BYU Law Review

Volume 48 | Issue 3 Article 10

Winter 1-5-2023

Rights Without a Remedy: Detained Immigrants and Unlawful Conditions of Confinement

Brandon Galli-Graves

Rights Without a Remedy: Detained Immigrants and Unlawful Conditions of Confinement

Brandon Galli-Graves

CONTENTS

INTRODUCTION

The United States is the world's leader in incarceration. Over the past several decades, the country has built the largest prison population in the entire world, dominating the world stage both in incarceration rate per capita as well as overall numbers of incarcerated people.[1] There are currently over two million people

1. M. Szmigiera, *Countries With the Largest Number of Prisoners as of July 2021*, STATISTA (July 30, 2021), https://www.statista.com/statistics/262961/countries-with-the-most-prisoners/#:~:text=Within%20OECD%20countries%2C%20the%20United,spent%20the%20most%20on%20corrections.

in the nation's prisons and jails, marking a 500% increase over the last forty years.[2]

Unsurprisingly, this pacesetting extends outside of the strictly criminal context: the U.S. also operates the world's largest immigration detention system.[3] Made up of a network of over 200 detention centers, prisons, and jails across the country,[4] the immigration detention system confines tens of thousands of people each day,[5] many of whom are survivors of torture, asylum seekers, and victims of trafficking. Others include families with small children, the elderly, individuals with serious health conditions, and lawful permanent residents with established family and community ties who face deportation because of previous criminal convictions as minor as shoplifting and low-level drug offenses.[6] The operation of these detention facilities is overwhelmingly contracted out to private, for-profit prison companies, and many of these facilities have been built in rural places where immigrants are most likely to be isolated from legal counsel, remain in detention without real opportunity for release, and lose their cases.[7] Immigration detention centers around the country have been thrust into the spotlight in recent years, with increasing documentation of abuse and mistreatment including sexual violence, medical and health care neglect, and other human rights violations. Despite this exposure, however, change remains elusive.

The Supreme Court has been clear that because detained immigrants are civil, rather than criminal detainees, their detention

2. *Criminal Justice Facts*, THE SENT'G PROJECT, https://www.sentencingproject.org/criminal-justice-facts/ (last visited Nov. 18, 2022).

3. Setareh Ghandehari, Luis Suarez & Gabriela Viera, *First Ten to Communities Not Cages*, DETENTION WATCH NETWORK 2, https://www.detentionwatchnetwork.org/sites/default/files/reports/DWN%20First%20Ten%20to%20Communities%20Not%20Cages.pdf (last visited Nov. 18, 2022).

4. *Id.*

5. *ICE Detainees: Part A. ICE Detainees by Date* and Arresting Authority*, TRACIMMIGRATION, https://trac.syr.edu/immigration/detentionstats/pop_agen_table.html (last visited Nov. 18, 2022).

6. *See, e.g.*, MICHAEL TAN, IMMIGR. POL'Y CTR., LOCKED UP WITHOUT END: INDEFINITE DETENTION OF IMMIGRANTS WILL NOT MAKE AMERICA SAFER 3 (2011), https://www.americanimmigrationcouncil.org/sites/default/files/research/Tan_-_Locked_Up_Without_End_100611_0.pdf.

7. EUNICE H. CHO, TARA TIDWELL CULLEN & CLARA LONG, ACLU, JUSTICE-FREE ZONES: U.S. IMMIGRATION DETENTION UNDER THE TRUMP ADMINISTRATION 4 (2020), https://www.hrw.org/sites/default/files/supporting_resources/justice_free_zones_immigrant_detention.pdf.

is legally justified only so long as it is not punitive.[8] This means that immigrants cannot be detained for retributive or deterrence purposes,[9] but it also means that the conditions *within* detention cannot be so deplorable as to become punitive. Where the conditions of confinement "amount to punishment," the government violates the due process rights of the detained immigrant.[10]

Conditions may amount to punishment in either of two main ways: (1) the duration of detention is so long that it becomes punitive,[11] or (2) certain conditions of confinement are sufficiently intolerable that they become punitive.[12] The proper avenue for challenging indefinite or unreasonably prolonged detention is through habeas corpus.[13] However, the reach of the writ of habeas corpus in conditions of confinement cases is not yet settled, and some circuit courts have thus far interpreted it narrowly.[14] For this reason, noncitizens detained in many parts of the country, such as Texas (which this article will focus on and which currently is the state with the most ICE detainees[15]), do not have a clear procedural vehicle to use to challenge and ameliorate unlawful conditions of confinement.

The Fifth Circuit has expressed that "conditions of confinement" claims are usually properly brought under 42 U.S.C. § 1983.[16] However, its guidance on this matter comes from cases dealing with criminal or pretrial citizen detainees, not noncitizens.

8. Zadvydas v. Davis, 533 U.S. 678, 690 (2001).

9. Kansas v. Crane, 534 U.S. 407, 412 (2002) (warning that civil detention may not "become a 'mechanism for retribution or general deterrence'—functions properly those of criminal law, not civil commitment"); R.I.L-R v. Johnson, 80 F. Supp. 3d 164 (D.D.C. 2015).

10. Bell v. Wolfish, 441 U.S. 520, 535 (1979); *see also* Hare v. City of Corinth, 74 F.3d 633, 639 (5th Cir. 1996) (en banc).

11. *Zadvydas*, 533 U.S. at 691.

12. *E.g.*, *Bell*, 441 U.S. 520.

13. *E.g.*, *Zadvydas*, 533 U.S. at 688 (holding that detained noncitizens found to be deportable may use habeas corpus to bring statutory and constitutional challenges to post-removal order detention); Demore v. Kim, 538 U.S. 510 (2003) (holding that detained noncitizens may use habeas corpus to bring a constitutional challenge to pre-removal order detention); Clark v. Martinez, 543 U.S. 371 (2005) (holding that its decision in *Zadvydas* also applies to government detention of persons found to be inadmissible).

14. *See infra* Part III.

15. *Immigration Detention Quick Facts*, TRAC IMMIGRATION, https://trac.syr.edu/immigration/quickfacts/ (last visited Nov. 17, 2022). As of February 2022, Texas alone held about 5,829 of the over 28,000 people detained in ICE custody nationwide (about one-fifth of all detained noncitizens). This is almost as much as the next two states, Louisiana and Arizona, combined. *See id.*

16. *E.g.*, Poree v. Collins, 866 F.3d 235, 243 (5th Cir. 2017); Rice v. Gonzalez, 985 F.3d 1069, 1070 (5th Cir. 2021).

Because noncitizens are detained by federal, rather than state actors, this procedural vehicle is simply not available to them.[17] Alternatively, some federal district courts in Texas have suggested in unpublished opinions that a proper avenue for challenging unlawful conditions of confinement might lie in an APA claim,[18] but this is also unavailable in most circumstances, as most unlawful conditions do not have to do with official agency action.[19] Thus, judges in Texas district courts have dismissed detained noncitizens' conditions claims on the basis of non-applicable alternative avenues of relief, leaving noncitizens with no clear avenue to exercise their rights. Because the guidance on this subject in general is unclear and inconsistent, it is vital to uncover a viable way for immigrants to challenge unconstitutional conditions of confinement in the state. Where there is a right, there must be a remedy.[20]

This Note will not attempt to provide an exhaustive history of noncitizens' constitutional rights jurisprudence—aside from the formidable task of reconciling the centuries of often conflicting pronouncements, such analyses can readily be found in other articles.[21] Rather, this Article's aims are twofold: (1) to hone in on the current state of the law pertaining to unlawful conditions of confinement in immigration detention, with a focus on Texas and Fifth Circuit law, and (2) to explore potential viable avenues for detained noncitizens to challenge unlawful conditions. This Article proceeds as follows. Part I examines the current state of immigration detention in the United States. Part II provides a background on Supreme Court and Fifth Circuit punitive detention and conditions of confinement caselaw in the immigration context. Part III explores how traditional civil rights remedies for

17. *See infra* Part III.

18. *E.g.*, Umarbaev v. Moore, No. 3:20-CV-1279-B-BN, 2020 WL 3051448 (N.D. Tex. June 6, 2020) (declining to recognize a direct cause of action under Fifth Amendment for detainee's conditions of confinement claim because such claims may be brought under APA); Garza Marroquin v. Garcia Longoria, No. 5:20-CV-54, 2021 WL 1179008, at *2 (S.D. Tex. Mar. 29, 2021) (same).

19. *See infra* Section IV.B.

20. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.").

21. *See, e.g.*, Note, *Affirmative Duties in Immigration Detention*, 134 HARV. L. REV. 2486 (2021); Margaret H. Taylor, *Detained Aliens Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine*, 22 HASTINGS CONST. L.Q. 1087 (1995).

addressing unconstitutional conditions of confinement are not available to detained noncitizens, and Part IV explores a few potential alternative vehicles through which detained immigrants might consider bringing conditions claims.

I. THE REALITY OF MODERN IMMIGRATION DETENTION

The United States' outsize reliance on immigration detention is a relatively recent phenomenon. In the 1980s, fewer than 2,000 people were held in immigration detention nationwide.[22] The nation's reliance on immigration detention began to explode following the enactment of new criminal justice and immigration laws in the 1990s, as part of the same policies now widely recognized as fueling mass-incarceration of communities of color.[23] By the time Immigrations and Customs Enforcement (ICE) was created in 2003, it inherited an immigration detention system that already held about 20,000 people per day.[24] And still it continued to grow, ballooning to unprecedented size during the last three years of the Trump presidency, at times holding more than 55,000 people per day.[25] In fact, *on average*, ICE detained over 50,000 people each day in fiscal year 2019.[26] Including Customs and Border Protection (CBP) facilities, this number rose to around 80,000 people at a time.[27]

From 2017–2020, ICE opened over forty new detention centers, and by the end of 2019, over 25% of all detained immigrants were held in these new facilities—many of which are isolated from access

22. DORIS MEISSNER, DONALD M. KERWIN, MUZAFFAR CHISHTI & CLAIRE BERGERON, IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY 126 (2013), https://www.migrationpolicy.org/sites/default/files/publications/enforcementpillars.pdf.

23. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440(a), 110 Stat. 1214 (1996); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 133, 110 Stat. 3009 (1996).

24. ALISON SISKIN, CONG. RSCH. SERV., RL32369, IMMIGRATION-RELATED DETENTION: CURRENT LEGISLATIVE ISSUES 13 (2012), https://fas.org/irp/crs/RL32369.pdf.

25. *ICE Detainees*, *supra* note 5.

26. U.S. IMMIGR. & CUSTOMS ENF'T, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT FISCAL YEAR 2019 ENFORCEMENT AND REMOVAL OPERATIONS REPORT 5, https://www.ice.gov/sites/default/files/documents/Document/2019/eroReportFY2019.pdf (last accessed Nov. 17, 2022).

27. *Trump Administration: 80,000 People in ICE and CBP Detention Facilities*, DET. WATCH NETWORK (May 31, 2019), https://www.detentionwatchnetwork.org/pressroom/releases/2019/trump-administration-80-000-people-ice-cbp-detention-facilities.

to legal counsel.[28] As found in a recent study by the ACLU, Human Rights Watch, and the National Immigrant Justice Center, people held in these facilities have far less access to attorneys than people detained in facilities opened under previous administrations.[29] Indeed, four of the five ICE detention centers with the fewest local attorneys available opened under the Trump administration.[30] Among these are the Winn Correctional Center in Winnfield, Louisiana, which has one immigration attorney within 100 miles for every 234 people detained at the facility; the Richwood Correctional Center in Monroe, Louisiana, which has one immigration attorney within 100 miles for every 186 people detained at the facility; and the Jackson Parish Correctional Center in Jonesboro, Louisiana, which has one immigration attorney for every 153 people detained at the facility.[31]

Private prison companies operate not only the majority of these recently opened detention facilities, but most of the detention facilities in the nation.[32] As of January 2020, 91% of people imprisoned in the facilities opened after 2017, and a staggering 81% of people detained in ICE custody *nationwide*, were held in facilities owned or managed by private prison corporations.[33] Two of these corporations in particular—GEO Group and CoreCivic—receive over half of the private prison industry contracts for ICE detention.[34]

In pursuit of such profitability, the private prison industry has spent more than $25 million lobbying lawmakers and federal agencies over the past ten years, including $3.8 million in 2018 alone.[35] But cashing in on detention, as these businesses have seen, is a highly lucrative endeavor: contracts for ICE detention made up approximately 25% of both GEO Group's and CoreCivic's annual

28. CHO ET AL., *supra* note 7, at 4–5, 14.

29. *Id.* at 6 ("When comparing immigration detention facilities operating before 2017 to those opened after 2017, there are four times as many immigration attorneys available within a 100-mile radius of pre-existing facilities versus new ones."); *id.* at 20.

