ACLU OF WASHINGTON LEGAL DOCKET

2019

The ACLU of Washington's legal docket is published annually.[1]

[1] Case status is current as of January 7th, 2020; for subsequent updates check www.aclu-wa.org .

CRIMINAL JUSTICE

Protecting the Houseless from Illegal Search and Seizure. In January of 2017, the ACLU of Washington filed a class-action lawsuit against the City of Seattle and the Washington State Department of Transportation (WSDOT) for their official policies and longstanding practices of seizing and destroying the property of homeless people, often referred to as "sweeps." Clients have lost critical and irreplaceable belongings as a result of these sweeps, which are often conducted without warning or without an offer of a meaningful way to reclaim items not immediately destroyed. These belongings include forms of shelter, clothing, the only remaining photos of family members, medication, important paperwork, and other items needed for survival. The lawsuit alleges that the way the sweeps are conducted violates the constitutional rights of houseless people living outside. In October of 2017, the federal district court denied our motions for a preliminary injunction and class certification. The denial of class certification was appealed to the Ninth Circuit and argued in court in February. We are currently awaiting the judgement of the court. (*Hooper v. City of Seattle,* ACLU of Washington Attorneys Breanne Schuster and Nancy Talner; Cooperating Attorneys Todd Williams and Eric Lindberg (Corr Cronin, LLP); Toby Marshall and Amanda Steiner (Terrell Marshall, PLLC)).

Addressing the Criminalization of Homelessness. In October of 2019, the ACLU of Washington filed another lawsuit against the City of Seattle for their "Encampment Abatement Program." The City's 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, 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 violates the state constitution and is brought on behalf of three houseless individuals and a Seattle taxpayer who objects to the City's wasteful use of taxpayer dollars on an unlawful program. (*Kitcheon v. City of Seattle*, ACLU of Washington Attorney Breanne Schuster; Cooperating Attorney Chris Petroni (Wilson Sonsini Goodrich & Rosati, P.C.).

Demanding Constitutionally Adequate Public Defense for Juveniles. On April 3, 2017, ACLU of Washington filed a class-action lawsuit against the State and the State Office of Public Defense (OPD) for failing to enforce the constitutional requirement of adequate public defense for juveniles in Grays Harbor County. Children, just like adults, have a right to a lawyer; with children, who often cannot advocate for their own rights without guidance, the right to a lawyer who provides actual advocacy is especially important. The lack of adequate representation is detrimental to the children accused of offenses and detained in Grays Harbor. They plead guilty without understanding the alternatives or consequences, are held in detention longer than is legal, and receive harsher sentences than their cases warrant. The lawsuit, filed in Thurston County Superior Court, asked the court to declare that the public defense services that juveniles in Grays Harbor County receive are constitutionally inadequate, and to declare that OPD has the authority to take the measures necessary to ensure the provision of constitutionally adequate services. An important issue in case was argued in the Washington Supreme Court on November 12, 2019.

(*Davison v. State of WA and OPD*, ACLU of Washington Attorneys John Midgley, Nancy Talner, Breanne Schuster, and Jaime Hawk; Cooperating Attorneys Theresa Wang, Mathew Harrington, and Lance Pelletier (Stokes Lawrence, P.S.)).

LFO Debt Creates and Perpetuates a Cycle of Poverty. The ACLU of Washington joined as Amici in *State v. Conway* on August 30, 2019. Karen Conway is a senior with disabilities who is intermittently homeless and relies on Supplemental Security Income (SSI). At the time of sentencing, mandatory legal financial obligations (LFOs) were imposed on Ms. Conway for a Class C felony drug offense. Despite making payments for nine years, and complying with all other requirements of her sentence, Ms. Conway only reduced her mandatory LFOs by $9.04. The courts refused to waive the mandatory LFOs, despite strong evidence that Conway was unable to pay them. The refusal to waive the LFOs hindered Ms. Conway from vacating her conviction, which would help her obtain safe and affordable housing. The ACLU of Washington, along with co-amici, urged the Washington State Supreme Court to grant review based on constitutional issues, as well as the economic harm caused by an LFO system that creates and perpetuates poverty for numerous people in Washington who have otherwise served their sentence and struggle financially. On December 3, 2019, the Supreme Court denied review. (*State v. Conway*, ACLU of Washington Attorneys Nancy Talner and Antoinette M. Davis; Magda Baker (Washington Defender Association); Rhena K. Brinkmann (National Alliance on Mental Illness Washington); Prachi Dave (Public Defender Association); Amanda Martin (Northwest Consumer Law Center); Janet Chung (Columbia Legal Services); Alex Doolittle (Benefits Law Center); Sara Taboada (Washington Appellate Project); Rita Griffith (Washington Association of Criminal Defense Lawyers); Tarra Simmons (Civil Survival Project Attorney)).

Youthful Offenses Count as "Strikes" Supporting a Life without Parole Sentence. ACLU of Washington submitted a brief in *State v. Moretti*, which asked the Washington State Supreme Court to address whether a sentence of life without parole (LWOP) constitutes cruel punishment when it is imposed under a three strikes mandatory minimum statute, without consideration of the youthfulness of an offender at the time of a predicated strike. The brief asked the Court to allow consideration of individual mitigating circumstances and highlighted the tremendous variation in the seriousness of the offenses on the "strikes" list. ACLU of Washington has always opposed the three strikes law because of its disproportionate impact on people of color, and other forms of unfairness which often result in disproportionate sentencing. The Supreme Court rejected these arguments and upheld the defendants' LWOP sentences. *(Moretti et al. v. State of Washington*, ACLU of Washington Attorneys Nancy Talner and Antoinette M. Davis; Cooperating Attorneys Ulrike Connelly, Lindsay McAleer, and Michelle Maley (Perkins Coie, LLP)).

