
LECTURE

DEFENDING LIBERTY IN THE TRUMP ERA: REFLECTIONS FROM THE FRONT

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The 2016 election of Donald Trump took me and many of my fellow citizens by complete surprise. Like most Americans—including reportedly Trump himself¹—I was sure that Hillary Clinton would win the election. She did win the popular vote, as we know, by more than 2 million votes. But thanks to the vagaries of the Electoral College, Donald Trump won the presidency. Trump’s victory would have huge consequences for the planet, the nation, constitutional law, and most parochially of all—me.

In the summer of 2016, I accepted the job of ACLU National Legal Director, with a delayed start date of January 2017 so that I could fulfill teaching responsibilities I had at Georgetown Law. Earlier in 2016, the ACLU’s executive director, Anthony Romero, had encouraged me to apply for the legal director job with visions of overseeing the ACLU’s legal department, and especially its Supreme Court docket, under a liberal-majority Supreme Court. At that time, we all *knew* that Hillary Clinton would win the 2016 election and that, as a result, she would have the privilege of naming a successor for the Supreme Court seat vacated by Justice Antonin Scalia’s untimely death in February 2016. That would mark the first time since the early 1970s that the Supreme Court would have a liberal majority. “How could you refuse?” Romero asked.

Everything changed on November 8, 2016. I was still committed to starting in January, but I would be starting with an entirely different game plan. Before the election, we had been imagining which constitutional rights a liberal Supreme Court could expand, we now had to expect a conservative Court for the foreseeable future. Where we had been planning an inside game—working with a Justice Department that would be sympathetic to civil rights and civil liberties—we now had to confront the fact that we would likely receive little

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¹ Ben Schreckinger, *Inside Donald Trump’s Election Night War Room*, GQ (Nov. 7, 2017), <https://www.gq.com/story/inside-donald-trumps-election-night-war-room> [<https://perma.cc/9SWA-QGMF>].

cooperation, and in fact much opposition, from the Justice Department and indeed the entire executive branch. As a candidate, Trump had threatened to ban Muslim immigrants from entering the country, to overturn *Roe v. Wade*,² and to appoint judges approved by the right-wing Federalist Society. Based on his campaign and his base of support, we could expect voter suppression, opposition to LGBT equality, and a Justice Department Civil Rights Division that would do little to enforce the civil rights that are its *raison d'être*.

On my third day on the job, I testified before the Senate Judiciary Committee on then-Senator Jeff Sessions's nomination to become Attorney General. The ACLU, I emphasized, does not endorse or oppose candidates for elective or appointed office, so I was not urging the senators to vote for or against Sessions. But I did ask them to investigate Sessions's history of hostility to the very rights the Justice Department was tasked with protecting. I noted that he had prosecuted civil rights activists for encouraging Black citizens to vote, opposed expanding the Hate Crimes Prevention Act to include crimes based on prejudice against women and LGBT people, and insisted that the conduct Trump boasted about in the *Access Hollywood* tape—grabbing women's genitalia—would not constitute sexual assault.³ The Senate confirmed Sessions, and he went on to oversee a Justice Department that revived “tough on crime” prosecutorial policies; rescinded guidance requiring recipients of federal funds to treat transgender students equally; rolled back civil rights enforcement against police departments with records of abuse; and defended many of President Trump's most troubling immigration initiatives, including the ban on entry from predominantly Muslim countries.⁴

So to say that my job—and that of the ACLU—changed with the election of Donald Trump is an understatement. But in a fundamental sense, our jobs remained precisely the same: defending liberty. The ACLU was founded in 1920, and for a century it has sought to advance civil liberties and civil rights. We are a nonpartisan organization, and we have challenged civil liberties violations by every administration, Democratic or Republican.⁵ We sued President Obama over his targeted killing using drones, surveillance practices, and immigration enforcement policies.⁶

² 410 U.S. 113 (1973).

³ *Confirmation Hearing on the Nomination of Hon. Jeff Sessions to Be Attorney General of the United States: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. 169-70 (2017) (statement of David Cole, National Legal Director, ACLU) (“We take no position on how you should ultimately vote, but we urge you to painstakingly probe the many serious questions that his actions, words, and deeds raise about his commitment to civil rights and civil liberties.”).

⁴ David Cole, *Trump's Inquisitor*, N.Y. REV. BOOKS, Apr. 19, 2018, at 16.

⁵ See generally SAMUEL WALKER, IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU (2d ed. S. Ill. Univ. Press 1999) (1990).

⁶ See, e.g., *ACLU v. U.S. DOJ*, 844 F.3d 126, 128 (2d Cir. 2016) (targeted killing using drones); *ACLU v. Clapper*, 785 F.3d 787, 799 (2d Cir. 2015) (surveillance practices); *R.I.L.-R v. Johnson*, 80 F. Supp. 3d 164, 172 (D.D.C. 2015) (immigration enforcement policies).

But we have never sued any President more often than we have sued President Trump. As of summer 2020, we had filed over 400 legal actions challenging Trump Administration initiatives.⁷ We have also filed many suits against state officials who, inspired by Trump's promise to appoint federal judges who would overturn *Roe*, enacted a slew of aggressive restrictions on abortion.⁸

And then came the pandemic. As I write, we are in the ninth month of remote work; we closed our national offices, located principally in New York City and Washington, D.C., shortly before the shelter-in-place orders were implemented in those locations. Our work challenging President Trump's initiatives continues, but we have also pivoted to respond to multiple threats to civil rights and civil liberties that have arisen in the pandemic. We have filed more than 175 COVID-related lawsuits across the country, many seeking the release of immigration and criminal detainees vulnerable to the virus or seeking better protection for them in detention.⁹ We have sued to block states from exploiting the pandemic to try to stop abortion clinics from providing abortions.¹⁰ And we worked to expand vote-by-mail options in the states so that citizens would be able to exercise their right to vote without risking infection with a deadly disease.¹¹ The ACLU generally has not challenged the lockdown and social distancing orders, however, because while they plainly restrict basic liberties, they are justified by the evidence that COVID-19 is highly contagious, deadly,

⁷ See Press Release, ACLU, ACLU Has Filed 400 Legal Actions Against Trump Administration (Aug. 17, 2020), <https://www.aclu.org/press-releases/aclu-has-filed-400-legal-actions-against-trump-administration> [<https://perma.cc/2SEM-GYNT>].

⁸ Jessica Arons, *The Battle for Abortion Access Is in the States*, ACLU (Dec. 11, 2019), <https://www.aclu.org/news/reproductive-freedom/the-battle-for-abortion-access-is-in-the-states/> [<https://perma.cc/5GEB-SLN8>].

⁹ *How the ACLU Is Responding to the Pandemic, Visualized*, ACLU (Apr. 30, 2020), <https://www.aclu.org/news/civil-liberties/how-the-aclu-is-responding-to-the-pandemic-visualized/> [<https://perma.cc/B5F9-FV33>].

¹⁰ See, e.g., *Adams & Boyle, P.C. v. Slatery*, 956 F.3d 913, 916 (6th Cir.) (upholding preliminary injunction barring enforcement of Tennessee Executive Order that postponed elective and noninvasive surgical procedures for three weeks due to pandemic), *petition for cert. filed*, No. 20-482 (U.S. Oct. 8, 2020); *Robinson v. Att'y Gen*, 957 F.3d 1171, 1173 (11th Cir. 2020) (denying motion to stay preliminary injunction against enforcement of Alabama state health directive postponing all nonemergency surgeries due to pandemic).

