

**Immigration
Litigation
Fund**



Reflections on Five Years of the Immigration Litigation Fund at Borealis Philanthropy

**A WRAP-UP
REPORT OF THE ILF:
2017-2021**

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Phorn Tem is reunited with his mother and brother in San Francisco after his deportation to Cambodia. AAAJ — Asian Law Caucus attorney Melanie Kim filed a motion to reverse his deportation and a judge agreed that Phorn's removal order was invalid.

PHOTO BY PAUL KIM

Summary

From 2017-2021, the **Immigration Litigation Fund**, housed at Borealis Philanthropy, supported key organizations fighting for immigration justice, dignity, and rights against an increasingly hostile set of anti-immigrant laws and policies.

This wrap-up report celebrates the incredible work of grantee partners of the Immigration Litigation Fund over its five years of existence. The report shares the context behind the Fund's origins; discusses the needs the ILF met over its lifespan; names challenges faced and lessons learned; and shares reflections from former ILF grantees. Borealis Philanthropy is deeply grateful to ILF grantees for sharing their insights and experiences with the field through surveys, final reporting, and interviews.

ILF grantees used litigation to achieve key victories to support immigrant rights, from litigation that led to policy change, to the release of immigrants from detention. Grantee partners worked diligently in front of the courts, as well as through community-driven advocacy efforts to secure the safety and protection of immigrants, asylum seekers, and refugees.

GRANTEE RECOMMENDATIONS



Give **MULTI-YEAR, FLEXIBLE GRANTS**



Provide **TECHNICAL ASSISTANCE AND CAPACITY BUILDING SUPPORT**, especially for smaller, emerging organizations



When funders understand the wider movement ecosystem they're supporting (through pooled funds or other approaches), it allows for **GREATER COORDINATION AND THEREFORE GREATER IMPACT** on the issues grantees are working to change

LESSONS LEARNED

We learned a lot from five years of the ILF, from lessons about grantmaking practice to the kinds of successes grantee partners had when provided with additional opportunities for collaboration. The primary learnings we share in this report include:



FLEXIBILITY IS CRUCIAL, especially in the face of unexpected challenges



COLLABORATION AMONG ORGANIZATIONS IS KEY when challenging an administration



Litigation efforts are particularly strong **WHEN PAIRED WITH COMMUNITY ORGANIZING**



The importance of **EXPECTATION-SETTING AND GRANTMAKING FOR A PARTICULAR CONTEXT**

BACKGROUND

Why and How the ILF Came to Be

The Immigration Litigation Fund (ILF) was a national funder collaborative that supported impact litigation, advocacy, organizing, and communications efforts to challenge discriminatory, unlawful, and overly punitive immigration enforcement policies and practices between 2017–2021. Grantee partners worked across multiple stages of the enforcement trajectory, from identification and apprehension; to detention and removal; to exclusion of immigrants trying to enter the country.

The ILF was born in response to a moment of unprecedented anti-immigrant sentiment in the United States, with a clear and unwavering belief that litigation could play a key role in fighting back against the Trump Administration's attempts to erode immigrant rights. Litigation was also seen as a tool in achieving public policy and social change within the constellation of efforts undertaken by the immigrant rights movement.

The 2017-2021 administration enforced immigration policies and practices aimed at dehumanizing and demoralizing immigrant communities, and tried to block any pathway to inclusion. The cruel treatment of immigrants, asylum seekers, and refugees—especially those who are non-white—has long been a part of racial injustice in this country.

Litigation supported by the ILF helped bring harms to light, keeping the experiences of immigrants in front of the court and the public, and addressed problems not solved by legislation. The Fund's grantmaking prioritized litigation efforts that were connected to, and coordinated with, immigrant communities and organizations.

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Setting a Clear Focus for the Immigration Litigation Fund

From its inception, the Immigration Litigation Fund prioritized support for organizations, projects, and impact litigation efforts that demonstrated an ability to partner with local and state-based grassroots groups. Like other funds housed at Borealis, the ILF saw this support as part of a much wider movement ecosystem rooted in a commitment to justice and liberation. Grantee partners were selected based on their work in the following priority areas:

1

SYSTEMIC CHANGE, including:

Policy change

Legal precedent

Directly benefiting ongoing advocacy and organizing efforts; or

Contributing to shifting public narratives and discourse on immigration enforcement