Mandatory Impound Provisions are Unconstitutional. Joel Villela was stopped for speeding and arrested for suspected Driving Under the Influence (DUI). The officer then impounded Villela's vehicle and did a warrantless impound search of it, based on statutes making impound mandatory for any DUI arrest, regardless of the availability of other means to keep the vehicle from being driven by an impaired driver. The trial court held that the mandatory impound provisions of the statute were unconstitutional because they omit the consideration of individual circumstances necessary to comply with the state constitution. The Washington State Supreme Court granted direct review and agreed that the statute was unconstitutional. The ruling is consistent with the arguments made by the ACLU of Washington in its amicus brief. We explained

that the state constitution required individual consideration before the significant intrusion of an impound and search occurred. The Court also agreed with the amicus brief that the legislature lacks authority to pass a law which violates the privacy provision of the state constitution. (*State v. Villela*, ACLU of Washington Attorney Nancy Talner; Volunteer Attorney Bill Block; Co-Counsel Magda Baker (Washington Defender Association); William Maurer (Institute for Justice); Teymur Askerov (Washington Association for Criminal Defense Lawyers)).

DISABILITY RIGHTS

Guaranteeing Access to Treatment for Opioid Addiction in County Jails and Federal Prisons. People suffer from opioid use disorder—a disability—when they cannot control their opioid use and experience physical tolerance and withdrawal. Medication assisted treatment (MAT), including treatment with buprenorphine and methadone, is one of the best treatments available to treat opioid use disorder. However, many county jails across the state, as well as federal prisons, refuse to provide these medications due to outdated and discriminatory ideas about the nature of addiction.

In June 2018, ACLU of Washington filed a class action lawsuit alleging violations of the Americans with Disabilities Act (ADA) against Whatcom County on behalf of two named plaintiffs who were denied MAT while in Whatcom County Jail. The case settled in July and the jail has implemented policies for providing MAT; for more information on the settlement, please visit our website. (*Kortlever v. Whatcom County*, ACLU of Washington Attorneys John Midgley, Mark Cooke, and Lisa Nowlin; Cooperating Attorneys Bart Freedman, Todd Nunn, and Christina Elles (K&L Gates, LLP)).

Similarly, in September 2019, ACLU of Washington filed a lawsuit on behalf of Melissa Godsey who was scheduled to self-report to the Bureau of Prisons (BOP) and expected to be denied her MAT while incarcerated per BOP policy. The case settled in November and BOP has agreed to provide Ms. Godsey with her Suboxone treatment while incarcerated. BOP has also promulgated guidelines nationwide to assist BOP facilities in preparing to implement MAT programs. (*Godsey v. Sawyer*, ACLU of Washington Attorneys John Midgley, Mark Cooke, and Lisa Nowlin; Cooperating Attorneys Bart Freedman and Christina Elles (K&L Gates, LLP)).

Police Negligence in Shooting of Disabled, Spanish-Speaking Tacoma Resident. On June 29, 2013, Cesar Beltran-Serrano, a Spanish-speaking older Hispanic man with perceived and actual mental disabilities, was shot four times by a police officer, after the police needlessly escalated the contact and lacked probably cause for arrest. The police observed Mr. Beltran-Serrano dig a hole in the ground, pull a bottle from the hole, drink from the bottle and place the bottle back in the hole. Based on this conduct, the officer made contact with Beltran-Serrano, who the officer quickly concluded was mentally ill, appeared homeless and did not speak English. While waiting for a Spanish-speaking police officer to arrive, the police repeatedly gave orders in English to Beltran-Serrano, who became frightened and tried to walk away. After a taser had no effect, the police employed deadly force shooting Beltran-Serrano four times to stop him, leaving him severely and permanently injured. On October 1, 2018, the ACLU of Washington filed an amicus brief with the Washington Supreme Court arguing police have a duty of care owed to the citizens they serve, including those with disabilities and those who speak languages other than English. Allowing

negligence claims against the police acts as a deterrence where police use unreasonable, deadly force against those to whom they owe a duty care. In a June 13, 2019 opinion, the Washington Supreme Court agreed. (*Beltran-Serrano v. City of Tacoma*, ACLU of Washington Attorney Antoinette M. Davis; Cooperating Attorney J. Dino Vasquez (Karr Tuttle Campbell)).

FREE SPEECH & EXPRESSION

Washington's Cyberstalking Statute Chills Speech and is Overbroad. The ACLU of Washington joined two amicus briefs with the Electronic Frontier Foundation (EFF) challenging Washington's vague and overbroad cyberstalking statute in federal court as a free speech and due process violation. Plaintiff Rynearson filed suit challenging the cyberstalking statute after he was threatened with prosecution for repeatedly criticizing a neighbor via Facebook posts and messages, text messages, and the creation of a Facebook page. Our amicus briefs explained that the First Amendment protects both online speech with the intent to "embarrass" and speech that is anonymous and repeated. In March of 2019, the federal district court agreed that the parts of the cyberstalking statute discussed in our brief were unconstitutional. (*Rynearson v. Ferguson et al.*, ACLU of Washington Attorney Nancy Talner).