30. *Id.* at 20.

31. *Id.*

32. *Id.* at 17.

33. *Id.*

34. Livia Luan, *Profiting from Enforcement: The Role of Private Prisons in U.S. Immigration Detention*, MIGRATION POL'Y INST. (May 2, 2018), https://www.migrationpolicy.org/article/profiting-enforcement-role-private-prisons-us-immigration-detention.

35. Jesse Franzblau, *Phase Out of Private Prisons Must Extend to Immigration Detention System*, NAT'L IMMIGRANT JUST. CTR. (Jan. 28, 2021), https://immigrantjustice.org/staff/blog/phase-out-private-prisons-must-extend-immigration-detention-system.

revenue in fiscal years 2017–2020, totaling between $500–$700 million dollars in yearly revenue for each corporation.[36] For context, GEO Group and CoreCivic earned approximately the same amount of revenue from ICE detention contracts as they earned from Department of Justice (Bureau of Prisons and U.S. Marshals Service) contracts combined.[37]

The cost of maintaining this massive incarceration system is immense—and comes directly from taxpaying American citizens' pockets. According to ICE's fiscal year 2020 results (the most recent for which there is official data), on average immigration detention costs about $120 dollars, per person, per day.[38] Immigration advocates, however, have found such estimates to be low, as they often exclude significant payroll costs and other relevant ICE operational expenses.[39] Indeed, even under the agency's own methodology, ICE seems to persistently miscalculate costs. A recent report by the General Accountability Office concluded that "ICE consistently underestimated the actual bed rate due to inaccuracies in the model," and that "ICE's methods for estimating detention costs do not [constitute] . . . a reliable cost estimate."[40] Properly factored, the average daily cost is likely closer to $200 dollars per person.[41] This increases to around $319 dollars a day for family beds, which keep mothers and children together in a family residential center, and up to $775 a day for beds in certain "tent cities" along the border which hold unaccompanied children.[42] These costs skyrocket when totaling all detainees across the nation, many of whom are detained for months or even years

36. CHO ET AL., *supra* note 7, at 17.

37. Eunice Cho, *More of the Same: Private Prison Corporations and Immigration Detention Under the Biden Administration*, ACLU (Oct. 5, 2021), https://www.aclu.org/news/immigrants-rights/more-of-the-same-private-prison-corporations-and-immigration-detention-under-the-biden-administration/.

38. U.S. IMMIGR. & CUSTOMS ENF'T, BUDGET OVERVIEW, FISCAL YEAR 2021, CONGRESSIONAL JUSTIFICATIONS 7 (2020), https://www.dhs.gov/sites/default/files/publications/u.s._immigration_and_customs_enforcement_0.pdf.

39. Laurence Benenson, *The Math of Immigration Detention, 2018 Update: Costs Continue to Multiply*, NAT'L IMMIGR. F. (May 9, 2018), https://immigrationforum.org/article/math-immigration-detention-2018-update-costs-continue-mulitply/.

40. *Immigration Detention: Opportunities Exist to Improve Cost Estimates*, GAO (Apr. 18, 2018), https://www.gao.gov/products/gao-18-343.

41. Benenson, *supra* note 39.

42. Jaden Urbi, *This Is How Much It Costs to Detain an Immigrant in the US*, CNBC (June 20, 2018), https://www.cnbc.com/2018/06/20/cost-us-immigrant-detention-trump-zero-tolerance-tents-cages.html.

before release. For comparison, the U.S. spends only a fraction of this per capita on public education—about $36 per pupil, per day.[43]

Yet due to successful private lobbying efforts and ICE's multi-year tactic of overspending appropriated funds and then requesting increased funding for the next year, Congress increased ICE's detention operations budget by 23% from 2017–2019 to a grand sum of $3.2 billion dollars.[44] Budget allotments have stayed at similar levels since.

Because the Biden administration has issued interior immigration enforcement priorities which have reduced ICE arrests in the U.S. and has continued to rely upon policies such as Migrant Protection Protocols (MPP)[45] and Title 42 expulsions[46] to increasingly shutter-off the border, the average number of people ICE currently detains hovers around 25,000.[47] But this doesn't

43. *See Public School Spending Per Pupil Increases by Largest Amount in 11 Years*, U.S. CENSUS BUREAU (May 18, 2021), https://www.census.gov/newsroom/press-releases/2021/public-school-spending-per-pupil.html.

44. CHO ET AL., *supra* note 7, at 16.

45. While the Biden administration made attempts to dismantle MPP, litigation brought by the states of Texas and Missouri resulted in the forced re-implementation of the program. *See Featured Issue: Migrant Protection Protocols (MPP)*, AM. IMMIGR. LAWS. ASS'N (Mar. 7, 2022), https://www.aila.org/advo-media/issues/all/port-courts. At the same time, the Administration expanded MPP to include more migrants than the original policy. U.S. COMM. FOR REFUGEES AND IMMIGRANTS, MIGRANT PROTECTION PROTOCOLS (MPP) TIMELINE (2022), https://refugees.org/wp-content/uploads/2022/03/MPP-TimelineFinal.pdf. Finally, on June 30, 2022, the Supreme Court ruled that the Biden administration's rescission of the program did not violate federal law, *Biden v. Texas*, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/biden-v-texas-2/, and the program was officially wound down, *see Featured Issue: Migrant Protection Protocols (MPP): Current State of Play*, AM. IMMIGR. LAWS. ASS'N (Oct. 7, 2022), https://www.aila.org/advo-media/issues/port-courts#:~:text=In%20short%2C%20MPP%20is%20over,least%20one%20government%20attorney%20reportedly.

46. Although the Biden administration announced on April 1, 2022, that it would end the expulsion policy in May, *Statement by Secretary Mayorkas on CDC's Title 42 Order Termination*, DEP'T OF HOMELAND SEC. (Apr. 1, 2022), https://www.dhs.gov/news/2022/04/01/statement-secretary-mayorkas-cdcs-title-42-order-termination, opposition to the announcement was strong. On April 21, 2022, twenty-one states filed a motion for a temporary restraining order in the U.S. District Court for the Western District of Louisiana to block the Biden administration from ending the policy. Priscilla Alvarez, *More Than 20 States Ask Judge to Immediately Block Biden from Ending Title 42*, CNN (Apr. 21, 2022, 3:09 PM), https://www.cnn.com/2022/04/21/politics/biden-title-42-lawsuit/index.html. The court ruling has kept Title 42 in place indefinitely, and the Biden Administration most recently announced an *expansion* of the program to expel Venezuelans to Mexico who arrive at the southern border. Adam Isacson, *Weekly U.S.-Mexico Border Update: Title 42 for Venezuelans, Darién Gap, Foreign Ministers, Mexico Militarization, Texas*, WOLA (Oct. 14, 2022), https://www.wola.org/2022/10/weekly-u-s-mexico-border-update-title-42-for-venezuelans-darien-gap-foreign-ministers-mexico-militarization-texas/.

47. *ICE Detainees*, *supra* note 5.

necessarily translate into savings for the Biden administration or the American people. Because of the way ICE structures its contracts with private prison companies and localities that own and operate detention centers, the agency guarantees it will pay for a minimum number of beds whether they are filled or not.[48] This ensures that for-profit entities like GEO Group and CoreCivic continue to thrive.

To further maximize profits in the face of high operational expenses, private prison corporations are incentivized to cut costs wherever possible. Not surprisingly, this often translates to poor quality of care. One of private prison companies' primary approaches to controlling spending is to maintain a smaller staff, lower staff benefits, and lower salaries than publicly run facilities.[49] Staff shortages and failure to provide adequate medical care in private immigration detention facilities are well documented,[50] including by the Department of Homeland Security (DHS) itself.[51]

48. Joel Rose, *Beyond the Border, Fewer Immigrants Being Locked Up But ICE Still Pays for Empty Beds*, NPR (Apr. 1, 2021, 5:00 AM), https://www.npr.org/2021/04/01/982815269/beyond-the-border-fewer-immigrants-being-locked-up-but-ice-still-pays-for-empty- ("For dozens of detention centers across the country with these 'guaranteed minimums,' ICE pays more than $1 million a day for empty detention beds . . . .").

49. Kara Gotsch & Vinay Basti, *Capitalizing on Mass Incarceration: U.S. Growth in Private Prisons*, THE SENT'G PROJECT (Aug. 2, 2018), https://www.sentencingproject.org/publications/capitalizing-on-mass-incarceration-u-s-growth-in-private-prisons/.

50. *E.g.*, Elly Yu, *Exclusive: An ICE Detention Center's Struggle with 'Chronic' Staff Shortages*, WABE (May 31, 2018), https://www.wabe.org/exclusive-an-ice-detention-centers-struggle-with-chronic-staff-shortages/ ("One of the country's largest immigration detention centers [operated by CoreCivic] had no psychiatrist on staff, 'chronic shortages' of almost all medical positions and was described by its own staff as a 'ticking bomb' because noncriminal detainees were mixed with high-security offenders."); Julia Ainsley & Jacob Soboroff, *Nearly Half the Employees at an Arizona ICE Detention Center Have Tested Positive for COVID-19*, NBC NEWS (July 8, 2020, 3:00 AM), https://www.nbcnews.com/politics/immigration/nearly-half-employees-arizona-ice-detention-center-have-tested-positive-n1233101 ("[A] shortage of staff has left detainees in their cells without access to showers, laundry, and other necessities."); Erica Bryant, *ICE's Deadly Practice of Abandoning Immigrants with Disabilities and Mental Illnesses on the Street*, VERA (Sept. 2021), https://www.vera.org/ices-deadly-practice-of-abandoning-immigrants-with-disabilities-and-mental-illnesses-on-the-street (reporting that "[i]n 2020, the U.S. House Committee on Oversight and Reform and Subcommittee on Civil Rights and Civil Liberties analyzed internal . . . [DHS] reports examining the deaths of people detained in ICE facilities run by private contractors." These reports detailed "critical medical staff shortages and a widespread failure to provide necessary medical care to people with serious and chronic medical conditions.").

51. OFF. OF INSPECTOR GEN., DEP'T OF HOMELAND SEC., OIG-22-03, MANY FACTORS HINDER ICE'S ABILITY TO MAINTAIN ADEQUATE MEDICAL STAFFING AT DETENTION FACILITIES (2021), https://www.oig.dhs.gov/sites/default/files/assets/2021-11/OIG-22-03-Oct21.pdf.

Those corrections officers which private corporations *do* employ earn far less than others, up to $23,850 less on average in annual salary compared to those employed in the public sector.[52]

For all of these reasons, conditions of confinement issues abound in immigration detention. Even before the COVID-19 pandemic, congressional committees and advocacy groups alike regularly reported on the disturbing realities of inadequate care in immigration detention facilities. For example, a recent investigation by the House Homeland Security Committee of eight private and county-run ICE detention facilities "confirm[ed] that ICE does not do enough to ensure that its own standards of confinement are met" and "revealed ongoing problems with cleanliness, use of segregation, and access to legal and language services."[53] The report detailed patterns of abuse, including guards threatening to lock detainees in solitary confinement in retaliation for making too many complaints or medical requests, medical staff ignoring hundreds of sick calls by detainees and failing to provide immigrants with chronic conditions routine care, and facilities employing guards who were previously convicted for covering up use-of-force incidents.[54] The ACLU, Human Rights Watch, and the National Immigrant Justice Center have reported similar findings in other detention facilities, including seriously deficient or nonexistent legal libraries required by ICE's own detention standards, inability to access critical case information from ICE officers, and officers tricking detained immigrants into signing away their rights to hearings or for their deportations.[55]

Other examples saturate the news. In 2020, over forty women joined a legal petition alleging they were victims of forced sterilization and other invasive and unnecessary medical procedures while in ICE custody in Georgia.[56] Another lawsuit

52. Gotsch & Basti, *supra* note 49.

53. Nick Miroff, *Immigrant Detainees Get Poor Medical Care, Face Retaliation for Speaking Out, According to Democrat-led Report*, WASH. POST (Sept. 21, 2020, 4:02 PM), https://www.washingtonpost.com/immigration/ice-detainees-health-care-report/2020/09/21/270a64f4-fc1e-11ea-830c-a160b331ca62_story.html.