2

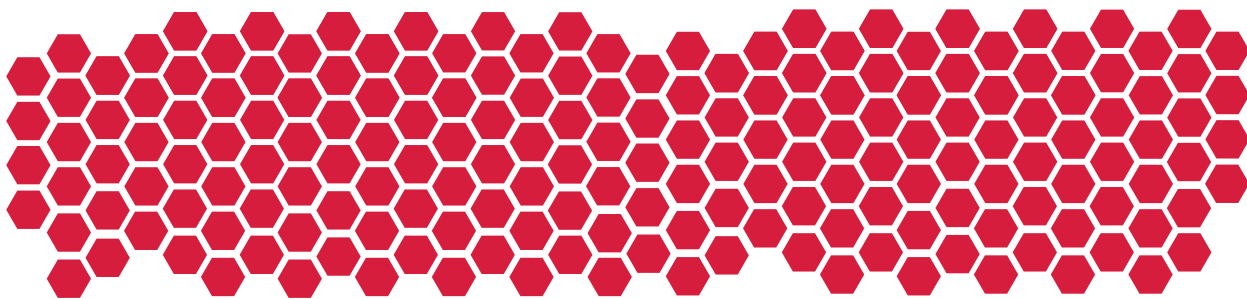
Working in a **GEOGRAPHIC REGION WITH LIMITED LEGAL CAPACITY**

3

Addressing **ISSUES FACING UNDER-REPRESENTED COMMUNITIES**, particularly Black immigrants, Asian Pacific Islander (API) immigrants, Middle Eastern, Arab, and South Asian (MASA) immigrants, lesbian, gay, bisexual, and transgender (LGBT) immigrants, immigrants with disabilities, immigrant women, indigenous migrants, and immigrants with contact with the criminal justice system.

Celebrating the Progress That ILF Grantees Built

During the lifespan of the ILF (2017-2021), the Fund made **183** grants totaling over **\$11** million.



183 GRANTS

\$11 MILLION +

ILF grantees used litigation to achieve key victories to support immigrant rights, including:

Litigation that Led to Policy Change

- **AAAJ-Atlanta** filed *Trinh v. Johnson*, a nationwide class action that challenged the indefinite and prolonged detention of Vietnamese refugees who had final orders of removal but who were unlikely to be removed in the reasonably foreseeable future. Many of the class members had been previously released on orders of supervision but were suddenly re-detained in 2017. These were Vietnamese refugees who came to the United States before July 12, 1995 (“pre-1995 Vietnamese”).

ICE released the class representatives from detention, as well as dozens of other class members that it could not deport. It also reverted back to its prior policy of generally releasing pre-1995 Vietnamese immigrants within 90 days of their orders of removal. Additionally, a federal district judge certified nationwide classes in a habeas petition, and a federal district judge ruled that a detained immigrant can file a Zadvydas claim 90 days post-order and does not need to wait until six months to file.

- **Immigrant Defenders Law Center** and **Justice Action Center** filed *Immigrant Defenders v. DHS* on January 14, 2021. As a result of the litigation, they secured a policy change stating that all unaccompanied children who were once in the Remain in Mexico program have a right to apply for affirmative asylum before the U.S. Citizenship and Immigration Services. In addition, they received a court order in July 2021 that was a substantial win, dismissing all of the government's efforts to dismiss the case. This prompted the case to go into settlement discussions, which, while confidential, appear to hold the promise of getting complete relief including the return of children wrongly deported.

Fighting for the Freedom of Immigrants in Detention

- **Al Otro Lado** challenged ICE's lack of COVID-19 protections at Pine Prairie ICE Processing Center as a violation of the Fifth Amendment and Rehabilitation Act rights of long-term detained immigrants. After obtaining a Third Party Inspection Order from the court, ICE released all of the plaintiffs to moot the case out.
- **Lawyers Committee for Civil Rights of the San Francisco Bay Area** (LCCRSF) filed *Bahena Ortuno*, which resulted in the release of clients with serious health conditions and secured a ruling that their health risks during the pandemic made conditions of confinement unconstitutional for them.



LCCRSF

CASE STUDY

Lawyers Committee for Civil Rights of the San Francisco Bay Area

On March 24, 2020, the **Lawyers Committee for Civil Rights of the San Francisco Bay Area (LCCRSF)** filed *Bahena Ortuno*, when over 300 immigrants were detained by ICE in the for-profit Mesa Verde Detention Facility (Mesa Verde) in dangerous, tightly-packed dormitories. Over 150 people were detained in ICE custody in similarly unsafe conditions at the Yuba County Jail (Yuba). At both facilities, ICE continued intake, despite the mounting dangers of the pandemic. Through *Bahena Ortuno*, ILF grantees secured release for clients with serious health conditions and secured a ruling that their health risks during the pandemic made conditions of confinement unconstitutional for them.