Challenging the Criminalization of Telephonic Speech to Government Officials. Mr. Waggy is a former Marine who receives his healthcare at the VA, but has not received all the treatment he needs, which has led to several heated phone conversations with the VA where he complained about not receiving proper care. Mr. Waggy was charged with Washington Telephone Harassment for calling the Veterans Administration, yelling and swearing at one of its secretaries, and then calling back with a string of obscenities (which did not include any threats) when she hung up. This statute, when it criminalizes the use of "lewd, lascivious, and indecent" speech in calls made to government officials, infringes on protected First Amendment Speech. ACLU of Washington, along with other amici, filed amicus briefs in the Eastern District and Ninth Circuit courts in support of Mr. Waggy. The briefs argue that the statute creates an unconstitutional, content-based restriction on calls to government officials. ACLU of Washington and amici asked that the court declare the statute invalid as applied to calls to government officials and to Mr. Waggy. The court affirmed the conviction. (*Waggy v. U.S.*, ACLU of Washington Attorney Lisa Nowlin; Co-Counsel Aaron Caplan (Loyola Law School); Eugene Volokh (UCLA School of Law))

The Statute Criminalizing Intimidating a Public Servant is Overbroad. Mr. Dawley, a disabled veteran was arrested and charged with three counts of intimidating a public servant and a count of telephone harassment after a series of complaints to police about how he was treated by police. The police claimed Mr. Dawley's statements and conduct were threats and he was convicted of two counts of intimidating a public servant and one count of telephone harassment. ACLU of Washington filed an amicus brief supporting Mr. Dawley's argument on appeal that the statute criminalizing intimidating a public servant is unconstitutionally overbroad and limits protected speech because it fails to distinguish "true threats" from strongly worded but constitutionally protected complaints about the police. (*State of Washington v. Dawley*, ACLU of Washington Attorneys Nancy Talner and Lisa Nowlin; Cooperating Attorney Matthew Crossman)

GOVERNMENT TRANSPARENCY

Use of Stingrays to Search Cell Phones. The Tacoma Police Department ("TPD") owns and operates a cell site simulator, commonly referred to by its brand name, "Stingray." Stingrays trick cell phones into connecting with the device instead of a cell phone tower and providing the phone's location—as well as possibly information about calls, texts, and previous locations. They also often sweep in private data from all cell phones within an approximately one-mile radius. Without appropriate limits on the use of this technology, law enforcement agencies can obtain data from many people who were not the target of the search and potentially use that information at a later date. The ACLU of Washington has sued TPD for failing to provide public records in response to our requests about its use of cell site simulators. In 2016, ACLU sued on behalf of local ministers and a community activist. In June of 2018, a Pierce County Superior Court judge ruled that the City had improperly withheld some documents and awarded statutory penalties and attorneys fees, but also ruled against the plaintiffs' request for further disclosures. Both sides have appealed the rulings against them and the case awaits argument and decision in the Court of Appeals. (*Banks et al. v. City of Tacoma*, ACLU of Washington Attorneys Lisa Nowlin and John Midgley; Cooperating Attorney Dean Williams (Johns Monroe Mitsunaga Kolouškova, PLLC))

IMMIGRANTS' RIGHTS

Right to Counsel for Unaccompanied Minors. Each year, the federal government initiates deportation proceedings against thousands of children who are required to appear in court without an attorney. Without legal representation, these children face a very real risk of being sent back to the perilous circumstances they left. That's why the ACLU filed a nationwide, class-action lawsuit on behalf of thousands of children to challenge the federal government's failure to provide them with legal representation in deportation proceedings. Although the Ninth Circuit ruled in September 2016 that the case cannot proceed in District Court and the right to counsel claim should be raised in individual children's immigration proceedings, Plaintiffs have sought rehearing before the full Ninth Circuit court.

The ACLU has also filed a Petition for Review in the Ninth Circuit on behalf of a child who was unrepresented in his immigration proceedings (*C.J.L.G. v. Sessions)*. We also petitioned for and were recently granted a rehearing on that case before the full Ninth Circuit court and continue to hope for a decision that will prevent the absurd practice of children defending themselves against trained prosecutors. (*F.L.B. v. Sessions*, ACLU of Washington Attorney Emily Chiang; ACLU National Attorneys Cecillia Wang and Stephen Kang; ACLU of Southern California Attorneys Ahilan Arulanantham and Carmen Iguina; Co-Counsel Theodore J. Angelis and Todd Nunn (K&L Gates, LLP), Matt Adams and Glenda M. Aldana Madrid (Northwest Immigrant Rights Project), Kristen Jackson and Talia Inlender (Public Counsel), Melissa Crow and Karolina Walters (American Immigration Council), and Kristin Macleod-Ball (National Lawyers Guild)).

Use of Extreme Vetting in Immigration Cases. On January 23, 2017, the ACLU of Washington and the Northwest Immigrant Rights Project filed a lawsuit challenging the use of an "extreme vetting" program called the Controlled Application Review and Resolution Program (CARRP). This program is designed to delay and deny citizenship and permanent residency to Muslim immigrants and immigrants from Muslim majority countries using flawed watch lists and overly

expansive criteria. It frequently denies the opportunity to gain citizenship or residency to people who otherwise meet all the congressionally approved standards for naturalization or residency. In June, 2018 the court allowed the case to become a nationwide class suit on behalf of all people with cases pending before the U.S. Citizenship and Immigration Services that might be or are subject to CARRP. The outcome of this case will be key to reforming the illegal practice of extreme vetting in U.S. immigration. The case is scheduled for trial in mid-2020. (*Wagafe v. Trump*, ACLU of Washington Attorney Emily Chiang; Co-Counsel and Cooperating Attorneys Jennifer Pasquarella (ACLU of Southern California), Matt Adams and Glenda Madrid (Northwest Immigrant Rights Project), Trina Realmuto and Kristin Macleod-Ball (National Immigration Project of the National Lawyers Guild), Stacy Tolchin (Law Offices of Stacy Tolchin), and Nick Gellert, Harry Schneider, and David Perez (Perkins Coie, LLP)).

Freedom of Information Related to the Trump Administration Travel Ban. On April 12, 2017 the ACLU of Washington along with the ACLU of Montana and ACLU of North Dakota filed a lawsuit against the US Department of Homeland Security (DHS) and the US Customs and Border Protection (CBP) for failing to produce records in response to a Freedom of Information Act request for documents related to the local implementation of President Trump's Muslim ban. We reviewed the documents we received in response, many of which reflect the chaotic implementation of the ban at Sea-Tac Airport. The case was dismissed based on agreement of the parties in February 2019. (*ACLU-WA v. DHS*, ACLU of Washington Attorney Emily Chiang; Cooperating Attorney Eric Stahl (Davis Wright Tremaine, LLP)).

