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Liamarie Quinde

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COMMENTS

PROTECTING THE SUBSTANTIVE DUE PROCESS RIGHTS OF IMMIGRANT DETAINEES: USING COVID-19 TO CREATE A NEW ANALOGY

Liamarie Quinde*

While the Supreme Court has defined certain constitutional protections for incarcerated individuals, the Court has never clearly defined the due process rights of immigrant detainees in the United States. Instead, the Supreme Court defers to the due process protections set by Congress when enacting U.S. immigration law. Increasingly, the federal courts defer to Congress and the Executive's plenary power over immigration law and enforcement. This has resulted in little intervention in immigration matters by the federal courts, causing the difference between immigration detention and criminal incarceration to diminish in both organization and appearance. Immigration detention, however, is a form of civil detention and is legally distinct from criminal incarceration. This distinction is important because the federal courts traditionally approach civil detention with a scrutinizing eye. Civil detainees receive certain Fifth Amendment protections not available to the criminally convicted, namely that their detention cannot amount to punishment.

The consequences of lacking a clear definition of immigrant detainees' due process rights became far more apparent during the COVID-19 pandemic. As COVID-19 infections spread and detention and confinement

* Northwestern University Pritzker School of Law, J.D., expected May 2022. University of Virginia, B.A. 2016. Many thanks to Professor Erin Delaney without whose guidance, review, and expertise, this Comment would not have been possible. I am also grateful to the student editors of the *Journal of Criminal and Criminology* for their feedback and review, and to the Mexican American Legal Defense and Educational Fund for championing the civil rights of immigrants in the United States.

conditions became more perilous, immigrant detainees relied on habeas corpus petitions to challenge the conditions of their confinement and seek release. However, several federal courts concluded that habeas was an inappropriate vehicle through which to challenge conditions of immigration detention, reflecting a long-standing circuit split within the criminal incarceration context. This Comment argues that courts that denied habeas petitions for release of immigrant detainees during the COVID-19 pandemic incorrectly analogized immigration detention to post-conviction criminal incarceration. This Comment suggests that the COVID-19 pandemic highlights the need for the federal courts to take a more principled approach to analyzing the substantive due process rights of immigrant detainees by drawing analogies to a different stage of the criminal adjudication process: pretrial detention.

INTRODUCTION

Immigration detention is a form of civil detention that provides immigrant detainees constitutional protections against conditions that amount to punishment.[1] However, life-threatening conditions within immigration detention centers are a growing phenomenon that dramatically worsened during the COVID-19 pandemic.[2] According to a CNN tally of Immigration and Customs Enforcement (ICE) data, twenty-one individuals died in ICE custody in 2020.[3] Although only nine of those deaths were linked to COVID-19,[4] the number of total deaths in 2020 was nearly triple the number of deaths reported in 2019 and the highest annual death toll in fifteen years, even though the detained population had dropped by a third since 2019.[5] As necessitated by the rate at which COVID-19 spread within ICE detention facilities,[6] immigrant detainees filed a mounting number of habeas petitions beginning in March 2020 arguing that release from detention was the only remedy sufficient to protect themselves from severe harm or death.[7]

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[1] Bell v. Wolfish, 441 U.S. 520, 535 n.16 (1979) (concluding that due process requires that pretrial detainees cannot be punished, while sentenced inmates can be punished if it is not cruel and unusual).

[2] *See* Matt Stieb, *Everything We Know About the Inhumane Conditions at Migrant Detention Camps*, N.Y. MAG. (July 2, 2019), https://nymag.com/intelligencer/2019/07/the-inhumane-conditions-at-migrant-detention-camps.html (likening migrant detention centers to concentration camps).

[3] Catherine E. Shoichet, *The Death Toll in ICE Custody Is the Highest It's Been in 15 Years*, CNN (Sept. 30, 2020, 8:11 AM), https://www.cnn.com/2020/09/30/us/ice-deaths-detention-2020/index.html [https://perma.cc/98SA-ZRY8].

[4] Noelle Smart, Adam Garcia & Nina Siulc, *One Year Later, We Still Don't Know How Many People in ICE Detention Have Been Exposed to COVID-19*, VERA INST. JUST. (Apr. 8, 2021), https://www.vera.org/blog/one-year-later-we-still-dont-know-how-many-people-in-ice-detention-have-been-exposed-to-covid-19 [https://perma.cc/45PE-X5L5].

[5] *Immigration Detention and COVID-19*, BRENNAN CTR. FOR JUST. (Oct. 14, 2021), https://www.brennancenter.org/our-work/research-reports/immigration-detention-and-covid-19 [https://perma.cc/Z87S-JLLS].

[6] *See generally* Parsa Erfani, Nishant Uppal, Caroline H. Lee, Ranit Mishori & Katherine R. Peeler, *COVID-19 Testing and Cases in Immigration Detention Centers, April-August 2020*, 325 JAMA 182, 182–84 (2021).

[7] *See e.g.*, Hope v. Warden York Cnty. Prison, 972 F.3d 310, 317–18 (3d Cir. 2020); Toure v. Hott, 458 F. Supp. 3d 387, 393 (E.D. Va. 2020); Saillant v. Hoover, 454 F. Supp. 3d 465, 466 (M.D. Pa. 2020); Martinez Franco v. Jennings, 456 F. Supp. 3d 1193, 1196 (N.D. Cal. 2020); Bent v. Barr, 445 F. Supp. 3d 408, 413 (N.D. Cal. 2020); Basri v. Barr, 469 F. Supp. 3d 1063, 1066 (D. Colo. 2020); Juan E. M. v. Decker, 458 F. Supp. 3d 244, 247–48 (D.N.J.

Writs of habeas corpus traditionally provide a remedy to individuals in custody who want to challenge the legality of their detention.[8] Yet several federal courts denied immigrant detainee habeas petitions during the COVID-19 pandemic, reasoning that the writ of habeas corpus is only appropriate where immigrant detainees also challenge their underlying immigration charges by arguing that the federal government "has no lawful basis to detain the petitioner" in the first place.[9] These courts reasoned that immigrant petitions for release during the COVID-19 pandemic were conditions of confinement claims which should instead be brought as civil rights actions.[10] This distinction derives from a long-standing circuit split that requires criminally incarcerated prisoners to use different procedural vehicles depending on whether the individual challenges their detention, its duration, or the conditions of their confinement.[11] However, the typical remedy for civil rights actions is damages, which is an insufficient remedy for immigrant detainees seeking release.[12]

This Comment argues that by denying immigrant habeas petitions for release, the federal courts may incorrectly be analogizing immigrant detainees to post-conviction, criminally incarcerated individuals. In doing so, the courts fail to provide the substantive due process protections that are

2020); Awshana v. Adducci, 453 F. Supp. 3d 1045, 1046 (E.D. Mich. 2020); Peregrino Guevara v. Witte, No. 20-CV-01200, 2020 WL 6940814, at *1 (W.D. La. Nov. 17, 2020); Gomez-Arias v. U.S. Immigr. & Customs Enf't, No. 20-CV-00857, 2020 WL 6384209, at *1 (D.N.M Oct. 30, 2020); Ndudzi v. Perez, 490 F. Supp. 3d 1176, 1177 (S.D. Tex. 2020); O.M.G. v. Wolf, 474 F. Supp. 3d 274, 277 (D.D.C. 2020); Njuguna v. Staiger, No. 20-CV-00560, 2020 WL 3425289, at *1 (W.D. La. June 3, 2020); Mohammed S. v. Tritten, No. 20-CV-783, 2020 WL 2750109, at *2 (D. Minn. May 27, 2020); Matos v. Lopez Vega, No. 20-CIV-60784, 2020 WL 2298775, at *1 (S.D. Fla. May 6, 2020); Favi v. Kolitwenzew, No. 20-CV-2087, 2020 WL 2114566, at *1 (C.D. Ill. May 4, 2020); Vazquez Barrera v. Wolf, 455 F. Supp. 3d 330, 333 (S.D. Tex. 2020); Dawson v. Asher, No. C20-409, 2020 WL 1704324, at *1 (W.D. Wash. Apr. 8, 2020).

[8] I.N.S. v. St. Cyr, 533 U.S. 289, 301 (2001).

[9] *E.g.*, *Basri*, 469 F. Supp. 3d at 1067; *see also Toure*, 458 F. Supp. 3d at 398–99 (holding that the Fourth Circuit has declined to recognize conditions of confinement challenges under § 2241, which should instead be brought as § 1983 or *Bivens* actions).

[10] *See* cases cited *supra* note 9.

[11] Hill v. McDonough, 547 U.S. 573, 579 (2006); *see also* Muhammad v. Close, 540 U.S. 749, 750 (2004).

[12] Lee v. Winston, 717 F.2d 888, 892 (4th Cir. 1983) (stating that civil rights actions "cannot be used to seek release from illegal physical confinement"); Glaus v. Anderson, 408 F.3d 382, 387 (7th Cir. 2005) (concluding that "release is not available under *Bivens*" civil rights actions for those confined by federal authorities).

traditionally afforded to individuals in civil detention.[13] Part I provides an overview of the governing habeas corpus statutes, the current circuit split regarding whether habeas can be used to challenge conditions of confinement, and how the circuit split has impacted immigrant detainees. As applied to habeas petitions by immigrant detainees seeking release due to unsafe living conditions during the COVID-19 pandemic, the split turns on whether these petitions should be classified as conditions of confinement claims and, if so, whether those claims are cognizable under habeas. Part II analyzes federal court opinions that denied immigrant habeas petitions during the height of the COVID-19 pandemic and demonstrates how courts may implicitly rely on inaccurate analogies that compare detained immigrants to post-conviction criminally incarcerated individuals. However, Part III acknowledges the danger of pushing the federal courts away from analogizing immigration detention to the criminal legal system because federal courts traditionally defer to the federal government on immigration matters. To avoid overcorrecting and risking further erosion of substantive due process rights for immigrant detainees, this Comment argues that federal courts could analogize to a different stage of the criminal adjudication process: pretrial criminal detention. Although no analogy is perfect, this Comment concludes that this approach would allow federal courts to uphold the principal purpose of habeas corpus while simultaneously protecting the substantive due process rights of immigrant detainees.

I. SITUATING DETAINED IMMIGRANTS IN CURRENT LAW

The writ of habeas corpus is a foundational pillar of the American legal system,[14] but its application to the immigration detention system has been less than consistent. This Part first explains the current federal statutes governing the writ of habeas corpus petitions and how the writ is applied in immigration detention. This Part then explores the reasoning behind the circuit split on whether habeas corpus can be used to challenge conditions of confinement within the criminal legal system context. Finally, this Part demonstrates how the circuit split has impacted immigrant detainee habeas petitions during the COVID-19 pandemic.

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[13] Bell v. Wolfish, 441 U.S. 520, 535 n.16 (1979) (concluding that due process requires that pretrial detainees cannot be punished, while sentenced inmates can be punished if it is not cruel and unusual).

[14] *See* I.N.S. v. St. Cyr, 533 U.S. 289, 302 (2001).

A. THE WRIT OF HABEAS CORPUS AND ITS APPLICATION IN IMMIGRATION LAW

Both non-enemy aliens and U.S. citizens have historically used the writ of habeas corpus to challenge and review the legality of both civil and criminal executive detention.[15] Three statutes currently govern habeas corpus. First, state prisoners can file a habeas petition if they believe they are in custody in "violation of the Constitution or laws of the United States" under 28 U.S.C. § 2254, but only after exhausting state court remedies.[16] Second, federal prisoners wanting to vacate their sentence or conviction or who seek resentencing may file a habeas petition under 28 U.S.C. § 2255.[17] Third, a federal prisoner can file a post-conviction habeas petition under 28 U.S.C. § 2241[18] to challenge the execution of their sentence or if they can show the remedy of changing their conviction or sentence under § 2255 is "inadequate or ineffective."[19] In the criminal incarceration context, § 2241 actions generally challenge "the administration of parole, computation of a prisoner's sentence by prison officials, prison disciplinary actions, prison transfers, type of detention and prison conditions."[20] Conversely, section 2255 claims are used to challenge the legality of the sentence imposed.[21] The writ, as applied in the criminal incarceration context, however, cannot be mapped onto civil immigration because immigrant detainees can only access the writ through § 2241.[22]

The writ of habeas corpus is the main vehicle through which immigrant detainees can challenge the constitutionality of their detention. The REAL ID Act of 2005[23] greatly limited judicial review of habeas petitions by immigrant detainees challenging final orders of removal, deportation, and

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[15] *Id.* at 302–03.

[16] 28 U.S.C. § 2254.