54. STAFF OF H.R. COMM. ON HOMELAND SEC., ICE DETENTION FACILITIES: FAILING TO MEET BASIC STANDARDS OF CARE (2020), https://homeland.house.gov/imo/media/doc/Homeland%20ICE%20facility%20staff%20report.pdf.

55. *See generally* CHO ET AL., *supra* note 7.

56. Victoria Bekiempis, *More Immigrant Women Say They Were Abused by ICE Gynecologist*, THE GUARDIAN (Dec. 22, 2020, 11:40 AM), https://www.theguardian.com/us-news/2020/dec/22/ice-gynecologist-hysterectomies-georgia.

by women detained in a Texas immigration facility alleged guards sexually assaulted victims in camera "blind spots" and told them that "no one would believe" them because footage did not exist. In this case, the harassment involved officers as high-ranking as lieutenant.[57]

Notwithstanding these disturbing issues, there is no federal statute that explicitly sets forth the standard for conditions of immigration detention.[58] While ICE has published nationwide detention standards,[59] these aren't strictly binding on the agency and are implemented through individually negotiated contracts which lead to varying degrees of protection across detention facilities.[60] Furthermore, there is often no real penalty for violations of these contracts; ICE continues to utilize facilities that demonstrate a pattern of violating detention standards. For example, in 2014, the Office of Detention Oversight (ODO)[61] conducted an inspection of the Adelanto Detention Facility in California. It identified noncompliance with eleven of seventeen detention standards reviewed, including deficiencies in the areas of food service, funds and personal property, the grievance system, law libraries, legal materials, sexual abuse, assault prevention and intervention, and telephone access.[62] In 2015 and 2017, the DHS Office of Civil Rights and Civil Liberties likewise found major violations that could lead to the injury of those in custody, and then again in 2018, the DHS Office of the Inspector General (OIG) found unsafe conditions with nooses hanging in housing units, improper

57. Lomi Kriel, *ICE Guards "Systematically" Sexually Assault Detainees in an El Paso Detention Center, Lawyers Say*, TEX. TRIB. (Aug. 14, 2020), https://www.texastribune.org/2020/08/14/texas-immigrant-detention-ice-el-paso-sexual-abuse/.

58. *Affirmative Duties*, *supra* note 21, at n.58 ("[N]either the INA nor its implementing regulations currently provide any specific standards for the conditions of confinement."); *see also* HILLEL R. SMITH, CONG. RSCH. SERV., R45915, IMMIGRATION DETENTION: A LEGAL OVERVIEW 47 (2019), https://fas.org/sgp/crs/homesec/R45915.pdf [https://perma.cc/L4YZ-8QZG].

59. *E.g.*, U.S. IMMIGR. & CUSTOMS ENF'T , NATIONAL DETENTION STANDARDS FOR NON-DEDICATED FACILITIES (2019), https://www.ice.gov/doclib/detention-standards/2019/nds2019.pdf.

60. *Affirmative Duties*, *supra* note 21, at n.60.

61. The Office of Detention Oversight is an entity within U.S. Immigration and Customs Enforcement (ICE), which is the agency responsible for detaining and prosecuting immigrants in immigration court. *See* U.S. IMMIGR. AND CUSTOMS ENF'T, OFFICE OF DETENTION OVERSIGHT INSPECTIONS 2 (2022), https://www.dhs.gov/sites/default/files/2022-05/ICE%20-%20Office%20of%20Detention%20Oversight%20Inspections.pdf.

62. STAFF OF H.R. COMM. ON HOMELAND SEC., *supra* note 54, at 11–12.

use of solitary confinement, and untimely and inadequate medical care.[63] Yet ICE continues to cooperate with this and other facilities that routinely disregard contractual standards.

And sometimes ICE will even waive compliance outright for facilities that cannot meet specific ICE standards.[64] For example, ICE's standards only permit strip searches to take place under limited circumstances. However, ICE provided the Worcester County Detention Center in Maryland a waiver to permit detainees to undergo full strip searches any time they leave the facility (e.g., for a court appearance).[65] This was simply because the warden did not want ICE detainees treated differently than the convicted county inmates held at the facility.[66]

Given the expansion in immigration detention, the increasing privatization of detention, and the troubling human rights issues the detention system allows to proliferate, litigation is vital at this time to ensure that detained immigrants are protected from unconstitutional confinement and to hold detention facilities accountable for the harms they inflict.

II. THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT PROTECTS DETAINED NONCITIZENS FROM PUNITIVE DETENTION CONDITIONS

Under the Fifth Amendment to the Constitution, all persons within the boundaries of the United States have the right to be free from deprivation "of life, liberty, or property, without due process of law."[67] In principle, this guarantee extends to *all*, regardless of citizenship.[68] However, its applicability to noncitizens is not as clear as might appear at first glance—two competing frameworks exist for governing noncitizens' constitutional rights in the U.S.

The first is the plenary power doctrine, under which courts grant broad and near-exclusive deference to political branches on

63. *Id.* at 12.

64. OFF. OF INSPECTOR GEN., OIG-18-67, ICE'S INSPECTIONS AND MONITORING OF DETENTION FACILITIES DO NOT LEAD TO SUSTAINED COMPLIANCE OR SYSTEMIC IMPROVEMENTS 11, 13–14 (2018), https://www.oig.dhs.gov/sites/default/files/assets/2018-06/OIG-18-67-Jun18.pdf; STAFF OF H.R. COMM. ON HOMELAND SEC., *supra* note 54, at 12.

65. STAFF OF H.R. COMM. ON HOMELAND SEC., *supra* note 54, at 12.

66. *Id.*

67. U.S. CONST. amend. V.

68. *E.g.*, Mathews v. Diaz, 426 U.S. 67, 77 (1976) ("There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons . . . .").

decisions to admit or exclude noncitizens—or in other words, on claims relating to immigration law.[69] Yet this doctrine has existed since its inception alongside cases that *do* provide constitutional protections to noncitizens—as "persons" protected under the Constitution—when their claims do not directly relate to the immigration laws.[70] These cases make up what scholars have termed the "aliens' rights tradition."[71] As scholars have pointed out, these frameworks are meant to govern different spheres, but the boundary is not always clear,[72] especially when the remedy sought—such as parole into the U.S. or relief from removal—seems to interfere with the government's plenary control over immigration.[73] While there are still some cases that have withheld constitutional protections from noncitizens even when their claims fall outside of the immigration context,[74] "the aliens' rights tradition generally marks a domain where courts 't[ake] th[e] constitutional claims [of noncitizens] seriously, in contrast to the cavalier treatment of constitutional claims in immigration law.'"[75]

Because this Note focuses on challenges to detention conditions, and not the execution of immigration laws which falls under Congress's plenary power, the aliens' rights tradition—at least in theory—should govern such claims. As such, this section will proceed by analyzing Supreme Court and Fifth Circuit caselaw

69. *Affirmative Duties*, *supra* note 21.

70. T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 AM. J. INT'L L. 862, 865 (1989) ("Outside the immigration process, aliens receive most of the constitutional protections afforded citizens."); *see also* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 565 (1990); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, SUP. CT. REV. 255, 256 (1984).

71. *Id.*; *see also* Taylor, *supra* note 21, at 1091–92.

72. *Affirmative Duties*, *supra* note 21; Taylor, *supra* note 21, at 1091–92.

73. *See, e.g.*, Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1628–30, 1665–69 (1992) (highlighting cases in the "gray area" where the outcome may differ based on whether the court characterizes the claim as a "substantive" challenge to the government's decision to admit or expel or a "procedural" challenge to the manner in which such decision is made).

74. *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 274–75 (1990) (holding that the Fourth Amendment does not apply to a search by American officials of the Mexican residence of a Mexican citizen detained within the United States); Mathews v. Diaz, 426 U.S. 83–84 (1976) (upholding federal law denying Medicare benefits to certain noncitizens); Flemming v. Nestor, 363 U.S. 603, 621 (1960) (upholding a provision of the Social Security Act which cut off benefits to noncitizens deported for past membership in the Communist party).

75. Taylor, *supra* note 21, at 1092 (quoting Motomura, *supra* note 70, at 574).

outlining noncitizens' due process rights under the Constitution insofar as these courts have ruled on the matter so far.

A. Supreme Court Overview

In 1995, Professor Margaret Taylor observed that "[o]nly a handful of reported cases have decided the due process challenges to conditions of confinement suffered by alien detainees."[76] This still holds true today—while the Supreme Court has generally addressed challenges to the *duration* of immigration detention, it has almost entirely avoided addressing challenges to the *conditions* of confinement.[77] Nonetheless, a few guiding principles have emerged.

The Supreme Court has clarified that a noncitizen detained for immigration purposes is the equivalent of a "pretrial detainee" whose constitutional claims are considered under the "Due Process Clause rather than the Eighth Amendment."[78] Because

> [f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects[,] . . . government detention violates that Clause unless the detention is ordered in a criminal proceeding with adequate procedural protections . . . or, in certain special and "narrow" *nonpunitive* "circumstances" . . . where a *special justification*, such as harm-threatening mental illness, outweighs the "individual's constitutionally protected interest in avoiding physical restraint.[79]

This turns out to be a crucial distinction: unlike criminal detainees who can be detained and punished as long as that punishment is not "cruel and unusual,"[80] immigration detainees can only be detained insofar as the detention is (or the conditions of detention are) not punitive. While the Supreme Court has decided that immigration detention qualifies as a special

76. *Id.*

77. Smith, *supra* note 58, at 47–48; Anshu Budhrani, *Regardless of My Status, I Am a Human Being: Immigrant Detainees and Recourse to the Alien Tort Statute*, 14 U. PA. J. CONST. L. 781, 793 (2012) ("The Supreme Court has not really addressed this issue, and those circuit courts that have are not in perfect alignment with one another.").

78. Bell v. Wolfish, 441 U.S. 520, 535 n.16 (1979).

79. Zadvydas v. Davis, 533 U.S. 678, 690 (2001) (citing, *inter alia*, Foucha v. Louisiana, 504 U.S. 71, 80 (1992)) (emphasis and internal citations omitted) (different emphasis added).

80. *See* U.S. CONST. amend. VIII.

justification, and thus by itself does not qualify as punishment,[81] it has likewise acknowledged that when the government restrains individuals' freedom through detention, it assumes an "affirmative duty to protect" their wellbeing and provide for their basic needs, including medical care and reasonable safety.[82] It "transgresses the substantive limits on state action set by the . . . Due Process Clause" for the government to take away an individual's freedom to care for himself or herself and at the same time fail to protect his or her liberty interests and basic needs.[83]

Thus, in sum, since civil detainees (including noncitizens) are "entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish,"[84] civil detention is permitted only insofar as it is "nonpunitive in purpose and effect."[85] Where the conditions "amount to punishment," the government has violated the due process rights of the civil detainee.[86]

However, these pronouncements alone do not provide guidance on how a noncitizen is to bring a claim alleging unconstitutional punishment, or the standards under which such claims are analyzed. On these questions, two Supreme Court cases—*Kennedy v. Mendoza-Martinez* and *Bell v. Wolfish*—are instructive.

1. Kennedy v. Mendoza-Martinez

In *Kennedy v. Mendoza-Martinez*, the Supreme Court examined the automatic forfeiture-of-citizenship provisions of the immigration laws to determine whether that sanction amounted to unconstitutional punishment or a mere regulatory restraint.[87] The petitioner in the case was a natural-born citizen of the United States who also had dual citizenship status with Mexico, and in 1942, he moved to Mexico to evade the draft.[88] After returning to the United

81. *Bell*, 441 U.S. at 537 ("[T]he fact that such detention interferes with the detainee's understandable desire to live as comfortably as possible and with as little restraint as possible during confinement does not convert the conditions or restrictions of detention into 'punishment.'").
82. DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 200 (1989).
83. *Id.*
84. Youngberg v. Romeo, 457 U.S. 307, 322 (1982).
85. Zadvydas v. Davis, 533 U.S. 678, 690 (2001).
86. *Bell*, 441 U.S. at 535.
87. Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963).
88. *Id.* at 147.