Fighting President Trump's Muslim Ban. ACLU of Washington filed a class action lawsuit in the Western District Court of Washington in response to President Trump's executive order restricting travel from seven predominately Muslim countries. Our lawsuit is brought on behalf of people with non-immigrant visas, like students at the University of Washington; the Episcopal Diocese of Olympia, whose refugee resettlement program has been seriously hampered by the ban; and the Council on American Islamic Relations of Washington State, which has had to divert resources to deal with the increase in bigotry in the wake of the executive order. Although the United States Supreme Court has ruled against the preliminary injunction issued in *Trump v. Hawaii*, the portion of our case challenging the suspension of "follow to join" families of refugees already admitted to the United States remains active. In December 2017, the District Court ordered the government to reinstate the admissions processing of these families. The government moved to dismiss the case, but we argued that more information is needed about the government's compliance (or lack thereof) with the court's order. The court denied the government's motion to dismiss and in December, 2018, the court ordered the government to produce additional information to us. The parties have reached a settlement in principle and are finalizing the agreement, which will prioritize the processing of many refugees impacted by the refugee ban. *(Jane Doe et al. v. Donald Trump et al.,* ACLU of Washington Attorneys Emily Chiang & Lisa Nowlin; Cooperating Attorneys Tana Lin, Lynn Lincoln Sarko, Amy Williams-Derry, Derek W. Loeser, Alison Gaffney, Laurie B. Ashton, and Alison Chase (Keller Rohrback, LLP)).

Customs and Border Protection's Unlawful Detention of Greyhound Bus Passenger. In July 2017, Andres Sosa Segura was transferring from one Greyhound bus to another at the Spokane Intermodal Center on his way home from work in Montana. He was the only Latinx-appearing passenger on the bus, and as he got off the bus two Border Patrol agents stopped him and demanded

to know where he was from and to see his "papers." Mr. Sosa asserted his right to remain silent and showed the agents a card listing his rights, but the agents said the card meant Mr. Sosa must be "illegal." The agents detained Mr. Sosa for hours and kept him in a cell in a remote location. By the time he was brought back to the bus station, he had missed the last bus and his family had to drive for hours to pick him up. On June 20, 2018, the ACLU, together with co-counsel Northwest Immigrant Rights Project, filed a claim for damages with the federal Customs and Border Protection agency, alleging that the agency had discriminated against Mr. Sosa and committed the torts of false arrest and false imprisonment. When the government did not respond to the claim, a lawsuit was filed in federal court. In November 2019, the federal district court judge rejected the government's argument that the state discrimination claim against CBP should be dismissed, allowing our discrimination claim to continue. (*Sosa v. United States,* ACLU of Washington Attorneys Lisa Nowlin and Molly Tack-Hooper; Cooperating Attorneys Ken Payson and Jennifer Chung (Davis Wright Tremaine, LLP); Co-Counsel Matt Adams, Leila Kang, and Aaron Korthuis (Northwest Immigrant Rights Project)).

Freedom of Speech for Immigrant Detainee Hunger Strikers. Immigrant detainees at the Northwest Detention Center in Tacoma, Washington, engaged in peaceful hunger strikes to protest conditions of confinement in the facility. Authorities at the detention center retaliated by assaulting and placing hunger strikers in solitary confinement. In February 2018, ACLU-WA sued Immigration and Customs Enforcement (ICE) and the GEO Group, Inc., the private prison company that operates the detention center, on behalf of Mr. Chavez Flores, for violation of his First Amendment right to free speech and assault, negligence, and false imprisonment. In October, 2018 the Magistrate Judge on the case recommended that the court dismiss all but one claim against GEO defendants. However, the court recently allowed new video evidence in the case and is currently reconsidering that recommendation in light of the new evidence. Claims against ICE were voluntarily dismissed when Mr. Chavez Flores was released from detention based on winning his immigration case. A hearing on GEO's motion for summary judgment is scheduled for December 2019. (*Chavez Flores v. United States Immigration and Customs Enforcement, et al.*, ACLU of Washington Attorneys Maissa Chouraki-Lewin and Nancy Talner; Cooperating Attorneys Daniel Weiskopf, Theresa DeMonte, and Jonathan Tamimi (McNaul Ebel Nawrot & Helgren, PLLC)).

Unconstitutional Immigration Enforcement by Local Police. The ACLU of WA filed an amicus brief in support of Northwest Immigrant Right Project's (NWIRP) lawsuit, *Rodriguez Macareno v. Thomas*. Mr. Rodriguez Macareno called the police because someone had jumped his fence at 4 am. The Tukwila Police Department arrived, warned the trespasser, but then arrested Mr. Rodriguez Macareno, the victim, because they ran his name through a database, and ICE listed him as having an administrative "warrant." They then offered to take him directly to ICE, which they did, after arresting him and placing him in their police car. Our brief discusses the highly limited rights of local law enforcement to engage in immigration enforcement actions. Police Departments which engage in this type of immigration enforcement violate both 4th Amendment rights to be free from unreasonable search and seizure and Washington Constitutional rights prohibiting warrantless arrests. (*Rodriguez Macareno v. Thomas*, Cooperating Attorneys Kenneth Payson and Jennifer Chung (Davis Wright Tremaine)).

