5-2022

Immigration Detention and Illusory Alternatives to Habeas

Fatma Marouf

Immigration Detention and Illusory Alternatives to Habeas

Fatma Marouf*

The Supreme Court has never directly addressed whether, or under what circumstances, a writ of habeas corpus may be used to challenge the conditions of detention, as opposed to the fact or duration of detention. Consequently, a circuit split exists on habeas jurisdiction over conditions claims. The COVID-19 pandemic brought this issue into the spotlight as detained individuals fearing infection, serious illness, and death requested release through habeas petitions around the country. One of the factors that courts considered in deciding whether to exercise habeas jurisdiction was whether alternative remedies exist, through a civil rights or tort-based action. This Article examines that question in depth, focusing specifically on the availability of meaningful alternatives for detained noncitizens. The Article analyzes challenges for noncitizens in bringing civil rights actions under Section 1983 or Bivens*, tort actions under the Federal Tort Claims Act and state tort laws, and actions for injunctive relief directly under the Fifth Amendment and under the Administrative Procedure Act. By demonstrating that meaningful alternatives to habeas are often illusory for detained noncitizens, the Article argues that courts should err on the side of exercising habeas jurisdiction instead of making cursory conclusions that alternative remedies can be pursued.*

* Professor of Law, Texas A&M School of Law (JD, MPH, Harvard; BA, Yale).

INTRODUCTION

Across the country, medically vulnerable immigrants have been challenging their detention during the COVID-19 pandemic through habeas petitions demanding release.[1] For many, the door has been slammed shut with a finding that the court lacks subject matter jurisdiction over these habeas petitions.[2] Without direct guidance from the Supreme Court, circuit courts are split as to whether a habeas petition may be used to challenge the *conditions* of detention, as opposed to the *fact or duration* of detention.[3] In *Preiser*, the Supreme Court indicated that a habeas petition is the proper way to challenge the fact or duration of detention, but

1. *See generally* Jonathan L. Hafetz, Note, *The Untold Story of Noncriminal Habeas Corpus and the 1996 Immigration Acts*, 107 YALE L.J. 2509, 2524 (1998) (examining the historical availability of habeas to challenge noncriminal detention and explaining that "[a]liens in the United States have likewise been able to challenge their confinement through habeas corpus since the nation's founding").

2. *See infra* Part I.

3. *See id.*

a civil rights action is the proper way to challenge the conditions of detention.[4] However, the Court did not rule out the possibility of habeas also being used to challenge detention conditions.[5]

The COVID-19 pandemic brought this jurisdictional question into the spotlight. Some courts have exercised jurisdiction even in circuits that generally do not recognize habeas as a vehicle to challenge detention conditions. These courts have reasoned that the remedy requested is release, no conditions would be constitutionally sufficient, or, in a small number of cases, that no alternative remedies are available. Other courts, however, have rejected habeas jurisdiction, contending that civil rights remedies or even tort remedies *are* available. Despite extensive legal scholarship on the role of alternative remedies in examining *Bivens* civil rights claims,[6] no prior articles have explored the relevance of alternative remedies in jurisdictional questions regarding habeas petitions related to detention conditions.[7] This Article examines that issue in the context of habeas petitions brought by noncitizens, where alternative remedies are especially limited. This Article argues that civil rights and tort remedies provide largely illusory alternatives for most detained noncitizens and should not be viewed as substitutes for the writ of habeas corpus.

Noncitizens can be detained for many reasons, even if they do not have a criminal history.[8] Some are subject to mandatory detention under the Immigration and Nationality Act, including asylum seekers who present themselves at ports of entry,[9] while others are detained by Immigration and Customs Enforcement (ICE) as a matter of discretion.[10] Although the average length of detention may be only a

4. *See* Preiser v. Rodriguez, 411 U.S. 475, 500 (1973).

5. *See id.*

6. *See, e.g.*, Alex Langsam, Note, *Breaking* Bivens*?: Falsification Claims After* Ziglar v. Abbasi *and Reframing the Modern* Bivens *Doctrine*, 88 FORDHAM L. REV. 1395, 1426–27 (2020) (discussing how courts are split on whether to focus on the formal existence of alternative remedies or the practical existence and meaningfulness of the remedy in the *Bivens* context); David C. Nutter, Note, *Two Approaches to Determine Whether an Implied Cause of Action Under the Constitution Is Necessary: The Changing Scope of the* Bivens *Action*, 19 GA. L. REV. 683, 705 (1985) (discussing the Court's move from an "Equally Effective Approach" in *Bivens* cases to a "Damages or Nothing Approach" as one where the focus shifted from "redressing constitutional wrongs" to separation of powers).

7. Other articles addressing jurisdictional questions involving habeas petitions by noncitizens have examined issues such as jurisdiction over noncitizens detained abroad and jurisdiction-stripping statutes but not the issue of subject matter jurisdiction over conditions claims. *See, e.g.*, Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2101–02 (2007); Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 980 n.105 (1998).