[17] U.S. Dep't of Just., Just. Manual § 9-37.000 (2020), https://www.justice.gov/jm/jm-9-37000-federal-habeas-corpus [https://perma.cc/87GW-87W8].

[18] *Id.*

[19] *Id.*

[20] Jiminian v. Nash, 245 F.3d 144, 146 (2d Cir. 2001) (citing Chambers v. United States, 106 F.3d 472, 474–75 (2d Cir. 1997)).

[21] *Chambers*, 106 F.3d at 474–75 (explaining that § 2255 actions are appropriate where "[a] petitioner seek[s] to challenge the legality of the *imposition* of a sentence by a court."); *see also* 28 U.S.C. § 2255.

[22] U.S. CTS., PETITION FOR A WRIT OF HABEAS CORPUS UNDER 28 U.S.C. § 2241 1 (2017), https://www.uscourts.gov/sites/default/files/AO_242_0.pdf [https://perma.cc/QWY5-TBZT]; *see also* Zadvydas v. Davis, 533 U.S. 678, 687 (2001) (concluding that immigrant detainees may bring § 2241(c)(3) petitions challenging their custody if they are detained in violation of the Constitution or laws of the United States).

[23] REAL ID Act of 2005, 8 U.S.C. § 1252(a)(5).

exclusion,[24] although it did not impact an immigrant's ability to challenge the length or conditions of detention.[25] In fact, prior to the COVID-19 pandemic, immigrant detainees used habeas to challenge extended detention or failure to receive a bond hearing while awaiting adjudication of their immigration charges or removal.[26] Since the start of the pandemic, immigrant detainees—especially those with preexisting medical conditions[27]—argued that conditions within ICE facilities during the pandemic violated their constitutional right to substantive due process under the Fifth Amendment.[28] Relying on the writ of habeas corpus, these immigrant detainees sought temporary restraining orders, preliminary injunctions seeking immediate release, or alternatives to detention.[29]

While acknowledging the unprecedented dangers of the COVID-19 pandemic, federal courts are split on whether to classify immigrant habeas petitions for release as challenges to conditions of confinement or challenges to the fact or duration of detention.[30] Traditionally, an individual in custody

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[24] Thoung v. United States, 913 F.3d 999, 1001 (10th Cir. 2019) (explaining that the REAL ID Act of 2005 limited judicial review of habeas petitions challenging final orders of removal for immigrants).

[25] *See, e.g.*, Kellici v. Gonzales, 472 F.3d 416, 419–20 (6th Cir. 2006) (concluding that when petitioner solely challenges his or her detention through habeas, and not the underlying removal, the case cannot be transferred to the court of appeals); Bonhometre v. Gonzales, 414 F.3d 442, 446 n.4 (3d Cir. 2005) ("An alien challenging the legality of his *detention* still may petition for habeas corpus."); *see also* H.R. Rep. No 109-72, at 176 (2005) (Conf. Rep.) ("[REAL ID Act] section 106 will not preclude habeas review over challenges to detention that are independent of challenges to removal orders.").

[26] *See, e.g.*, *Zadvydas*, 533 U.S. at 688 (establishing that a noncitizen may raise "statutory or constitutional challenges to post-removal-period detention" through habeas); Demore v. Kim, 538 U.S. 510, 531 (2003) (holding that deportable aliens can be detained while their immigration charges are adjudicated where respondent filed habeas petition challenging the constitutionality of his mandatory detention); Jennings v. Rodriguez, 138 S. Ct. 830, 845, 847–48 (2018) (concluding that although the federal government must provide a bond hearing to detained immigrants, periodic review is not required).

[27] *E.g.*, Favi v. Kolitwenzew, No. 20-CV-2087, 2020 WL 2114566, at *5 (C.D. Ill. May 4, 2020).

[28] *See* cases cited *supra* note 7.

[29] *See* cases cited *supra* note 7. In the alternative, immigrant detainees have also argued that ICE detention violates their constitutional right to be free from cruel and unusual punishment under the Eighth Amendment, *id.*, or that the detention violates § 504 of the Rehabilitation Act. *Id.*

[30] *Compare* Njuguna v. Staiger, No. 20-CV-00560, 2020 WL 3425289, at *5 (W.D. La. June 3, 2020) ("If no set of conditions is sufficient to protect a detainee's constitutional rights, his claim for relief is cognizable in habeas."), *with* Ndudzi v. Perez, 490 F. Supp. 3d 1176, 1181 (S.D. Tex. 2020) (concluding that habeas action are only appropriate when a litigant challenges the "legal basis of their confinement and seek release from detention").

brings a petition for habeas corpus when seeking release.[31] If an individual in custody wants to challenge the conditions of their confinement, a civil rights claim seeking monetary damages is used.[32] During the COVID-19 pandemic, some courts held that habeas petitions for release brought as challenges to the conditions of confinement within ICE detention were in fact conditions of confinement claims more properly brought as civil rights actions, regardless of the remedy sought.[33] But civil rights actions require the detainee to demonstrate that a federal agent acted with objective "deliberate indifference" to their safety and well-being, which is a difficult standard for immigrant detainees to meet.[34] Further, civil rights actions are traditionally limited to monetary, not injunctive, relief, making them inappropriate for federal immigrant detainees seeking release from confinement.[35] However, other federal courts have allowed immigrant detainees to use the writ of habeas corpus to seek release from confinement during the pandemic because the petitioners challenged the "fact or duration of [their] physical imprisonment," and sought "immediate . . . or a speedier release."[36]

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[31] Muhammad v. Close, 540 U.S. 749, 750 (2004) ("Challenges to the validity of any confinement or to the particulars affecting its duration are the province of habeas corpus").

[32] Hill v. McDonough, 547 U.S. 573, 579 (2006) ("An inmate's challenge to the circumstances of his confinement, however, may be brought under § 1983.").

[33] *See, e.g.*, Toure v. Hott, 458 F. Supp. 3d 387, 400–01 (E.D. Va. 2020) (holding that a habeas action under 28 U.S.C. § 2241 does not serve as a proper remedy when challenging conditions of confinement in immigration detention in light of the coronavirus pandemic); *Ndudzi*, 490 F. Supp. 3d at 1180 (same); Matos v. Lopez Vega, No. 20-CIV-60784, 2020 WL 2298775, at *6 (S.D. Fla. May 6, 2020) (same); Gayle v. Meade, No. 20-21553, 2020 WL 1949737, at *25–26 (S.D. Fla. Apr. 22, 2020) (same); Benavides v. Gartland, No. 20-CV-46, 2020 WL 1914916, at *5 (S.D. Ga. Apr. 18, 2020) (same); Dawson v. Asher, No. 20-409, 2020 WL 1704324, at *8 (W.D. Wash. Apr. 8, 2020) (same).

[34] Ziglar v. Abbasi, 137 S. Ct. 1843, 1864 (2017) (referencing civil rights actions which are filed pursuant to 42 U.S.C. § 1983 or *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971)).

[35] *See* Patel v. Santana, 348 F. App'x 974, 976 (5th Cir. 2009) (explaining that injunctive relief against the Bureau of Prisons is "a form of relief that would not be proper under *Bivens*").

[36] Preiser v. Rodriguez, 411 U.S. 475, 498 (1973); *see also* Hope v. Warden York Cnty. Prison, 972 F.3d 310, 324 (3d Cir. 2020); Vazquez Barrera v. Wolf, 455 F. Supp. 3d 330, 336 (S.D. Tex. 2020); Awshana v. Adducci, 453 F. Supp. 3d 1045, 1047 (E.D. Mich. 2020); Bent v. Barr, 445 F. Supp. 3d 408, 413 (N.D. Cal. 2020); Juan E. M. v. Decker, 458 F. Supp. 3d 244, 253 (D.N.J. 2020); Peregrino Guevara v. Witte, No. 20-CV-01200, 2020 WL 6940814, at *4 (W.D. La. Nov. 17, 2020); Gomez-Arias v. U.S. Immigr. & Customs Enf't, No. 20-CV-00857, 2020 WL 6384209, at *2, *3 (D.N.M. Oct. 30, 2020); Njuguna v. Staiger, No. 20-CV-00560, 2020 WL 3425289, at *5 (W.D. La. June 3, 2020); Mohammed S. v. Tritten, No. 20-CV-783, 2020 WL 2750109, at *2 (D. Minn. May 27, 2020); Favi v. Kolitwenzew, No. 20-CV-2087, 2020 WL 2114566, at *5 (C.D. Ill. May 4, 2020).

The Supreme Court has not definitively stated whether conditions of confinement claims are cognizable under habeas, resulting in a circuit split between eleven federal appellate courts.[37] Their disagreement derives from *Preiser v. Rodriguez*, in which two New York state prisoners brought a civil rights action (42 U.S.C. § 1983) and a habeas action alleging they were unconstitutionally deprived of good-conduct-time credits which, if reinstated, would result in their immediate release.[38] The Court explained that the purpose of habeas "is to secure release from illegal custody."[39] Since the prisoners alleged that their continued confinement was illegal, their complaint fell squarely within the scope of habeas.[40] Section 1983 claims, however, were traditionally considered appropriate when a prisoner challenged their prison conditions.[41] The Court left open whether conditions of confinement claims were cognizable under habeas, stating habeas may be available "[w]hen a prisoner is put under additional and unconstitutional restraints during his lawful custody."[42]

Since *Preiser*, the Supreme Court has avoided settling whether conditions of confinement claims are cognizable under habeas.[43] Early cases focused on situations in which civil rights actions were inappropriate because the claims struck at the core of habeas corpus. In *Heck v. Humphrey*, the Court found that where "establishing the basis for the damages claim

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[37] *Compare* Melot v. Bergami, 970 F.3d 596, 598–99 (5th Cir. 2020) (holding conditions of confinement claims are not cognizable under habeas); Martin v. Overton, 391 F.3d 710, 714 (6th Cir. 2004) (same); Robinson v. Sherrod, 631 F.3d 839, 841 (7th Cir. 2011) (same); Spencer v. Haynes, 774 F.3d 467, 468 (8th Cir. 2014) (same); Nettles v. Grounds, 830 F.3d 922, 931 n.6 (9th Cir. 2016) (same); Palma-Salazar v. Davis, 677 F.3d 1031, 1035 (10th Cir. 2012) (same); Gomez v. United States, 899 F.2d 1124, 1127 (11th Cir. 1990) (same), *with* Aamer v. Obama, 742 F.3d 1023, 1036 (D.C. Cir. 2014) (holding that conditions of confinement claims are cognizable under habeas); Brennan v. Cunningham, 813 F.2d 1, 4 (1st Cir. 1987) (same); *Hope*, 972 F.3d at 324–25 (same); Jiminian v. Nash, 245 F.3d 144, 146 (2d Cir. 2001) (holding that § 2241 habeas petitions can be used to challenge "the *execution* of a federal prisoner's sentence, including such matters as . . . type of detention and prison conditions.").

[38] *Preiser*, 411 U.S. at 476–77.

[39] *Id.* at 484.

[40] *Id.* at 487.

[41] *Id.* at 499; *see also* Muhammad v. Close, 540 U.S. 749, 750 (2004) ("Challenges to the validity of any confinement or to particulars affecting its duration are the province of habeas corpus") (citing *Preiser*, 411 U.S. at 500).

[42] *Preiser*, 411 U.S. at 499; *see also Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1084 (1970).

[43] *See* Bell v. Wolfish, 441 U.S. 520, 526 n.6 (1979) ("[W]e leave to another day the question of the propriety of using a writ of habeas corpus to obtain review of the conditions of confinement"); Ziglar v. Abbasi, 137 S. Ct. 1843, 1863 (2017) (same).

necessarily demonstrates the invalidity of the conviction"[44] a § 1983 action was inappropriate "unless . . . the conviction or sentence has already been invalidated."[45] In *Edward v. Balisok*, the Court addressed challenges to prison disciplinary procedures by holding that habeas was the only vehicle for an inmate seeking declaratory relief and monetary damages if the prisoner's success would "necessarily imply the invalidity of the punishment imposed."[46] Whether "*directly* through an injunction compelling speedier release or *indirectly* through a judicial determination that necessarily implies the unlawfulness of the State's custody," the Court reframed that habeas was the sole remedy for prisoners seeking to invalidate the fact or duration of their confinement.[47] Finally, in *Ziglar v. Abassi*, the Supreme Court stated that it remained an open question whether immigrant detainees could challenge the conditions of confinement within detention using the writ of habeas corpus.[48] Together, these cases established that civil rights actions cannot be used to challenge the fact or duration of confinement but did not address whether habeas is appropriate to challenge conditions of confinement for the incarcerated or detained.[49]

B. ANALYSIS OF THE CIRCUIT SPLIT ON THE APPROPRIATE USE OF HABEAS CORPUS

The use of habeas corpus by immigrant detainees seeking release during the COVID-19 pandemic revived a long-standing circuit split on whether the courts should classify habeas petitions for release from confinement as conditions of confinement claims or fact or duration claims, and if the courts classified these claims as conditions of confinement claims, whether these claims are cognizable under habeas.[50] However, as demonstrated below, the overwhelming majority of precedent on this issue derives from the criminal legal system and not the immigration system.