Bond Hearings Should Not Be Denied to Asylum Seekers. ACLU of WA along with ACLU National, the American Immigration Council, and Northwest Immigrant Rights Project (NWIRP) filed a proposed amended complaint in federal court challenging the Trump administration's policy that categorically denies bond hearings to asylum seekers. The policy targets asylum seekers whom immigration officers previously determined have a "credible fear" of persecution or torture if returned to the places they fled. Many such people have had the right to a bond hearing where an immigration judge will decide if they should be held or released from custody as their asylum case proceeds. If the new policy goes into effect, they could be jailed indefinitely without a hearing. The plaintiffs in *Padilla v. ICE*, cites violations of the Due Process Clause, the Immigration and Nationality Act, and the Administrative Procedure Act. A federal district court judge in Seattle certified a class and issued a preliminary injunction requiring the continuation of bond hearings. The United States has appealed and the case is pending in the U.S. Court of Appeals for the Ninth Circuit. (*Padilla v. ICE,* ACLU of Washington Attorney Emily Chiang, ACLU National Immigrant Rights Project Attorneys Judy Rabinovitz, Michael Tan, and Anand Balakrishnan; Cooperating Attorneys Thomas F. Ahearne, Joanna Plichta Boisen, Benjamin J. Hodges, and Kevin Ormiston (Foster Pepper, PLLC); Matt Adams, Glenda M. Aldana Madrid, and Leila Kang (Northwest Immigrant Rights Project); Trina Realmuto and Kristin Macleod-Ball (American Immigration Council Attorneys)).

LGBT RIGHTS

Using Religion to Discriminate Against Gay Couples. When Robert Ingersoll and Curt Freed got engaged and started planning their wedding, they knew they wanted their longtime florist to do the flowers. Having purchased from Arlene's Flowers on many occasions, Ingersoll approached the florist in March 2013, but was turned away on the grounds that selling him flowers for his wedding would violate the flower shop owner's religious beliefs. We sued on behalf of Robert and Curt, and in February, 2017 the Washington Supreme Court unanimously ruled in their favor. The case was then appealed by Arlene's Flowers to the U.S. Supreme Court where the court, without disagreeing with the lower court's decision, sent it back to the Washington Supreme Court to re-evaluate its decision in light of *Masterpiece Cakeshop v. Colorado*. The Washington Supreme Court again unanimously ruled in Robert and Curt's favor in June 2019. Arlene's Flowers is again seeking review from the U.S. Supreme Court, where the ACLU will continue to argue for the rights of LGBT people. The ACLU's response was filed December 6, 2019. (*Ingersoll v. Arlene's Flowers,* ACLU of Washington Attorneys Emily Chiang and Lisa Nowlin; ACLU LGBT Project Attorneys James Esseks, Leslie Cooper, and Elizabeth Gill; Cooperating Attorney Jake Ewart (Hillis Clark Martin & Peterson, P.S)).

Fighting Anti-Trans Discrimination: Healthcare Providers. In December 2017, we filed a case on behalf of a transgender law student who was denied services by Swedish Plastics and Aesthetics, which is affiliated with Swedish Medical Group and Providence Health & Services. Mr. Robbins had a consultation with Dr. Mary Lee Peters at Swedish Plastics & Aesthetics for chest reconstruction surgery in December 2016, and scheduled his surgery with her for March 2017. Just weeks before the surgery, Dr. Peters and Swedish cancelled Mr. Robbins's surgery, along with the appointments of several other transgender people, without explanation. The parties settled the case in July 2019, with Swedish agreeing to make several changes to improve transgender patients' access to healthcare. (*Robbins v. Swedish Health Services,* ACLU of

Washington Attorneys Lisa Nowlin and Leah Rutman; Cooperating Attorneys Susan Mindenbergs (Law Office of Susan Mindenbergs) and McKean Evans (Plaintiff Litigation Group, PLLC)).

Access to Gender Affirming Surgery. The ACLU of Washington represents Nonnie Lotusflower, a transgender woman in the custody of the Washington Department of Corrections ("DOC") in a case challenging DOC's blanket ban on gender affirming surgery for transgender people. In September 2017, Ms. Lotusflower filed a pro se complaint against the DOC claiming a violation of her Eighth Amendment right to be free from cruel and unusual punishment. The ACLU of Washington became attorneys of record soon after. Although DOC revised its policy after the complaint was filed, litigation over Ms. Lotusflower's access to medically necessary surgery is ongoing. (*Goninan v. Washington DOC et al.*, ACLU of Washington Attorney Antoinette M. Davis; Cooperating Attorneys Hank Balson (Budge & Heipt, PLLC); Benjamin Byers (Corr Cronin, LLP) and Kristina Markosova (Davis Wright Tremaine, LLP).

Religious Exemption Should Not Allow Employment Discrimination. The ACLU and the ACLU of Washington jointly filed an amicus brief with the Washington Supreme Court in *Woods v. Union Gospel Mission* on August 26th, 2019. Attorney Matthew Woods was denied employment by Union Gospel Mission (UGM) due to his sexual orientation, so he filed suit under the Washington Law Against Discrimination. UGM argued that as a religious entity, they fall within WLAD's statutory exemption for religious employers. Mr. Wood's suit and our brief argue that this application of the exemption allows for unconstitutional discrimination. We asked the Court to affirm that religious entities can still be subject to the rigors of judicial review without courts becoming entangled in religious matters. The Washington Supreme Court heard oral argument in the case on October 10, 2019. (*Woods v. Union Gospel Mission,* ACLU of Washington Attorney Lisa Nowlin, ACLU National Attorneys Lindsey Kaley, Rose Saxe, and Daniel Mach))

PRIVACY

Privacy Issues - Level 1 Sex Offender Registry and Treatment Evaluations. There is ongoing litigation in cases in Thurston, Pierce, and King County, involving the public release of personal information about individuals on the Level I sex offender registry. Our clients have been determined to be the least likely to re-offend—such as minors and adults who have successfully completed all aspects of their original sentences. Their personal information is not published on the State's online registry of sex offenders. A Washington resident made a public records request for records relating to our clients, and specifically sought access to the clients' treatment evaluation records. Those records contain highly sensitive personal and medical information.