8. *See* 8 U.S.C. § 1225(b) (generally requiring detention of noncitizens arriving at a port of entry who appear subject to removal, including asylum seekers); 8 C.F.R. § 1236.1 (generally authorizing discretionary detention pending a decision of whether a noncitizen is to be removed).

9. *See* 8 U.S.C. § 1225(b)(1)(B)(ii) (stating that a noncitizen in expedited proceedings who establishes a credible fear "shall be detained for further consideration of the application for asylum").

10. *See* 8 C.F.R. 1236.1; *see also* Alina Das, *Immigration Detention: Information Gaps and Institutional Barriers to Reform*, 80 U. CHI. L. REV. 137, 140–41 (2013) (discussing the long history of discretionary detention); Alina Das, *Unshackling Habeas Review:* Chevron *Deference and Statutory Interpretation in*

few months, there are hundreds of cases where detention lasts over a year.[11] Like other incarcerated populations, noncitizens in civil immigration detention have been hit hard by COVID-19. As of February 22, 2021, ICE reported that 9,530 detained immigrants have tested positive for COVID-19 out of 101,214 tested.[12] This positivity rate of 9.4% among detained immigrants is much higher than the rate of 5.9% for the United States as a whole.[13] While the total number of immigration detainees has dropped by two-thirds since the COVID-19 pandemic started and is currently under 15,000,[14] the average length of detention has almost doubled, placing those who remain detained, especially those with medical vulnerabilities, at heightened risk.[15]

Approximately seventy percent of detained noncitizens are currently in privately operated detention facilities, and the rest are primarily in jails and prisons operated by states or localities.[16] Very few are in federally operated facilities.[17] Some

---

Immigration Detention Cases, 90 N.Y.U. L. REV. 143, 205–06 (2015) (discussing mandatory detention under 8 U.S.C. § 1226(c)); Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 28–30 (1984) (describing detention of noncitizens as "an awesome power in its own right"); Denise Gilman, *Realizing Liberty: The Use of International Human Rights Law to Realign Immigration Detention in the United States*, 36 FORDHAM INT'L L.J. 243, 267–79 (2013) (arguing that a human rights framework calls for limiting the use of detention).

11. Mark Noferi, *Cascading Constitutional Deprivation: The Right to Appointed Counsel for Mandatorily Detained Immigrants Pending Removal Proceedings*, 18 MICH. J. RACE & L. 63, 80–82 (2012) (discussing prolonged detention).

12. *See ICE Guidance on COVID-19*, U.S. IMMIGR. & CUSTOMS ENF'T, https://www.ice.gov/coronavirus [https://web.archive.org/web/20210222181131/https://www.ice.gov/coronavirus] (last visited Feb. 22, 2021).

13. *See COVID Data Tracker Weekly Review*: *Stop Variants by Stopping the Spread*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/covid-data/covidview/past-reports/02192021.html [https://perma.cc/X7AA-WGFC] (Feb. 19, 2021).

14. U.S. IMMIGR. & CUSTOMS ENF'T, *supra* note 12.

15. *See* U.S. IMMIGR. & CUSTOMS ENF'T, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT FISCAL YEAR 2020 ENFORCEMENT AND REMOVAL OPERATIONS REPORT 10, 11 fig.7 (2020).

16. *See Detention by the Numbers*, FREEDOM FOR IMMIGRANTS, https://www.freedomforimmigrants.org/detention-statistics [https://web.archive.org/web/20210221044337/https://www.freedomforimmigrants.org/detention-statistics] (last visited Feb. 22, 2021) (reporting seventy percent based on federal data); Tara Tidwell Cullen, *ICE Released Its Most Comprehensive Immigration Detention Data Yet. It's Alarming.*, NAT'L IMMIGRANT JUST. CTR. (Mar. 13, 2018), https://immigrantjustice.org/staff/blog/ice-released-its-most-comprehensive-immigration-detention-data-yet [https://perma.cc/VKV9-D6R3] (reporting that seventy-one percent of detained noncitizens were in privately operated detention centers in November 2017); *see also* EMILY RYO & IAN PEACOCK, AM. IMMIGR. COUNCIL, THE LANDSCAPE OF IMMIGRATION DETENTION IN THE UNITED STATES 2 (2018) (finding that sixty-seven percent of detained noncitizens were "confined at least once" in a privately operated facility based on FY 2015 data); Emily Ryo & Ian Peacock, *A National Study of Immigration Detention in the United States*, 92 S. CAL. L. REV. 1, 28 tbl.2 (2018) (same); HOMELAND SEC. ADVISORY COUNCIL, DEP'T OF HOMELAND SEC., REPORT OF THE SUBCOMMITTEE ON PRIVATIZED IMMIGRATION DETENTION FACILITIES 6 tbl.1 (2016), https://www.dhs.gov/sites/default/files/publications/DHS%20HSAC%20PIDF%20Final%20Report.pdf [https://perma.cc/QQ5P-4D6L] (stating that sixty-five percent of immigration detainees were in privately operated facilities).