¹¹ See, e.g., Complaint at ¶ 1, *Conn. State Conference of NAACP Branches v. Merrill*, No. 3:20-cv-00909, 2020 WL 3619025 (D. Conn. July 2, 2020), ECF No. 1 (“This action seeks to remedy the violation of the fundamental right to vote for the many thousands of Connecticut citizens who cannot safely vote at the polls and do not meet one of Connecticut’s narrow requirements to vote by mail”); First Amended Complaint for Declaratory & Injunctive Relief at ¶ 1, *Oppenheim v. Watson*, 25-CH-1:20-cv-00961 (Miss. Ch. Aug. 26, 2020) (seeking recognition of additional classes of people who should be permitted to vote by mail); Dale Ho & Sonia Gill, *We’re Working to Safeguard Our Democracy and Our Health*, ACLU (June 9, 2020), <https://www.aclu.org/news/voting-rights/were-working-to-safeguard-our-democracy-and-our-health/> [<https://perma.cc/8P6D-A77X>].

and already widespread. The evidence suggests that the only way to “flatten the curve” is to keep people isolated.¹²

I offer this brief window on what the ACLU has done during the Trump Administration to illustrate a broader point: that the fate of liberty relies as much on the workings of civil society as on the Constitution’s more formal constraints on government power. The separation of powers and federalism are essential safeguards of liberty because they operate to ensure that no single branch of government—and no single official—amasses too much power.¹³ But, as important as these formal checks and balances built into the structure of government are, they are insufficient standing alone. That is especially so when, as was the case in the first half of President Trump’s term, one party has majority control of all three branches of the federal government and about two-thirds of the state legislatures. But it remains true even when control of the formal branches is more divided.

We often think of the First Amendment as protecting individual rights—the right to say what one likes, to read what one wants, to worship what one believes, and to associate with those one chooses. But as Vincent Blasi has argued, the First Amendment also serves a checking function and in this sense provides a structural safeguard.¹⁴ It does so not by dividing government internally but by protecting the independence of civil society *outside of* government. The centrality of civil society to checking government power is revealed by the fact that when autocrats come to power in other countries, they often make the institutions and actors that comprise a civil society—the press, the nonprofit sector, opposition political parties, dissidents, the academy, and religious groups—the targets of their repression. Autocrats understand that all of these sources are potential checks on their will, so they seek to neutralize them, either by co-opting them, chilling their activities, or sweeping them aside.

The First Amendment, and the robust civil society it has fostered in the United States, makes such a strategy much more difficult for American officials. President Trump is openly hostile toward the press. He frequently labels his critics in the media as “FAKE NEWS.”¹⁵ But he cannot shut down the *New York Times*, the *Washington Post*, or CNN. Academic freedom ensures that critical thought remains free and valued in our nation’s colleges and universities, where it is fostered in students. Religious freedom ensures that people may come

¹² Harry Stevens, *Why Outbreaks Like Coronavirus Spread Exponentially, and How to “Flatten the Curve,”* WASH. POST. (Mar. 14, 2020), <https://www.washingtonpost.com/graphics/2020/world/corona-simulator/> [<https://perma.cc/XXV9-97VL>].

¹³ See, e.g., *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring) (“Liberty is always at stake when one or more of the branches seek to transgress the separation of powers.”).

¹⁴ Vincent Blasi, *The Checking Value in First Amendment Theory*, 2 AM. BAR FOUND. RES. J. 521, 527 (1977).

¹⁵ See, e.g., Donald J. Trump (@realDonaldTrump), TWITTER (July 11, 2020, 8:04 AM), <https://twitter.com/realDonaldTrump/status/1281922216876224513?s=20>.

together around beliefs and norms that find their authority not in government but in a higher power. And the freedoms of speech, association, and assembly guarantee that critics can express themselves and unite with others who share their views to call for change. In turn, all of these guarantees support the right to petition the government for redress. In these ways, the First Amendment, and the civil society that it protects, constitute a critical structural feature of checks and balances. They recognize that an engaged citizenry is essential to a free and robust democracy.

The rights the First Amendment protects in this regard, however, are only as strong as the civil society institutions they support. There is a symbiotic relationship between the two. Without a vigorous opposition political party, critics in the academy, perspectives of religious faiths, and people speaking out individually and together for their beliefs, the First Amendment (and the rest of the Constitution) would only be so many words on a page. Thus, while the First Amendment is essential to protect civil society, civil society is also essential to the realization of the First Amendment's deepest values. Accordingly, as citizens, we have an obligation to exercise our civil and political rights intentionally and collectively. It is no accident that the development of First Amendment jurisprudence has been driven by dissidents,¹⁶ opposition political parties,¹⁷ academic critics,¹⁸ labor unions,¹⁹ publishers,²⁰ and nonprofit organizations.²¹ The ACLU has played an especially central part in that

¹⁶ See *Texas v. Johnson*, 491 U.S. 397, 406 (1989) (holding that First Amendment protects flag burning).

¹⁷ See *Scales v. United States*, 367 U.S. 203, 229 (1961) (protecting right to associate with Communist Party).

¹⁸ See *Sweezy v. New Hampshire*, 354 U.S. 234, 251 (1957) (protecting academics from persecution as "subversive" because of radical ideas they publish or advocate).

¹⁹ LAURA WEINRIB, *THE TAMING OF FREE SPEECH: AMERICA'S CIVIL LIBERTIES COMPROMISE 6-9* (2016) (recounting early history of First Amendment jurisprudence and role of ACLU and labor union activism); David Kairys, *Freedom of Speech, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 237, 237-38 (David Kairys ed., 2d ed. 1990) (noting role of labor unions in expansion of speech rights in early twentieth century).

²⁰ See *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (holding that government did not meet "heavy burden" to justify censorship of classified information published in newspapers); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 283 (1964) (holding that public officials may not recover on libel claims unless they prove "actual malice"); *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 157 (1946) (holding that postmaster's judgment of whether a mailable periodical meets standards of public good should not prevent dissemination); *United States v. One Book Called "Ulysses,"* 5 F. Supp. 182, 184-85 (S.D.N.Y. 1933) (protecting experimental novel from censorship), *aff'd sub nom. United States v. One Book Entitled Ulysses by James Joyce*, 72 F.2d 705 (2d Cir. 1934).

²¹ See *Reno v. ACLU*, 521 U.S. 844, 861 (1997) (holding that certain provisions of Communications Decency Act of 1996 abridge First Amendment rights to free speech following legal challenge from twenty plaintiff organizations); *In re Primus*, 436 U.S. 412, 416 (1978) (holding that broad application of state bar regulation infringed on associational right of nonprofit organization soliciting clients); *NAACP v. Alabama ex rel. Patterson*, 357

development, and at the same time it is that jurisprudence that ensures that we can continue to do what we do.