States, the petitioner spent a year in prison.[89] Years after his release, he was ordered deported on the grounds that the Selective Training and Service Act of 1940 (as amended by the Immigration and Nationality Act of 1952) divested draft evaders of their U.S. citizenship automatically and without any prior judicial or administrative proceedings.[90] After appeals all the way up to the Supreme Court, the Court ruled in Mendoza-Martinez's favor, holding that the civil penalty statutes were unconstitutional because they were "essentially penal in character" and would inflict severe punishment without due process of law and without the procedural safeguards that must attend criminal prosecutions under the Fifth and Sixth Amendments.[91]

In making this determination, the Court collected a list of tests traditionally applied in determining whether a civil penalty imposed by the government amounts to unconstitutional punishment that cannot be imposed prior to a determination of guilt. The following, the Court held, "are all relevant to the inquiry"[92]:

> [1] Whether the sanction involves an affirmative disability or restraint, [2] whether it has historically been regarded as a punishment[,] [3] whether it comes into play only on a finding of *scienter*, [4] whether its operation will promote the traditional aims of punishment—retribution and deterrence, [5] whether the behavior to which it applies is already a crime, [6] whether an alternative purpose to which it may rationally be connected is assignable for it, and [7] whether it appears excessive in relation to the alternative purpose assigned . . . .[93]

In *Mendoza-Martinez*, the Court found that there was conclusive and irrefutable evidence of congressional intent to punish, and therefore, that it was unnecessary to make a detailed, factor-by-factor examination.[94] However, it also made clear that absent such

89. *Id.*
90. *Id.* at 148.
91. *Id.* at 149, 159–86 (internal quotation marks omitted).
92. *Id.* at 169.
93. *Id.* at 168–69 (footnotes omitted).
94. *Id.* at 169 ("Here, although we are convinced that application of these criteria to the face of the statutes supports the conclusion that they are punitive, a detailed examination along such lines is unnecessary, because the objective manifestations of congressional purpose indicate conclusively that the provisions in question can only be interpreted as punitive.").

clear and conclusive evidence of intent to punish, the above factors "*must* be considered in relation to the statute on its face."[95]

2. Bell v. Wolfish

Sixteen years after deciding *Mendoza-Martinez*, the Supreme Court heard another case about unconstitutional punishment, this time in the context of whether certain conditions or restrictions of pretrial detention amounted to punishment of the detainee.[96] Although the Court began its analysis by invoking *Mendoza-Martinez* and its traditional tests for determining whether a governmental act is punitive, the *Bell* Court appeared to limit the applicability of the tests to the situation at hand, writing that those factors merely "provide *useful guideposts* in determining whether particular restrictions and conditions accompanying pretrial detention amount to punishment in the constitutional sense of that word."[97] Instead, honing in on the final two *Mendoza-Martinez* factors, the Court held that the key inquiry in a case alleging punitive civil detention conditions is "whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose."[98] Absent express intent to punish, the Court explained, if the condition or restriction is "reasonably related to a legitimate governmental objective, it does not, without more, amount to 'punishment.'"[99] Conversely, if the condition of detention is "arbitrary or purposeless[,]"[100] or if it "appears excessive in relation to the alternative purpose assigned to it[,]"[101] it likely "support[s] a conclusion that the purpose for which [it] w[as] imposed was to punish."[102]

95. *Id.* at 169 (emphasis added).
96. Bell v. Wolfish, 441 U.S. 520 (1979).
97. *Id.* at 538 (emphasis added).
98. *Id.*
99. *Id.* at 539.
100. *Id.*
101. *Id.* at 538 (citing Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168–169 (1963)).
102. *Id.* at 539 n.20 ("[L]oading a detainee with chains and shackles and throwing him in a dungeon may ensure his presence at trial and preserve the security of the institution. But it would be difficult to conceive of a situation where conditions so harsh, employed to achieve *objectives that could be accomplished in so many alternative and less harsh methods*, would not support a conclusion that the purpose for which they were imposed was to punish.") (emphasis added).

However, as much as *Bell v. Wolfish* added clarity to the framework for challenging punitive detention conditions, it also created more questions. While there are significant differences between *Mendoza-Martinez* and *Bell*,[103] the *Bell* Court's explanation that the *Mendoza-Martinez* tests are only partially applicable seems particularly lacking.[104] First, as Justices Marshall, Stevens, and Brennan pointed out in their dissenting opinions, by narrowing the *Mendoza-Martinez* framework to focus on detention officials' intent to punish, the Court departed from settled Due Process analysis precedent[105] without explanation of why it did so and waded into "the far more permissive terms of equal protection and Eighth Amendment analysis."[106]

Second, as mentioned above, the *Bell* Court dedicated various paragraphs to its decision in *Mendoza-Martinez*, including a quotation of its enumeration of the traditional tests applied "to determine whether a governmental act is punitive in nature[.]"[107] However, within a few lines of quoting the tests, the Court narrowed the relevant standard to merely the final two *Mendoza-Martinez* factors.[108] While the Court could, and arguably should, have attempted to draw out the factual differences between the cases to justify or explain its choice here, it did almost the opposite, using general language seeming to suggest the wider applicability of the *Mendoza-Martinez* factors in related cases outside the specific facts of that case. For example, citing *Mendoza-Martinez*, the *Bell* Court wrote that it "ha[d] recognized a distinction between punitive measures that may not constitutionally be imposed prior to a determination of guilt and regulatory restraints that may."[109]

103. For example, *Mendoza-Martinez* (a) dealt factually with determining whether acts of Congress, as opposed to detention center conditions or practices, were unconstitutionally penal, and (b) was based on procedural due process instead of substantive due process rights as in *Bell*. Additionally, *Bell* was a case involving *criminal* pretrial detainees, not *noncitizen* pretrial detainees.

104. *See Bell*, 441 U.S. at 537–39; *see also, e.g.*, *id.* at 563–79 (Marshall, J., dissenting) (criticizing the majority's departure from *Mendoza-Martinez* and Due Process precedent, and "[c]onspicuous[] lack[] from this analysis . . . [of] any meaningful consideration of the most relevant factor, the impact that restrictions may have on inmates.").

105. *Id.* at 564 (Marshall, J., dissenting) ("[A]s with other due process challenges, the inquiry should be whether the governmental interests served by any given restriction outweigh the individual deprivations suffered.").

106. *Id.* at 586 (Stevens, J. and Brennan, J., dissenting).

107. *Id.* at 537.

108. *Id.* at 538.

109. *Id.* at 537.

The Court did not state that it only recognized that distinction in punitive measures imposed *by Congress* (as *Mendoza-Martinez* dealt with), but rather, asserted the principle generally. Likewise, when further explaining this distinction, the *Bell* Court articulated the *Mendoza-Martinez* tests as those "traditionally applied to determine whether a *governmental act* is punitive in nature[.]"[110] Here as well, the Court's language was broad and inclusive—it did not state that the tests are used to determine whether an *act of Congress* is punitive in nature, but instead, simply governmental acts in general.

Furthermore, although it did not proceed to consider any of the remaining factors in its decision, the *Bell* Court explicitly stated that the *Mendoza-Martinez* factors were all "useful guideposts" in determining whether certain restrictions and conditions of pretrial detention amount to unconstitutional punishment,[111] suggesting that they remain potentially persuasive considerations.

Nonetheless, the rest of the *Mendoza-Martinez* factors have gone largely—if not entirely—uncited and unanalyzed in contemporary cases by advocates and courts alike. Yet (and notwithstanding the *Bell* Court's more narrow construction of the legal standard for challenges to punitive conditions of detention), it appears that the remainder of the *Mendoza-Martinez* factors are still good (albeit not determinative) law, which claimants may still consider using to analyze the facts of their claim in addition to the two emphasized in *Bell*.

In addition to the unclear applicability of *Mendoza-Martinez* after *Bell*, *Bell* likewise left the scope of many key words and phrases—such as what constitutes "punishment" or "legitimate governmental purposes"—undefined. Because the Supreme Court has offered very little guidance on the framework governing *noncitizens'* constitutional challenges to conditions of immigration confinement, lower courts have been forced to take on these questions by looking to caselaw governing similar claims by prisoners and other pretrial detainees.[112]

110. *Id.* (emphasis added).

111. *Id.* at 538.

112. *See, e.g.*, Daniel Hatoum, *Abolition of Immigrant Family Detention: Tracing an Evolving Standard of Decency from Separation through Imprisonment*, 47 HOFSTRA L. R. 1229, 1267 (2019) (explaining why courts often rely on Eighth Amendment jurisprudence in deciding Fifth Amendment conditions claims).

B. Fifth Circuit Overview

Like at the Supreme Court, most of the caselaw at the Fifth Circuit pertaining to challenges to conditions of confinement comes from cases dealing with criminal pretrial detainees. In the Fifth Circuit, the base *Bell* test remains essentially the same, beginning with a two-part inquiry. First, if there is a showing of expressed intent to punish on the part of detention facility officials or the government, that punishment violates the noncitizen detainee's due process rights and is therefore unlawful.[113] *Absent* a showing of an expressed intent to punish, that determination generally will turn on whether the disputed unlawful condition of detention is "reasonably related to a legitimate, non-punitive governmental objective."[114] At this level of the analysis, the Fifth Circuit has specified that demonstrating actual intent to punish is no longer required.[115] If the condition of detention is not reasonably related to a legitimate governmental objective—if it is "arbitrary or purposeless[,]"[116] or it "appears excessive in relation to the alternative purpose assigned to it[,]"[117]—it "support[s] a conclusion that the purpose for which [it] w[as] imposed was to punish."[118]

For a noncitizen immigration detainee to prevail on a claim of unconstitutional conditions of confinement *absent* a showing of an expressed intent to punish, he or she must prove:

> (1) "a rule or restriction or . . . the existence of an identifiable intended condition or practice . . . [or] that the jail official's acts or

113. *See Bell*, 441 U.S. at 538; *id.* at 539 n.20.

114. Scott v. Moore, 114 F.3d 51, 53 (5th Cir. 1997) (en banc) (citing Hare v. City of Corinth, 74 F.3d 633, 640 (5th Cir. 1996) (en banc)).

115. *Hare*, 74 F.3d at 644–45 ("[I]n such cases . . . the jail officials' state of mind is not a disputed issue . . . . [A]n avowed or presumed intent by the State or its jail officials exists in the form of the challenged condition, practice, rule, or restriction . . . . Thus, a true jail condition case starts with the assumption that the State intended to cause the pretrial detainee's alleged constitutional deprivation. . . . ") ("[E]ven where a State may not want to subject a detainee to inhumane conditions of confinement or abusive jail practices, its intent to do so is nevertheless presumed when it incarcerates the detainee in the face of such known conditions and practices.").

116. *Bell*, 441 U.S. at 539.

117. *Id.* at 538 (citing Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168–169 (1963)).

118. *See Bell*, 441 U.S. at 539 n.20 ("[L]oading a detainee with chains and shackles and throwing him in a dungeon may ensure his presence at trial and preserve the security of the institution. But it would be difficult to conceive of a situation where conditions so harsh, employed to achieve *objectives that could be accomplished in so many alternative and less harsh methods*, would not support a conclusion that the purpose for which they were imposed was to punish.") (emphasis added).

> omissions were sufficiently extended or pervasive"; (2) which was not reasonably related to a legitimate governmental objective; and (3) which caused the violation of [the detainee's] constitutional rights.[119]

The following subsections discuss the main aspects of this test.

1. Sufficiently Prevalent

To show that a condition of confinement is unlawful, claimants must prove that the complained-of condition or practice is sufficiently prevalent. In the Fifth Circuit, a challenged punitive condition of confinement may take the form of "a rule[,]" a "restriction[,]" "an identifiable intended condition or practice[,]" or "acts or omissions" by a jail official that are "sufficiently extended or pervasive."[120] A condition "may reflect an unstated or *de facto* policy, as evidenced by a pattern of acts or omissions 'sufficiently extended or pervasive, or otherwise typical of extended or pervasive misconduct by [jail] officials, to prove an intended condition or practice.'"[121] However, this is a more stringent standard than may appear at first glance—according to the Fifth Circuit, "[i]solated examples of illness, injury, or even death, standing alone, cannot prove that conditions of confinement are constitutionally inadequate . . . ."[122] Instead, there must be "a *pervasive pattern* of serious deficiencies in providing for [detainees'] basic human needs; any lesser showing cannot prove punishment in violation of the detainee's Due Process rights."[123] And as the Fifth Circuit has stated, "[p]roving a pattern is a heavy burden, one that has rarely been met in [its] caselaw."[124]

119. Duvall v. Dallas Cnty., 631 F.3d 203, 207 (5th Cir. 2011) (first alteration in original) (quoting *Hare*, 74 F.3d at 645).

120. Estate of Henson v. Wichita Cnty., 795 F.3d 456, 468 (5th Cir. 2015) (quoting *Duvall*, 631 F.3d at 207).

121. Shepherd v. Dallas Cnty., 591 F.3d 445, 452 (5th Cir. 2009) (quoting *Hare*, 74 F.3d at 645).

122. *Duvall*, 631 F.3d at 208 (quoting *Shepherd*, 591 F.3d at 454).