17. *See* U.S. IMMIGR. & CUSTOMS ENF'T, FY 2021 DETENTION STATISTICS, https://www.ice.gov/doclib/detention/FY21-detentionstats.xlsx [https://perma.cc/C87D-LAF2] (Mar. 14, 2022) (see tab for Facilities FY21 YTD showing that the Federal Bureau of Prisons operates

detention facilities are owned by ICE and operated by private companies (Service Processing Centers).[18] Others are both owned and operated by private companies that contract with ICE (Contract Detention Facilities).[19] State and local jails also hold immigration detainees, either with criminal detainees pursuant to an Inter-governmental Service Agreement (IGSA) with ICE, or exclusively for ICE, pursuant to a Dedicated Inter-Governmental Service Agreement.[20] Either way, the state or locality may subcontract operations to private companies.[21] The three "Family Residential Centers" that detain children with their parents are all privately operated. Additionally, the U.S. Marshals Service contracts with both private companies and local governments to operate detention facilities that are utilized by ICE as a rider on the contract.[22] Finally, the Federal Bureau of Prisons (BOP) operates two facilities in Hawaii and Puerto Rico with a miniscule number of noncitizens in ICE custody.[23]

This detention scheme, dominated by privately operated facilities, has a significant impact on the feasibility of civil rights remedies, in part because claims brought under Section 1983 of the Civil Rights Act require action under color of *state law*, and a *Bivens* civil rights claim requires action under color of *federal law*. This Article argues that courts should engage in an individualized analysis of whether alternative remedies are actually available, taking into account the type of detention facility, before reflexively denying habeas jurisdiction based on the notion that detention conditions should be challenged through civil rights claims. Since the founding of the United States, "the Great Writ was considered a primary safeguard of individual liberty against a tyrannical Executive."[24] Before blocking habeas as a remedy, courts should at least carefully evaluate whether a meaningful alternative exists.

Part I discusses the Supreme Court jurisprudence on habeas petitions and challenges to the conditions of confinement, explaining that the Court has left this an open question for nearly half a century. Part I then examines the circuit split that has resulted from the vacuum in guidance from the Supreme Court. Part I shows that the distinction between a habeas petition challenging conditions and one challenging the fact or duration of detention is not always clear, as the COVID-19 pandemic highlighted. By examining the reasoning of recent federal court decisions in cases involving COVID-19-related habeas petitions, this Article identifies three rationales that courts have utilized in construing a claim related to conditions as

---

only two facilities in Puerto Rico and Hawaii with an average daily detained population of only sixteen noncitizens in ICE custody).

18. *Id.* (see tab for Footnotes explaining the different types of detention facilities).
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. Paul Diller, *Habeas and (Non-)Delegation*, 77 U. CHI. L. REV. 585, 590 (2010).

actually challenging the fact of detention. One rationale is that the remedy requested is release. A second rationale is that no conditions of detention would be constitutionally sufficient. A third rationale is that no alternative remedies are available. However, many courts have also rejected habeas jurisdiction, reasoning that alternative remedies *are* available. The availability of alternative remedies therefore emerges as a critical issue in judicial decisions about habeas subject matter jurisdiction.

Part II examines whether civil rights remedies, mentioned by the Supreme Court in *Preiser*, are actually meaningful alternatives for detained noncitizens. Part II argues that the state action requirement for Section 1983 claims creates a structural barrier to relief for most detained noncitizens. The thirty percent of immigration detainees in city and county jails have a better chance at showing state action than the seventy percent in privately operated facilities, but given ICE's heavy involvement in supervising and monitoring, courts may well conclude that even officials in city and county jails are operating under color of federal law, not state law. For noncitizens in privately operated facilities, especially those that are dedicated to ICE, it will be even harder to establish the state action requirement for liability under Section 1983. Additionally, Part II argues that a *Bivens* remedy for a constitutional violation under color of federal law is unlikely to be available to detained noncitizens challenging detention conditions and policies after the Supreme Court's decisions in *Abbasi* and *Hernandez*, which sharply curtailed the contexts for a *Bivens* action.

Part III turns to tort-based remedies, which some courts have mentioned as alternatives to habeas petitions, examining claims under the Federal Tort Claims Act (FTCA) as well as state tort laws. Part III argues that there is often no private analogue in tort law to the actions taken by immigration officials, and multiple exceptions to the limited waiver of sovereign immunity in the FTCA exist for independent contractors, discretionary functions, and due care that may block a claim brought by a detained noncitizen. State tort law also may not provide a meaningful remedy because constitutional violations related to detention conditions often do not correspond to any tort.