With hundreds of others in custody and the pandemic worsening, LCCRSF filed *Zepeda Rivas v. Jennings*, a class action lawsuit on behalf of everyone in ICE custody at Mesa Verde and Yuba, seeking release as a remedy for the entire class. The litigation secured the release of hundreds of immigrants from custody, both through “voluntary” releases by ICE due to the pressure of litigation and through federal court orders in response to individual class members’ release applications (through a “bail” process). Although both

facilities experienced COVID outbreaks during the winter of 2020, hundreds of class members were spared their harm—and LCCRSF sought and won further protections for the class during and after each outbreak.

Zepeda Rivas set important legal precedent that release can be a remedy for unconstitutional conditions of confinement, and that such claims can be successful on behalf of an entire detained class. Notably, it also demonstrated that ICE detention is dangerous, and that releasing families to their communities, where they belong, keeps people safe. Of the hundreds of class members released through litigation—many of whom had serious previous criminal convictions and most of whom were subject to so-called mandatory detention statutes—ICE has alleged that only a handful have violated the conditions of their release, and that only 1 has committed a new crime that could warrant re-detention.

Scholars who study the health impacts of incarceration are conducting a study based on voluntary interviews with released Zepeda Rivas class members that demonstrates the harm of ICE detention, and the benefit of keeping immigrants home with their families and communities.

Building the Litigation Muscle of Broader Advocacy Efforts

Some efforts led by grantee partners were not as neatly categorized, or ended up leading to work informed by lessons learned along the way. For example:

- **Just Futures Law**'s ongoing FOIA litigation helped them learn more about the role of surveillance as a tool for further data collection and immigration enforcement. Just Future Law created the COVID-19 FOIA Project to monitor how government and tech companies are rapidly expanding tech surveillance in response to the pandemic and to ensure that a public health emergency is not misused to increase deportation and criminalization and do further harm to communities.
- Litigation, even when unsuccessful, was an important tool for coalition building and leveraging power with government officials. **Organized Communities Against Deportation (OCAD)** reflected on an example with “the Gang database litigation against the City of Chicago, while the lawsuit was dismissed in Sept 2020, the city-wide coalition is still in conversation with the Mayor’s Office and City Council on the future elimination of the gang database through policy changes.”
- In addition to litigation, **Lawyers’ Committee for Civil Rights of the SF Bay Area** and **Asylum Seeker Advocacy Project**'s national coalition of advocates took on several advocacy efforts, including organizing and preparing clients for media and administrative advocacy with the Task Force for Family Reunification and DHS Secretary Mayorkas.
- **Justice Action Center** was also able to use ILF funding to conduct important communications work around their case.

Facing a Mountain of Anti-Immigrant Policies, and Other Challenges

The biggest challenges faced by the ILF and the immigration litigation field more broadly were the mercurial and anti-immigrant sentiments of the Trump Administration.

Because Trump's path to the election was premised on anti-immigrant rhetoric, the administration continued to return to policies and practices that reinforced its stance on increased deportations and prohibitions on entry into the United States, to as many immigrants and refugees, as possible. This resulted in a flurry of hastily implemented, cruel policies such as the near end to refugee admission, the Muslim Ban, returning asylum seekers to Mexico, blocking asylum applicants at the border, and separating children from their parents.

The impacts of the pandemic on immigrants, including the lack of protections for people being held in detention, were immediate. Many facilities experienced COVID outbreaks early on, and grantees had to pivot strategies to provide support in this dangerous, fast-changing and high-stakes context. Operationally, ILF grantees as well as funders and staff had to shift strategies, from shifting work and convenings online to changing grantmaking to become more flexible and responsive.

The challenges ILF grantees and the field faced were numerous, and included:

The Sheer Volume of Anti-Immigrant and Anti-Refugee Policies from Every Level

- The volume and pace of new anti-immigrant efforts was overwhelming. There were so many bad and unconstitutional policies being announced and implemented that it was difficult for the immigration litigation field and funders to keep up with each new twist and turn.
- From local 287(g) agreements to federal rulings, some organizations described it as a twisted version of “whack-a-mole.” As soon as they challenged one piece of litigation, another would spring up. Grantees reflected on the need for sustained support in this political climate and its aftermath.