In the Trump era in particular, it is in civil society's response that hope for the future of civil liberties and civil rights lies. The popular response to President Trump's election vividly demonstrated that many Americans understand the central importance of civic engagement as a check on government abuse. Americans did not take President Trump's election sitting down. They did not accept their fate in defeated resignation. Instead, they marched in the streets, joined organizations that would fight back against President Trump's excesses, supported the news outlets that would report on his abuses, spoke out, and started wholly new institutions to fight back. The scale of the response was unprecedented. We saw it within the ACLU. Before President Trump's election, we had about 400,000 members; within a few months of his inauguration, our membership had grown to 1.84 million, a more than four-fold increase.²² Subscriptions to the *New York Times* and the *Washington Post* have also skyrocketed.²³ And new organizations, such as Protect Democracy and Indivisible, sprung up as citizens sought ways to push back.

People have also taken to the streets like never before. The Women's March—which was held in cities across the country and indeed the world, on the day after President Trump's inauguration—was likely the single largest march in American history.²⁴ When President Trump announced, in his first week in office, a ban on entry from seven predominantly Muslim countries, Americans streamed out to airports across the country to protest.²⁵ When President Trump sought to repeal the Affordable Care Act, citizens jammed into

U.S. 449, 459 (1958) (upholding NAACP's right to refuse to produce its membership lists to government).

²² Aris Folley, *ACLU Membership Grew from 400,000 to 1.84 Million After Trump Was Elected: Report*, HILL (Jul. 4, 2018 8:57 PM), <https://thehill.com/blogs/blog-briefing-room/news/395525-aclu-membership-grew-from-400000-to-184-million-months-after> [<https://perma.cc/38YV-38R3>].

²³ Pete Vernon, *Subscription Surges and Record Audiences Follow Trump's Election*, COLUM. JOURNALISM REV. (Dec. 6, 2016), https://www.cjr.org/business_of_news/trump_journalism_subscription_surge.php [<https://perma.cc/2EVV-JJV5>] (noting ten-fold increase in subscriptions to the *New York Times* compared to same period in prior year).

²⁴ See Conor Friedersdorf, *The Significance of Millions in the Streets*, ATLANTIC (Jan. 23, 2017), <https://www.theatlantic.com/politics/archive/2017/01/the-significance-of-millions-in-the-streets/514091/> (estimating that at least three million people participated in Women's March).

²⁵ See Lauren Gambino, Sabrina Siddiqui, Paul Owen & Edward Helmore, *Thousands Protest Against Trump Travel Ban in Cities and Airports Nationwide*, GUARDIAN (Jan. 29, 2017, 7:01 PM), <https://www.theguardian.com/us-news/2017/jan/29/protest-trump-travel-ban-muslims-airports> [<https://perma.cc/L7ZP-NZKY>].

their representatives' town halls to protest, and the repeal effort failed.²⁶ When President Trump sought to rescind protected status for "Dreamers"—young undocumented immigrants who entered the country without inspection as minors—protesters again took to the streets.²⁷ A mass shooting at a high school in Parkland, Florida, prompted the launch of a nationwide, youth-run gun control movement.²⁸ The killing of George Floyd by Minneapolis police officers, captured on video, sparked the most widespread and sustained popular demonstrations against police abuse and racial injustice that the country has seen in generations.²⁹ And it was in the wake of the election of President Trump, who is the target of multiple allegations of sexual harassment and assault,³⁰ that the #MeToo movement took off.³¹ The Trump era has shown that our culture favors political action and engagement, not resignation and fatalism. And it is on that culture of hope that democracy's future depends.

Shortly after President Trump was elected, the ACLU warned that if the Administration pursued policies like those he had promised on the campaign trail that we believed were unconstitutional, "we'll see him in court."³² Since then we have filed over 400 legal actions against his Administration.³³

We have won significant victories. Our work has focused largely on the areas in which President Trump has been most hostile to rights and liberties: immigration, reproductive freedom, voting rights, and LGBT rights.

²⁶ See Emily Karl, Ted Barrett & Grace Hauck, *80 Arrested on Capitol Hill After Health Care Protests*, CNN (July 10, 2017, 4:10 PM), <https://www.cnn.com/2017/07/10/politics/health-care-protests-capitol-hill/index.html> [<https://perma.cc/M3LR-AAAL>].

²⁷ See Meghan Keneally, *DACA Announcement Sparks Protest Nationwide, Dozens Arrested at Trump Tower*, ABC NEWS (Sept. 6, 2017, 1:54 AM), <https://abcnews.go.com/Politics/arrests-made-daca-protest-york/story?id=49625957> [<https://perma.cc/2LVB-G2BQ>].

²⁸ David Weigel & Wesley Lowery, *U.S. Students Make the Gun-Safety Movement Their Own*, WASH. POST, Feb. 22, 2018, at A7.

²⁹ See Ronald Brownstein, *The Rage Unifying Boomers and Gen Z*, ATLANTIC (June 18, 2020), URL

³⁰ See Lisa Desjardins, *All the Assault Allegations Against Donald Trump, Recapped*, PBS NEWS HOUR (June 21, 2019, 2:01 PM), <https://www.pbs.org/newshour/politics/assault-allegations-donald-trump-recapped> [<https://perma.cc/3EG7-MYXH>] (summarizing allegations of sexual assault against Donald Trump made by sixteen women).

³¹ See Renée Graham, Editorial, *Yes, Mr. President, #YouToo*, BOS. GLOBE, Dec. 13, 2017, at A10.

³² ACLU (@ACLU), TWITTER (Nov. 9, 2016, 11:29 AM), <https://twitter.com/ACLU/status/796389278033051648>; see also Letter from Anthony D. Romero, Exec. Dir., ACLU, to Donald Trump, President-Elect, U.S. (Nov. 11, 2016), <https://www.aclu.org/letter/aclu-letter-president-elect-trump-published-new-york-times> [<https://perma.cc/33FP-68FX>] (listing campaign promises that ACLU would challenge).

³³ See ACLU Has Filed 400 Legal Actions Against Trump Administration, *supra* note 7 (noting that four hundredth filing was class action lawsuit seeking to block removal of children seeking asylum at U.S.-Mexico border).

With regard to immigration, President Trump has taken aim at asylum, seeking through a variety of measures to reduce the number of people who seek asylum here—whether or not their asylum claims are valid.³⁴ To this end, his Administration has detained asylum applicants as their asylum hearings are pending, whether or not they pose a flight risk or danger to the community.³⁵ His Administration adopted a policy of separating children of asylum seekers from their parents, often without informing the parents where their children were being held, with the goal of deterring people from seeking asylum in the first place.³⁶ He announced that he would deny asylum to anyone who did not enter the country lawfully, even though the asylum statute guarantees a right to asylum whether one enters the country legally or illegally.³⁷ He barred asylum to those who traveled to the United States through another country without first applying for and being denied asylum there, even if applying for asylum in that country would itself pose great risks and be futile.³⁸ He raised the standard for establishing asylum based on fear of gang or domestic violence.³⁹ And he

³⁴ See generally Cecillia D. Wang, *Ending Bogus Immigration Emergencies*, 129 YALE L.J.F. 620 (2020).