Finally, Part IV examines the possibility of injunctive relief as an alternative to habeas, analyzing an implied cause of action directly under the Fifth Amendment or a claim under the Administrative Procedure Act. Obstacles exist to both, especially for noncitizens detained within the jurisdictions of the Fifth and Eleventh Circuits, who comprise a majority of all detained noncitizens.

The Article concludes that the absence of meaningful alternative remedies for many detained noncitizens weighs heavily in favor of exercising jurisdiction over habeas petitions which request release based on the conditions of detention.

I. HABEAS CORPUS AND CONDITIONS OF CONFINEMENT

In sixteenth-century England, the most important form of habeas corpus was to "inquir[e] into illegal detention with a view to an order releasing the petitioner."[25] The Supreme Court has explained that, at an "absolute minimum," the Suspension Clause of the U.S. Constitution protects the writ of habeas corpus as it existed in 1798.[26] But the federal habeas corpus statute, 28 U.S.C. § 2241, expanded the writ of habeas corpus,[27] which was never "a static, narrow, formalistic remedy."[28] While the historical "core" of habeas corpus included challenges to the *fact or duration* of confinement,[29] a claim that falls outside that core may still be the proper subject of statutory habeas.[30] The plain language of statutory habeas extends to anyone who is "in custody in violation of the Constitution or laws or treaties of the United States."[31] Whether this broad language encompasses claims challenging the conditions of confinement, however, remains disputed.[32]

As explained below, half a century ago, the Supreme Court held that the writ of habeas corpus encompassed conditions of confinement claims. But it later backed off that position in a series of decisions stating that this is an open question. Consequently, a circuit split has emerged regarding whether habeas can be used to challenge the conditions of confinement.

A. The Circuit Split on Habeas Jurisdiction over Conditions Claims

In 1969, the Supreme Court allowed a federal prisoner to use the writ of habeas corpus to challenge a prison regulation that prohibited giving legal assistance to other prisoners.[33] Two years later, the Court ruled that a petition by state prisoners challenging "their living conditions and disciplinary measures" was "cognizable in federal habeas corpus."[34]

However, in 1973, the Court backed off that position in *Preiser*, where it addressed the scope of relief state prisoners may seek under Section 1983 of the Civil Rights Act. In *Preiser,* the Court explained that "when a state prisoner is

25. Fay v. Noia, 372 U.S. 391, 399 n.5 (1963), *overruled in part by* Wainwright v. Sykes, 433 U.S. 72 (1977).

26. Immigr. & Naturalization Serv. v. St. Cyr, 533 U.S. 289, 301 (2001) (quoting Felker v. Turpin, 518 U.S. 651, 664 (1996)), *superseded by statute*, REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302, *as recognized in* Nasrallah v. Barr, 140 S. Ct. 1683 (2020).

27. Rasul v. Bush, 542 U.S. 466, 474 (2004) (quoting Swain v. Pressley, 430 U.S. 372, 380 n.13 (1977)).

28. Jones v. Cunningham, 371 U.S. 236, 243 (1963).

29. Preiser v. Rodriguez, 411 U.S. 475, 484–87 (1973).

30. Kiyemba v. Obama, 561 F.3d 509, 513 (D.C. Cir. 2009).

31. 28 U.S.C. § 2241(c)(3).

32. *See infra* Section I.A (discussing the circuit split that has emerged).

33. *See generally* Johnson v. Avery, 393 U.S. 483 (1969).

34. Wilwording v. Swenson, 404 U.S. 249, 249, 251 (1971) (per curium), *superseded by statute*, Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321-71, *as amended*, 42 U.S.C. § 1997e, *as recognized in* Woodford v. Ngo, 548 U.S. 81 (2006).

challenging the *very fact or duration* of his confinement, 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."[35] On the other hand, "a [Section] 1983 action is a proper remedy for a state prisoner who is making a constitutional challenge to the *conditions* of his prison life, but not to the fact or length of his custody."[36] The Court noted, however, that "*[w]hen 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."[37] Thus, the Court suggested that habeas may still be a viable way to challenge the conditions of custody, but it declined to "explore the appropriate limits of habeas corpus as an alternative remedy."[38]

At least three times since *Preiser*, the Court has confirmed that this remains an open question.[39] In *Bell*, the Court decided to "leave to another day the question of the propriety of using a writ of habeas corpus to obtain review of the conditions of confinement."[40] In *Boumediene*, the Court declined to "discuss the reach of the writ with respect to claims of unlawful conditions of treatment or confinement."[41] Most recently, in *Abbasi*, the Court explicitly stated that it had "left open the question whether [detainees] might be able to challenge their confinement conditions via a petition for a writ of habeas corpus."[42]

Abbasi, like *Preiser*, suggests that, at least in some circumstances, habeas may be used to challenge the conditions of detention. In refusing to extend a *Bivens* cause of action to noncitizens who challenged the government's detention policy after the 9/11 attacks, the Court in *Abbasi* noted that "the habeas remedy, if necessity required its use, would have provided a faster and more direct route to relief than a suit for money damages."[43] Given the absence of clear guidance from the Supreme Court, lower courts have taken conflicting positions on this question.[44]

35. Preiser v. Rodriguez, 411 U.S. 475, 500 (1973) (emphasis added).

36. *Id.* at 499 (emphasis added).