Harsh Immigration Policies Did Not End When Trump Left Office

- Many Trump-appointed judges remain in positions of influence. In some cases, programs that were initiated under the Trump administration needed significant pressure to come to an end. For example, the **Justice Action Center** brought a lawsuit to ensure the unaccompanied children who were once subjected to the Remain in Mexico program were able to have their congressionally mandated rights to seek asylum under child-centric standards, before being deported. They were able to put increased pressure on the Biden administration to wind down the Remain in Mexico program.
- More broadly, those impacted by harsh Trump-era immigration policies continue to live with the harms endured through the gutting of asylum, the Muslim Ban, family separations, and so on.

Litigation is Often a Long, Drawn-Out Process; Victory in One Court Can Be Overturned by Another

- **Al Otro Lado** challenged the right of ICE to detain immigrants after a district court judge in their criminal case ordered them released on bail. These are Mississippi community members arrested and charged with federal crimes after massive 2019 workplace raids. Al Otro Lado obtained the first order in years from a district court that ICE may not detain an immigrant after a federal judge in a criminal case ordered their release on bail. Unfortunately, the Fifth Circuit Court of Appeals overturned the decision. Al Otro Lado is petitioning for certification to the Supreme Court.

Flexibility is Crucial, and Other Lessons from the ILF

We learned a lot from five years of the Immigration Litigation Fund, from lessons about grantmaking practice to the kinds of successes grantee partners had when provided with additional opportunities for collaboration.

Our primary learnings include:

Flexibility is Crucial, Especially in the Face of Unexpected Challenges

- In April 2020, funders to the ILF approved a Borealis request to offer ILF grantees the option to convert their project-specific grants to general operating support. This shift provided more flexibility to grantees in the face of the uncertainties of the COVID-19 pandemic and helped them do their work.
- For ILF's final grantmaking cycle, the Fund provided general operating support to all grantees. In interviews, some staff at grantee partner organizations noted that general operating support helped the organization "keep the lights on" and pay staff during a difficult financial period.
- In addition to flexible funding, grantees such as **IRAP** reflected back on how funding over multiple years allowed them to continue litigation efforts that often surpass a one-year grant cycle, increasing the impact of grants across the field.

Collaboration Among Organizations is Key When Challenging an Administration

- We learned that when organizations partnered together to leverage their resources and skills, they were more likely to be successful in their litigation efforts. In some cases, the ILF funded multiple organizations that were working in tandem.

- On November 13, 2017 **IRAP**, along with the **National Immigration Law Center** (NILC) and **HIAS**, all previous ILF grantees, filed a complaint against President Trump’s 10/24/17 “refugee ban” executive order that suspended processing of follow-to-join refugees and of refugees from Security Advisory Opinion (SAO) countries (mostly Muslim-majority countries). The *JFS v. Trump* case won an emergency motion in December 2017 before a judge in Washington overturned Trump’s latest Executive Order banning refugee admissions from 11 countries. The ruling also reinstated the follow-to-join program allowing refugees to reunite with their immediate family members.
- As a result of this major court victory, the State Department resumed refugee processing for all nationalities and instructed embassies to resume family reunification processing. This move allowed for the administration to be blocked in its attempt to dismantle the U.S. refugee program through procedure and instead get resettlement procedures to resume globally. On July 27, 2018, the court determined that the plaintiffs in the case could seek discovery, to help bring to light why refugee admissions from certain Muslim-majority countries have stalled even after the December 2017 ruling.

Litigation Efforts are Particularly Strong When Paired with Community Organizing

- The ILF has supported several grassroots organizations that are not litigating firms. In some instances, they served as organizational plaintiffs, given the trust and relationships already established with impacted community members. This is important when gathering plaintiffs for a class action lawsuit.
- Other grassroots organizations added litigation as another tool to support their organizing work, like **OCAD** in Chicago with their End the Gang Database campaign. “We truly appreciate ILF, which made it possible for us to start our litigation work in 2018,” OCAD shared. “We were new to using lawsuits as a tactic into our organizing strategy. We have seen the benefits and also the challenges with litigation and without the kind support from ILF we might have not started the litigation projects of the organization.”