Three main "camps" of reasoning define the circuit split. Camp 1 seeks to avoid excessive prisoner litigation.[51] This line of reasoning draws on the

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[44] Heck v. Humphrey, 512 U.S. 477, 481 (1994).

[45] *Id.* at 487.

[46] *See* Edwards v. Balisok, 520 U.S. 641, 648 (1997).

[47] Wilkinson v. Dotson, 544 U.S. 74, 81 (2005).

[48] Ziglar v. Abassi, 137 S. Ct. 1843, 1862–63 (2017).

[49] *See id.*; *Wilkinson*, 544 U.S. at 81–82.

[50] *See* cases cited *supra* note 36.

[51] Nettles v. Grounds, 830 F.3d 922, 932 (9th Cir. 2016) (concluding that Congress intended the PLRA to make § 1983 the exclusive remedy for prisoner suits concerning life in prison); Jones v. Smith, 720 F.3d 142, 145 (2d Cir. 2013) (discussing how the PLRA's three-

Prisoner Litigation Reform Act of 1996 (PLRA)[52] and the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA),[53] which both restrict prisoner access to litigation remedies, to conclude that conditions of confinement claims are not cognizable under habeas.[54] Camp 2 defines access to habeas based on the remedy sought by the petitioner, since habeas has historically been narrowly applied to claims in which the remedy sought is release.[55] Finally, Camp 3 finds conditions of confinement claims cognizable under habeas, reasoning that the distinction between conditions of confinement claims and fact or duration claims is unnecessary and concluding that the root of the issue for both types of claims is the same.[56]

1. Camp 1: Very Limited Access to Habeas for Prisoners

Camp 1 distinguishes between conditions of confinement claims and fact or duration claims because of the statutory limitations to challenges to conditions of confinement created by the PLRA and AEDPA.[57] In *Nettles v. Grounds*, the Ninth Circuit concluded that Congress intended to "reduce the quantity and improve the quality of prisoner suits" when enacting the PLRA by requiring exhaustion of administrative remedies for all suits related to prison life other than those at the core of habeas.[58] This includes conditions of confinement claims. The Ninth Circuit found that Congress's purpose in

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strike rule limits civil actions by prisoners that are "frivolous, malicious, or fail[] to state a claim upon which relief may be granted."); Davis v. Fechtel, 150 F.3d 486, 490 (5th Cir. 1998) ("[T]he legislative history of the PLRA indicates that Congress was interested in discouraging suits involving frivolous challenges to prison conditions.").

[52] 42 U.S.C. § 1997e.

[53] 28 U.S.C. § 2254(b)–(d); 28 U.S.C. § 2255(e)–(f).

[54] Michael M. O'Hear, *Not So Sweet: Questions Raised by Sixteen Years of the PLRA and AEDPA*, 24 FED. SENT'G REP. 223, 223 (2012); *Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/antiterrorism_and_effective_death_penalty_act_of_1996_(aedpa) [https://perma.cc/2DSP-Y463].

[55] *Nettles*, 830 F.3d at 931; Spencer v. Haynes, 774 F.3d 467, 469–70 (8th Cir. 2014); Palma-Salazar v. Davis, 667 F.3d 1031, 1035 (10th Cir. 2012); Melot v. Bergami, 970 F.3d 596, 599 (5th Cir. 2020); Robinson v. Sherrod, 631 F.3d 839, 841 (7th Cir. 2011).

[56] Aamer v. Obama, 742 F.3d 1023, 1035–36 (D.C. Cir. 2014) (holding that conditions of confinement claims were cognizable under habeas); Brennan v. Cunningham, 813 F.2d 1, 4 (1st Cir. 1987) (same); Jiminian v. Nash, 245 F.3d 144, 146 (2d Cir. 2001) (holding that § 2241 habeas petitions can be used to challenge "the *execution* of a federal prisoner's sentence, including such matters as . . . type of detention and prison conditions."); *see also* Hope v. Warden York Cnty. Prison, 972 F.3d 310, 323 (3d Cir. 2020) (finding that habeas is properly used to challenge conditions of confinement where "the deprivation of rights is such that it necessarily impacts the fact or length of detention.").

[57] *Nettles*, 830 F.3d at 932; Jones v. Smith, 720 F.3d 142, 145–46 (2d Cir. 2013); Davis v. Fechtel, 150 F.3d 486, 488–89 (5th Cir. 1998).

[58] *Nettles*, 830 F.3d at 932 (quoting Porter v. Nussle, 534 U.S. 516, 524 (2002)).

passing the PLRA would be frustrated if state prisoners could evade administrative remedies by bringing their conditions of confinement challenges under habeas.[59] Similarly, the Second Circuit explained "that a habeas petition seeking to overturn a criminal conviction or sentence was not a 'civil action' for purposes of the PLRA."[60] As defined by the Fifth Circuit, while "habeas corpus proceedings are technically civil actions," the "label is gross and inexact" because "the proceeding is unique."[61] A habeas petition "involve[s] someone's liberty, rather than mere civil liability."[62] The Second Circuit similarly reasoned that Congress's intent in passing the statute was to curtail an increase in frivolous civil actions focused on "insufficient storage locker space, a defective haircut by the prison barber," or "being served creamy peanut butter instead of chunky."[63] The Second Circuit even pointed to a floor statement by one of the PLRA's sponsors which reinforced that it was not written to limit access to habeas as a vehicle to challenge a conviction or sentence.[64] Additionally, two days before passing the PLRA, Congress enacted the AEDPA which substantially limited habeas petitions under §§ 2254 and 2255.[65] According to Camp 1, joint passage of the PLRA and AEDPA reinforced that Congress did not intend for civil rights actions and habeas petitions to be used interchangeably within the criminal legal system.[66]

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[59] *Id.* (citing Preiser v. Rodriguez, 411 U.S. 475, 489–90 (1973)).

[60] *Jones*, 720 F.3d at 145 (citing Reyes v. Keane, 90 F.3d 676, 678 (2d Cir. 1996), *overruled on other grounds by* Lindh v. Murphy, 521 U.S. 320, 336 (1997)).

[61] *Davis*, 150 F.3d at 488 (citing Harris v. Nelson, 394 U.S. 286, 293–94 (1969)).

[62] *Id.* at 490; *cf.* O'Neal v. McAninch, 513 U.S. 432, 440 (1995) (comparing stakes involved in habeas proceedings to civil cases in the context of the standard of review required).

[63] *Jones*, 720 F.3d at 147; *see, e.g.*, 141 CONG. REC. S14,413 (daily ed. Sept. 27, 1995) (remarks of Sen. Bob Dole); *id.* at 418 (statement of Sen. Jon Kyl); 141 CONG. REC. S14,627 (daily ed. Sept. 29, 1995) (statement of Sen. Harry Reid).

[64] *Id.* (citing 141 CONG. REG. S14,418 (daily ed. Sept. 27, 1995) (statement of Sen. Orin Hatch)).

[65] *Id.*

[66] *See* Nettles v. Grounds, 830 F.3d 922, 932 (9th Cir. 2016); *see also Davis*, 150 F.3d at 490 (concluding that Congress did not intend for exhaustion requirement in PLRA to apply to habeas when it simultaneously passed the PLRA and AEDPA); McIntosh v. U.S. Parole Comm'n, 115 F.3d 809, 811 (10th Cir. 1997) ("[H]abeas actions are not the type of abusive, prison condition litigation that Congress sought to curtail in enacting the PLRA."); Blair-Bey v. Quick, 151 F.3d 1036, 1040 (D.C. Cir. 1998) (differentiating between civil actions and habeas petitions as related to the PLRA because in a habeas proceeding "someone's custody, rather than mere civil liability, is at stake." (quoting O'Neal v. McAninch, 513 U.S. 432, 440 (1995)).

2. Camp 2: Habeas Can be Accessed Based on the Remedy Sought

Camp 2 differentiates between conditions of confinement claims and fact or duration claims based on the remedy sought. This line of reasoning narrowly defines habeas to apply only to those claims in which an individual in custody seeks release. Specifically, the Ninth Circuit held that a civil rights action (42 U.S.C. § 1983) was the exclusive vehicle for claims brought by state prisoners that, even if successful, would fail to invalidate the criminal judgment itself.[67] For example, a prisoner's habeas petition challenging a disciplinary proceeding would be barred unless the prisoner specifically sought to challenge the conviction itself or the length of the prisoner's sentence.[68] Subsequently, the Supreme Court explained that "when a prisoner's claim would not 'necessarily spell speedier release,' that claim does not lie at 'the core of habeas corpus'" and should be brought as a civil rights action.[69] When a federal prisoner challenged his conditions of confinement after being forcibly restrained to his bed for thirty hours, the Eighth Circuit also held that habeas was an inappropriate remedy.[70] Citing *Preiser*, the Eighth Circuit concluded that because the petitioner challenged the conditions of his confinement and did not seek early release, habeas was inappropriate[71] because "[i]t is the substance of the relief sought which counts."[72] Taken together, these rulings suggest that access to habeas should be limited to situations where the remedy sought by a prisoner is release.[73]

The definition of release from confinement can get complicated when a petitioner simply seeks a change in his or her type of confinement.[74] In *Palma-Salazar v. Davis*, an alleged leader of the Sinaloa Cartel filed a habeas petition challenging his confinement at a maximum-security prison in Colorado and sought lower-security confinement.[75] Having previously held that a request for change in type of confinement constituted a conditions of

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[67] *Nettles*, 830 F.3d at 928 (citing Heck v. Humphrey, 512 U.S. 477, 487 (1994)).

[68] *Id.* at 929 (quoting Muhammad v. Close, 540 U.S. 749, 754–55 (2004)) (concluding that use of habeas was only appropriate where a prisoner sought "a judgment at odds with [the prisoner's] conviction or with the State's calculation of time to be served.").

[69] Skinner v. Switzer, 562 U.S. 521, 535 n.13 (2011) (quoting Wilkinson v. Dotson, 544 U.S. 74, 82 (2005)).

[70] Spencer v. Haynes, 774 F.3d 467, 468–69 (8th Cir. 2014).

[71] *Id.* at 469–70 (citing Preiser v. Rodriguez, 411 U.S. 475, 499 (1973)).

[72] Kruger v. Erickson, 77 F.3d 1071, 1073 (8th Cir. 1996).

[73] *Nettles*, 830 F.3d at 930–31 ("[H]abeas is available only for state prisoner claims that lie at the core of habeas (and is the exclusive remedy for such claims), while § 1983 is the exclusive remedy for state prisoner claims that do not lie at the core of habeas.").

[74] Confinement can range from detention within a high security prison to work release programs to home arrest.

[75] Palma-Salazar v. Davis, 667 F.3d 1031, 1033 (10th Cir. 2012).

confinement claim, the circuit was unwilling to extend habeas to claims that did not shorten the duration of confinement.[76] Even if granted lower-level security confinement, Palma-Salazar would still be imprisoned and would not gain any increase in his liberty. The Fifth Circuit similarly established a "bright-line rule" that "if a favorable determination of the prisoner's claim would not automatically entitle him to accelerated release, then the proper vehicle is a civil rights suit."[77] When a federal prisoner filed a habeas petition seeking home confinement through an elderly release program, the Fifth Circuit concluded that habeas was an improper vehicle because the individual's liberty had not changed.[78] The Seventh Circuit articulated yet another way to differentiate between changes in types of confinement:

> If the prisoner is seeking what can fairly be described as a quantum change in the level of custody—whether outright freedom, or freedom subject to the limited reporting and financial constraints of bond or parole or probation, or the run of the prison in contrast to the approximation to solitary confinement that is disciplinary segregation—then habeas corpus is his remedy. But if he is seeking a different program or location or environment, then he is challenging the conditions rather than the fact of his confinement and his remedy is under civil rights law, even if, as will usually be the case, the program or location or environment that he is challenging is more restrictive than the alternative that he seeks.[79]

These courts agree that the writ of habeas corpus requires a change in the level of freedom experienced by an individual in custody.