We were granted permission to use pseudonyms for the clients in court records based on evidence of the harm they would suffer if their names were public. We argued in each case that exceptions to the Public Records Act (PRA) showed the evaluations were medical records exempt from public disclosure. We also explained that public release of these evaluations can re-traumatize victims and other innocent third parties. While we obtained favorable rulings on all cases at the Superior Court level, the Washington Supreme Court ruled the treatment evaluation records for adults are public records. The treatment evaluation records for juveniles, however, were protected from disclosure. The Supreme Court also ruled that the clients should not be allowed to proceed in pseudonym unless the constitutional requirements for open court records are met.

The cases were remanded back to the trial courts. Even though the releasable records were provided to the requester and our clients moved to voluntarily dismiss the cases, the records requester is arguing the names of the plaintiffs must now be revealed in court records. We are continuing to argue on behalf of the privacy rights of the plaintiffs. (*Does v. King County; Does v. Thurston County; Does v. Pierce County*, ACLU of Washington Attorneys Nancy Talner and Molly Tack-Hooper; Cooperating Attorneys Reuben Schutz and Sal Mungia (Gordon Thomas Honeywell, LLP), Margaret Enslow (MBE Law Group, PLLC)).

Disclosure of Government Employees' Birthdates to the Public. The Evergreen Freedom Foundation filed a public records request to various state agencies, seeking the names and associated birthdates of state employees because the Foundation wanted to use that information to find the employees' home addresses and mail them flyers encouraging them not to join a union. The unions argued that the employees have a privacy right in their birthdates which makes that information exempt from the Public Records Act (PRA). The ACLU of Washington filed an amicus brief in the Washington Supreme Court urging the Court to find that the personnel records exemption to the PRA applied to the birthdates because personnel records are the source of the birthdate information. The brief explained how birthdates are sensitive private information and can be used to intrude on other sensitive records. However, the Court has now rejected the unions' and ACLU's arguments. (*WSPEA v. Evergreen Freedom Foundation*, ACLU of Washington Attorney Nancy Talner; Volunteer Attorney Douglas Klunder).

Government Installation of Malware and Operation of Child Pornography Site. Federal law enforcement engaged in a nationwide operation targeting online access to child pornography. In applying for a search warrant, the agents omitted information about the malware they planned to install on target computers. The malware created significant security risks for the computers that were hacked by the government. The agents also failed to clearly disclose to the search warrant magistrate that they would be operating a massive child pornography website. In October 2017, the ACLU of Washington filed an amicus brief in the Ninth Circuit Court of Appeals explaining how intrusive and harmful these methods were. The brief supported the defendant's arguments that the search warrant was invalid because the magistrate's duty to independently determine the validity of the warrant application was undermined by the agents' deception in describing the methods that were going to be used. However, in 2019, the Ninth Circuit ruled against the defendant's and the ACLU's arguments. (*United States v. Tippens*, ACLU of Washington Attorneys Nancy Talner and Shankar Narayan; ACLU National Attorneys Jennifer Granick, Brett Max Kaufman, and Vera Eidelman; Cooperating Attorney Karin Jones (Stoel Rives, LLP)).

Maintaining Strong Washington State Constitutional Privacy Protections. Police contacted Mr. Mayfield after he was reported sleeping in a truck parked in the caller's driveway. The officer conducted warrantless searches of both Mr. Mayfield and his truck and found drugs. Mr. Mayfield argued he was unlawfully seized when the officer prolonged the detention without valid justification and by questioning him and asking repeatedly for consent to search, when Mr. Mayfield felt he had no choice but to agree. After the Court of Appeals affirmed the conviction, we filed an amicus brief with other amici in the Washington State Supreme Court, arguing that the state constitution issue had been adequately raised and should have been addressed by the Court of Appeals. On February 7, 2019, the Court agreed the state constitution issue was properly raised,

and that in numerous cases the Court has found the state constitution more protective of privacy rights than the 4th Amendment. The Court also ruled 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. (*State v. Mayfield*; ACLU of Washington Attorney Nancy Talner; Cooperating Attorneys John Roberts and Christopher Petroni (Wilson Sonsini Goodrich & Rosati, P.C.); Robert S. Chang and Jessica Levin (Korematsu Center)).

Obstruction Conviction based on Asserting Rights. Police arrived at Mr. McLemore's door after a reported domestic disturbance, knocked for a prolonged period of time, and threatened to break the door down. When Mr. McLemore came to the door and stated that he was exercising his right to refuse them entry without a warrant they broke down his door and arrested him for obstruction of law enforcement. The ACLU of Washington filed an amicus brief with the Washington Association of Criminal Defense Lawyers and Washington Defender Association arguing that this misuse of obstruction charges has a chilling effect on the exercise of individual rights in interactions with the police. We asked the court to limit interpretation of the statute in order to protect constitutional rights. The Washington Supreme Court issued a split 4 to 4 Opinion, half in favor of Mr. McLemore's conviction and half against—which had the effect of affirming Mr. McLemore's conviction. We then filed an amicus brief in support of reconsideration, with additional organizations, explaining that the ruling created confusion about significant rights, making it very difficult for organizations like the ACLU to provide know-your-rights information. However, the Court denied reconsideration. Mr. McLemore has filed a cert petition seeking review by the US Supreme Court. (*Shoreline v. McLemore*, ACLU of Washington Attorney Nancy Talner; Cooperating Attorneys Nicole Beges (Pierce County Department of Assigned Counsel); Thomas E. Weaver, Jr. (Washington Association of Criminal Defense Lawyers); Hillary Ann Behrman (Washington Defender Association))