AL OTRO LADO

The Importance of Expectation-Setting and Grantmaking for a Particular Context

Because of the Trump Administration’s consistent attempts to destroy any pro-immigrant policies and protections, the ILF was in essence a defensive project. Therefore “success” was about stopping new, more extreme anti-immigrant policies from taking effect or being implemented. In this climate, ILF grantees worked to prevent a harsh climate for immigrants from becoming harsher. Impact litigation supported by the ILF successfully did just that, and lawsuits brought by the Fund’s grantees had success in the courts. Judges stopped policies (sometimes temporarily) from going into effect in cases such as the Muslim Ban, ban on asylum seekers at ports of entry, ending TPS and DACA, prolonged detention of those in deportation proceedings, and banning asylum seekers who travel through other countries.

Over time, litigators in this field learned from experience on how to file litigation quickly and defensively, improving the field’s ability to stop policies, at least temporarily. With the understanding that most of the impact litigation supported by Borealis was defensive, Borealis developed administrative processes for grant applications, vetting, site visits (prior to COVID), and grant reporting that was streamlined and narrowly tailored toward impact litigators who were responding urgently to new immigration enforcement policies and practices.

What's Next After the ILF?

The ILF was created to respond to an administration coming into power that was openly hostile to immigrants, refugees, and asylum seekers.

Now that we are no longer operating in the context of that administration, what's next? While litigation remains a necessary and important tool to effect change on enforcement issues, the immigrant rights landscape is in a very different place, with movement leaders forming new pathways forward.

In interviewing ILF grantees, we heard recommendations for the types of support they found to be most impactful:



MULTI-YEAR FUNDING allowed for deeper investments in the work, and led to greater outcomes. **IRAP** received ILF support for four years, “during which time the IRAP litigation team was very active and filed numerous lawsuits,” resulting in several significant victories.



TECHNICAL ASSISTANCE AND CAPACITY BUILDING SUPPORT, especially for smaller, emerging organizations. One example comes from the **Asylum Seeker Advocacy Project**, which used part of its funds to help support pro bono attorneys through the creation of resources, resulting in nearly 300 damages cases being filed for asylum seeking families injured as a result of immigration detention and family separation.



FLEXIBLE FUNDING made a difference in allowing organizations to invest dollars where they were most needed. As **Al Otro Lado** shared, “We would not have been able to do any of this without ILF funds. The funds partially subsidized the salary of the only detention conditions litigator in our organization.”



HAVING A CORE FUND DEDICATED TO THIS WORK helped bring in other support for some ILF grantee partners. As **IRAP** shared, “Support from the ILF helped us to bring on other funders, and enabled us to quickly establish a very strong litigation team. Even with the change of administration, our litigation team continues to be very active in efforts to hold the government accountable to its commitments and ideals.”



AL OTRO LADO

The crucial work grantee partners are doing to support immigration litigation and the field of immigrant rights more broadly, continues.

Looking at funder support, we asked grantee partners about the role that ILF funding played in helping to sustain their work: 50% indicated that the Fund was “Very Helpful - ILF funding allowed us to put additional resources into a case that we were already interested in pursuing,” and the other half of respondents indicated ILF funds were “Crucial - we would not have been able to file/proceed with the case without ILF funding.” (The other two options in the survey were “Helpful - ILF funding was helpful but not essential to us moving the case forward” and “Other/provide a description.”)

We do not know how future donor collaboratives will help support the field in building safe futures for immigrants and refugees, through litigation and other strategies. From grantee organizations who were new to litigation and were able to “develop in-house expertise, strengthen partnerships, and build organizational infrastructure that will support us in future litigation efforts” to crucial coalitions that were built to respond collectively to concurrent litigation efforts, the Immigration Litigation Fund supported incredible grantee-led efforts at a pivotal time in this country. It held a distinct role in the field, as one grantee wrote in a future-facing reflection, “This fund was a unique fund, and there is still a huge need for immigration related litigation.”



MIGRANT JUSTICE

Acknowledgments

Borealis Philanthropy would like to thank all Immigration Litigation Fund grantees, who worked tirelessly to uphold the freedom and dignity of immigrants and refugees through an incredibly trying time.

American Civil Liberties Union Foundation, Inc.

American Civil Liberties Union Foundation of Louisiana

American Civil Liberties Union of New Jersey Foundation

American Civil Liberties Union Foundation of Southern California

American Civil Liberties Union San Diego and Imperial Counties

ADC Research Institute/
American-Arab Anti-Discrimination Committee

Adhikaar for Human Rights and Social Justice

Advancement Project

Advocates for Basic Legal Equality, Inc.