37. *Id.* (emphasis added). *But see* Muhammad v. Close, 540 U.S. 749, 751 n.1 (2004) (per curiam) (observing that the Court has "never followed [that] speculation in [*Preiser*]").

38. *Preiser*, 411 U.S. at 500.

39. *See generally* Bell v. Wolfish, 441 U.S. 520, 526 n.6 (1979); Boumediene v. Bush, 553 U.S. 723, 792 (2008); Ziglar v. Abbasi, 137 S. Ct. 1843, 1862–63 (2017).

40. *Wolfish*, 441 U.S. at 526 n.6.

41. *Boumediene*, 553 U.S. at 792.

42. *Abbasi*, 137 S. Ct. at 1862–63.

43. *Id.* at 1863. *See generally* Ojo v. United States, 364 F. Supp. 3d 163 (E.D.N.Y. 2019).

44. *See infra* notes 45–58.

The federal appellate courts are currently split on whether habeas may be used to challenge the conditions of confinement.[45] The D.C. Circuit,[46] First Circuit,[47] Second Circuit,[48] and Third Circuit[49] have allowed conditions claims to be brought through habeas petitions. The Fifth Circuit,[50] Sixth Circuit,[51] Seventh Circuit,[52] Eighth Circuit,[53] and Tenth Circuit,[54] on the other hand, generally do not allow conditions of confinement claims to be brought through a habeas petition. The Fourth Circuit[55] and Eleventh Circuit[56] have rejected the use of habeas to challenge

45. *See* Aamer v. Obama, 742 F.3d 1023, 1036–38 (D.C. Cir. 2014) (explaining that the courts of appeals are divided on whether habeas petitions are appropriate procedural vehicles to remedy conditions-of-confinement claims).

46. *Id.* at 1038 (finding that a conditions claim related to being force-fed while attempting a hunger strike was appropriate under a habeas petition).

47. United States v. DeLeon, 444 F.3d 41, 59 (1st Cir. 2006) (stating in dictum, "[i]f the conditions of incarceration raise Eighth Amendment concerns, habeas corpus is available.").

48. Thompson v. Choinski, 525 F.3d 205, 209 (2d Cir. 2008) (holding that a habeas petition was appropriate in challenging denial of access to the law library, denial of kosher food, and contested prison discipline).

49. Hope v. Warden York Cnty. Prison, 972 F.3d 310, 317 (3d Cir. 2020) (recognizing jurisdiction over habeas petition brought by immigration detainees challenging conditions during COVID-19); *see also* Ali v. Gibson, 572 F.2d 971, 975 n.8 (3d Cir. 1978) (noting that a conditions-of-confinement claim is cognizable in habeas "only in extreme cases"), *superseded by statute in irrelevant part* Revised Organic Act of 1954, Pub. L. No. 98–454, 98 Stat. 1732, *as recognized in* Callwood v. Enos, 230 F.3d 627, 633 (3d Cir. 2000).

50. Carson v. Johnson, 112 F.3d 818, 820–21 (5th Cir. 1997) ("If 'a favorable determination . . . would not automatically entitle [the detainee] to accelerated release,' . . . the proper vehicle is a [civil rights] suit." (quoting Orellana v. Kyle, 65 F.3d 29, 31 (5th Cir. 1995) (per curiam))).

51. Luedtke v. Berkebile, 704 F.3d 465, 466 (6th Cir. 2013) (habeas "is not the proper vehicle for a prisoner to challenge conditions of confinement" (citing Martin v. Overton, 391 F.3d 710, 714 (6th Cir. 2004))); *see also* Velasco v. Lamanna, 16 F. App'x 311, 314 (6th Cir. 2001). *But see* Adams v. Bradshaw, 644 F.3d 481, 482–83 (6th Cir. 2011) (per curiam) (recognizing an exception where no set of conditions would be sufficient to protect a petitioner's constitutional rights by holding that an Eighth Amendment challenge to lethal injection procedures was appropriate in the context of a habeas petition (citing Nelson v. Campbell, 541 U.S. 637, 645 (2004))).

52. Glaus v. Anderson, 408 F.3d 382, 386–88 (7th Cir. 2005) (holding that habeas could be used to challenge denial of proper medical treatment).

53. Kruger v. Erickson, 77 F.3d 1071, 1073 (8th Cir. 1996) (per curiam) ("If the prisoner is not challenging the validity of his conviction or the length of his detention, such as loss of good time, then a writ of habeas corpus is not the proper remedy."). *See generally* Spencer v. Haynes, 774 F.3d 467 (8th Cir. 2014).