³⁵ See *Damus v. Nielsen*, 313 F. Supp. 3d 317, 339 (D.D.C. 2018) (discussing allegations that five ICE Field Officers violated Department of Homeland Security’s “Parole Directive” by denying asylum seekers parole in “virtually all cases”); see also *Mons v. McAleenan*, No. 19-cv-01593, 2019 WL 4225322, at *12 (D.D.C. Sept. 5, 2019) (granting preliminary injunction against ICE Field Office that denied individualized parole adjudication to asylum seekers); *Padilla v. U.S. Immigration & Customs Enf’t*, 953 F.3d 1134, 1143 (9th Cir.) (requiring government to provide individualized bond hearings to foreign nationals demonstrating credible fear of persecution and therefore entitled to full immigration hearings on asylum), *petition for cert. filed*, No. 20-234 (U.S. Aug. 24, 2020).

³⁶ See *Ms. L. v. U.S. Immigration & Customs Enf’t*, 310 F. Supp. 3d 1133, 1149 (S.D. Cal.) (granting preliminary injunction to prevent ICE from separating minor children from detained parents absent determination that parent is unfit or presents danger to child), *appeal filed*, No. 18-cv-56151 (9th Cir. Aug. 27, 2018).

³⁷ See *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 754, 771 (9th Cir. 2018) (describing Trump Administration’s rule to denying asylum to applicants applying outside of port of entry as “the equivalent of a bar to *applying* for asylum in contravention of a statute that forbids the Attorney General from laying such a bar on these grounds”); see also 8 U.S.C. § 1158(a)(1) (2018) (“Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival . . .) . . . may apply for asylum . . .”).

³⁸ *E. Bay Sanctuary Covenant v. Barr*, 385 F. Supp. 3d 922, 935, 960 (N.D. Cal. 2019) (granting preliminary injunction against Trump Administration’s rule imposing “a new mandatory bar for asylum eligibility for aliens who enter or attempt to enter the United States across the southern border after failing to apply for protection from persecution or torture in at least one third country through which they transited en route to the United States” (quoting 84 Fed. Reg. 33,829, 33,830 (July 16, 2019) (codified at 8 C.F.R. pts. 208, 1003, 1208 (2020))))), *aff’d*, 964 F.3d 832 (9th Cir. 2020).

³⁹ *Matter of A-B-*, 27 I. & N. Dec. 316, 320 & n.1 (A.G. 2018) (stating that, under Attorney General Barr’s heightened standards for credible fear, “[g]enerally, claims by aliens

ordered that asylum applicants at the Southern border who had established a credible fear of persecution be returned to Mexico, even though the Mexican border regions to which many were sent were so dangerous that the U.S. State Department warned Americans that they were not safe travel destinations and should be avoided like war zones.⁴⁰

We challenged all of these policies and, in each case, obtained injunctions against them. The Supreme Court stayed some of these injunctions, including those barring implementation of the “transit ban”⁴¹ and “return to Mexico”⁴² policies, pending the United States’s appeals. But in every instance, the lower courts found these policies illegal.⁴³ None has been upheld as lawful.

We also challenged the “Muslim ban.”⁴⁴ And while the Supreme Court narrowly affirmed the third version of the ban by a 5-4 vote,⁴⁵ the lower courts enjoined the first two versions of the ban, and the third version was substantially narrower than the first two versions.⁴⁶

pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum,” and “[a]ccordingly, few such claims would satisfy the legal standard to determine whether an alien has a credible fear of persecution”); *Grace v. Whitaker*, 344 F. Supp. 3d 96, 126 (D.D.C. 2018) (“[T]he general rule [created in *A-B-*] . . . runs contrary to the individualized analysis required by the [Immigration & Nationality Act].”), *stay pending appeal denied*, No. 18-cv-01853, 2019 WL 329572, at *5 (D.D.C. Jan. 25, 2019) (denying Attorney General’s request to stay Court’s order pending appeal after Court enjoined rule from *A-B-* as unlawful), *remanding in relevant part sub nom.* *Grace v. Barr*, 965 F.3d 883, 906 (D.C. Cir. 2020) (abrogating *A-B-* but finding that “the record in this case does not support the asylum seekers’ argument that USCIS and the Attorney General have erected a rule against asylum claims involving allegations of domestic and/or gang violence” because statements are qualified by words “generally”).

⁴⁰ *Innovation Law Lab v. Wolf*, 951 F.3d 1073, 1081 (9th Cir. 2020) (affirming injunction against Department of Homeland Security’s Migrant Protection Protocols, which required “that non-Mexican asylum seekers who arrive at a port of entry along the United States’ southern border must be returned to Mexico to wait while their asylum applications are adjudicated”), *cert. granted*, No. 19-1212, 2020 WL 6121563 (U.S. Oct. 19, 2020) (mem.).

⁴¹ *Barr v. E. Bay Sanctuary Covenant*, 140 S. Ct. 3, 3 (2019) (mem.).

⁴² *Wolf v. Innovation Law Lab*, 140 S. Ct. 1564 (2020) (mem.).

⁴³ *E.g.*, *E. Bay Sanctuary Covenant v. Barr*, 964 F.3d 832, 857 (9th Cir. 2020); *Innovation Law Lab*, 951 F.3d at 1081.

⁴⁴ *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554, 572 (4th Cir. 2017) (describing President Trump’s first executive order prohibiting travel from seven predominantly Muslim countries as one “that in text speaks with vague words of national security, but in context drips with religious intolerance, animus, and discrimination”).

⁴⁵ *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (“[T]he Government has set forth a sufficient national security justification to survive rational basis review. We express no view on the soundness of the policy.”).

⁴⁶ *See id.* at 2403-04.

We also sued the Trump Administration over its efforts to add a question about citizenship to the decennial census.⁴⁷ Census Bureau officials opposed the addition because such a question would deter many immigrants from answering the census and thereby cause an erroneous undercount.⁴⁸ Causing an undercount appeared to be the Administration's goal; it believed that neighborhoods with substantial immigrant populations were more likely to lean toward Democrats. Because census figures are used to draw districts for the state and federal legislatures and to allocate federal funding, the leading Republican gerrymandering expert advised the Administration that adding this question would favor White Republicans and disfavor "Hispanics" and Democrats.⁴⁹ The Supreme Court, by a 5-4 vote, ruled that the Trump Administration's decision to add the question was pretextual and violated the Administrative Procedure Act,⁵⁰ and President Trump was begrudgingly forced to admit defeat.

In July 2020, President Trump announced that he intended to exclude undocumented immigrants from the population numbers used to apportion seats in the House of Representatives. The Constitution and federal statutes require the census to count all residents, regardless of their immigration status, and require the President to use those figures for apportionment. Again, we sued, and a three-judge district court declared the President's plan illegal.⁵¹

The Trump Administration has also taken aim at abortion rights. His Administration adopted a policy of refusing to allow young undocumented women in federal custody to leave the facility where they are housed to obtain an abortion, even though it would allow them to leave for any other medical purpose.⁵² After we challenged this policy in court, the U.S. Court of Appeals

⁴⁷ See generally Complaint, N.Y. Immigration Coal. v. U.S. Dep't of Commerce, No. 1:18-cv-05025, 2018 WL 6819563 (S.D.N.Y. June 6, 2018).

⁴⁸ See *id.* at ¶¶ 81-90 (describing Census Bureau's decades-long opposition to citizenship question in census). The census is required to enumerate all "persons" living in the United States, regardless of citizenship or immigration status. U.S. CONST. art. 1, § 2, cl. 3.