Warrantless Inventory Searches of Vehicles. While conducting an inventory of an impounded vehicle, officers unzipped a CD case without a warrant, and discovered drugs and paraphernalia inside. In an amicus brief to the Washington State Supreme Court, the ACLU of Washington argued that closed containers cannot be searched as part of the warrantless inventory search of an impounded vehicle and such a search violates the Washington's Constitution that prohibits any disturbance of an individual's private affairs without authority of law. The use of inventory searches risk revealing intimate, personal information or effects, and therefore, should be strictly limited to maintain constitutionally protected privacy rights. However, the Washington Supreme Court ruled against the defense arguments in this case. (*State v. Peck and Tellvik*, ACLU of Washington Attorney Antoinette M. Davis; Volunteer Attorney Douglas Klunder)

RACIAL JUSTICE

Racial Bias in Jury Deliberations. Racial biases in jury deliberations violate a defendant's right to a fair trial and undermine the concept of fair and impartial administration of the criminal justice system. A black juror was accused by other jurors of siding with a defendant purely because they were both black. Following the conviction of the defendant, the juror of color reached out to his attorney to inform him of the racial hostility she suffered during deliberation. In spite of the attorney's requests for a thorough investigation, the trial court made very little inquiry and refused

the request for a new trial. The ACLU of Washington filed with the Washington State Supreme Court an amicus brief, asking the Court require investigations into the black juror's complaints and grant the defendant a new trial. The Washington State Supreme Court held the trial court failed to adequately investigate the juror's allegations of racial bias before denying the motion for a new trial. The Court vacated the order denying the juror's motion for a new trial and remanded for further proceedings. (*State v. Berhe*, ACLU of Washington Attorney Antoinette M. Davis; ACLU National Foundation Attorneys Jeffery Robinson and Twyla Carter; Cooperating Attorney Margaret Enslow (MBE Law Group, PLCC); Erika J. Evans (Loren Miller Bar Association))

Low Rate of Juror Pay is Barrier to Jury Diversity. A significant barrier to jury diversity is the low rate of juror pay: $10 per day, a rate that has not increased since the 1950's, despite a skyrocketing increase in the cost of living. The ACLU of Washington filed a supplemental amicus brief in the Washington Supreme Court, joined by several other organizations, explaining how the justice system is harmed by lack of jury diversity and that the harms support plaintiffs' arguments for applying minimum wage laws to jurors. The case was argued in Fall 2019 and is awaiting a decision. (*Bednarczyk v. King County*, ACLU of Washington Attorneys Antoinette M. Davis and Nancy Talner; Cooperating Attorney Jamal Whitehead (Schroeter Goldmark & Bender); ACLU National Foundation Attorneys Jeffery Robinson, Twyla Carter, and ReNika Moore; Robert Chang, Melissa Lee, and Jessica Levin (Korematsu Center); Rita Griffith, Tom Weaver, and Teymur Askerov (Washington Association of Criminal Defense Lawyers); Tarra Simmons (Civil Survival Project); Prachi Dave (Public Defender Association); Smriti Chandrashekar (South Asian Bar Association of Washington); Raina Wagner (Loren Miller Bar Association): Courtney Chappell (Legal Voice); Hillary Behrman (Washington Defender Association); Bonnie Wasser Stern (One America)).

REPRODUCTIVE FREEDOM

Challenge to Title X Barring of Provision of Abortion by Providers. In March of 2019, ACLU filed a complaint on behalf the Nation Family Planning and Reproductive Health Association and others challenging the Trump administration's new Title X regulations that prohibit Title X funds from gong to all providers that offer or are associated with abortion related services, and that include narrow restrictions on provision of pregnancy counseling and family planning services. These rules will severely limit access to these services across the country. The plaintiffs claim that the new regulations violate the Constitution and the Administrative Procedures Act. The State of Washington filed a similar case and a federal district court issued a preliminary injunction. The United States appealed and requested a stay of the injunctions pending appeal. In June, the U.S. Court of Appeals for the Ninth Circuit granted the stay, allowing the new rules to go into effect. The case remains pending on appeal. (ACLU of Washington Attorney Emily Chiang; ACLU National Attorneys Ruth Harlow, Fiona Kaye, and Brigitte Amiri; Cooperating Attorney Joe Shaeffer (MacDonald Hoague & Bayless))

SECOND CHANCES

Removing Barriers to Reentry. On April 12, 2016, ACLU of Washington filed a complaint in King County Superior Court on behalf of a woman whose child-care license was revoked by the Department of Early Learning (DEL) when it learned about her 27-year-old conviction for

attempted robbery. The client has put her criminal history behind her and has been an exemplary member of the community for years, but her criminal history poses a barrier to her success because state law prevents DEL from giving child care licenses to everyone with this type of conviction regardless of changed circumstances. The Superior Court denied relief, but the Washington Supreme Court held in February 2019 that DEL's failure to provide an individual hearing to determine the plaintiff's fitness was a denial of due process of law. (*Fields v. Washington Department of Early Learning*, ACLU of Washington Attorney Nancy Talner; Cooperating Attorney Toby Marshall, Terrell Marshall Law Group, PLLC)).

Supporting Access to Housing for Those with Criminal Records. ACLU of Washington joined an amicus brief with the Korematsu Center in November 2018 in support of Seattle's Fair Chance Housing Ordinance. The City's Fair Chance Housing Ordinance removed barriers to accessing housing for those with criminal records by preventing landlords from inquiring about arrest, criminal conviction, or criminal history records in screening tenants. The brief outlined the historically disparate impact of screening based on criminal history and the resulting racial disparities in accessing housing following a criminal conviction. The brief also explained that evidence suggests no link between criminal records and good tenancy. Part of the case was argued in the Washington Supreme, and the ordinance was upheld as to that part of the case in November 2019. The other part of the case, including the part related to the amicus brief, remains pending in federal district court. (*Yim et al. v. City of Seattle*, ACLU of Washington Attorney Nancy Talner; Attorneys Melissa Lee and Robert S. Chang for Korematsu Center).