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[76] *Id.* at 1035 (quoting United States v. Garcia, 470 F.3d 1001, 1003 (10th Cir. 2006)).

[77] Melot v. Bergami, 970 F.3d 596, 599 (5th Cir. 2020); *see also* Rice v. Gonzalez, 985 F.3d 1069, 1069–70 (5th Cir. 2021) (mem.) (concluding that a pretrial detainee's petition for release due to unsafe COVID-19 conditions within state prison was improperly brought under habeas corpus because the conditions within the facility did not "impugn the underlying legal basis for . . . his confinement.").

[78] *Melot*, 970 F.3d at 599 (citing Carson v. Johnson, 112 F.3d 818, 820 (5th Cir. 1997)); *see also* Robinson v. Sherrod, 631 F.3d 839, 841 (7th Cir. 2011) ("When there isn't even an indirect effect on duration of punishment . . . we'll adhere to our long-standing view that habeas corpus is not a permissible route for challenging prison conditions."); Glaus v. Anderson, 408 F.3d 382, 386 (7th Cir. 2005) (explaining that when a prisoner challenges the "conditions under which he is being held" a § 1983 or *Bivens* claim, not a habeas petition, is appropriate).

[79] Graham v. Broglin, 922 F.2d 379, 381 (7th Cir. 1991).

3. Camp 3: Conditions of Confinement Claims are Cognizable Under Habeas

Camp 3 concludes that conditions of confinement claims are cognizable under habeas.[80] The D.C. Circuit explained that conditions of confinement claims are cognizable under habeas because the prisoner is deprived of a constitutional right both in conditions of confinement claims and in fact or duration claims.[81] Thus, access to habeas for both types of claims is consistent with the original purpose of habeas as a remedy for "unlawful executive detention."[82] The D.C. Circuit also stated that other circuits fundamentally misunderstood *Preiser* which created a "habeas-channeling rule, not a habeas-limiting rule."[83] In *Preiser*, the Supreme Court stated that "claims lying at the 'core' of the writ must be brought in habeas" but expressly disclaimed restricting habeas.[84]

C. COVID-19 SPECIFIC CASES

While limiting access to habeas for criminally incarcerated individuals has its justifications, blanketly and incorrectly applying those same limitations to civil immigrant detainees during a pandemic is not only constitutionally unjustified, but also has substantial consequences on immigrant detainees' health. The communal nature of immigration detention facilities makes social distancing nearly impossible.[85] Harvard Medical

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[80] Aamer v. Obama, 742 F.3d 1023, 1036 (D.C. Cir. 2014) (holding that conditions of confinement claims were cognizable under habeas); Brennan v. Cunningham, 813 F.2d 1, 4–5 (1st Cir. 1987) (same); Jiminian v. Nash, 245 F.3d 144, 146 (2d Cir. 2001) (holding that § 2241 habeas petitions can be used to challenge "the *execution* of a federal prisoner's sentence, including such matters as . . . type of detention and prison conditions."); Hope v. Warden York Cnty. Prison, 972 F.3d 310, 323 (3d Cir. 2020) (finding that habeas is properly used to challenge conditions of confinement where "the deprivation of rights is such that it necessarily impacts the fact or length of detention.").

[81] *Aamer*, 742 F.3d at 1036 (explaining that in both situations "the petitioner contends that some aspect of his confinement has deprived him of a right to which he is entitled while in custody.").

[82] *Id.* (quoting Munaf v. Geren, 553 U.S. 674, 693 (2008)).

[83] *Id.* at 1037 (citing Preiser v. Rodriquez, 411 U.S. 475, 499–500 (1973)).

[84] *Id.* (citing *Preiser*, 411 U.S. at 499–500); *see also* Dickerson v. Walsh, 750 F.2d 150, 153–54 (1st Cir. 1984); Miller v. United States, 564 F.2d 103, 105 (1st Cir. 1977).

[85] Noelle Smart & Adam Garcia, *Tracking COVID-19 in Immigration Detention: A Dashboard of ICE Data*, VERA INST. JUST. (Nov. 18, 2020), https://www.vera.org/tracking-covid-19-in-immigration-detention [https://perma.cc/Z6HL-PG73]; *see also* Timothy Williams & Danielle Ivory, *Chicago's Jail Is Top U.S. Hot Spot as Virus Spreads Behind Bars*, N.Y. TIMES (Apr. 23, 2020), https://www.nytimes.com/2020/04/08/us/coronavirus-cook-county-jail-chicago.html [https://perma.cc/FRA8-NERB] ("Concerns about the virus's

School studied COVID-19 case rates at ICE facilities from April through August 2020 and found a higher monthly case rate than the national average.[86] Additionally, an epidemiological model developed by the Vera Institute concluded that the actual number of positive cases in ICE facilities as of mid-May 2020 may have been fifteen times higher than the numbers reported by ICE.[87] As of January 17, 2022, 33,536 people in immigration detention have tested positive for COVID-19.[88] ICE continues to omit from its reporting COVID-19 cases amongst its full-time and contract staff entirely, making it highly likely that ICE has inaccurately reported COVID-19 cases within ICE facilities.[89]

At the start of the pandemic, ICE issued new safety guidelines for its facilities that called for cohorting suspected COVID-19 cases.[90] ICE asserted that its practice of cohorting detainees who might have been exposed to COVID-19 was in line with Centers for Disease Control and Prevention (CDC) guidelines.[91] CDC guidelines, however, clearly state that "cohorting individuals with suspected COVID-19 is not recommended due to [the] high risk of transmission from infected to uninfected individuals."[92] Yet ICE continues the practice of quarantining suspected COVID-19 cases together which has resulted in real harm.[93] For example, July 2020 data from ICE and

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spread have prompted authorities across the country to release thousands of inmates, many of whom were awaiting trial or serving time for nonviolent crimes. But those measures have not prevented a dizzying pace of infection among a population in which social distancing is virtually impossible and access to soap and water is not guaranteed.").

[86] Erfani, *supra* note 6, at 183.

[87] Smart & Garcia, *supra* note 85.

[88] *Id.*

[89] FREEDOM FOR IMMIGRANTS, CONDITIONS IN IMMIGRATION DETENTION: QUARTERLY ANALYSIS & UPDATE 6 (2021), https://static1.squarespace.com/static/5a33042eb078691c386e7bce/t/605e0faad231f61abb610ad7/1616777130314/March+Conditions+Report+_FINAL.pdf [https://perma.cc/SCQ5-FR6Y].

[90] FREEDOM FOR IMMIGRANTS, *supra* note 89, at 5. Cohorting refers to the practice of quarantining immigrant detainees in the same detention cells or sleeping facilities who were exposed to someone who tested positive for COVID-19 and who are at risk of developing symptoms. Jude Joffe-Block & Valeria Fernández, *ICE Tactics to Limit Spread of COVID-19 in Detention Centers Stir Controversy*, ARIZ. CTR. FOR INVESTIGATIVE REPORTING (Apr. 16, 2020), https://azcir.org/news/2020/04/16/ice-cohorting-immigrant-detention/ [https://perma.cc/82V5-2YNW].

[91] Joffe-Block & Fernández, *supra* note 90.

[92] *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html#QuarantiningCloseContacts [https://perma.cc/55EL-5GZ4] (last updated June 9, 2021).

[93] *See* FREEDOM FOR IMMIGRANTS, *supra* note 89, at 5.

the Texas Department of State Health Services found that Texas ICE facilities were fifteen times more likely to experience a COVID-19 outbreak than the rest of the state's population.[94] The agency also continued transfers of immigrant detainees between facilities during the pandemic which was the main driver of the spread of COVID-19 infections in immigration detention.[95] Further, it is now apparent that COVID-19 has long-term health implications for some patients of all ages (with or without co-morbidities).[96] Unsurprisingly, immigrants sought temporary release from ICE detention facilities as fears of severe illness or death from COVID-19 grew, and, in response, used the writ of habeas corpus to challenge the unsafe conditions within the ICE facilities.[97]

ICE initially stated in March 2021 that it was each state's responsibility to distribute vaccines for immigrant detainees within its borders.[98] Despite the existence of the COVID-19 vaccine, however, a report by the Intercept in June 2021 found that there was a six-fold increase in COVID-19 cases in ICE detention facilities between March and May of 2021 that coincided with "ICE's decision to [do] [inter-facility] transfer[s]" and refusal to provide vaccines to detainees.[99] The Biden administration took steps in August 2021 to increase vaccinations of immigrant detainees, announcing that it will offer vaccines to migrants in custody along the Mexico border.[100] As of January 14, 2022, 48,246 immigrant detainees had received at least one shot of a COVID-19 vaccine.[101] The vaccination efforts coincide, however, with growing number of COVID-19 infections amongst immigrant detainees as

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[94] *Immigration Detention and COVID-19*, *supra* note 5.

[95] Lisa Riordan Seville & Hannah Rappleye, *ICE Keeps Transferring Detainees Around the Country, Leading to COVID-19 Outbreaks*, NBC NEWS (May 31, 2020, 5:08 AM), https://www.nbcnews.com/politics/immigration/ice-keeps-transferring-detainees-around-country-leading-covid-19-outbreaks-n1212856 [https://perma.cc/B55R-7TE9]; *see also* FREEDOM FOR IMMIGRANTS, *supra* note 89, at 10–11.

[96] *Long Haulers: Why Some People Experience Long-term Coronavirus Symptoms*, UC Davis Health (Feb. 8, 2021), https://health.ucdavis.edu/coronavirus/covid-19-information/covid-19-long-haulers.html [https://perma.cc/5NMJ-XCS3].

[97] *See* cases cited *supra* note 7.

[98] *See* FREEDOM FOR IMMIGRANTS, *supra* note 89, at 9.

[99] Felipe De La Hoz, *Recent COVID-19 Spike in Immigration Detention Was a Problem of ICE's Own Making*, INTERCEPT (June 20, 2021, 6:00 AM), https://theintercept.com/2021/06/20/covid-asylum-detention-ice/ [https://perma.cc/AD7S-39JW].

[100] Camilo Montoya-Galvez, *ICE Ramps Up Vaccination of Immigrants in U.S. Custody, but Thousands Have Refused*, CBS NEWS (Aug. 13, 2021, 3:25 PM), https://www.cbsnews.com/news/ice-ramps-up-vaccination-of-immigrants-in-u-s-custody-but-thousands-have-refused/ [https://perma.cc/EUS4-NCVE].

[101] Camilo Montoya-Galvez, *Coronavirus Infections Inside U.S. Immigration Detention Centers Surge By 520% in 2022*, CBS NEWS (Jan. 14, 2022, 4:44 PM), https://www.cbsnews.com/news/immigration-detention-covid-cases-surge/ [https://perma.cc/B6NB-4RWQ].

the ICE detainee population has grown to 25,000 in August 2021—a 70% increase since the beginning of the Biden administration.[102]

In response to the crisis in ICE detention facilities and to circumvent the criminal legal system's restricted approach to habeas in August 2020, the Third Circuit concluded that conditions of confinement claims brought by immigrant detainees were cognizable under habeas because of the unique challenges posed by COVID-19.[103] In *Hope v. Warden York County Prison*, immigrant detainees filed a habeas petition seeking release from confinement during the COVID-19 pandemic.[104] The Third Circuit concluded that "[g]iven the extraordinary circumstances . . . of the COVID-19 pandemic, we are satisfied that their § 2241 claim seeking only release on the basis that unconstitutional confinement conditions require it is not improper."[105] The court acknowledged that there are "a narrow subset of actions that arguably might properly be brought as either" habeas or civil rights actions because the deprivation of rights are severe enough to impact the fact or duration of detention.[106] Additionally, the court explained that habeas provides a remedy for non-prisoner detainees, which includes immigrant detainees.[107] Although the court tailored its decision to make conditions of confinement claims cognizable under habeas "only in extreme cases," it concluded that the pandemic qualified as extreme.[108] While this approach does not resolve the circuit split, it provides federal courts with a simpler approach to immigrant detainee habeas petitions that focuses on the core principle of habeas corpus.

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[102] Montoya-Galvez, *supra* note 100.

[103] Hope v. Warden York Cnty. Prison, 972 F.3d 310, 324 (3d Cir. 2020).

[104] *Id.* at 324–25 (concluding that immigrant detainees can challenge the conditions of their confinement through habeas during the COVID-19 pandemic).

[105] *Id.* Although the court acknowledged the appropriate use of habeas in this situation, it ultimately reversed the district court's temporary restraining order for immediate release due to the failure of the immigrant detainees to show likelihood of success on the merits. *Id.* at 325–31.