⁴⁹ Michael Wines, *Files Disclose Partisan Hand in 2020 Census*, N.Y. TIMES, May 31, 2019, at A1 (noting that Thomas Hofeller's study found redrawing political maps based on American citizens of voting age would dilute Latinx voters' representation and "force Democratic districts to expand," which would "translate into fewer districts in traditionally Democratic areas, and a new opportunity for Republican mapmakers to create even stronger gerrymanders").

⁵⁰ Dep't of Commerce v. New York, 139 S. Ct. 2551, 2575-76 (2019) (finding that "the decision to reinstate a citizenship question cannot be adequately explained in terms of DOJ's request for improved citizenship data to better enforce the [Voting Rights Act]" and that the DOJ failed to provide reasoned explanation for adding question).

⁵¹ New York v. Trump, 20-cv-05770, 2020 WL 5422959 (S.D.N.Y. Sept. 10, 2020), *appeal docketed*, No. 20-366 (U.S. Sept. 22, 2020).

⁵² J.D. v. Azar, 925 F.3d 1291, 1303 (D.C. Cir. 2019) (per curiam) (describing how new requirement for shelters to obtain Office of Refugee Resettlement Director's approval to facilitate abortion "function[ed] as a blanket ban" because Director rejected every request).

for the D.C. Circuit upheld an order requiring the Administration to afford all such women access to abortion.⁵³

Meanwhile, inspired by President Trump's promise to appoint judges who would overturn *Roe v. Wade*, seven states enacted what amounted to virtually complete bans on abortion.⁵⁴ The ACLU and our allies at Planned Parenthood and the Center for Reproductive Rights have challenged all of the bans; thus far, the courts have enjoined them all.⁵⁵ When some states used the COVID-19 pandemic as an excuse to deny access to abortion,⁵⁶ we again sued.⁵⁷ And again, the courts have largely barred such actions, upholding women's right to choose to terminate an unwanted pregnancy.⁵⁸

We also sued to hold the Trump Administration accountable abroad after they detained a U.S. citizen as an "enemy combatant" in Iraq—without criminal

⁵³ *Id.* at 1339.

⁵⁴ See Alexa Kolbi-Molinas, *Abortion Is Legal in All 50 States, and We Intend to Keep it That Way*, ACLU (Oct. 31, 2019), <https://www.aclu.org/news/reproductive-freedom/abortion-is-legal-in-all-50-states-and-we-intend-to-keep-it-that-way/> [<https://perma.cc/7M4G-CYN4>] (noting that Alabama, Arkansas, Georgia, Kentucky, Missouri, Ohio, and Utah attempted to pass near-total bans on abortion).

⁵⁵ See *id.* ("[T]he ACLU has an undefeated, 7-0 record challenging state abortion bans in court. None of the state abortion bans passed earlier this year will be permitted to take effect.").

⁵⁶ See Miranda Yaver, *In Some States, Coronavirus Measures Are Effectively Banning Abortion*, WASH. POST (Mar. 31, 2020, 6:00 AM), <https://www.washingtonpost.com/politics/2020/03/31/some-states-coronavirus-measures-are-effectively-banning-abortion/> (describing how states describe abortion as "nonessential" to cancel procedures during COVID-19 pandemic).

⁵⁷ See Press Release, ACLU, Court Blocks Tennessee's COVID-19 Ban on Most Abortions (Apr. 17, 2020), <https://www.aclu.org/press-releases/court-blocks-tennessees-covid-19-ban-most-abortions> [<https://perma.cc/74PQ-SFSJ>]; Press Release, Ctr. for Reproductive Rights, Court Block's Tennessee's COVID-19 Ban on Most Abortions (Apr. 17, 2020), <https://reproductiverights.org/press-room/court-blocks-tennessees-covid-19-ban-most-abortions> [<https://perma.cc/L44V-5KE6>]; see also, e.g., Complaint at 15-17, *June Med. Servs., LLC v. Russo*, No. 3:20-cv-00229, 2020 WL 1875943 (M.D. La. Apr. 13, 2020) (challenging Louisiana's notice regarding previability abortion during COVID-19).

⁵⁸ See, e.g., *Adams & Boyle, P.C. v. Slatery*, 956 F.3d 913, 930 (6th Cir.), *petition for cert. filed*, No. 20-482 (U.S. Oct. 8, 2020); *Little Rock Family Planning Servs. v. Rutledge*, No. 4:19-cv-00449, 2020 WL 1862830, at *11 (E.D. Ark. Apr. 14, 2020), *vacated in part*, 2020 WL 2079224, at *1 (E.D. Ark. Apr. 22, 2020); *Robinson v. Marshall*, No. 2:19-cv-00365, 2020 WL 1847128, at *16 (M.D. Ala. Apr. 12, 2020), *appeal dismissed sub nom.* *Robinson v. Att'y Gen.*, No. 20-cv-11401, 2020 WL 3989457, at *1 (11th Cir. May 5, 2020); *Planned Parenthood Ctr. for Choice v. Abbott*, No. 20-cv-00323, 2020 WL 1815587, at *7 (W.D. Tex. Apr. 9, 2020), *vacated in part sub nom.* *In re Abbott*, 956 F.3d 696, 724 (5th Cir. 2020), *petition for cert. filed*, No. 20-305 (U.S. Sept. 3, 2020); *S. Wind Women's Ctr. LLC v. Stitt*, No. 20-cv-00277, 2020 WL 1677094, at *6 (W.D. Okla. Apr. 6, 2020), *appeal dismissed*, 808 F. App'x 677, 681 (10th Cir. 2020) (per curiam).

charges, a warrant, a trial, or even access to a lawyer.⁵⁹ When we learned of this action, we sued on behalf of the prisoner, were awarded access to him by a federal court, and then challenged the legality of his detention. The Trump Administration ultimately agreed to his release.⁶⁰

We have also sued to protect LGBT rights. We challenged the Trump Administration's ban on transgender people serving in the military, obtaining an initial injunction that the Supreme Court stayed pending appeals.⁶¹ In the Supreme Court, we faced off against the Trump Administration over whether the First Amendment permitted a baker to refuse to sell a wedding cake to a gay couple to celebrate their marriage.⁶² The Trump Administration argued that businesses should have a First Amendment right to discriminate if they provide "expressive" services, such as custom wedding cakes.⁶³ We maintained that no such First Amendment right exists and that businesses that choose to open their doors to the public are obligated to abide by generally applicable nondiscrimination requirements, regardless of whether their conduct is expressive.⁶⁴ After an oral argument in which neither the Solicitor General nor the lawyer for the bakery could offer any principled line for identifying "expressive" businesses that are free to discriminate,⁶⁵ the Supreme Court resolved the case without reaching the merits of whether such a First

⁵⁹ See Press Release, ACLU, ACLU Secures Release of American Citizen Unlawfully Detained by Trump Administration (Oct. 29, 2018), <https://www.aclu.org/press-releases/aclu-secures-release-american-citizen-unlawfully-detained-trump-administration> [<https://perma.cc/4Q25-4L2C>].