YOUTH

Excessive Discipline of Students with Disabilities in Washington Schools. On June 8, 2017 the ACLU of Washington filed a class action lawsuit against the 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 in the Yakima and Pasco school districts. The suit asks the court to declare that the excessive and discriminatory discipline has deprived students of their basic right to an education, and that OSPI's failure to monitor and exercise appropriate supervisory authority over Washington's schools and school districts violates the Washington State Constitution and Washington Law Against Discrimination. In July of 2019, the superior court granted Defendants' motion for summary judgment and denied Plaintiffs' cross motion for summary judgment and request for mandamus relief. The ACLU of Washington is appealing the court's decision and we are working on our opening brief. (*A.D. et al. v. OSPI et al.*, ACLU of Washington Attorneys Nancy Talner, Breanne Schuster, Maissa Chouraki-Lewin, and John Midgley; Cooperating Attorneys Karen King, Alex Hyman, and Jessica Finberg (Paul Weiss Rifkind Wharton & Garrison, LLP)).

Excessive Sentences for Juveniles. ACLU of Washington filed amicus briefs, joined by other amici, in two cases in which juveniles were sentenced to exceptionally harsh sentences for misdemeanor crimes. In one case, the court reasoned that the juvenile's victimization in sex trafficking put her in need of a significantly longer sentence to detention in order to provide treatment and "structure." As a result, she received 27-36 weeks detention for a crime for which sentencing guidelines suggest no more than 30 days. In the second case, similar reasoning regarding the juvenile's history of running away from foster care placements resulted in an

excessive one-year sentence. The brief explained that research shows detention does not result in rehabilitation for juveniles and if anything increases rates of recidivism. We asked the court to rule that a history of trauma, vulnerability, and dependency should not be a factor which increases sentences in juvenile cases. The Washington State Supreme Court agreed that the extra-long sentences were invalid. (*State v. F.T.*, ACLU of Washington Attorney Nancy Talner; Cooperating Attorney Tadeu Velloso (Phillips Burgess, PLLC); Marsha Levick (Juvenile Law Center); Hickory Gateless (The Mockingbird Society); Chen-Chen Jiang and Sara Zier (TeamChild); Nicholas Allen (Columbia Legal Services)) (*State v. B.J.*, ACLU of Washington Attorney Nancy Talner; Cooperating Attorney Amy Muth (Law Office of Amy Muth, PLLC)).

Life Equivalent Consecutive Sentences Applied to Juvenile. The Washington Supreme Court has ruled that juveniles cannot be sentenced to life without parole. However, that case still allowed juveniles to receive life equivalent sentences through consecutive sentences for multiple crimes. Mr. Gilbert was convicted in adult court of six crimes committed when he was 15. When he was resentenced based on the cases outlawing life without parole for juveniles, he was still given consecutive instead of concurrent sentences in spite of an evaluation which noted both that he was a low risk for reoffending and that his youth likely contributed to his committing the crimes (now considered a mitigating factor in juvenile sentencing). We filed an amicus brief with other amici in the Washington State Supreme Court, arguing that the widely recognized "mitigating factors of youth" should allow for concurrent sentences. The Court issued an opinion on April 4, 2019 agreeing that concurrent sentences should be considered. (*State v. Gilbert*, ACLU of Washington Attorney Nancy Talner; Gregory C. Link and Rita J. Griffith (Washington Association of Criminal Association Defense Lawyers); Hillary Behrman and Cindy Arends Elsberry (Washington Defender Association)).

The Minimum Sentence Should be Set After Adequate Consideration of Youth as a Mitigating Factor. The ACLU of Washington joined an amici curiae brief filed by the Korematsu Center in this case. In 1994, 17-year-old Cristian Delbosque was convicted of murder of another juvenile. He was originally sentenced to life without parole, then resentenced under the Miller-fix statute to 48 years to life. The brief argued that Delbosque's minimum sentence was imposed without adequate consideration for youth as a mitigating factor. The vast majority of youthful offenders are capable of rehabilitation and deserving of meaningful opportunities for release. The brief asked the Washington State Supreme Court to recognize that Delbosque is one of these youth and deserves a re-sentencing hearing with adequate consideration of a minimum sentence of 25 years, the lowest under the statute. The brief also asked the court to rule that, unless the State can prove by clear and convincing evidence that a particular juvenile does not have the "hallmark features" of youth, a sentencing court must provide opportunities for release by always setting the minimum sentence at 25 years. (*State v. Delbosque*, ACLU of Washington Attorney Nancy Talner; Attorneys for Korematsu Center David A. Perez, Thomas W. Hillier, and Sopen Shah (Perkins Coie, LLP), Robert S. Chang, Melissa Lee, and Jessica Levin (Korematsu Center); Rita Griffith (Washington Association of Criminal Defense Lawyers), and Hillary Behrman (Washington Defender Association)).

WORKER'S RIGHTS

Farmworkers Deserve Overtime Pay. The ACLU of Washington filed an amicus brief in the Washington Supreme Court on September 9, 2019 in Martinez-Cuevas, et al. v. Deruyter Brothers Dairy, Inc., et al. State labor laws exclude farmworkers in Washington State from the right to overtime pay and the workers in this case seek to have the exclusion ruled unconstitutional. The workers impacted by this law are overwhelmingly Latinx, and our brief asks the court to recognize this disparate impact as grounds for heightened scrutiny of the statute under the equal protection guarantee of the Washington Constitution. It argues that the Washington Supreme Court has the authority to hold the Washington Constitution's equal protection clause as providing broader protection than the Fourteenth Amendment. Disparate impact discrimination is discrimination. (*Martinez-Cuevas, et. Al. Deruyter Vrothers Dairy, Inc., et al.,* ACLU of Washington Attorney John Midgley; Volunteer Attorney Chris Fargo-Masuda).