[106] *Id.* at 323 (quoting Leamer v. Fauver, 288 F.3d 532, 540 (3d Cir. 2002)). Put another way, "what if confinement itself is the unconstitutional 'condition of confinement?'" Essien v. Barr, 457 F. Supp. 3d 1008, 1013–14 (D. Colo. 2020) (holding that an ICE detainee's conditions of confinement claim was cognizable through habeas corpus). In a nearly identical case brought by four federal prisoners, the Sixth Circuit also established that "where a petitioner claims that no set of conditions would be constitutionally sufficient the claim should be construed as challenging the fact or extent, rather than the conditions, of the confinement." Wilson v. Williams, 961 F.3d 829, 838 (6th Cir. 2020).

[107] *Hope*, 972 F.3d at 323–24 (pointing to § 2241(e), which restricts access to the writ by enemy combatants, the court concluded "that[] where the exclusion in § 2241(e) does not apply, the writ is available to immigration detainees like Petitioners here, who are not challenging convictions or sentences.").

[108] *Id.* at 324–25.

The pandemic's unprecedented pervasiveness revived a circuit split on the appropriate use of habeas corpus in the criminal legal process that has been newly applied to the immigration detention context. Part II explores potential underlying rationales motivating the federal courts to distinguish between the appropriate uses of habeas corpus in the immigration context and how such rationales may impact immigrant detainees' substantive due process rights.

II. IDENTIFYING AND CHALLENGING HIDDEN RATIONALES

In principle, Camp 3's approach is the simplest for the federal courts to adopt: when a petitioner is deprived of a constitutionally protected right in custody, habeas is the appropriate remedy.[109] However, federal district courts that rely on the precedent set by Camps 1 and 2 within criminal adjudications have not responded to immigrant petitions for release during the pandemic with the same flexibility as the Third Circuit. In closely reviewing the opinions of courts that classify immigrant habeas petitions during the pandemic as conditions of confinement claims inappropriately brought through habeas corpus petitions, elements of an underlying rationale become evident. Though not explicitly stated, the courts may unconsciously analogize these immigrant detainees to criminally incarcerated individuals. As explained below, such an analogy may be improper given the civil nature of immigration detention and the additional constitutional protections afforded to civil detainees.

Structural similarities certainly exist between immigration detention and criminal incarceration. Immigrant detainees wear prison uniforms and are held in secured facilities while they wait for immigration courts to adjudicate their immigration charges,[110] and ICE regularly relies on local jails and for-profit prisons to house immigrant detainees.[111] When a federal district court acknowledges these similarities, it draws on a well-accepted practice in legal analysis: analogy.[112] If judges use analogies in decision making, however, they must see "the importance of structural similarities

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[109] Aamer v. Obama, 742 F.3d 1023, 1036 (D.C. Cir. 2014).

[110] Altaf Saadi, Maria-Elena De Trinidad Young, Caitlin Palter, Jeremias Leonel Estrada & Homer Venters, *Understanding US Immigration Detention: Reaffirming Rights and Addressing Social-Structural Determinants of Health*, 22 HEALTH & HUM. RTS. 187, 189 (2020), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7348446/ [https://perma.cc/LNF4-94B6].

[111] *Id.*

[112] Linda L. Berger, *A Revised View of the Judicial Hunch*, 10 LEGAL COMMC'N & RHETORIC: JALWD 1, 3 (2013) (suggesting that judicial intuition is derived from "recognition of potentially parallel patterns and paths" and are "triggered by factual analogies as well as by the use of metaphor and perspective.").

rather than being distracted by the similarities or differences in surface features."[113] One critical difference exists between immigrant detainees and criminally incarcerated individuals: an immigrant detainee is in civil detention[114] and is entitled to more constitutional protections than a prisoner serving a criminal sentence.[115] Immigration matters adjudicated by immigration judges are largely kept out of federal courts,[116] but surface-level similarities between immigration detention and criminal incarceration appear to influence how these federal courts treat the constitutional challenges to immigration detention they adjudicate.

Part II focuses on two long-standing areas of confusion that came into focus during the COVID-19 crisis: statutory limitations on prisoner litigation being applied to immigrant detention and the effect of preconceived guilt in immigration detention. This Part explores how analogizing between criminal incarceration and immigration detention may actually limit an immigrant detainee's constitutional rights.

A. AVOIDING EXCESSIVE PRISONER LITIGATION

Over time, access to habeas for the criminally incarcerated has been substantially limited by the AEDPA and PLRA. In 1948, prior to the passage of these two statutes, Congress created 28 U.S.C. § 2255, which required federal prisoners to file collateral challenges to their convictions first through § 2255 and in the jurisdiction in which they were sentenced.[117] Section 2255's purpose was to redistribute collateral challenges to a prisoner's conviction across districts rather than inundating the federal districts with the most federal prisons.[118] Although § 2255 was considered distinct from habeas,[119] the Supreme Court acknowledged that the statute was meant to provide a remedy equivalent to habeas in breadth and substance.[120] However, in 1996, Congress passed the AEDPA which created a one-year

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[113] *Id.* at 22.

[114] *Detention Management: Detention Statistics*, IMMIGR. & CUSTOMS ENF'T, https://www.ice.gov/detain/detention-management [https://perma.cc/C5V2-AG6D].

[115] *See* Bell v. Wolfish, 441 U.S. 520, 535 n.16 (1979) (concluding that due process requires that pretrial detainees cannot be punished, while sentenced inmates can be punished if it is not cruel and unusual).

[116] *Background on Judicial Review of Immigration Decisions*, AM. IMMIGR. COUNCIL (Jun. 1, 2013), https://www.americanimmigrationcouncil.org/research/background-judicial-review-immigration-decisions [https://perma.cc/G4PP-62CG].

[117] *Suspended Justice: The Case Against 29 U.S.C. § 2255's Statute of Limitations*, 129 HARV. L. REV. 1090, 1091 (2016).

[118] United States v. Hayman, 342 U.S. 205, 213–14 (1952).

[119] *See id.* at 220.

[120] *Id.* at 217–18.

statute of limitations for § 2255 motions[121] and severely limited subsequent challenges.[122] If a federal prisoner failed to meet these requirements, they could only access the writ of habeas corpus if the court found that "the remedy by motion is inadequate or ineffective to test the legality of [their] detention."[123] Similarly, Congress passed the PLRA in 1996 to channel all conditions of confinement claims through a prison's administrative remedy process before a prisoner could file lawsuits in federal court.[124] As a consequence, prisoners were required to exhaust administrative remedies before filing a lawsuit, even if no damages were available through administrative action.[125] However, immigrant detainees can still file habeas petitions under the original habeas statute, 28 U.S.C. § 2241, to which the limiting principles of the AEDPA and PLRA should not apply.[126]

Immigrant detainees are not considered prisoners within the definition of the PLRA and AEDPA.[127] Yet two district courts in the Tenth Circuit cited congressional limitations on habeas when denying petitions for immigrant detainees seeking release.[128] The District of Colorado reasoned that "release from custody is . . . an extreme remedy, so Congress has been careful to

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[121] 28 U.S.C. § 2255(f).

[122] *See id.* § 2255(h)(1)–(2) (requiring a panel of appellate judges to certify that either there was a new, retroactive, rule of constitutional law to challenge the conviction or that new evidence was discovered that demonstrated by clear and convincing evidence that no reasonable fact-finder would have found the prisoner guilty of the charge for which he or she was confined).

[123] *Id.* § 2255(e).

[124] 42 U.S.C. § 1997e(a) ("No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.").

[125] Booth v. Churner, 532 U.S. 731, 733–34 (2001).

[126] U.S. CTS., *supra* note 22, at 1.

[127] The PLRA definition of prisoner is "any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of *criminal* law or the terms and conditions of parole, probation, pretrial release, or diversionary program." 28 U.S.C. § 1915(h) (emphasis added); *see also* Ojo v. I.N.S., 106 F.3d 680, 683 (5th Cir. 1997) (holding that because the PLRA does not reference immigrants in its definitions and the "fact that Congress addressed immigration reform in the AEDPA and IIRIRA, but not in the PLRA" demonstrates that immigrant detainees are not bound by the PLRA); Shuhaiber v. Ill. Dep't. of Corr., 980 F.3d 1167, 1169 (7th Cir. 2020) (same); Agyeman v. I.N.S., 296 F.3d 871, 885–86 (9th Cir. 2002) (same); LaFontant v. I.N.S., 135 F.3d 158, 165 (D.C. Cir. 1998) (same). The Supreme Court also held that the AEDPA did not deprive the court of jurisdiction over an immigrant detainee's habeas petition. St. Cyr v. I.N.S., 533 U.S. 289, 298–99 (2001).

[128] Basri v. Barr, 469 F. Supp. 3d 1063, 1066 (D. Colo. 2020); Gomez-Arias v. U.S. Immigr. & Customs Enf't, No. 20-CV-00857, 2020 WL 6384209, at *2 (D.N.M. Oct. 30, 2020).

circumscribe its use by the courts."[129] The court cautioned against expanding the writ to include conditions of confinement claims because it would "fundamentally change" what it defined as a "drastic remedy"[130] that should be limited to challenging arbitrary executive detention.[131]

Even if statutory limitations such as the PLRA and AEDPA were applicable to immigrant detainees, the administrative pathways available for immigrant detainees to challenge their confinement are fewer than those available to the criminally incarcerated. For example, immigrant detainees who are inadmissible or removable by reason of having committed a criminal offense or engaging in terrorist activity are subject to mandatory detention.[132] Immigrant detainees held in discretionary detention cannot be released on less than a $1,500 bond[133] and will only be released if an immigration judge determines that the individual is neither a flight risk nor a danger to the community.[134] If an immigration judge denies an immigrant detainee bond, an immigrant detainee may appeal to the Board of Immigration Appeals (BIA)[135]—but must only exhaust that remedy if challenging the underlying order of removal.[136] The vast majority of immigrant detainees seeking release from detention during the COVID-19 pandemic do not challenge their underlying immigration charges, but instead assert their constitutional substantive due process rights.[137] Because immigrant detainees filing habeas petitions during the pandemic are not prisoners and are not challenging their underlying immigration charges, the justifications underlying congressional limitations on access to habeas, such as those created by the PLRA and AEDPA, are misapplied to immigrant detainees.

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[129] *Basri*, 469 F. Supp. 3d at 1066.

[130] *Id*.

[131] *Id. See generally* THE FEDERALIST NO. 84 (Alexander Hamilton) (explaining that habeas protects against "the practice of arbitrary imprisonments, [which] have been, in all ages, the favorite and most formidable instruments of tyranny.").

[132] 8 U.S.C. § 1226(c)(1) (requiring mandatory detention for criminal aliens); 8 U.S.C. § 1226a(a)(1) (requiring mandatory detention of terrorist aliens).

[133] 8 U.S.C. § 1226(a)(2)(A).

[134] BRYAN LONEGAN, LEGAL AID SOC'Y, IMMIGRATION DETENTION AND REMOVAL: A GUIDE FOR DETAINEES AND THEIR FAMILIES 6 (2015), https://www.nilc.org/wp-content/uploads/2015/12/detentionremovalguide_2006-02.pdf [https://perma.cc/68JD-TK76].

[135] *Executive Office for Immigration Review Policy Manual, 9.3(f) Bond Proceedings: Appeals*, U.S. DEP'T OF JUST., https://www.justice.gov/eoir/eoir-policy-manual/9/3 [https://perma.cc/3H5R-464Q] (last updated Jan. 14, 2021).

[136] 8 U.S.C. § 1252(d)(1).

[137] *See* cases cited *supra* note 7.

B. THE EFFECT OF PRECONCEIVED GUILT AND LACKING THE RIGHT TO REMAIN

Certain courts—specifically those that differentiate between conditions of confinement and fact or duration claims—may be uncomfortable releasing immigrant detainees from confinement.[138] Unlike criminally convicted citizens, immigrant detainees are in custody because of a potential immigration violation and, depending on the outcome of their immigration adjudication, may not have a right to remain in the United States.[139] An unconscious discomfort with an immigrant's violation of an immigration law and potentially unlawful status may motivate some courts to deny habeas petitions for release despite strong evidence of constitutional due process violations within ICE facilities during the COVID-19 pandemic.