⁶⁰ *Id.*

⁶¹ *Stone v. Trump*, 280 F. Supp. 3d 747, 769 (D. Md. 2017) (stating that all factors "weigh in favor of granting a preliminary injunction" and "enjoin[ing] the enforcement of the Retention, Accession, and Sex Reassignment Surgical Directives"), *stayed*, No. 17-cv-02459, 2019 WL 5697228, at *3 (D. Md. Mar. 7, 2019) (granting defendants' motion to stay preliminary injunction after Supreme Court decided in other cases to stay preliminary injunctions against similar policies).

⁶² *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018).

⁶³ Brief for the United States as Amicus Curiae Supporting Petitioners at 25, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111) ("Even if a custom wedding cake is not pure speech, [Petitioner's] act of designing and creating the cake is at least expressive conduct. That act involves both a subjective intent to convey a message and a significant likelihood that the message will be understood by those who view the final product.").

⁶⁴ Transcript of Oral Argument at 83, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111) (arguing for Respondent that "[i]t doesn't matter whether it's speech or whether it's not speech" if a business opens itself to the public but refuses to transact with certain customers).

⁶⁵ *Id.* at 40-41 (drawing line by first "analogiz[ing] [the activity] to something that everyone regards as traditional art and everyone agrees is protected speech" and "when you cross that threshold into free speech, the question is can you compel somebody to create and contribute speech to an expressive event . . . that they oppose"); *accord id.* at 4-47; *see also id.* at 9, ("[W]e are drawing the line prior to the compulsion -- there can be no compulsion of speech. . . . [W]hen someone comes in and requests speech, if that speech has already been created, then that would be -- not be compelled.").

Amendment right to discriminate exists.⁶⁶ Instead, the Court merely ruled that the Colorado Civil Rights Commission had exhibited impermissible religious hostility in adjudicating the dispute.⁶⁷ But, in dicta, the Court affirmed that “it is a general rule that [religious and philosophical] objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law,”⁶⁸ a conclusion directly contrary to that advanced by the Trump Administration in the case.⁶⁹

More recently, in a pair of employment discrimination cases, the Trump Administration opposed claims of discrimination on the basis of sexual orientation and transgender status, switching sides from the positions the Obama Administration had originally taken in the cases.⁷⁰ The Trump Administration argued that Title VII’s prohibition on discrimination “because of sex”⁷¹ does not bar employers from firing employees for being gay or transgender.⁷² We successfully argued that discrimination on the basis of sexual orientation and transgender status are both subsets of discrimination “because of sex”; they treat similarly situated employees differently because of their sex.⁷³ For example, if an employer fires a man for being sexually attracted to men but would not fire a woman for being sexually attracted to men, he is treating the man differently

⁶⁶ *Masterpiece Cakeshop*, 138 S. Ct. at 1729.

⁶⁷ *Id.* at 1732.

⁶⁸ *Id.* at 1727.

⁶⁹ See Brief for the United States as Amicus Curiae Supporting Petitioners, *supra* note 63, at 32-33 (arguing that expressive businesses have First Amendment right to discriminate against gay customers if they object to message they would send).

⁷⁰ Compare Brief for the United States as Amicus Curiae Supporting Affirmance in No. 17-1618 and Reversal in No. 17-1623 at 12, *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020) (Nos. 17-1618 and 17-1623) (arguing that Title VII does not prohibit discrimination because of sexual orientation), with *Amici Curiae* Brief of Former Executive Branch Officials and Leaders Including Chairs, Commissioners, and General Counsel from the Equal Employment Opportunity Commission, Secretaries of Education, Deputy Attorney General, and Other Officials from the EEOC and the Departments of Education, Health & Human Services, Justice, and Labor, in Support of the Employees at 15-17, *Bostock*, 140 S. Ct. 1731 (describing evolution of EEOC’s interpretation of Title VII under Obama Administration, which determined that Title VII does include claims of discrimination based on sexual orientation). For a summary of the changing positions, see Selena Simmons-Duffin, ‘Whiplash’ of LGBTQ Protections and Rights, from Obama to Trump, NPR (Mar. 2, 2020, 3:12 PM), <https://www.npr.org/sections/health-shots/2020/03/02/804873211/whiplash-of-lgbtq-protections-and-rights-from-obama-to-trump> [<https://perma.cc/J7KF-WM2T>].

⁷¹ 42 U.S.C. § 2000e-2 (2018).

⁷² Brief for the United States as Amicus Curiae Supporting Affirmance in No. 17-1618 and Reversal in No. 17-1623, *supra* note 70, at 12.

⁷³ See Opening Brief for Respondents, *Altitude Express, Inc. v. Zarda*, 140 S. Ct. 34 (2019) (No. 17-1623); Brief for Respondent Aimee Stephens, *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, 139 S. Ct. 1599 (2019) (No. 18-107).

because of his sex. And when an employer fires an employee because she identifies and dresses as a woman but was assigned a male sex at birth but would not fire an employee for identifying and dressing as a woman if she were assigned a female sex at birth, he is treating the employee differently because of her sex assigned at birth. The Court agreed in a decision written by Justice Gorsuch and joined by Chief Justice Roberts and the Court's four liberal justices.⁷⁴ Because the decision reasons that discrimination on the basis of sexual orientation and transgender status are inherently forms of sex discrimination, it has the effect of ensuring that all statutes prohibiting sex discrimination also prohibit LGBT discrimination—not just Title VII.

The courts, then, have been an important check on illegal government behavior in these and many other cases filed against Trump Administration initiatives. At their best, the courts protect those who cannot obtain protection through the political process. To a significant degree, they have done just that during the Trump era.

But we cannot rely entirely on courts. Political mobilization for rights is also crucial. Accordingly, in the wake of President Trump's election, when the ACLU gained so many new members,⁷⁵ we launched a new grassroots initiative, People Power, designed to encourage people to become guardians of liberty themselves.⁷⁶ People Power asked our members and supporters to take action in their local communities to defend liberty. In some instances, we suggested campaigns. For example, we launched a "Freedom Cities" campaign,⁷⁷ urging activists to pressure their cities and towns to adopt immigrant-friendly law enforcement policies. In the run-up to the 2018 midterms, we organized a "Let People Vote" campaign, with a fifty-state menu for how each state could expand access to the ballot for citizens in their state.⁷⁸ We created a People Power campaign in which activists wrote post cards to ACLU members who had not voted in the prior midterm, encouraging them to get to the polls.⁷⁹ And in the

⁷⁴ *Bostock*, 140 S. Ct. at 1754 ("An employer who fires an individual merely for being gay or transgender defies the law.").

⁷⁵ Renae Reints, *The ACLU's Membership Has Surged and It's Putting Its New Resources to Use*, FORTUNE (July 5, 2018, 10:58 AM), <https://fortune.com/2018/07/05/aclu-membership-growth/> [<https://perma.cc/928E-LD4V>].

⁷⁶ See ACLU PEOPLE POWER, <https://www.peoplepower.org> [<https://perma.cc/B435-NHDZ>] (last visited Nov. 20, 2020).

⁷⁷ Ronald Newman, *The 'Freedom Cities' Campaign: Resistance Through Progress at the Local Level*, ACLU (Mar. 11, 2017, 6:00 PM), <https://www.aclu.org/blog/civil-liberties/mobilization/freedom-cities-campaign-resistance-through-progress-local-level> [<https://perma.cc/TR6J-3VFG>].