123. *Shepherd*, 591 F.3d at 454 (emphasis added).

124. *Id.* at 452; *compare, e.g.*, *Shepherd*, 591 F.3d at 450, 453–54 (finding that pretrial detainee's "extensive evidence" presented at trial, including "a comprehensive evaluative report commissioned by the County, [a] DOJ report, affidavits from employees of the jail and its medical contractor attesting to the accuracy and applicability of the reports, and a plethora of additional documentary evidence[,]" was sufficient to establish the existence of an unlawful condition in the inadequate treatment he received in a series of interactions with the jail's medical system which inevitably led to his suffering a stroke), *with* Cadena v. El Paso Cnty., 946 F.3d 717, 728 (5th Cir. 2020) (finding that where a pretrial detainee who was

Indeed, if a detainee is unable to show that an alleged condition is sufficiently widespread or pervasive, the Fifth Circuit analyzes the claim under an alternate framework. As the Court held in *Hare v. City of Corinth*,[125] "the *Bell* [conditions] test retains vitality only when a pretrial detainee attacks general conditions, practices, rules, or restrictions of pretrial confinement." By contrast, when "a pretrial detainee's claim is based on a jail official's *episodic acts or omissions*, the *Bell* test is inapplicable, and hence the proper inquiry is whether the official had a culpable state of mind in acting or failing to act."[126]

For example, in *Scott v. Moore*,[127] a pretrial detainee brought a conditions claim over a sexual assault which the detainee argued was the result of constitutionally inadequate staffing. However, the Fifth Circuit held that such an incidence could not be classified as a conditions claim, because the detainee suffered from an individual's specific act—the assault—committed on a single occasion.[128] Similarly, in *Sibley v. Lemaire*,[129] the court held that the lawsuit of a mentally disturbed detainee who had been allowed to pluck out his eyeballs while left alone and shackled—although such shackling was commonplace—was not properly classified as a condition of confinement, but rather, an episodic act or omission.[130] Other cases have held similarly.

2. More Than a de Minimis Violation

Furthermore, in addition to showing that a condition of confinement is sufficiently widespread, claimants must show that the

injured while forced to carry both her crutches and her food tray, but had "identified only one other instance in which an inmate on crutches was allegedly required to carry a food tray and only three other instances in which inmates filed grievances alleging delayed medical care[,]" failed to establish sufficiently extended or pervasive conditions of confinement).

125. *Hare*, 74 F.3d at 643.

126. *Id.* (emphasis added). In such a case, "the episodic act or omission of a state jail official does not violate a pretrial detainee's constitutional right to be secure in his basic human needs, such as medical care and safety, unless the detainee demonstrates that the official acted or failed to act with *deliberate indifference* to the detainee's needs." *Id.* at 647–48 (emphasis added).

127. Scott v. Moore, 114 F.3d 51 (5th Cir. 1997).

128. *Id.* at 53–54.

129. Sibley v. Lemaire, 184 F.3d 481 (5th Cir. 1999).

130. *Id.* at 487–88.

challenged condition is more than a *de minimis* violation.[131] Generally, the Fifth Circuit has required fairly significant violations in order to rise above this threshold, such as where: "*serious injury and death* [a]re the inevitable results of the [institution's] *gross inattention* to the needs of inmates with chronic illness[;]"[132] a specific rule or policy "caused . . . *extreme suffering* or resulted in *adverse medical outcomes serious enough* to establish a constitutional violation[;]"[133] or where the treatment that would have been received "in the absence of [certain] policies would have been meaningfully better than the care" that was received.[134]

However, this part of the analysis in particular is further complicated when applied to noncitizens. Although courts have made clear that noncitizens in immigration detention are "the equivalent of . . . pretrial detainee[s]" whose "claims are considered under the due process clause[,]"[135] some scholars have argued that "the continued perplexity over whether the plenary power doctrine or aliens' rights tradition should govern amplifies uncertainties"[136] in lower courts. Specifically, it remains unclear the extent to which a noncitizen being classified as deportable (considered to have already entered the country) or inadmissible (not considered to have entered the country; formerly called "excludable") influences the scope of due process protections he or she receives against unlawful conditions of confinement.

Over three decades ago, the Fifth Circuit in *Lynch v. Cannatella*[137] held that *all* noncitizen detainees, regardless of their status under immigration laws, can claim due process protections to challenge mistreatment at the hands of their captors.[138] In this case, sixteen Jamaican nationals who had entered the United States by illegally

131. Duvall v. Dallas Cnty., 631 F.3d 203, 208 (5th Cir. 2011); *see also* Bell v. Wolfish, 441 U.S. 520, 539 n.21 (1979) ("There is, of course, a *de minimis* level of imposition with which the Constitution is not concerned.").

132. Shepherd v. Dallas Cnty., 591 F.3d 445, 454 (5th Cir. 2009) (emphasis added).

133. Cadena v. El Paso Cnty., 946 F.3d 717, 728 (5th Cir. 2020) (emphasis added).

134. *Id.*

135. *E.g.*, Edwards v. Johnson, 209 F.3d 772, 778 (5th Cir. 2000) (citing Ortega v. Rowe, 796 F.2d 765, 767 (5th Cir. 1986)); E.D. v. Sharkey, 928 F.3d 299, 306 (3d Cir. 2019) ("This Circuit has long[] viewed the legal rights of an immigration detainee to be analogous to those of a pretrial detainee.").

136. *Affirmative Duties*, *supra* note 21, at 2497; *accord* Taylor, *supra* note 21, at 1092.

137. Lynch v. Cannatella, 810 F.2d 1363 (5th Cir. 1987).

138. *Id.* at 1364.

stowing away aboard a barge[139] brought a challenge to the treatment they had received from the New Orleans Harbor Police. While in detention, the plaintiffs claimed, the Harbor Police had beaten them, showered them with stun gas, threatened to withhold food, drenched them with a fire hose, and left them with only wet clothes and bedding materials.[140] While the Harbor Police asserted that excludable noncitizens were not entitled to due process protections, and thus did not have a "clearly established" constitutional right to be free from abuse or mistreatment while in custody,[141] the Fifth Circuit disagreed.

While the Court acknowledged that excludable noncitizens had limited constitutional rights "with regard to immigration and deportation proceedings," it ultimately concluded that precedent "does not limit the right of excludable aliens detained within the United States territory to humane treatment."[142] It simply could not conceive "of *any* national interests that would justify the malicious infliction of cruel treatment on a person in [the] United States . . . because that person is an excludable alien."[143] "[W]hatever due process rights excludable aliens may be denied by virtue of their status," the Court held, "they are entitled under the due process clauses of the fifth and fourteenth amendments to be free of gross physical abuse at the hands of state or federal officials."[144]

Nevertheless, the very next year, the Fifth Circuit appeared to narrow its holding, suggesting that key parts of its language in *Lynch* were not just *sufficient* conditions to show a violation of due process, but *necessary* ones.[145] Because the noncitizen plaintiffs—twenty-six Colombian noncitizens who attempted to enter the United States as stowaways, were captured and detained, and one of whom was killed and another injured after a failed escape attempt[146]—"alleged neither that cruel treatment was *maliciously inflicted* upon them nor that they suffered *gross physical abuse*," the Court held that they "stated no claim for violation of due

139. *Id.* at 1367, 1370. Because they were never inspected and admitted, they were treated as though they were at the border. *Id.*

140. *Id.* at 1367.

141. *Id.* at 1372–74.

142. *Id.* at 1373.

143. *Id.* at 1374 (emphasis added).

144. *Id.*

145. Medina v. O'Neill, 838 F.2d 800 (5th Cir. 1988).

146. *Id.* at 801.

process rights."[147] Thus, scholars have argued, this holding seemed to raise the bar considerably for excludable noncitizens seeking to challenge the conditions of their confinement.[148]

Yet in more recent decisions, this heightened standard is rarely cited, and seemingly never for the conclusion that noncitizens are subject to a more demanding burden of proof.[149] Instead, Texas federal district courts have tended to rely on the standards established in cases such as *Hare*,[150] *Shepherd*,[151] and *Cadena*[152] when analyzing claims of unlawful conditions of confinement. For example, in a 2021 case involving a noncitizen detained pursuant to 8 U.S.C. § 1226(c),[153] the District Court for the Northern District of Texas cited the tests from *Shepherd* and *Cadena*, finding that the petitioner "failed to allege any facts that show either that *serious injury or death are the inevitable results* of [the detention center's] failings or that any policy has caused *extreme suffering* or resulted in *adverse medical outcomes serious enough* to establish a constitutional violation."[154] The Fifth Circuit affirmed this decision,[155] and other cases citing this language abound.[156]

147. *Id.* at 803 (emphasis added).

148. *E.g.*, Taylor, *supra* note 21, at 1148; Budhrani, *supra* note 77, at 795; *Affirmative Duties*, *supra* note 21, at 2497.

149. While certainly not constituting an exhaustive search, navigating to the Citing References for *Medina* on Westlaw produces twelve cases. Two of these are from the Fifth Circuit, and only one from Texas federal district court. None of these allege that the *Medina* language is the proper standard for determining immigration detainees' rights.

150. Hare v. City of Corinth, 74 F.3d 633 (5th Cir. 1996).

151. Shepherd v. Dallas Cnty., 591 F.3d 445 (5th Cir. 2009).

152. Cadena v. El Paso Cnty., 946 F.3d 717 (5th Cir. 2020).

153. Nogales v. Dep't of Homeland Sec., 524 F. Supp. 3d 538 (N.D. Tex. 2021), *aff'd*, No. 21-10236, 2022 WL 851738 (5th Cir. 2022).

154. *Id.* at 546 (emphasis added).

155. Nogales v. Dep't of Homeland Sec., No. 21-10236, 2022 WL 851738 (5th Cir. Mar. 22, 2022).

156. *E.g.*, Okiki v. Wilkinson, No. 1:21-CV-00063-H, 2021 WL 1345531, at *6 (N.D. Tex. Apr. 9, 2021) (petitioner "failed to allege any facts that show either that *serious injury or death are the inevitable results* of [the detention center's] failings or that any policy has caused *extreme suffering* or resulted in *adverse medical outcomes serious enough* to establish a constitutional violation") (emphasis added); Barbosa v. Barr, 502 F. Supp. 3d 1115, 1124 (N.D. Tex. 2020) (same); Yoka v. Barr, No. 1:20-CV-00255-C, 2021 WL 7137107, at *4 (N.D. Tex. Dec. 7, 2020) (same); Akbar v. Barr, No. SA-20-CV-01132-FB, 2021 WL 1345530, at *5 (W.D. Tex. Mar. 5, 2021) ("[T]he increasing availability of several vaccines that protect against *serious illness or death* from the virus, significantly undermines the fundamental theory of [detainee's] Petition . . . ."); Vazquez Barrera v. Wolf, 455 F. Supp. 3d 330, 338–39 (S.D. Tex. 2020) ("[T]he detention of Plaintiffs, who are at *high risk of serious illness or death* if they contract COVID-19 . . . does not reasonably relate to a legitimate governmental purpose.") (emphasis added).

Conspicuously absent from these modern cases involving noncitizens' challenges to immigration detention conditions is any mention of *Medina*'s alleged requirements of "malicious" infliction of cruel treatment or "gross physical abuse."[157] As an initial matter, it's unclear whether a requirement of "gross physical abuse" is substantially different from those of "serious injury or death" or "extreme suffering," the requirements outlined in the more recent *Shepherd* and *Cadena* lines of cases.[158] Furthermore, although *Medina* has not been explicitly overruled, a requirement that cruel treatment be "maliciously" inflicted now flies in the face of more recent Fifth Circuit caselaw—"malice" is a specific state of mind, and in conditions cases, "the jail officials' state of mind is not a disputed issue."[159] Thus, *Medina* has simply not appeared to have the effect that scholars assumed it would, at least in the Fifth Circuit.[160] Still, even to the extent *Medina* is no longer good law in the Fifth Circuit, "serious injury and death,"[161] "extreme suffering,"[162] or serious "adverse medical outcomes"[163] remain significant hurdles for noncitizens to meet to establish actionable unlawful conditions of confinement claims.

3. Not Reasonably Related to a Legitimate Governmental Objective

But there is still one remaining element in the Fifth Circuit's conditions test, and for this element as well, it is uncertain whether the standard substantially differs for noncitizens as compared with citizen pretrial detainees. For any challenge to detention conditions to succeed absent a showing of expressed intent to punish, the claimant must also show that the alleged unlawful condition is not "reasonably related to a legitimate, non-punitive governmental

157. *See* Medina v. O'Neill, 838 F.2d 800, 803 (5th Cir. 1988).

