clara County; removed to U.S.D.C., N.D. Cal.). Claims against City under federal and state constitutional provisions arising out of exclusion of non-residents from access to City-owned parkland. Constitutional claims included right of travel and equal protection (right of travel); rights to freedom of speech and freedom of assembly.

Result: stipulated injunction requiring City to open access to park to all persons.

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- *Navarro v. City of Mountain View* (U.S.D.C., N.D. Cal.; pending). Claims brought by vehicularly housed individuals against City under federal and state constitutional provisions arising out of City's attempt to exclude great majority of city streets from oversized vehicle parking. State constitutional claims include imposition of excessive fines and fees; unlawful seizure of property by towing; violation of right to privacy; and violation of right to travel.

- *Geary v. City of Pacifica* (U.S.D.C., N.D. Cal.). Claims by vehicularly housed individuals against City under federal and state constitutional provisions arising out of City ordinances prohibiting parking of oversized vehicles on City streets. Federal and state claims asserted under equal protection (right of travel); excessive fines and fees; and unlawful seizure by towing. Result: City repealed ordinance and entered into stipulated injunction requiring City to maintain at least two miles of streets available for OSV parking; refund all fines and fees resulting from enforcement of ordinance; establish a regulated "safe parking" program; and publicly post a map showing OSV-available streets.

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- *People v. Padilla-Martel* (Cal. Superior Court, County of San Francisco, Pending before California 1st DCA). The City of San Francisco has sought exclusion orders against a group of individuals to prevent them from entering the Tenderloin neighborhood, *indefinitely*, for almost all purposes. The City Attorney has asserted, among other legal theories, that the likelihood of these individuals committing future criminal offenses/drug sales makes them a public nuisance. Representing some of these individuals, we successfully argued last spring that the injunctive relief sought by the City Attorney was both statutorily unauthorized and unconstitutional under the right to travel protected by the California Constitution. The City Attorney appealed, and we argued the case before the California Court of Appeal. This appeal presents an opportunity to establish—for the first time under the California Constitution—what level of scrutiny should be applied to infringements on the right to intrastate travel.

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