⁷⁸ Press Release, ACLU, ACLU Launches 50-State People Power "Let People Vote" Campaign (Oct. 1, 2017), <https://www.aclu.org/press-releases/aclu-launches-50-state-people-power-let-people-vote-campaign> [<https://perma.cc/4KHK-EJTC>].

⁷⁹ See *Sorry! We're All Out of Postcards.*, ACLU PEOPLE POWER, <https://go.peoplepower.org/signup/sorry-were-all-out-postcards/> [<https://perma.cc/6UJ4-H3W3>] (last visited Nov. 20, 2020).

run-up to the 2020 election, our “Rights for All” campaign encouraged activists to press the candidates on specific civil rights and civil liberties issues.⁸⁰ But because so much of politics—and civil liberties—is local, we also encouraged our activists to identify local civil liberties issues in their communities and take collective action to press for positive change at the local level. By 2018, over 500,000 people had not only identified themselves as People Power activists but had also taken some concrete, real-world action to defend liberty and reported it back to us.

The ballot box is another important venue for the advancement of civil liberties and civil rights. The ACLU engaged in the 2018 midterms at a level and in ways that we had not previously done. With our People Power activists and increased financial support,⁸¹ we were able to invest significant resources in ballot measure campaigns affecting civil rights and civil liberties. In Florida, for example, the ACLU was a principal supporter of Amendment 4, which sought to amend Florida’s constitution to allow individuals who had completed their prison sentences for felonies the right to vote.⁸² The existing constitution imposed disenfranchisement for life on anyone convicted of a felony.⁸³ People Power volunteers collected approximately 180,000 signatures to help put Amendment 4 on the ballot. They made tens of thousands of phone calls and 15,000 home visits to encourage citizens to vote for the amendment. We invested \$5 million to support signature-gathering, advertising, get-out-the-vote initiatives, and associated costs of the campaign.⁸⁴ We discouraged opposition by working with our conservative allies on criminal justice reform. To amend the Florida constitution by ballot referendum, a measure must achieve 60% of the vote⁸⁵—this was a challenge given the potential partisanship of this issue in

⁸⁰ See RIGHTS FOR ALL, <https://www.rightsforall.org/> [<https://perma.cc/6H7W-FG22>] (last visited Nov. 20, 2020).

⁸¹ Dale Maharidge, *Can the ACLU Remake Itself as a Mass Movement for Progressive Change?*, NATION (Apr. 25, 2018), <https://www.thenation.com/article/archive/can-the-aclu-remake-itself-as-a-mass-movement-for-progressive-change/>.

⁸² See FLA. CONST. art. VI, § 4.

⁸³ See FLA. CONST. art. VI, § 4 (amended 2018).

⁸⁴ See David Weigel, *ACLU Investing Millions of Dollars in Florida to Restore Ex-Felons’ Voting Rights*, WASH. POST (July 31, 2017, 4:41 PM), <https://www.washingtonpost.com/news/powerpost/wp/2017/07/31/aclu-investing-millions-in-florida-to-restore-felons-voting-rights/>.

⁸⁵ FLA. CONST. art. XI, § 5(e).

a state divided almost equally between Democrats and Republicans.⁸⁶ The amendment ultimately passed with 64.5% of the vote.⁸⁷

We also supported successful ballot initiatives in Michigan and Nevada that expanded access to the vote.⁸⁸ In Louisiana, we supported a ballot initiative to require unanimous jury verdicts in criminal cases,⁸⁹ ending a relic of the Reconstruction era, when the state approved nonunanimous verdicts in response to the new federal requirement that newly freed slaves be permitted to serve on juries. And in Massachusetts, we helped to defeat a ballot measure that would have rolled back advances for transgender equality.⁹⁰ In the 2020 presidential election, we again invested substantial time and resources in ballot initiatives, voter education, and efforts to ensure that as many voters could vote as possible.

The scale and scope of this grassroots political work is relatively new for the ACLU. As a nonpartisan organization, we have long had a policy of neither endorsing nor opposing candidates for elected or appointed office. But that does not mean we should silence ourselves—or our members—when an election is on the horizon. After all, it is during electoral campaigns that public attention to social and legal issues is often at its height. We cannot bow out of the conversation precisely when citizen participation is highest. And, as Donald Trump's election in 2016 dramatically illustrated, electoral outcomes can have massive consequences for civil rights and civil liberties. Almost certainly, the 2016 election was the most consequential civil liberties and civil rights event in the last decade. After his election, President Trump appointed three Supreme

⁸⁶ See *Voter Registration - By County and Party*, FLA. DIVISION OF ELECTIONS, <https://dos.myflorida.com/elections/data-statistics/voter-registration-statistics/voter-registration-reportsxlsx/voter-registration-by-county-and-party/> [https://perma.cc/NJD8-96UU] (last updated Aug. 31, 2020) (stating that as of August 31, 2020, there were 5,020,199 Republican and 5,203,795 Democratic active registered voters in State of Florida).

⁸⁷ Official Result for Voting Restoration Amendment in November 6, 2018 General Election, FLA. DIVISION OF ELECTIONS, [https://results.elections.myflorida.com/Index.asp?ElectionDate=11/6/2018&DATAMODE=\(select "2018 General Election" as election and "Const. Amendments" as office; then click "Voter Restoration Amendment"\)](https://results.elections.myflorida.com/Index.asp?ElectionDate=11/6/2018&DATAMODE=(select%20%222018%20General%20Election%22%20as%20election%20and%20%22Const.%20Amendments%22%20as%20office;then%20click%20%22Voter%20Restoration%20Amendment%22)) (stating that 5,148,926 voters supported Amendment 4).

⁸⁸ See Press Release, ACLU, *ACLU Backs Question 5 Campaign to Implement Automatic Voter Registration* (Sept. 12, 2018), <https://www.aclu.org/press-releases/aclu-backs-question-5-campaign-implement-automatic-voter-registration> [https://perma.cc/9J89-4SCA]; Press Release, ACLU of Michigan, *Michigan Voters Approve ACLU-Backed Promote the Vote Proposal* (Nov. 6, 2018), <https://www.aclumich.org/en/press-releases/michigan-voters-approve-aclu-backed-promote-vote-proposal> [https://perma.cc/YC7Q-F5FV].

⁸⁹ See German Lopez, *Louisiana Votes to Eliminate Jim Crow Jury Law with Amendment 2*, VOX (Nov. 6, 2018, 10:41 PM), <https://www.vox.com/policy-and-politics/2018/11/6/18052540/election-results-louisiana-amendment-2-unanimous-jim-crow-jury-law>.

⁹⁰ See Julie Moreau, *Massachusetts Backs Transgender Rights in Historic Statewide Referendum*, NBC NEWS (Nov. 7, 2018, 12:00 PM), <https://www.nbcnews.com/feature/nbc-out/massachusetts-backs-transgender-rights-historic-statewide-referendum-n933516> [https://perma.cc/9N5R-LJPJ].