1. Federal District Courts May Assume the Guilt of Immigrant Detainees

Simply because immigrants are detained, certain federal courts may perceive them to already have been adjudged guilty[140] and, therefore, ineligible for release from confinement.[141] On one end of the perceived guilt spectrum is a case decided in the Southern District of Texas. The court denied an immigrant detainee's pandemic-related habeas petition because an immigration judge ordered the petitioner removed after her asylum hearing after concluding that she was a member of a Tier III terrorist organization.[142]

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[138] *See, e.g.*, Ndudzi v. Perez, 490 F. Supp. 3d 1176, 1180 (S.D. Tex. 2020); Perez v. Wolf, 445 F. Supp. 3d 275, 284 (N.D. Cal. 2020) (noting that the immigrant detainee's appeal to the Board of Immigration Appeals had not yet been heard).

[139] *Removal*, IMMIGR. & CUSTOMS ENF'T, https://www.ice.gov/remove/removal [https://perma.cc/H3VL-JLL7] (last updated Sept. 17, 2021) (noting that ICE enforcement and removal operations remove noncitizen absconders from the United States).

[140] Legal studies show that immigration courts may create a unique environment ripe for the implicit bias of immigration judges to impact immigration adjudications. *E.g.*, Fatma E. Marouf, *Implicit Bias and Immigration Courts*, 45 NEW ENG. L. REV. 417, 428 (2011). Specifically, Marouf argues that an immigration judge's lack of independence, inability to engage in deliberate thinking due to a high caseload, low motivation due to high stress and burnout, and the legally complex nature of the Immigration and Nationality Act make them prone to the influence of implicit bias. *Id.* at 428–40.

[141] In addition to immigrant detainees with final orders of removal, I am also referring to immigrant detainees awaiting adjudication of their immigration charges.

[142] *Ndudzi*, 490 F. Supp. 3d at 1181. Tier III terrorist organizations under the Immigration and Nationality Act are "a group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in" terrorist activity. *Terrorism-Related Inadmissibility Grounds (TRIG)*, U.S. CITIZENSHIP & IMMIGR. SERVS. (last updated Nov. 19, 2019), https://www.uscis.gov/laws-and-policy/other-resources/terrorism-related-inadmissibi-

The Southern District of Texas found that the immigration detainee was not eligible for release because ICE can detain an immigrant ordered removed for up to six months before the detainee can challenge their detention.[143] While strong public safety arguments exist for mandatory detention of immigrants found to support terrorist organizations, this case represents only the extreme end of the guilt spectrum and should not serve as a baseline for detaining the entire immigrant population. Although the petitioner remains in detention, her detention is meant to be civil and free from punishment until her sentenced punishment for violating U.S. immigration law—removal—can be carried out.[144]

Conversely, in April 2020, the Northern District of California granted an immigrant detainee's motion for a temporary restraining order to be immediately released from detention because of pandemic-related concerns.[145] Despite the fact that the petitioner was in removal proceedings because he had five DUIs and presented a danger to the community, the court found his release warranted because his continued detention constituted punishment.[146] The court explained that civil detention conditions amount to punishment when (1) the conditions are expressly intended to punish or (2) are excessive in relation to their non-punitive purpose and can be accomplished by less harsh means.[147] Because the facility conditions during the COVID-19 pandemic were excessive in relation to the purpose of detaining him for removal, his continued detention constituted punishment and he was ordered released.[148] Further, ICE could impose reasonable conditions upon his release to ensure he did not pose a danger to the community before his removal.[149]

Instead of focusing on his underlying immigration charges, the Northern District of California evaluated the petitioner as a civil immigrant detainee

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lity-grounds-trig [https://perma.cc/8G4H-LJYG]. Unlike Tier I and Tier II terrorist organizations, which are formally designated by the Secretary of State, a Tier III terrorist organization designation is made on a case-by-case basis in connection with the adjudication of immigration charges. *Id.*

[143] *Ndudzi*, 490 F. Supp. 3d at 1182; *see also* Zadvydas v. Davis, 533 U.S. 678, 701 (2001) (adopting the presumption that the government can reasonably detain an immigrant detainee for up to six months).

[144] *See* Youngberg v. Romeo, 457 U.S. 307, 322 (1982) (holding that civil detainees are "entitled to more considerate treatment . . . than criminals whose conditions of confinement are designed to punish.").

[145] Perez v. Wolf, 445 F. Supp. 3d 275, 295 (N.D. Cal. 2020).

[146] *Id.* at 294–95.

[147] *Id.* at 294 (citing Jones v. Blanas, 393 F.3d 918, 932 (9th Cir. 2004)).

[148] *Id.*

[149] *Id.* at 295.

awaiting adjudication of his immigration case and sought to ensure that his detention remained free from punishment.[150] This case highlights an often forgotten aspect of immigration detention: immigration detention is civil detention and therefore is not meant to punish.[151] Instead, detention is incidental to removal, which is the actual "sentence" of punishment for an immigration violation. Because the detainee mentioned above had yet to "serve" his sentence of removal, he was not at a stage in his proceedings where punishment was constitutionally appropriate.

However, when an immigrant is detained for an immigration violation, some courts appear to implicitly, but incorrectly, equate them to post-conviction incarcerated individuals who, in our current criminal legal system, pay their debt to society by serving their time.

2. Release of Immigrant Detainees Frustrates Removal

Some federal district courts may avoid releasing immigrant detainees during the COVID-19 pandemic because immigrant detainees are detained due to unlawful status, and—unlike United States citizens who are criminally incarcerated—do not have a right to remain in the United States. Furthermore, government officials in several cases have claimed that releasing immigrants from detention could hinder the government's ability to remove them in the future.[152] However, ICE allows for home confinement through their Alternatives to Detention Division.[153] This also includes GPS monitoring of migrants' cell phones who are released from detention to ensure that migrants are in the cities to which border agents were told they would be traveling.[154] As of May 13, 2021, nearly 100,000 migrants had been placed in ICE's ATD programs.[155] Although some circuits consider home

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[150] *Id.* at 294–95.

[151] *Removal*, *supra* note 139.

[152] *E.g.*, Jennings v. Rodriguez, 138 S. Ct. 830, 836 (2018) (reasoning that detention prevents "the risk of the alien's either absconding or engaging in criminal activity before" a decision about their immigration charges is made).

[153] CONG. RSCH. SERV., IMMIGRATION: ALTERNATIVES TO DETENTION (ATD) PROGRAMS 6–8 (2019) (overview of ICE programs for "non-detained aliens includ[ing] those released from ICE custody on various types of orders, including orders of recognizance, parole, and bond" which can include "face-to-face and telephonic meetings, unannounced visits to an alien's home, scheduled office visits by the participant with a case manager, and court and meeting alerts" and "location monitoring via GPS.").

[154] Sandra Sanchez, *Instead of Ankle Monitors, New App Helps Track Asylum-Seekers Released in U.S.*, BORDER REP. (May 21, 2021, 4:33 PM), https://www.borderreport.com/news/top-stories/new-app-instead-of-ankle-monitors-being-used-to-track-asylum-seekers-released-in-us/ [https://perma.cc/PS6G-P3QR].

[155] *Id.*

confinement a "quantum change in the level of custody,"[156] ICE's technology allows for effective enforcement and should not be considered a declaration of an immigrant detainee's right to remain in the United States.

Additionally, immigrant detainees seeking release due to COVID-19 conditions did not challenge their underlying immigration charges in an attempt to remain in the United States. During the pandemic, immigrant detainees filing habeas petitions sought temporary release to avoid the potentially life-threatening implications of remaining in confinement. As previously discussed, the REAL ID Act of 2005 greatly limited an immigrant detainee's ability to challenge final orders of removal, deportation, and exclusion[157] and placed that authority with the federal appeals courts, but did not limit habeas challenges to length or conditions of immigration detention.[158] Yet some courts fault petitioners for failing to challenge the "legality of their confinement" when filing habeas petitions during the pandemic.[159] For example, the Eastern District of Virginia concluded that detained immigrants incorrectly brought a conditions of confinement challenge through habeas based on their failure to challenge their underlying immigration charges.[160]

This conclusion is unjustified for two reasons. First, the REAL ID Act of 2005 already limits challenges to underlying immigration charges.[161] Second, if immigrant detainees challenged their underlying immigration charges in addition to their confinement, they would be proactively seeking to remain in the United States—a reality these federal courts are clearly uncomfortable with. Additionally, the plenary power doctrine limits the judicial branch's authority to review decisions made by Congress and the Executive branch in furtherance of American immigration policy.[162] The Southern District of Texas recently stated it was not their job to "elucidate the precise conditions of when detention is no longer necessary" when

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[156] Graham v. Broglin, 922 F.2d 379, 381 (7th Cir. 1991).

[157] *See* 8 U.S.C. § 1252(a)(5).

[158] *See id.* at § 1252(a)(2)(D).

[159] *E.g.,* Toure v. Hott, 458 F. Supp. 3d 387, 398 (E.D. Va. 2020); Basri v. Barr, 469 F. Supp. 3d 1063, 1066–67 (D. Colo. 2020).

[160] *Toure*, 458 F. Supp. 3d at 398.

[161] *See* 8 U.S.C. § 1252(a)(5).

[162] Chae Chan Ping v. United States, 130 U.S. 581, 603 (1889) (establishing that it is within the federal government's authority to exclude aliens); Fong Yue Ting v. United States, 149 U.S. 698, 711 (1893) (holding that the federal government's immigration authority encompassed the power to deport).

denying a petition for habeas corpus.[163] In a similar immigration matter, the D.C. District Court also acknowledged finding "these questions difficult to answer."[164]

Each of these factors demonstrates why the federal district courts may avoid granting petitions that could prematurely infringe on the executive's prerogative to carry out the nation's immigration policy. Whether an immigrant detainee has been ordered to be removed or is still awaiting adjudication, the federal courts risk undermining the constitutional protections available for immigrants as civil detainees, if they defer to an immigration judge's decision and, explicitly or implicitly, liken immigrant detainees to criminal prisoners already found guilty.

By analogizing the release of immigrant detainees under habeas to the release of the criminally incarcerated, these courts may unnecessarily confuse and distract themselves from the purpose of habeas corpus. In its most principled form, the writ is meant to protect those in custody from unlawful executive detention regardless of the type of detention. In adjudicating immigrant detainee habeas petitions, federal district courts that rely on Camps 1 and 2's bright line division between conditions of confinement and fact or duration claims may operate on a false analogy that fundamentally misapplies the procedural restrictions on habeas corpus petitions within the criminal legal system to immigrant detainees.

III. POTENTIAL CONSEQUENCES AND A NEW APPROACH

When change occurs in federal jurisprudence, unintended consequences often follow. Federal courts have long deferred to the federal government's plenary power over immigration enforcement.[165] As a result, if the judiciary moves too far from analogizing immigration detention to criminal incarceration, due process protections for immigrant detainees may be further eroded.[166] Immigration Courts are housed in the Executive Office for

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[163] Ndudzi v. Perez, 490 F. Supp. 3d 1176, 1183 (S.D. Tex. 2020); *see also* Landon v. Plasencia, 459 U.S. 21, 34 (1982) ("The Government's interest in efficient administration of the immigration laws at the border also is weighty.").

[164] O.M.G. v. Wolf, 474 F. Supp. 3d 274, 288 (D.D.C. 2020).

[165] United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950) ("Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."); Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212 (1953) (same); Kleindienst v. Mandel, 408 U.S. 753, 769 (1972) (establishing the "facially legitimate and bona fide" test, which reinforced the federal government's authority to exclude aliens); Kerry v. Din, 576 U.S. 86, 104 (2015) (Kennedy, J., concurring) (same).

[166] Nishimura Ekiu v. United States, 142 U.S. 651, 660 (1892); Fong Yue Ting v. United States, 149 U.S. 698, 711 (1893); Chae Chan Ping v. United States, 130 U.S. 581, 603 (1889).

Immigration Review, a Department of Justice subagency,[167] which has traditionally led the federal courts to treat the immigration system as *sui generis*.[168] Consistent with Congress's regulatory scheme, the Supreme Court interprets the naturalization power, and therefore authority over immigration policy in the United States, as vested exclusively in Congress.[169] By eliminating all analogies to the criminal legal system, the federal courts risk further isolating the immigration system from the judiciary.

Part III first explores the potential consequences of the recent trend in immigration-related decisions that apply a more flexible approach to due process protections for immigrant detainees—namely allowing Congress to set the due process procedures available to immigrant detainees and deferring to the federal government's plenary power over immigration law.[170] This Part then presents an alternative approach that, while imperfect, may provide an analogy to the criminal adjudication and incarceration system that better protects the constitutional rights of immigrant detainees.