African Communities Together, Inc.

Al Otro Lado, Inc.

ALDEA — The People's Justice Center

American Immigration Council

Americans for Immigrant Justice

Asian Americans Advancing Justice — Asian Law Caucus

Asian Americans Advancing Justice — Atlanta

ASISTA Immigration Assistance

Asylum Seeker Advocacy Project

William J. Brennan Center for Justice, Inc.

Brooklyn Defender Services

Capital Area Immigrants' Rights Coalition

CASA de Maryland, Inc.

Catholic Charities Community Services	Detention Watch Network	International Refugee Assistance Project
Catholic Charities of Southern New Mexico	Alliance San Diego	Jane's Due Process
Catholic Legal Immigration Network, Inc. (CLINIC)	FIRN Inc	Jewish Family Service of San Diego
Center for American Progress	Florence Immigrant and Refugee Rights Project, Inc.	Jolt
Community Change	Free Migration Project	Just Futures Law
Center for Constitutional Rights	Friends of Farmworkers, Inc.	Justice Action Center
Center for Gender & Refugee Studies (CGRS)	Grassroots Leadership	Justice For Our Neighbors - Houston
Center for Law and Education, Inc.	Haitian Women for Haitian Refugees	Justice for Our Neighbors - Nebraska
Center for Migration Studies of New York	Heartland Alliance's National Immigrant Justice Center	Justice in Motion
Ceres Policy Research	HIAS, Inc.	LatinoJustice PRLDEF
Charlotte Center for Legal Advocacy	Houston Immigration Legal Services Collaborative	Lawyers for Civil Rights
Children's Rights	Human Rights Defense Center	Lawyers' Committee for Civil Rights of the San Francisco Bay Area
Civil Rights Education and Enforcement Center	Human Rights First	Legal Aid Justice Center
Coalition for Humane Immigrant Rights (CHIRLA)	Human Rights Initiative of North Texas	Legal Aid Service of Broward County, Inc.
Community Activism Law Alliance	Immigrant Defenders Law Center	The Legal Aid Society
Community Justice Exchange	Immigrant Defense Project	Make the Road New York
Community Justice Project, Inc.	Immigrant Justice Idaho	Mexican American Defense and Education Fund (MALDEF)
Council on American-Islamic Relations, Ohio	Immigrant Legal Resource Center	Familia: Trans Queer Liberation Movement
Defender Association of Philadelphia	Immigration Equality	Mid-South Immigration Advocates
	Immigration Services and Legal Advocacy	Migrant Clinicians Network
	Innovation Law Lab	

Migrant Justice	New York Immigration Coalition, Inc.	The Bronx Defenders
Mijente	No More Deaths	The Center for Popular Democracy
Mississippi Center for Justice	North Carolina Justice Center	The Door
Muslim Advocates	Northwest Immigrant Rights Project	The Judge David L. Bazelon Center for Mental Health Law
National Center for Law and Economic Justice	Organized Communities Against Deportation	Justice Strategies
National Center for Youth Law	Pangea Legal Services	Towards Justice of Colorado
National Domestic Workers Alliance	Partnership for the Advancement of New Americans	Transgender Law Center
National Immigration Law Center	Providence Youth Student Movement	UndocuBlack Network
National Immigration Project of the National Lawyers Guild (NIPNLG)	Public Counsel	United We Dream Network
National Iranian American Council	Rapid Defense Network	WeCount!, Inc.
National Korean American Service & Education Consortium (NAKASEC)	Safe Horizon, Inc.	Worker Justice Center of New York
National Queer Asian Pacific Islander Alliance	Safe Passage Project Corporation	Yemeni American Merchants Association
Nationalities Service Center of Philadelphia	Sanctuary for Families, Inc.	
National Day Laborer Organizing Network (NDLON)	Shriver Center on Poverty Law	
New Mexico Immigrant Law Center	Southeast Asia Resource Action Center (SEARAC)	
New Orleans Workers' Center for Racial Justice	Southern Poverty Law Center	
New Sanctuary Coalition	Tahirih Justice Center	
	Texas Civil Rights Project	
	Texas Rio Grande Legal Aid, Inc.	
	The Bail Project	



MIGRANT JUSTICE

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COVER: Photo by Nora Phillips **GRANTEE:** Al Otro Lado

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