54. Montez v. McKinna, 208 F.3d 862, 865 (10th Cir. 2000); Palma-Salazar v. Davis, 677 F.3d 1031, 1035 (10th Cir. 2012); Standifer v. Ledezma, 653 F.3d 1276, 1280 (10th Cir. 2011).

55. *See* Wilborn v. Mansukhani, 795 F. App'x 157, 163–64 (4th Cir. 2019) (per curiam); Rodriguez v. Ratledge, 715 F. App'x 261, 265–66 (4th Cir. 2017) (per curiam) (noting that transfer from one prison to another is not a cognizable habeas claim because it challenges the conditions of an inmate's confinement, not its fact or duration). *But cf.* McNair v. McCune, 527 F.2d 874, 875 (4th Cir. 1975) (per curiam) (allowing habeas for a challenge to segregated confinement, which could be considered a conditions claim, although segregated confinement can also potentially affect the duration of detention). *See generally* Braddy v. Wilson, 580 F. App'x 172 (4th Cir. 2014) (per curiam).

56. Vaz v. Skinner, 634 F. App'x 778, 781 (11th Cir. 2015) (per curiam) (finding a writ of habeas corpus is "not the appropriate vehicle for . . . a claim challeng[ing] the conditions of confinement"); *see also* Archilla v. Witte, No. 4:20-cv-00596, 2020 WL 2513648, at *14 (N.D. Ala. May 15, 2020) (collecting district court cases within the Eleventh Circuit holding that habeas may not be

conditions in unpublished decisions but have not directly addressed the issue in a precedential decision. The Ninth Circuit has also issued unpublished decisions rejecting attempts by federal prisoners to assert conditions of confinement claims via Section 2241.[57] However, in an en banc decision in *Nettles*, where the Ninth Circuit rejected a *state prisoner's* attempt to raise a conditions of confinement claim via 28 U.S.C. § 2254, the court found that it "need not address how the standard . . . adopted here applies to relief sought by prisoners in *federal* custody," leaving it an open question.[58]

B. A Split Within the Split: Rationales for Exercising Jurisdiction

Within the circuits that have generally rejected the use of habeas to challenge conditions of confinement, or that have not taken a clear position on this issue, courts are divided on whether to exercise jurisdiction over habeas petitions challenging detention conditions related to the COVID-19 pandemic. Many of the decisions finding subject matter jurisdiction reason that the petition is actually challenging the fact of detention, not the conditions of detention, either because the remedy requested is release, or because *no conditions* would be constitutionally sufficient, rendering release the only possible remedy. Additionally, some courts have reasoned that no alternative remedies are available, while others have denied jurisdiction based on cursory conclusions that alternative remedies *are* available.[59] After examining these rationales, this Section contends that the availability of alternative remedies is a critical issue that merits closer evaluation by federal courts analyzing the jurisdictional question.

1. The Remedy Requested is Release

In exercising habeas jurisdiction over COVID-19-related claims, many courts have focused on the fact that the remedy sought is immediate release. Numerous district courts within the Ninth Circuit, for example, have found habeas jurisdiction

used to challenge the conditions of confinement); Gomez v. United States, 899 F.2d 1124, 1126 (11th Cir. 1990) ("The appropriate Eleventh Circuit relief from prison conditions that violate the Eighth Amendment during legal incarceration is to require the discontinuance of any improper practices, or to require correction of any condition causing cruel and unusual punishment. . . . [R]elief of an Eighth Amendment violation does not include release from confinement." (citing Cook v. Hanberry, 596 F.2d 658, 660 (5th Cir. 1979) (per curiam))).

57. *See* Ibarra-Perez v. Howard, 468 F. Supp. 3d 1156, 1169–70 (D. Ariz. 2020) ("Unfortunately, Ninth Circuit law does not resolve this question definitively. . . . And because the door has been left ajar in this fashion, district courts within the Ninth Circuit have reached conflicting decisions concerning whether a federal detainee may invoke COVID-19 . . . .").

58. Nettles v. Grounds, 830 F.3d 922, 931 (9th Cir. 2016) (en banc) (emphasis added); *see also* Zepeda Rivas v. Jennings, 465 F. Supp. 3d 1028, 1035–36 (N.D. Cal. 2020) (explaining that the Ninth Circuit has not resolved the question of whether federal detainees can challenge the conditions of detention through habeas petitions), *appeal filed*, No. 20-16276 (9th Cir. 2020).