A. THE DANGERS OF OVERCORRECTING

The federal government has the sovereign prerogative, or plenary power, to set the procedures for entry into and exit out of the United States within the immigration context, and courts have long held that immigrants are only owed the due process set forth for them by Congress.[171] Within the immigration context, the Supreme Court has also acknowledged that "due process is flexible" and "calls for such procedural protections as the particular situation demands."[172] The government has a legitimate interest in the enforcement of immigration laws[173] because it gives "immigration

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[167] *Executive Office for Immigration Review: About the Office*, U.S. DEP'T OF JUST., https://www.justice.gov/eoir/about-office [https://perma.cc/NTN7-WE3Q] (last updated Feb. 3, 2021).

[168] Latin for "of its own kind." *Sui generis*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[169] U.S. CONST. art. I, § 8, cl. 4; *see also*, United States v. Macintosh, 283 U.S. 605, 626 (1931) (those seeking to naturalize in the U.S. "must accept the grant and take the oath in accordance with the terms fixed by the law, or forego the privilege of citizenship. There is no middle choice.").

[170] Dep't Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1964 (2020).

[171] United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950) ("Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."); Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212 (1953) (same); Kleindienst v. Mandel, 408 U.S. 753, 769 (1972) (establishing "facially legitimate and bona fide" test which reinforced the federal government's authority to exclude aliens); Kerry v. Din, 576 U.S. 86, 104 (2015) (Kennedy, J., concurring) (same).

[172] Jennings v. Rodriguez, 138 S. Ct. 830, 852 (2018) (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)); *see also* Landon v. Plasencia, 459 U.S. 21, 34 (1982).

[173] *See* Demore v. Kim, 538 U.S. 510, 523 (2003).

officials time to determine an alien's status without running the risk of the alien's either absconding or engaging in criminal activity before a final decision can be made."[174] Although ICE detainees have substantive due process rights under the Fifth Amendment, the court must also weigh the interest of the government in detaining the individual to carry out the nation's immigration policies.[175] It appears that, as a result, some courts choose to take a deferential position to the federal government's plenary power over immigration when denying habeas petitions for release from ICE detention.[176]

In a July 2020 ruling that denied release to more than 200 noncitizen parents and children detained in three ICE Family Residential Centers (FRCs), the District of D.C. concluded that releasing the detainees would "run contrary to the principle that a 'district court should approach issuance of injunctive orders'" with caution and "exercise its discretion if appropriate by giving officials time to rectify the situation before issuing an injunction."[177] The court acknowledged that a "district court's equitable power to redress constitutional injuries is broad," but the Supreme Court requires district courts to wait until local authorities attempt to remedy the situation before imposing an injunction.[178] In immigration cases, the local authority is ICE, a subagency of the executive branch which is distinct from the judiciary.[179] When considering whether to grant a habeas petition for ICE detainees at high risk of contracting COVID-19, the court "strike[s] a balance between the gravity of the risk of contracting COVID-19 (with uncertain outcomes for recovery and a path that could lead to death) with the danger to the public that could result from releasing the petitioners into the community."[180] Courts that deny immigrant detainees' habeas petitions appear to give more weight to the government's interests in detention and

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[174] *Jennings*, 138 S. Ct. at 836.

[175] *Landon*, 459 U.S. at 34.

[176] *See, e.g.*, C.G.B. v. Wolf, 464 F. Supp. 3d 174, 212 (D.D.C. 2020) (quoting Benavides v. Gartland, Civ. A. No. 20-46, 2020 WL 1914916, at *5 (S.D. Ga. Apr. 18, 2020)); *see also* O.M.G. v. Wolf, 474 F. Supp. 3d 274, 286–87 (D.D.C. 2020); Dawson v. Asher, No. C20-0409, 2020 WL 1704324, at *12 (W.D. Wash. Apr. 8, 2020).

[177] *O.M.G.*, 474 F. Supp. 3d at 289 (quoting Farmer v. Brennan, 511 U.S. 825, 846–47 (1994)).

[178] *O.M.G.*, 474 F. Supp. 3d at 289.

[179] *Compare* Mays v. Dart, 974 F.3d 810, 820–21 (7th Cir. 2020) (concluding that courts should defer to the expert judgment of correctional facility administrators in matters implicating safety and security concerns), *with* Awshana v. Adducci, 453 F. Supp. 3d 1045, 1055 (E.D. Mich. 2020) (using very similar language when denying a petition for habeas corpus to an ICE detainee).

[180] *Awshana*, 453 F. Supp. 3d at 1056.

avoidance of potential danger[181] because releasing immigrant detainees could be viewed as an imposition on the federal government's authority over immigration proceedings.

Substantial deference to immigration authorities, as compared to other civil detention contexts, is not surprising given recent Supreme Court rulings arising from cases in which immigrant detainees challenged their underlying immigration charges through habeas.[182] In *Department of Homeland Security v. Thuraissigiam*, the Supreme Court's ruling pointed toward a sliding scale of constitutional rights for immigrant detainees with an individual's due process rights increasing or decreasing depending on whether they entered the country legally.[183] This sliding scale of rights was developed within the context of immigrant detainees challenging their underlying immigration charges, not the constitutionality of their detention conditions—which is the main point at issue during the COVID-19 pandemic.[184]

The subset of cases discussed in this Comment, however, address a different matter. During the pandemic, immigrant detainees used habeas corpus to assert their right to liberty as a means of survival. Prior to the pandemic, the courts largely rejected an immigrant detainee's use of habeas corpus to seek release from confinement, but COVID-19 redefined an immigrant detainee's liberty interest as being impacted by the potential for severe illness or death.[185] Despite their unlawful presence, immigrant detainees assert a recognized, substantive due process claim to constitutionally-protected liberty interests.[186] Courts evaluating these habeas petitions are, in essence, assessing whether an individual's right to life,

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[181] *See, e.g.*, *C.G.B.*, 464 F. Supp. 3d at 212 (quoting Benavides v. Gartland, Civ. A. No. 20-46, 2020 WL 1914916, at *5 (S.D. Ga. Apr. 18, 2020)); *see also O.M.G.*, 474 F. Supp. 3d at 286–87; *Dawson*, 2020 WL 1704324, at *12.

[182] *See* Dep't Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1963 (2020) (rejecting respondent's attempt to use habeas corpus to seek "additional administrative review of his asylum claim"); Jennings v. Rodriguez, 138 S. Ct. 830, 838 (2018) (respondent filed habeas petition "alleging he was entitled to a bond hearing to determine whether his continued detention was justified."); Demore v. Kim, 538 U.S. 510, 514 (2003) (respondent filed habeas petition challenging the constitutionality of his mandatory detention).

[183] *See Thuraissigiam*, 140 S. Ct. at 1964; *see also Demore*, 538 U.S. at 523 (concluding that despite aliens' entitlement to due process of law in deportation proceedings, "detention during deportation proceedings" is a "constitutionally valid aspect of the deportation process.").

[184] *See Thuraissigiam*, 140 S. Ct. at 1963; *Jennings*, 138 S. Ct. at 838; *Demore*, 538 U.S. at 514.

[185] *See* Gomez-Arias v. U.S. Immigr. & Customs Enf't, No. 20-CV-00857, 2020 WL 6384209, at *3 (D.N.M. Oct. 30, 2020) (concluding that there are no "conditions of confinement that could adequately prevent" harm).

[186] *E.g.*, Zadvydas v. Davis, 533 U.S. 678, 690 (2001).

liberty, or property are being deprived without due process of law.[187] For example, the District of Minnesota concluded that an immigrant detainee's claim was "not a request to change conditions of their confinement to lessen the danger of the pandemic" but that the jail in which the ICE detainee was held had "violated the Constitution" because it could not prevent a COVID-19 outbreak "no matter the protective measures taken."[188] Therefore, the substantive due process rights asserted by these detainees live at the core of our legal system.

The *sui generis* approach to immigration adjudication has eroded the due process protections available to immigrant detainees for years, and the COVID-19 pandemic shined a light on the risk of further erosion should the federal courts continue to reject the use of habeas petitions by immigrant detainees seeking release from confinement as a result of unconstitutional living conditions. If district courts broadly apply the limited due process model from *Thuraissigiam*[189] to a constitutional rights context for which it was not created, courts risk eliminating any remaining liberty interest protections for immigrant detainees. This was especially dangerous when continued confinement posed a substantial risk of severe illness or death.

B. A BETTER ANALOGY: PRETRIAL DETENTION

The COVID-19 pandemic is a devastating reminder that the substantive due process rights of immigrant detainees must be protected. Similar to the Camp 3 circuits which recognize habeas as an appropriate vehicle through which to challenge conditions of confinement, the Third Circuit also rejected analogies to the criminal legal system and focused instead on the fundamental aspects of the writ to address the horrors of COVID-19 in ICE detention.[190] Several district courts also adopted this approach.[191] For example, the

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[187] U.S. CONST. amend. V.

[188] Mohammed S. v. Tritten, No. 20-CV-783, 2020 WL 2750109, at *2 (D. Minn. May 27, 2020).

[189] *Thuraissigiam*, 140 S. Ct. at 1964.

[190] Aamer v. Obama, 742 F.3d 1023, 1036 (D.C. Cir. 2014) (finding that conditions of confinement claims are cognizable under habeas); Brennan v. Cunningham, 813 F.2d 1, 4 (1st Cir. 1987) (same); Peralta v. Vasquez, 467 F.3d 98, 104 (2d Cir. 2006) (same); Hope v. Warden York Cnty. Prison, 972 F.3d 310, 323 (3d Cir. 2020).

[191] Gomez-Arias v. U.S. Immigr. & Customs Enf't, No. 20-CV-00857, 2020 WL 6384209, at *3 (D.N.M. Oct. 30, 2020) (holding that where a petitioner contends "that in light of the pandemic he should be released from custody because there are no conditions of confinement that could adequately prevent" constitutional violations, then "federal habeas proceedings may be appropriate."); Favi v. Kolitwenzew, No. 20-CV-2087, 2020 WL 2114566, at *6, *7 (C.D. Ill. May 4, 2020) (same); Vazquez Barrera v. Wolf, 455 F. Supp. 3d 330, 336 (S.D. Tex. 2020) (same).

Western District of Louisiana reasoned that "[w]hen fact claims are mentioned . . . conditions are indicators of the targeted harm: the confinement itself."[192] However, the mere mention of the word "conditions" does not result in a legitimate conditions of confinement claim. Supreme Court jurisprudence separates "conditions claims" from "fact claims" by considering (1) the nature of the claim and (2) the remedy requested.[193] The nature of the claim for immigrant detainees was that the confinement itself was the harmful condition which entitled them to release. When confinement conditions make continued detention unconstitutional, immigrant detainees correctly asserted habeas corpus to defend their substantive due process rights.[194]

Although some courts may understand Camp 3's approach as principled and logical, it may be hard for other courts to dislodge deeply ingrained analogies to the criminal legal system when assessing immigrant detainee habeas petitions, especially considering the large number of organizational similarities between immigration detention and criminal incarceration. At the other end of the spectrum, encouraging federal courts to avoid any analogy to the criminal legal system risks permanently tipping the scale of judicial deference toward ICE on immigration enforcement matters. A third approach, however, may offer the federal courts a solution that both aligns with habeas precedent and allows for protection of an immigrant detainee's substantive Fifth Amendment rights. This approach is to analogize immigrant detainees to *pretrial* detainees in the criminal legal context.

Pretrial detainees, like civil detainees, are afforded more protections than incarcerated prisoners under the Fifth Amendment Due Process Clause.[195] A pretrial detainee's conditions of confinement violate the Fifth

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[192] Dada v. Witte, 20-CV-00458, 2020 WL 5510706, at *4 (W.D. La. Apr. 30, 2020); *see also* Poree v. Collins, 866 F.3d 235, 242–43 (5th Cir. 2017).

[193] Preiser v. Rodriguez, 411 U.S. 475, 500 (1973) ("[W]hen a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from imprisonment, his sole federal remedy is a writ of habeas corpus.").

[194] *Gomez-Arias*, 2020 WL 6384209, at *3 (holding that where a petitioner contends "that in light of the pandemic he should be released from custody because there are no conditions of confinement that could adequately prevent" constitutional violations, then "federal habeas proceedings may be appropriate."); *Favi*, 2020 WL 2114566, at *6, *7 (same); *Vazquez Barrera*, 455 F. Supp. 3d at 336 (same).

[195] Bell v. Wolfish, 441 U.S. 520, 535–37 (1979); *see also* Youngberg v. Romeo, 457 U.S. 307, 322 (1982) (holding that civil detainees are "entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish.").