Court Justices and more than 300 federal judges—appointments that have altered the composition of the courts across the country, to the detriment of civil rights and civil liberties, for the next generation. When so much is at stake, it would be irresponsible not to educate voters about our issues and to urge them to “vote like your rights depend on it.”⁹¹

To that end, we have also done targeted voter education in a handful of candidate elections. Recognizing that prosecutorial charging policies have been one of the most significant drivers of mass incarceration, for example, we chose to educate voters about prosecutors’ power in the context of district attorney elections.⁹² We did not endorse any particular candidate, but we did impress upon voters the significance of the decision. In numerous races where we engaged in such education, including in Philadelphia, the voters elected prosecutors with criminal justice–reform agendas who subsequently brought about real reform.⁹³

Litigation and lobbying are the more traditional way to defend and advance civil liberties and civil rights. The ACLU has argued countless constitutional rights cases before the Supreme Court over its 100-year history, and its lobbyists have played important roles in drafting and advancing civil rights legislation. But since the election of President Trump, we have turned to another tool of democracy in the defense of liberty: the people themselves. Through People Power, we encourage citizens to be guardians of liberty by taking action in their local communities to advance the values we hold most dear. We are more aggressively engaging in referenda that involve our issues. And we are speaking up during electoral campaigns to ensure that voters are informed about the civil liberties consequences of the choices they make at the polls.

Some have criticized the ACLU’s ramped-up political work as undermining its nonpartisan stance. It is undoubtedly a challenge to engage in the political arena while remaining nonpartisan. However, there are several responses to this criticism. First, our interventions are driven by a principled commitment to civil liberties, not by identification with a particular political party. If one is

⁹¹ *Let People Vote 2020: Take the Pledge*, ACLU, <https://action.aclu.org/petition/let-people-vote-2020-take-pledge> [<https://perma.cc/BZ6J-6DXM>] (last visited Nov. 20, 2020).

⁹² See Press Release, ACLU, ACLU Launches New Initiative to Overhaul Prosecutorial Practices (Apr. 26, 2017), <https://www.aclu.org/press-releases/aclu-launches-new-initiative-overhaul-prosecutorial-practices> [<https://perma.cc/HUP8-DYDE>].

⁹³ See Udi Ofer, *The 2017 Elections Show Criminal Justice Reform Can Be a Winning Issue*, ACLU (Nov. 8, 2017, 5:00 PM), <https://www.aclu.org/blog/smart-justice/2017-elections-show-criminal-justice-reform-can-be-winning-issue> [<https://perma.cc/CH6V-FQN9>] (“By far the biggest criminal justice reform victory came with the election of Larry Krasner as Philadelphia’s next district attorney. . . . Philadelphians elected a candidate likely to become America’s most progressive prosecutor.”). *But see* Nicole Zayas Fortier & Weronika Bzura, *Prosecutors Disappoint During Pandemic – 2nd Edition*, ACLU (July 30, 2020), <https://www.aclu.org/news/criminal-law-reform/prosecutors-disappoint-during-pandemic-2nd-edition/> [<https://perma.cc/3NFG-X2ZY>] (criticizing Krasner’s response to coronavirus pandemic as “frustratingly slow and limited”).

committed to criminal justice reform, supporting those who are smart on crime and opposing those who are reflexively tough on crime, is one being principled or partisan? In today's America, many principled disagreements break down along party lines, so sometimes it can be difficult to see the difference. But there is a crucial normative difference between acting on principle and acting out of partisan loyalty. We work with both parties to advance our interests, and we oppose officials of either party when they undermine civil rights or civil liberties. We aim to hold all government officials accountable to our principles, no matter their affiliation.

Second, even if principled engagement risks creating the appearance of partisanship, the benefits of that engagement outweigh its cost. In a democracy, elections determine substantive policy through legislative and executive action, including the appointment of judges. For the nation's leading civil liberties organization to absent itself from political debate when it is most consequential would be to forego a critical tool for advancing its ideals. As I have shown in my book, *Engines of Liberty: How Citizen Movements Succeed*,⁹⁴ social movements that have changed constitutional law, whether focused on racial justice, women's rights, marriage equality, or the right to bear arms, have deployed *all* of the tools that democracy makes available—including not only litigation and lobbying but also grassroots organizing, public education, communications, and mass demonstrations. Legal change requires coordinated, incremental progress in a wide variety of forums. Whether one achieves marriage equality through a ballot initiative, a lobbying campaign, or litigation, the end result still guarantees marriage equality. And as I show in *Engines of Liberty*, reform at the judicial level generally follows, rather than leads, reform in other venues.

Nonpartisanship is one of the ACLU's critically important values. The Bill of Rights is not conservative or liberal, Republican or Democratic—it protects everyone, regardless of political or group identity. The universal and inalienable aspect of the Bill of Rights is essential to its acceptance as legitimate. That is why the ACLU famously defends the rights of those with whom it fundamentally disagrees. If the freedom of speech were extended only to those with whom we agree, it would lose its legitimacy. We are committed to working with anyone who favors civil liberties and civil rights, and, while we are often painted as liberal, we work across the aisle with conservative and libertarian groups to advance civil liberties as well.

There is nothing impure or unprincipled about using democratic processes, in addition to litigation, to advance civil liberties and civil rights. And once one engages in the process of persuading voters, constituents, and politicians to favor civil liberties, politics is inescapable. Moreover, because the courts are part of society and are affected by political movements, even litigation is not free of political influences. But there is a difference between being political and being partisan. The ACLU needs to avoid partisanship to remain true to its mission

⁹⁴ DAVID COLE, *ENGINES OF LIBERTY: HOW CITIZEN MOVEMENTS SUCCEED* (rev. ed. 2017).

and ideals. But it cannot avoid being political if it is going to be effective. In a democracy, politics are inextricable from the defense of liberty.

No one better captured this truth than the great Judge Learned Hand of the U.S. Court of Appeals for the Second Circuit. In a speech given to a mass naturalization ceremony in Central Park in 1944, Judge Hand spoke of the “Spirit of Liberty.”⁹⁵ In that speech, directed to 150,000 new American citizens,⁹⁶ he said, “Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it.”⁹⁷ Coming from one of the country’s greatest jurists, this caution is worth heeding. Judge Hand warned that we cannot rely exclusively on laws or courts to protect liberty. The ultimate guardians of liberty must be the people themselves. If that is correct, and I am convinced that it is, then organizations like the ACLU, comprised of citizens coming together to defend liberty, are absolutely essential. They embody the spirit of liberty. And to succeed, such organizations must engage not just the courts, not just legislators and executive officials, but also the people themselves in liberty’s defense. Liberty during the Trump era lay in popular resistance to Donald Trump—from the Women’s March and airport demonstrations to the town halls defending Obamacare and the demonstrations defending Dreamers, from the March for Our Lives to the Black Lives Matter protests, and from the 2018 midterms to the 2020 presidential election.

It is in that mobilization of hope that salvation lies.

⁹⁵ Judge Learned Hand, Second Circuit Court of Appeals, *Spirit of Liberty* (May 21, 1944), in *LEND ME YOUR EARS: GREAT SPEECHES IN HISTORY* 71 (William Safire ed., 3d ed. 2004).

⁹⁶ See Olivia B. Waxman, *Citizenship Day Used to Be Called ‘I Am an American Day.’ Here’s How it Came to Be—and Why It Changed*, *TIME* (Sept. 17, 2019, 2:41 PM), <https://time.com/5677862/citizenship-day-history/> [<https://perma.cc/B28U-M4SH>] (noting that, in addition to new citizens, 1.5 million people attended the ceremony).

⁹⁷ Hand, *supra* note 95, at 72-73.