59. *See infra* notes 90–96 and accompanying text.

proper based on this reasoning.[60] A district court within the Eighth Circuit likewise reasoned, "In such situations, where the relief requested is release, and the argument is that confinement itself is unconstitutional, this Court agrees that it has the authority to release individuals from custody through a Section 2241 petition."[61]

Similarly, multiple district courts within the Fifth Circuit, including in Texas, Louisiana, and Mississippi, have held that there is habeas jurisdiction because the remedy requested is immediate release, which impacts the fact of detention.[62] As the Fifth Circuit has recognized, the line between conditions cases and those based on the fact of detention is "a blurry one."[63] A judge in the Southern District of Texas explained, "The mere fact that Plaintiffs' constitutional challenge *requires discussion of conditions* in immigration detention does not necessarily bar such a challenge in a habeas petition."[64] At least two district courts in the Seventh Circuit also applied this reasoning, finding that the petitioner's claim "directly bears on not just his conditions of confinement, but whether the *fact* of his confinement is constitutional in light of the conditions caused by the COVID-19 pandemic."[65]

However, other district courts, including some within the Fifth Circuit and the Eleventh Circuit, have rejected this argument, asserting that "tacking a traditional habeas remedy on to a prototypical conditions-of-confinement claim does not convert that classic civil rights claim into a habeas claim."[66] One court described the

60. *See* Calderon v. Barr, No. 2:20-cv-00891, 2020 WL 2394287, at *4 (E.D. Cal. May 12, 2020) (stating that, despite decisions by many other district courts within the Ninth Circuit, the court was "uneasy with habeas corpus as the vehicle to decide conditions of confinement issues" given Ninth Circuit precedents, but finding "no need to make a final jurisdiction determination" because the court recommended a stay of the case).

61. Mohammed S. v. Tritten, No. 20-CV-783, 2020 WL 2750109, at *2 (D. Minn. May 27, 2020); *see also* Toma v. Adducci, No. 20-11071, 2020 WL 2832255, at *2 (E.D. Mich. May 31, 2020) (allowing the habeas action where the petitioner argued that release was the only remedy, and the government did not contest jurisdiction).

62. Espinoza v. Gillis, No. 5:20-cv-106, 2020 WL 2949779, at *2 (S.D. Miss. June 3, 2020); Njuguna v. Staiger, No. 6:20-CV-00560, 2020 WL 3425289, at *5 (W.D. La. June 3, 2020) ("Because Petitioner challenges the validity of his continued confinement and because he seeks immediate release from confinement as the remedy, his claims were properly brought under 28 U.S.C. § 2241 and the Court has jurisdiction to rule on his petition for writ of habeas corpus."); Beswick v. Barr, No. 5:20-cv-98, 2020 WL 3520312, at *2 (S.D. Miss. June 29, 2020) (finding habeas a proper vehicle: "If the Court were to grant the Petitioner's requested relief, it would result in his immediate release. Therefore, the Petitioner has brought a habeas matter because the requested relief challenges the fact or duration of confinement."); Vazquez Barrera v. Wolf, 455 F. Supp. 3d 330, 337 (S.D. Tex. 2020) ("Because Plaintiffs are challenging the fact of their detention as unconstitutional and seek relief in the form of immediate release, their claims fall squarely in the realm of habeas corpus.").

63. Poree v. Collins, 866 F.3d 235, 243 (5th Cir. 2017) (quoting Cook v. Tex. Dep't of Crim. Just. Transitional Plan. Dep't, 37 F.3d 166, 168 (5th Cir. 1994)); *see also Vazquez Barrera*, 455 F. Supp. 3d at 336.

64. *Vazquez Barrera*, 455 F. Supp. 3d at 337 (emphasis added).

65. Ruderman v. Kolitwenzew, 459 F. Supp. 3d 1121, 1131–32 (C.D. Ill. 2020); Favi v. Kolitwenzew, No. 20-CV-2087, 2020 WL 2114566, at *7 (C.D. Ill. May 4, 2020), *appeal dismissed*, No. 20-2372, 2020 WL 8262041 (7th Cir. Oct. 5, 2020).

66. Archilla v. Witte, No. 4:20-CV-00596, 2020 WL 2513648, at *12 (N.D. Ala. May 15, 2020); Umarbaev v. Moore, No. 3:20-CV-1279, 2020 WL 3051448, at *4 (N.D. Tex. June 6, 2020).

petitioners' exclusive request for release, rather than for improvement of conditions, as a "self-imposed limitation" that "does not save their habeas petition."[67] Another noted, "This argument proves too much. If petitioners were correct, then any time a detainee requests immediate release—no matter the basis for that relief—the appropriate vehicle would be [habeas]."[68]

Some courts have also simply rejected the notion that release from detention is the only meaningful remedy.[69] If a detention center were to adopt all of the protective measures set forth by the Centers for Disease Control and Prevention (CDC), these courts reason, then that would be an adequate remedy.[70] As a district court in Georgia explained:

> Even if an exception to [the] rule exists where the unconstitutional conditions cannot be remedied in some other way, the Court finds that, based on the present record, release from confinement is not the only way to remedy the alleged unconstitutional conditions of confinement here. Petitioners essentially concede this fact by suggesting that if Respondents followed the CDC Guidance, the risk of infection would be substantially reduced.[71]

A district court in Texas also was not convinced that the "extraordinary remedy" of release was warranted given the "protective measures and safety protocols detailed" by the government.[72] Similarly, a district court in New Mexico was not persuaded by the petitioner's request for release, finding that the petitioner had "failed to show why another, lesser remedy, such as changing the conditions of confinement [was] not available."[73] Merely requesting release therefore may not be sufficient to convince a court that habeas is the proper vehicle.