Amendment if they "amount to punishment"[196] before "an adjudication of guilt."[197] Conversely, a convicted prisoner can be punished after receiving full due process of law so long as the punishment is not cruel and unusual.[198] When the federal government takes someone into custody they assume responsibility for an individual's reasonable health, safety, and wellbeing.[199] This responsibility is heightened when an individual in custody has yet to receive due process of law because "pre-adjudication detainees retain greater liberty protections than convicted ones."[200] As previously stated, conditions of confinement for pretrial detainees constitute punishment if they are excessive or unnecessary to accomplish their non-punitive purpose and can be accomplished in a less harsh manner.[201] Deliberate disregard of the medical needs of those in custody constitutes excessive punishment.[202]

The Supreme Court has interpreted the Due Process Clause to apply "to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent."[203] Immigrants in detention are civil detainees who have not been convicted of a crime; as with pretrial detainees, their conditions of confinement violate the Fifth Amendment if they "amount to punishment"[204] before "an adjudication of

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[196] *Bell*, 441 U.S. at 535; *see also* Hardy v. District of Columbia, 601 F. Supp. 2d 182, 188 (D.D.C. 2009) (concluding that pretrial criminal detainees have not been convicted of any present crime, they "may not be subjected to punishment of any description.") (quoting Hill v. Nicodemus, 979 F.2d 987, 991 (4th Cir. 1992)).

[197] *Bell*, 441 U.S. at 535.

[198] *Id.* at 535 n.16 (concluding that due process requires that pretrial detainees cannot be punished, while sentenced inmates can be punished as long as it is not cruel and unusual).

[199] DeShaney v. Winnebago Cnty. Dep't. of Soc. Servs., 489 U.S. 189, 199–200 (1989); *see also* Farmer v. Brennan, 511 U.S. 825, 832 (1994) (concluding that the government has an obligation to safeguard the physical security of those it incarcerates); Hernandez Roman v. Wolf, 829 F. App'x. 165, 172 (9th Cir. 2020) (upholding a preliminary injunction and ruling that the government had likely failed to meet its "constitutional duty to provide reasonably safe conditions" to immigrant detainees within the Adelanto ICE detention facility).

[200] Jones v. Blanas, 393 F.3d 918, 932 (9th Cir. 2004) (citing *Bell*, 441 U.S. at 535–36) ("[A]n individual detained awaiting civil commitment proceedings is entitled to protections at least as great as those afforded to . . . an individual accused but not convicted of a crime.").

[201] *Id.* (finding that where an individual is detained awaiting civil commitment in a "condition identical to, similar to, or more restrictive than, those in which his criminal counterparts are held, we presume that the detainee is being subjected to 'punishment.'").

[202] Estelle v. Gamble, 429 U.S. 97, 103 (1976) (concluding that deliberate disregard of a prisoner's medical needs constitutes excessive punishment under the Eighth Amendment).

[203] Zadvydas v. Davis, 533 U.S. 678, 693 (2001).

[204] *Cf.* Bell v. Wolfish, 441 U.S. 520, 535 (1979); *see also* Hardy v. District of Columbia, 601 F. Supp. 2d 182, 188 (D.D.C. 2009) (quoting Hill v. Nicodemus, 979 F.2d 987, 991 (4th Cir. 1992) (concluding that because pretrial criminal detainees have not been convicted of any present crime, they "may not be subjected to punishment of any description.")).

guilt."[205] During the COVID-19 pandemic, immigrant detainees seeking habeas relief argued that the high COVID-19 infection rate, combined with ICE's inadequate prevention measures, amounted to punishment.[206] Therefore, ICE detention deprived them of a constitutional right to which they were entitled while in civil detention.

Since immigrant detainees are, similar to pretrial detainees, in a state of limbo (either awaiting adjudication of their cases or removal from the United States), habeas is one of the few avenues through which they can seek relief for constitutional violations of their rights to personal health and safety. Several federal district courts reason that immigrant detainees petitioning for release during the pandemic could advance claims that would "directly bear[] on not just [their] conditions of confinement, but whether the fact of [their] confinement is constitutional in light of the conditions caused by the COVID-19 pandemic."[207] Recall that *Preiser* left open the possibility that habeas was appropriate even "[w]hen a prisoner is put under additional and unconstitutional restraints during his lawful custody."[208] Although immigrant detainees are lawfully detained in relation to their immigration charges, the pandemic creates additional "unconstitutional restraints" that allows them to "patently" challenge the validity of their confinement,[209] which is the province of habeas corpus.[210] Some federal district courts justified decisions to release immigrant detainees by using the opening left by *Preiser* to apply

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[205] *Cf. Bell*, 441 U.S. at 535.

[206] *See* cases cited *supra* note 7.

[207] Favi v. Kolitwenzew, No. 20-CV-2087, 2020 WL 2114566, at *7 (C.D. Ill. May 4, 2020); *see also* Hope v. Warden York Cnty. Prison, 972 F.3d 310, 324 (3d Cir. 2020); Vazquez Barrera v. Wolf, 455 F. Supp. 3d 330, 336 (S.D. Tex. 2020); Awshana v. Adducci, 453 F. Supp. 3d 1045, 1047–48 (E.D. Mich. 2020); Bent v. Barr, 445 F. Supp. 3d 408, 413–14 (N.D. Cal. 2020); Juan E. M. v. Decker, 458 F. Supp. 3d 244, 253 (D.N.J. 2020); Peregrino Guevara v. Witte, No. 20-CV-01200, 2020 WL 6940814, at *4 (W.D. La. Nov. 17, 2020); Njuguna v. Staiger, No. 20-CV-00560, 2020 WL 3425289, at *5 (W.D. La. June 3, 2020); Mohammed S. v. Tritten, No. 20-CV-783, 2020 WL 2750109, at *2 (D. Minn. May 27, 2020); Gomez-Arias v. U.S. Immigr. & Customs Enf't, No. 20-CV-00857, 2020 WL 6384209, at *2, *9 (D.N.M. Oct. 30, 2020) (concluding that if civil immigration detention is punitive, it is violative of the Fifth Amendment); Coreas v. Bounds, 451 F. Supp. 3d 407, 419 (D. Md. 2020) (same); *Favi*, 2020 WL 2114566, at *9 (same); Engelund v. Doll, No. 20-CV-00604, 2020 WL 1974389, at *8 (M.D. Pa. Apr. 24, 2020) (same); Thakker v. Doll, 451 F. Supp. 3d 358, 370 (M.D. Pa. 2020) (same).

[208] Preiser v. Rodriguez, 411 U.S. 475, 499 (1973); *see also Developments in the Law—Federal Habeas Corpus*, *supra* note 42, at 1084.

[209] Bent v. Barr, 445 F. Supp. 3d 408, 413 (N.D. Cal. 2020).

[210] Muhammad v. Close, 540 U.S. 749, 750 (2004).

the framework of pretrial detention, thus redefining conditions of confinement claims during the pandemic.[211]

Even if an immigrant detainee is ordered removed, detention is incidental to removal; the sentence of deportation has yet to be carried out, and therefore detention should not be analogized to a prison sentence. Additionally, immigrant detainees awaiting adjudication of their immigration charges should not be analogized to incarcerated individuals just because they are in custody. Even when immigrant detainees are subject to mandatory detention for criminal offenses, many have already served their sentences for criminal convictions prior to arriving in immigration detention,[212] and, for immigration purposes, are the equivalent of recently detained, pretrial detainees awaiting adjudication of their immigration charges. As such, they have a constitutional right to pretrial-equivalent due process protections.

Of course, the federal courts do not have an unlimited ability to release individuals in any type of detention. A pretrial detainee's due process rights must be balanced against the government's legitimate interest in keeping the individual detained[213] which requires courts to strike a balance between the government's needs and the individual's constitutional rights.[214] As the courts traditionally defer to the federal government's plenary power in immigration matters, courts often weigh institutional need more heavily.[215] As such, some district courts have limited their grants for release of immigrants during COVID-19 to situations where a petitioner's condition—whether due to age or preexisting condition—is such that continued confinement would be "excessive in relation to the purpose of [their]

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[211] *See, e.g.*, *Favi*, 2020 WL 2114566, at *6 ("While a 'run-of-the-mill' condition of confinement claim may not touch upon the fact or duration of confinement, here, Petitioner is seeking immediate release based upon the claim that there are essentially no conditions of confinement that are constitutionally sufficient given the facts of the case." (quoting Hernandez v. Kolitwenzew, Case No. 20-CV-2088, Order, d/e 12 (C.D. Ill. Apr. 23, 2020))); *Bent*, 445 F. Supp. 3d at 413 (same); *Vazquez Barrera*, 455 F. Supp. 3d at 337 (same).

[212] *E.g.*, Andrea Castillo, *With or Without Criminal Records, Some Immigrants Spend Many Years in Detention*, L.A. TIMES (Nov. 12, 2018, 12:00 AM), https://www.latimes.com/local/lanow/la-me-immigrant-detainees-20181112-story.html.

[213] *See* Bell v. Wolfish, 441 U.S. 520, 540 (1979).

[214] *Id.* at 546 (quoting Wolff v. McDonnell, 418 U.S. 539, 556 (1974)).

[215] *See, e.g.*, Chae Chan Ping v. United States, 130 U.S. 581, 603 (1889) (concluding that the federal government has unrestricted sovereign power over immigration laws); *see also* David A. Martin, *Why Immigration's Plenary Power Doctrine Endures*, 68 OKLA. L. REV. 29, 31 (2015) (explaining that in establishing the plenary power doctrine, the court in *Chae Chan Ping* invoked sovereignty to support the assertion that the federal government "does possess the authority to regulate migration, even though such a power is not enumerated in the Constitution.").

detention."[216] As more information about COVID-19 becomes available, ICE detention facilities alter their practices, and vaccines are distributed, some courts are less inclined to challenge the government's interest in keeping immigrants detained.[217]

The rights traditionally afforded to pretrial detainees and civil detainees are compatible. Although use of this analogy still poses a risk of federal judges analogizing to the incarceration of criminally convicted individuals, it compares immigrant detainees to a more compatible stage in the criminal adjudication process and requires a more robust review of potential constitutional violations. It also encourages federal courts to move past the confusion caused by the immigration adjudication system, and instead apply a principled approach to habeas which, at its core, defends the constitutional rights of those in custody.

CONCLUSION

The immigration adjudicatory system is largely kept separate from judicial review. Lack of exposure to immigration adjudications may unnecessarily confuse federal courts and result in them analogizing the immigration system to the criminal legal system when adjudicating due process claims. By definition, however, immigration detention is civil detention, and civil detention is severely limited in any other context in the American legal system. If federal courts are encouraged to use the tools made available to them by the Supreme Court's ruling in *Preiser*, they will have the flexibility necessary to strengthen immigrant access to habeas corpus and maintain basic due process right protections.

Many courts have limited the release of immigrant detainees to elderly immigrants or those with preexisting medical conditions. However, it is apparent that COVID-19 has long-term health implications for many, including those of all ages (with or without co-morbidities).[218] As a result, immigration advocates increasingly used *Preiser* to fight for the temporary

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[216] Juan E. M. v. Decker, 458 F. Supp. 3d 244, 257 (D.N.J. 2020) (quoting *Bell,* 411 U.S. at 538); *see also* Kingsley v. Hendrickson, 576 U.S. 389, 398 (2015) (to establish a due process violation, a pretrial detainee must demonstrate that confinement conditions are not "rationally related to a legitimate nonpunitive governmental purpose" or that the conditions "appear excessive in relation to that purpose.").

[217] Paul v. Decker, No. 20-CV-2425, 2021 WL 1947776, at *5 (S.D.N.Y. May 14, 2021) (rejecting an immigration detainee's habeas petition in part because COVID-related conditions within the New York-area ICE facility were actually improving).

[218] Vazquez Barrera v. Wolf, 455 F. Supp. 3d 330, 333 (S.D. Tex. 2020) (concluding that petitioner's chronic health conditions made them "particularly susceptible to serious illness or death if they contract COVID-19."); Favi v. Kolitwenzew, No. 20-CV-2087, 2020 WL 2114566, at *2 (C.D. Ill. May 4, 2020).

release of all those in custody. Likening immigration detainees to pretrial detainees is not a perfect analogy, but it provides the foundation necessary for district courts to grant habeas petitions in this instance without fear of upsetting the immigration system. Reliance on the pretrial detention analogy also has the dual benefit of protecting the well-being of immigrant detainees, while also opening the door to a new way of thinking about the substantive due process rights of immigrant detainees which can be applied well beyond the pandemic crisis. Many immigrant detainees who filed habeas petitions in response to the pandemic have been and will continue to be removed from the United States, but the analogy to pretrial detention encourages a return to the historic purpose of the writ of habeas corpus: to protect against unlawful detention.