158. Shepherd v. Dallas Cnty., 591 F.3d 445 (5th Cir. 2009); Cadena v. El Paso Cnty., 946 F.3d 717 (5th Cir. 2020).

159. Hare v. City of Corinth, 74 F.3d 644 (5th Cir. 1996); s*ee also id.* ("[A]n avowed or presumed intent by the State or its jail officials exists in the form of the challenged condition, practice, rule, or restriction. . . . [E]ven where a State may not want to subject a detainee to inhumane conditions of confinement or abusive jail practices, its intent to do so is nevertheless presumed when it incarcerates the detainee in the face of such known conditions and practices.")

160. *But cf.* Adras v. Nelson, 917 F.2d 1552, 1559 (11th Cir. 1990) (concluding that "severe overcrowding, insufficient nourishment, [and] inadequate medical treatment" did not constitute "'gross' physical abuse") (internal citation omitted).

161. *Shepherd*, 591 F.3d at 454.

162. *Cadena*, 946 F.3d at 72.

163. *Id.*

objective."[164] While rational basis review generally provides the government with a broad shield against claims, detained noncitizens, unlike convicted criminals, have been provided with due process rights against all forms of punishment in detention. Thus, not all governmental objectives that are deemed legitimate in the criminal detention context pass muster in the civil detention context.[165] Therefore, claimants seeking release due to punitive conditions of confinement can and should argue that legitimate governmental interests are limited, and that even if there is a legitimate governmental interest involved, it is not reasonably related to the challenged unconstitutional conditions.

Ensuring noncitizens' appearance at trial, guarding against danger to the community, and facilitating deportation have all been deemed legitimate governmental interests.[166] Similarly, legitimate interests also clearly include facilitating the effective management of detention facilities, which includes ensuring order, security, and discipline within facilities.[167] But courts have seemed to question the extent of legitimate interests outside these factors.[168] For example, the Supreme Court itself held in *Zadvydas* that although Congress has plenary power over immigration, there are limitations on that power. Heightened deference to the judgments of the political branches on national security grounds, for example, is not the default—instead, such deference would likely require terrorism or other special circumstances.[169] Likewise, the U.S. District Court for the Southern District of Texas has held that preventing detainees from protecting themselves from the high risk of serious illness or death is not reasonably related to a legitimate governmental interest.[170]

164. *Cadena*, 946 F.3d at 727; *see also Hare*, 74 F.3d at 640 (citing Bell v. Wolfish, 441 U.S. 520, 539 (1979)).

165. For example, detaining noncitizens for deterrence purposes is not a legitimate governmental interest. *E.g.*, Kansas v. Crane, 534 U.S. 407 (2002); R.I.L-R v. Johnson, 80 F. Supp. 3d 164 (D.D.C. 2015).

166. *E.g.*, Zadvydas v. Davis, 533 U.S. 678 (2001).

167. *E.g.*, *Bell*, 441 U.S. 520; Okiki v. Wilkinson, No. 1:21-CV-00063-H, 2021 WL 1345531 (N.D. Tex. Apr. 9, 2021).

168. *E.g.*, Demore v. Kim, 538 U.S. 510 (2003) (Kennedy, J., concurring) ("Were there to be an unreasonable delay by the INS in pursuing and completing deportation proceedings, it could become necessary then to inquire whether the detention is not to facilitate deportation, or to protect against risk of flight or dangerousness, but to incarcerate for other reasons."); Dubon Miranda v. Barr, 463 F. Supp. 3d 632 (D. Md. 2020).

169. *Zadvydas*, 533 U.S. 678.

170. Vazquez Barrera v. Wolf, 455 F. Supp. 3d 330 (S.D. Tex. 2020).

Thus, while the burden for proving unlawful conditions of confinement in the Fifth Circuit *is* considerable, it appears that the standards for noncitizen detainees are not significantly more exigent than those for citizen pretrial detainees, if they are at all. In sum, for a noncitizen immigration detainee to prevail on a claim of unconstitutional conditions of confinement absent a showing of an expressed intent to punish, he or she must prove:

> (1) a rule or restriction or . . . the existence of an identifiable intended condition or practice . . . [or] that the jail official's acts or omissions were sufficiently extended or pervasive"; (2) which was not reasonably related to a legitimate governmental objective; and (3) which caused the violation of [the detainee's] constitutional rights.[171]

III. THERE IS NO CLEAR VEHICLE FOR DETAINED NONCITIZENS TO AMELIORATE UNLAWFUL CONDITIONS OF CONFINEMENT

Yet, notwithstanding that detained noncitizens are constitutionally protected from punitive conditions of confinement, they simply do not have access to the clear remedy that other pretrial detainees have: a civil rights action through 42 U.S.C. § 1983. Because of this, noncitizens have had to attempt to bring their claims through a variety of other statutory and constitutional vehicles—primary among these, habeas corpus petitions pursuant to 28 U.S.C. § 2241. However, because the reach of the writ of habeas corpus is not yet settled, and the Fifth Circuit has thus far interpreted it narrowly, detained noncitizens do not have a clear vehicle through which to bring challenges to unlawful conditions of confinement.

A civil rights, or a section 1983, action provides a remedy for the deprivation of constitutional rights. To prevail in such an action, a plaintiff must prove two critical points: a person subjected the plaintiff to conduct that occurred under color of state law, and this conduct deprived the plaintiff of rights, privileges, or immunities guaranteed under federal law or the U.S. Constitution.[172]

Alternatively, under 28 U.S.C. § 2241, an individual may seek habeas relief in federal district court if he or she is "in custody"

171. Duvall v. Dallas Cnty., 631 F.3d 203, 207 (5th Cir. 2011) (first alteration in original) (quoting Hare v. City of Corinth, 74 F.3d 633, 645 (5th Cir. 1996)).

172. *See* 42 U.S.C. § 1983.

under federal authority "in violation of the Constitution or laws or treaties of the United States."[173] One of the perceived benefits to a habeas petition, as opposed to another form of relief, is that the Supreme Court has explicitly clarified that this right extends to noncitizens challenging the constitutionality of their detention.[174]

Yet in the habeas context generally, the Supreme Court has recognized a distinction between "fact or duration" and "conditions of confinement" claims.[175] While challenges to the fact or duration of confinement *must* be brought under habeas corpus,[176] the Supreme Court has neither explicitly nor implicitly foreclosed "the reach of the writ [of habeas] with respect to claims of unlawful conditions of treatment or confinement."[177] Although the Court has held that a section 1983 action is *a* proper remedy for a state prisoner making a constitutional challenge to the conditions of his or her prison life, it has also made clear that "[t]his is not to say that *habeas corpus* may not also be available to challenge such prison conditions. When a prisoner is put under additional and unconstitutional restraints during his lawful custody, it is arguable that habeas corpus will lie to remove the restraints making the custody illegal."[178] Nonetheless, because the Supreme Court still has not decided this issue either way, circuits are split on whether conditions challenges may indeed be brought through habeas

173. 28 U.S.C. § 2241(c)(3).

174. Demore v. Kim, 538 U.S. 510, 516–17 (2003).

175. *E.g.*, McCarthy v. Bronson, 500 U.S. 136, 140 (1991); Preiser v. Rodriguez, 411 U.S. 475 (1973).

176. *Preiser*, 411 U.S. at 500 ("[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 that imprisonment, his sole federal remedy is a writ of habeas corpus.").

177. Boumediene v. Bush, 553 U.S. 723, 792 (2008). *See also, e.g.*, Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 2013 n.12 (2020) (Sotomayor, J., dissenting) ("[p]resumably a challenge to the length or conditions of confinement . . . falls outside [the prohibited] class of cases."); Ziglar v. Abbasi, 137 S. Ct. 1843, 1862–63 (2017) (leaving open question of whether noncitizen detainees challenging "large-scale policy decisions concerning the conditions of confinement imposed . . . might be able to challenge their confinement conditions via a petition for a writ of habeas corpus."); Bell v. Wolfish, 441 U.S. 520, 526 n.6 (1979) (leaving for "another day the question of the propriety of using a writ of habeas corpus to obtain review of the conditions of confinement"); Robinson v. Sherrod, 631 F.3d 839, 840 (7th Cir. 2011) (noting that "the Supreme Court [has] 'left the door open a crack' for prisoners to use habeas corpus to challenge a condition of confinement.").

178. *Preiser*, 411 U.S. at 499 (emphasis added) (citations omitted).

corpus, or instead, are properly brought through section 1983, *Bivens*, or other claims.[179]

Through a series of cases dealing exclusively with criminal or pretrial citizen detainees (i.e., not noncitizens), the Fifth Circuit has expressed that conditions of confinement claims are usually properly brought under 42 U.S.C. § 1983.[180] Historically, however, it has not explicitly approved or prohibited habeas conditions claims, stating as recently as 2017 that "[w]e reiterate that we decline to address whether habeas is available only for fact or duration claims."[181] Nonetheless, in a three-paragraph decision in 2021, the Fifth Circuit finally concluded in *Rice v. Gonzalez* that "the Great Writ does not, in this circuit, afford release for prisoners held in state custody due to adverse conditions of confinement."[182] Instead, the Court suggested, such individuals should seek relief through a section 1983 suit.[183]

Although *Rice* was a case involving a detainee in jail awaiting trial—and indeed, the Court by its plain language stated only that its decision applied to "prisoners held in state custody"[184]—federal district courts within Texas have applied this decision to preclude habeas conditions of confinement challenges to *immigration*

179. *Compare* Nettles v. Grounds, 830 F.3d 922, 933–34 (9th Cir. 2016) (holding that conditions-of-confinement claims must be brought via a civil rights claim rather than through a federal habeas petition), Spencer v. Haynes, 774 F.3d 467, 469–70 (8th Cir. 2014) (same), *Robinson*, 631 F.3d at 840 (same), *and* Cardona v. Bledsoe, 681 F.3d 533, 537 (3d Cir. 2012) (same), *with* Aamer v. Obama, 742 F.3d 1023, 1036 (D.C. Cir. 2014) (holding that it is appropriate for prisoners to challenge the terms of their confinement through a federal habeas petition), Adams v. Bradshaw, 644 F.3d 481, 483 (6th Cir. 2011) (per curiam) (allowing method-of-execution claim to proceed under habeas), Jiminian v. Nash, 245 F.3d 144, 146–47 (2d Cir. 2001) (providing that prisoners may challenge "prison disciplinary actions, prison transfers, type of detention and prison conditions" under section 2241), *and* Miller v. United States, 564 F.2d 103, 105 (1st Cir. 1997) (allowing prisoners to bring conditions-of-confinement claims through section 2241).

180. *E.g.*, Carson v. Johnson, 112 F.3d 818, 820–21 (5th Cir. 1997); Poree v. Collins, 866 F.3d 235, 243 (5th Cir. 2017); Rice v. Gonzalez, 985 F.3d 1069, 1070 (5th Cir. 2021).

181. *Poree*, 866 F.3d at 242–44 (5th Cir. 2017). S*ee also, e.g.*, Coleman v. Dretke, 409 F.3d 665, 670 (5th Cir. 2005) (per curiam) ("[N]either the Supreme Court nor this court has held that certain claims must be brought under § 1983 rather than habeas.").

182. *Rice*, 985 F.3d at 1070.

183. *Id.* ("As we noted in *Carson v. Johnson*, [i]f a favorable determination . . . would not automatically entitle [the prisoner] to accelerated release, . . . the proper vehicle is a § 1983 suit.") (alterations in original) (internal citations and quotations omitted).

184. *Id.*

detainees as well,[185] who are neither prisoners nor individuals under state custody. A significant source of this broad application, however, stems from the Fifth Circuit's contradictory caselaw on this topic. Apart from pronouncements in cases like *Poree v. Collins* and *Coleman v. Dretke*[186] which left the door open to habeas conditions challenges, there also exists other Fifth Circuit caselaw which, while not outright *precluding* conditions of confinement challenges through habeas, has long limited habeas viability to a narrow subdivision of claims. This has left an environment which the Fifth Circuit itself has admitted is unclear.[187]

First, the Fifth Circuit has long held that "habeas is not available to review questions unrelated to the cause of detention. Its sole function is to grant relief from unlawful imprisonment or custody and it cannot be used properly for any other purpose."[188] This, district courts have interpreted to mean, limits habeas petitions to challenges to the fact or duration of confinement.[189] And because the Fifth Circuit has held that habeas is appropriate only if ruling in the petitioner's favor would "automatically entitle [the petitioner] to accelerated *release*,"[190] and Texas district courts have further specified that "allegations of mistreatment that amount to . . . punishment do not nullify an otherwise lawful incarceration

185. *E.g.*, Petgrave v. Aleman, 529 F. Supp. 3d 665 (S.D. Tex. 2021); McLean v. Tate, No. CV H-20-2822, 2021 WL 3292758 (S.D. Tex. 2021); Garza Marroquin v. Garcia Longoria, No. 5:20-CV-54, 2021 WL 1179008 (S.D. Tex. 2021); Dalouche v. Johnson, No. 3:20-CV-2914-N-BH, 2021 WL 2188760 (N.D. Tex. 2021); Okiki v. Wilkinson, No. 1:21-CV-00063-H, 2021 WL 1345531 at 6 (N.D. Tex. 2021); *but see* Barrera v. Mayorkas, No. 4:20-CV-1241, 2021 WL 2188563 (S.D. Tex. 2021) (arguing that the *Rice* court's language about "prisoners held in state custody" as well as its reliance on section 1983 as a vehicle significantly undermines *Rice's* applicability to noncitizen detainees).

186. *Supra* note 181.

187. Poree v. Collins, 866 F.3d 235, 243–44 (5th Cir. 2017) ("Some circuit courts, however, have limited habeas corpus to claims that challenge the fact or duration of confinement. Others have not. *Our own Circuit has been less clear* . . . .") (emphasis added). *Compare* Carson v. Johnson, 112 F.3d 818, 820–21 (5th Cir. 1997) (suggesting level of exclusivity between habeas and § 1983 by adopting a "simple, bright-line rule" to determine when section 1983 was the proper vehicle for a claim), *and* Rourke v. Thompson, 11 F.3d 47, 49 (5th Cir. 1993), *with* Coleman v. Dretke, 409 F.3d 665, 670 (5th Cir. 2005) (per curiam), *and Poree*, 866 F.3d at 243–44.

188. Pierre v. United States, 525 F.2d 933, 935–36 (5th Cir. 1976).

189. *E.g.*, Akbar v. Barr, 2021 WL 1345530, at 2 (W.D. Tex. 2021); Gaona v. U.S. Dep't of Homeland Sec., No. 5-20-CV-00473-FB-RBF, 2020 WL 6255411 (W.D. Tex. 2020).

190. *Carson*, 112 F.3d at 821 (emphasis added) (finding that, where petitioner's reassignment from administrative segregation would not automatically entitle him to immediate release on parole, but "*merely enhance* eligibility for accelerated release," habeas was an inappropriate vehicle to challenge conditions of confinement).

or detention,"[191] challenges to conditions of confinement through habeas corpus have been consistently denied by Texas courts.

Yet a concerning rationalization emerges in these district court decisions—when denying noncitizen claimants habeas relief, many cite alternative civil rights remedies that the claimants should have instead sought, but which are simply not available.[192] In maintaining that *noncitizen detainees* should bring conditions of confinement claims through civil rights actions, the district courts demonstrate a fundamental misunderstanding of the availability of these forms of relief to detained noncitizens.

42 U.S.C. § 1983 provides a civil action only for unlawful conduct that occurred under color of state law. Because noncitizens are detained by federal, rather than state actors, a section 1983 action is not available to them as it is to other pretrial detainees. Thus, all of the Fifth Circuit caselaw citing this as an alternative remedy is inapposite as applied to noncitizens.

While at least one district court has suggested that noncitizen detainees can seek relief through *Bivens*[193] (the federal corollary to a section 1983 action),[194] such an assertion seems to demonstrate either unawareness or trivial treatment of the reality of *Bivens* claims in the modern world. In *Bivens*, the Supreme Court held that where a federal officer "acting under color of [federal] authority" commits a constitutional tort, a cause of action for damages may arise directly under the Constitution.[195] However, in the more than fifty years since *Bivens* was decided, the Supreme Court has endorsed damages remedies for constitutional violations by federal officers in only two other cases.[196] And in the last four decades,

191. Obaretin v. Barr, No. 3:20-cv-2805-E-BN, 2020 WL 5775822, at *2 (N.D. Tex. 2020) (citing Cureno Hernandez v. Mora, No. 1:20-cv-104-H, 2020 WL 3246753, at *1 (N.D. Tex. June 15, 2020).

192. *See supra* note 180.

193. *E.g.*, *Akbar*, 2021 WL 1345530, at 2.

194. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

195. *Id.* at 389. *Bivens* recognized a claim where agents of the Federal Bureau of Narcotics entered the plaintiff's apartment and arrested him for narcotics violations without a warrant or probable cause in violation of the Fourth Amendment.

196. In *Davis v. Passman*, the Court recognized a *Bivens* claim for violation of the Equal Protection Clause of the Fifth Amendment when a Congressman fired an administrative assistant based on her gender. 442 U.S. 228, 248–49 (1979). In *Carlson v. Green*, the Court recognized a *Bivens* claim where prison officials failed to provide an inmate with proper medical care in violation of his Eighth Amendment right to be free from cruel and unusual punishment. 446 U.S. 14, 16–18 (1980).

it has declined to provide a *Bivens* remedy in every instance,[197] while continuing to place additional limits on *Bivens* actions through new cases.

Ziglar v. Abbasi, 137 S. Ct. 1843 (2017) is a key case in this line. In this case, the Supreme Court discussed its precedent addressing *Bivens* remedies—both the cases which recognized a *Bivens* remedy and those which rejected it—and determined that these cases demonstrated a general reluctance to imply a damages remedy.[198] In particular, the Supreme Court admonished courts not to create a *Bivens* remedy where there may be reason to believe that Congress did not want to create one.[199] Additionally, the Court cautioned that the existence of an "alternative remedial structure" through which the person could otherwise address the harm could limit the court's ability to recognize a *Bivens* remedy.[200]

The Court then relied on a two-step analysis for determining whether a *Bivens* remedy is appropriate in any given case. First, a court must consider whether the claim involves a "new context."[201] "If the case is different in a meaningful way from previous *Bivens* cases decided by [the Supreme Court], then the context is new."[202] And a "new context," the Court held, is extremely broad—essentially, if the facts are at all dissimilar from those in *Bivens*, *Davis*, and *Carlson*, it is a new context.[203]

197. *See, e.g.*, Hernandez v. Mesa, 140 S. Ct. 735 (2020) (Fourth and Fifth Amendment suit against border patrol agent in a cross-border shooting); Ziglar v. Abbasi, 137 S. Ct. 1843, 1863 (2017) (Fourth and Fifth Amendment suit over prison mistreatment against high-ranking officials); Minneci v. Pollard, 565 U.S. 118, 131 (2012) (Eighth Amendment suit against prison guards at private prison); Wilkie v. Robbins, 551 U.S. 537, 561 (2007) (Fifth Amendment due process suit against Bureau of Land Management officials); Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 74 (2001) (Eighth Amendment suit against private prison operator); Schweiker v. Chilicky, 487 U.S. 412, 414 (1988) (Fifth Amendment due process suit against Social Security officials); United States v. Stanley, 483 U.S. 669, 685–86 (1987) (Fifth Amendment suit against military officers for violation of due process); FDIC v. Meyer, 510 U.S. 471, 486 (1994) (Fifth Amendment due process suit for wrongful termination from federal employment); Bush v. Lucas, 462 U.S. 367, 390 (1983) (First Amendment suit against federal employer for defamation and retaliatory demotion); Chappell v. Wallace, 462 U.S. 296, 305 (1983) (Fifth Amendment race discrimination suit against military officers).

198. Ziglar v. Abbasi, 137 S. Ct. 1843, 1854–57 (2017).

199. *Id.* at 1858.

200. *Id.*

201. *Id.* at 1859.

202. *Id.*

203. *Id.* The Court also provided a non-exhaustive list of examples of "meaningful" differences from the three types of *Bivens* claims the Court previously recognized, including:

- defendant officers are of a different rank;

Second, a court must address whether "special factors" counsel hesitation in implying a *Bivens* remedy.[204] In *Abbasi*, the Court reasoned that numerous special factors counseled against recognizing the plaintiffs' *Bivens* claims in this new context, including that plaintiffs' detention policy claims implicated important governmental policy-making decisions; the policy involved important national security concerns; Congress had been silent on the availability of a damages remedy despite intense legislative interest in responding to the September 11th attacks; and plaintiffs could have pursued habeas petitions or other forms of relief.[205]

Such a reality has led the Fifth Circuit itself to recognize *Bivens* as "an *ancien regime* . . . . [that] ended long ago."[206] Because "extending *Bivens* to new contexts is a 'disfavored judicial activity,'"[207] *Bivens* remedies are now functionally nonexistent. Besides, *Bivens* only ever existed to provide relief in the form of damages—and only against officers in their individual capacities[208]—not to enjoin official government action or widespread conditions of confinement.

Thus, although Texas district courts have denied noncitizen detainees' habeas challenges on the basis of ostensibly available alternative civil rights remedies, such alternatives do not exist for them. For this reason, it is vital to discover a viable way for immigrants to challenge unconstitutional conditions of confinement in the state.

- different constitutional claims;
- the generality or specificity of official action;
- the extent of judicial guidance as to how an officer should respond;
- the statutory or other legal mandate under which the officer was operating; and
- the risk of disruptive intrusion into functioning of legislative or executive branches.

Id. at 1859–60.

204. *Id.* at 1860–63.

205. *Id.*

206. Oliva v. Nivar, 973 F.3d 438, 442 (5th Cir. 2020) (internal quotations omitted).

207. *Id.* (quoting *Abbasi*, 137 U.S. at 1857).

208. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 394–96 (1971).

IV. POTENTIAL ALTERNATIVES

A. Injunctive Relief Arising Directly Under the Constitution

Although *Bivens* dealt with a plaintiff seeking damages for the violation of his constitutional rights at the hands of federal officers, the Supreme Court suggested that federal courts also have the power to award *equitable* relief—such as injunctions—directly under the Constitution.[209] The Court has since reiterated this concept time and again.[210]

For example, in *Brown v. Plata*, the Supreme Court affirmed a lower court injunction requiring the State of California to reduce its prison population by up to 48,000 people.[211] Because of overcrowding and lack of state resources, the medical and mental healthcare provided in California's prisons was so deficient that the Court found it was "broken beyond repair" and created an "unconscionable degree of suffering and death,"[212] resulting in a violation of the Constitution's prohibition on cruel and unusual punishment.[213]

Likewise, at least one circuit court has held that the Supreme Court's cases placing limitations on the availability of Bivens damages actions do not apply to claims for equitable relief.[214]

209. *Id.* at 397; *see also id.* at 400 (Harlan, J., concurring).

210. *E.g.*, Brown v. Plata, 563 U.S. 493, 542 (2011) ("The power of a court of equity to modify a decree of injunctive relief is long-established, broad, and flexible.") (internal quotations and citation omitted); Bush v. Lucas, 462 U.S. 367, 374 (1983) ("The federal courts' power to grant relief not expressly authorized by Congress is firmly established. Under 28 U.S.C. § 1331, the federal courts have . . . . not only the authority to decide whether a cause of action is stated by a plaintiff's claim that he has been injured by a violation of the Constitution, but also the authority to choose among available judicial remedies in order to vindicate constitutional rights.") (citation omitted).; Carlson v. Green, 446 U.S. 14, 42 (1980) (Rehnquist, J., dissenting) ("The broad power of federal courts to grant equitable relief for constitutional violations has long been established."); Hutto v. Finney, 437 U.S. 678, 687 n.9 (1978) ("[T]he scope of a district court's equitable powers . . . is broad, for breadth and flexibility are inherent in equitable remedies.") (quoting Milliken v. Bradley, 433 U.S. 267, 281 (1977), in turn quoting Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1, 15 (1971)).

211. *Brown*, 563 U.S. 493 (2011).

212. *Id.* at 507 (internal quotations omitted).

213. *Id.* at 545.

214. *See* Mitchum v. Hurt, 73 F.3d 30, 35–36 (3d Cir. 1995) ("Just because 'special factors counselling hesitation' militate against the creation of a new non-statutory damages remedy, it does not necessarily follow that the long-recognized availability of injunctive relief should be restricted as well. We assume that the power of the federal courts to award legal and equitable relief in actions under 28 U.S.C. § 1331 stems from the same source, but that does not mean that the factors that counsel against one type of relief are equally applicable with respect to the other.") (citations omitted).

However, the caselaw at the Fifth Circuit is not so straightforward. As the Fifth Circuit held in *Hearth, Inc. v. Department of Public Welfare*,[215] "the federal courts, and this Circuit in particular, have been hesitant to find causes of action arising directly under the Constitution."[216] The few exceptions to this rule, the *Hearth* court explained, "were necessitated primarily by the absence of alternative remedies."[217] "In each case, there simply was no other means of seeking redress for flagrant violations of the plaintiff's constitutional rights."[218] For example, in unpublished cases in both the Southern and Northern District Courts of Texas, the courts held that because the plaintiffs' conditions of confinement claims could be brought under the APA, a cause of action arising directly under the Fifth Amendment was unavailable.[219]

Yet the Fifth Circuit has also not ruled out such a remedy—quite the contrary. It has clearly and repeatedly stated that a proper remedy for addressing allegedly unsafe practices or conditions of confinement could very well involve injunctive relief.[220] Nonetheless, it appears that in the Fifth Circuit, the *Bivens*/*Abbasi* availability of "an alternative remedial structure" element[221] may also apply in the context of injunctive relief arising under the Constitution.[222] Thus, in order to even be considered on a claim for an injunction arising directly under the Fifth Amendment to the Constitution, a plaintiff in the Fifth Circuit likely must first show that there are no alternative remedies available.

215. Hearth, Inc. v. Dep't of Pub. Welfare, 617 F.2d 381 (5th Cir. 1980).

216. *Id.* at 382.

217. *Id.* (referencing the exceptions created in Davis v. Passman, 422 U.S. 228 (1979), and Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971)).

218. *Id.*

219. Garza Marroquin v. Garcia Longoria, No. 5:20-CV-54, 2021 WL 1179008, at *2 (S.D. Tex. Mar. 29, 2021); Umarbaev v. Moore, No. 3:20-CV-1279-B-BN, 2020 WL 3051448, at *6 (N.D. Tex. June 6, 2020).

220. *E.g.*, Cook v. Hanberry, 596 F.2d 658, 660 (5th Cir. 1979) ("The appropriate remedy [to alleviate unlawful conditions of confinement] would be to enjoin continuance of any practices or require correction of any conditions causing him cruel and unusual punishment."); Lineberry v. U.S., 380 F. App'x 452, 453 (5th Cir. 2010) ("The proper remedy [to alleviate unlawful conditions of confinement] is to require the discontinuance of a practice or to require the correction of an unconstitutional condition.").

221. *See* Ziglar v. Abbasi, 137 S. Ct. 1843, 1858 (2017).

222. *See, e.g.*, Hearth, Inc. v. Dep't of Pub. Welfare, 617 F.2d 381, 382 (5th Cir. 1980); Sacal-Micha v. Longoria, No. 1:20-CV-37, 2020 WL 1815691, at *8 (S. D. Tex. Apr. 9, 2020) ("Here, Sacal has not demonstrated an absence of alternative remedies that would warrant recognizing his cause of action directly under the Fifth Amendment.").

B. APA Challenges

Plaintiffs might also attempt to bring challenges to conditions of confinement through the Administrative Procedure Act, a federal statute that provides for judicial review of agency action.[223] The APA provides a means for individuals—including, in theory, noncitizens—to challenge unlawful decisions or action by immigration agencies in cases outside of the removal context.[224] Specifically, it states that a person "suffering [a] legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review."[225] Under the APA, however, only non-monetary relief—such as injunctive or declaratory relief—is available.[226]

The APA creates a cause of action, providing an individual a basis to sue a federal agency where Congress has not specifically provided such a basis elsewhere.[227] Likewise, the APA provides a waiver of sovereign immunity.[228] However, it does *not* provide jurisdiction; instead, jurisdiction is based on 28 U.S.C. § 1331, the Federal Question statute.[229]

In reviewing APA challenges, the reviewing court must either "compel agency action unlawfully withheld or unreasonably delayed," or "hold unlawful and set aside agency action, findings, and conclusions" that violate any one of six factors,[230] including agency action found to be: "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; [and] (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."[231]

At least at first glance, challenges to unlawful conditions of confinement might fit within any of the aforementioned factors. For example, in *Umarbaev v. Moore*, immigration detainees filed a

223. 5 U.S.C. §§ 701–706.
224. *Id.*
225. *Id.* § 702.
226. *Id.*
227. *Id.* § 704.
228. *Id.* § 702.
229. *E.g.*, Califano v. Sanders, 430 U.S. 99, 107 (1977); Bowen v. Massachusetts, 487 U.S. 879, 891 n.16 (1988) ("[I]t is common ground that if review is proper under the APA, the District Court had jurisdiction under 28 U.S.C. § 1331.").
230. 5 U.S.C. § 706.
231. *Id.* § 706(2)(A)–(C).

consolidated habeas application under 28 U.S.C. § 2241, requesting declaratory and injunctive relief, due to COVID-19-related confinement conditions they alleged violated the Fifth Amendment.[232] After denying the claimants relief on habeas grounds, the court then considered their argument that "independent of its ability to grant habeas relief . . . this Court has the power to . . . grant[] prospective injunctive relief" directly under the Constitution.[233] Nonetheless, finding that an alternative remedy existed through the APA for the claimants to challenge the conditions of their confinement, the Court dismissed the case.[234]

However, it is unlikely that the claimants in *Umarbaev* could, in fact, have successfully raised an APA challenge based on conditions of confinement because of two key APA requirements. First, only *official* agency action is subject to review under the APA.[235] "Agency action" is defined to include "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act [on procedures required by law]."[236]

Second, agency action must be *final* to be subject to review. Generally, two conditions must be satisfied for agency action to be final: (1) the action must mark the consummation of the agency's decision-making process and cannot be of a mere tentative or interlocutory nature; and (2) the action must be one by which rights or obligations have been determined or from which legal consequences will flow.[237]

Taken together, it seems unlikely that courts could seriously entertain APA challenges to most conditions of immigration detention, given that these conditions usually arise not out of an affirmative rule or official policy or rulemaking—or in other words, final agency action—but out of a lack of consistent and

232. Umarbaev v. Moore, No. 3:20-CV-1279-B-BN, 2020 WL 3051448, at *1 (N.D. Tex. June 6, 2020).

233. *Id.* at *5.

234. *Id.* at *6 ("Petitioners may challenge the conditions of their confinement (but likely not request review of parole decisions) through an action under the Administrative Procedures Act ("APA"); *accord* Garza Marroquin v. Garcia Longoria, No. 5:20-CV-54, 2021 WL 1179008, at *2 (S.D. Tex. Mar. 29, 2021) ("Here, 'alternative remedies' are available; Plaintiff could bring an action challenging his conditions of confinement under the Administrative Procedures Act ("APA") after filing a complaint with Defendants.").

235. *See* 5 U.S.C. § 702.

236. *Id.* § 551(13).

237. Bennett v. Spear, 520 U.S. 154, 177–78 (1997).

enforceable standards.[238] It is worth noting, furthermore, that the courts that have recommended bringing such suits did so in unpublished decisions.[239] Nonetheless, claimants within the jurisdiction of these courts should be sure to argue either for or against the availability of this remedy in order to exhaust alternative remedies.

C. The Office of the Immigration Detention Ombudsman

Finally, future plaintiffs might be able to seek assistance in removing unlawful conditions of confinement through complaints to the Office of the Immigration Detention Ombudsman. A new and independent office within the Department of Homeland Security, the Office was established by Congress[240] and is not a part of U.S. Immigration and Customs Enforcement (ICE) or U.S. Customs and Border Protection (CBP). According to the Office's official page on the DHS website, the Office will:

- assist individuals with complaints about the potential violation of immigration detention standards or misconduct by DHS (or contract) personnel,
- provide independent oversight of immigration detention facilities, including conducting unannounced inspections and reviewing contract terms for immigration detention facilities and services, and
- serve as an independent office to review and resolve problems stemming from the same.[241]

These functions are welcome and encouraging. However, the Office also seems to just be getting its feet off the ground—it conducted its first, announced inspection of a detention center on October 19 and 20, 2021, and released its final report for the

238. While ICE has published nationwide detention standards, *see ICE Detention Standards*, US IMMIG. & CUSTOMS ENF'T (Nov. 9, 2021), https://www.ice.gov/factsheets/facilities-pbnds, these are merely guidelines which the agency can depart from at will. There are no federal regulations or enforceable standards regulating immigration detention conditions. *See supra* Part I.

239. *See supra* note 234.

240. Consolidated Appropriations Act of 2020, Pub. L. No. 116-93, 133 Stat. 2317 (codified at 6 U.S.C. § 205).

241. *The Office of the Immigration Detention Ombudsman*, DEP'T OF HOMELAND SEC., https://www.dhs.gov/office-immigration-detention-ombudsman (last updated Apr. 22, 2022); *see also* 6 U.S.C. § 205.

inspection on March 15, 2022.[242] Likewise, although responding to individual requests for case assistance will be a primary role of the agency,[243] the Office's case intake form (DHS Form 405) only recently—on May 9, 2022—became available.[244] Thus, it is too soon to say what type of impact this office might have on the availability of relief from unlawful immigration detention conditions.[245]

CONCLUSION

Because detained noncitizens are civil, not criminal, detainees, they cannot be detained in conditions that are punitive. Where the conditions of confinement amount to punishment, the government violates the due process rights of the detained immigrant. Yet for many noncitizens around the country, this is a promise only in principle, not practice. Especially in states like Texas, it is extremely difficult for noncitizens to remove unconstitutional conditions of confinement, both because of the demanding standards for proving an unlawful condition exists as well as the absence of a clear vehicle through which to bring suit.

Immigration, and by extension, detention conditions, are questions of federal policy that should be uniform across the country. But congressional inaction and the Supreme Court's hesitation to decide immigration conditions cases have led to widely differing standards from state to state and thus a widely differing likelihood of vindicating one's constitutional rights. Nonetheless, the Supreme Court could clarify and harmonize this area of law by settling once and for all that suit through habeas corpus pursuant to 28 U.S.C. § 2241 is a proper way to remove

242. David D. Gersten, *OIDO Inspection: Limestone County Detention Center*, OFF. OF THE IMMIGR. DET. OMBUDSMAN, DEP'T OF HOMELAND SEC. (Mar. 15, 2022), https://www.dhs.gov/sites/default/files/2022-04/Final%20Report%20on%20the%20Limeston%20County%20Detention%20Center%20Inspection%20March%202022_0.pdf.

243. *The Office of the Immigration Detention Ombudsman*, *supra* note 241; *see also* 6 U.S.C. § 205(b)(2).

244. *Practice Alert: Detention Ombudsman Case Intake Form Now Available*, AM. IMMIGR. L. ASS'N (May 10, 2022), https://www.aila.org/advo-media/aila-practice-pointers-and-alerts/practice-alert-detention-ombudsman-case-intake.

245. Interestingly, however, both currently *and* formerly detained individuals can file a complaint or request assistance. Additionally, the Office aims to resolve issues immediately or within days after receipt of a complaint, and complaints may trigger a referral to the Office of Inspector General or the Office for Civil Rights & Civil Liberties for a deeper investigation. *Id.*

unlawful conditions of confinement.[246] Until then, detained immigrants in Texas and similar states who seek to challenge the conditions of their confinement will be forced to engage in trial-by-error to find alternative ways to exercise their human rights under the law.

246. The Supreme Court has avoided ruling on this question for over four decades now, *see supra* note 177, which has resulted in a circuit split on this issue, *see supra* note 179. However, it is highly unlikely that the current Supreme Court would expand, rather than continue to contract, noncitizens' rights. The 2021–2022 Supreme Court term resulted in a variety of cases which further stripped away noncitizens' rights, including in bond hearings, *see Johnson v. Arteaga-Martinez*, 142 S. Ct. 1827 (2022); *Garland v. Aleman Gonzalez*, 142 S. Ct. 2057 (2022), judicial review of agency immigration-related decisions, *see Patel v. Garland*, 142 S. Ct. 1614 (2022), and class action injunctive relief, *see Garland v. Aleman Gonzalez*, 142 S. Ct. 2057 (2022). Additionally, Justices Thomas and Gorsuch have recently called for overturning *Zadvydas v. Davis*, 533 U.S. 678 (2001), a key case in the immigrants' rights context which has been on the books for over two decades now. *See Johnson v. Arteaga-Martinez*, 142 S. Ct. 1827, 1836 (2022) (Thomas and Gorsuch, JJ., concurring ("[T]his case illustrates why we should overrule *Zadvydas* at the earliest opportunity.").