2. No Set of Conditions Would Be Constitutionally Sufficient

A more persuasive argument for habeas jurisdiction is if the petition alleges that "no set of conditions" exists that would be constitutionally sufficient, rendering release the only possible remedy.[74] This was the Sixth Circuit's rationale in exercising habeas jurisdiction in *Wilson*.[75] *Wilson* involved a habeas petition brought by medically vulnerable prisoners asserting deliberate indifference in violation of the

67. Toure v. Hott, 458 F. Supp. 3d 387, 399 (E.D. Va. 2020).

68. Codner v. Choate, No. 20-cv-01050, 2020 WL 2769938, at *7 (D. Colo. May 27, 2020).

69. Matos v. Lopez Vega, No. 20-CIV-60784, 2020 WL 2298775, at *5–6 (S.D. Fla. May 6, 2020).

70. A.S.M. v. Warden, Stewart Cnty. Det. Ctr., 467 F. Supp. 3d 1341, 1349 (M.D. Ga. 2020).

71. *Id.*

72. Cureno Hernandez v. Mora, 467 F. Supp. 3d 454, 462 (N.D. Tex. 2020).

73. Rodas Godinez v. U.S. Immigr. & Customs Enf't, No. 2:20-cv-466, 2020 WL 3402059, at *3 (D.N.M. June 19, 2020) (citing Codner v. Choate, No. 20-cv-01050, 2020 WL 2769938, at *6 (D. Colo. May 27, 2020).

74. Malam v. Adducci, 452 F. Supp. 3d 643, 650 (E.D. Mich. 2020) (citing Nelson v. Campbell, 541 U.S. 637, 644–45 (2004)).

75. Wilson v. Williams, 961 F.3d 829, 838 (6th Cir. 2020) (citing Adams v. Bradshaw, 644 F.3d 481, 483 (6th Cir. 2011) (per curiam)).

Eighth Amendment based on the failure to create safe conditions during the pandemic.[76] In concluding that habeas was the proper vehicle, the court stressed that the petitioner had argued that "the constitutional violations occurring at [the prison] as a result of the pandemic can be remedied *only* by release."[77] Relying on *Wilson*, the Fifth and Tenth Circuits have also acknowledged, in unpublished decisions, that habeas jurisdiction may exist if no set of conditions would be constitutionally sufficient.[78]

Numerous district courts have similarly applied this rationale. For instance, a district court in Louisiana opined that "[i]f no set of conditions is sufficient to protect a detainee's constitutional rights, his claim for relief is cognizable in habeas."[79] Similarly, two district courts in Minnesota explained, "to the extent that the conditions of confinement create a due process violation that cannot be remedied and for which death is a probability, this Court finds that it has the subject matter jurisdiction to entertain a habeas petition under Section 2241 for the release of Petitioners."[80]

In making this argument, petitioners have stressed that social distancing simply is not possible in a detained setting. In *Malam*, for example, the petitioner alleged that social distancing was impossible in the detention center and the government conceded that fact.[81] The petitioner argued that "no matter what steps were taken, due to her underlying serious health conditions, there is no communal holding facility where she could be incarcerated during the COVID-19 pandemic that would be constitutional."[82] The court therefore considered her claim "a challenge to the continued validity of confinement itself" and found it properly brought as a habeas petition.[83] Similarly, in *Awshana*, where the petitioners argued that "no custodial condition will protect them from infection," the court found habeas jurisdiction.[84]

But many courts remain unpersuaded that no conditions exist that can remedy the situation. For example, a court in the Southern District of Georgia found that the conditions alleged to contribute to the risk of COVID-19 "could be remedied with internal facility changes, such as more vigilant screening measures, increased

76. *Id.*

77. *Id.* (emphasis added).

78. Medina v. Williams, 823 F. App'x 674, 676 (10th Cir. 2020); Cheek v. Warden of Fed. Med. Ctr., 835 F. App'x 737, 739 (5th Cir. 2020) (per curiam).

79. Njuguna v. Staiger, No. 6:20-CV-00560, 2020 WL 3425289, at *5 (W.D. La. June 3, 2020); *Malam*, 452 F. Supp. 3d at 650.

80. Mohammed S. v. Tritten, No. 20-cv-793, 2020 WL 2750836, at *19 (D. Minn. Apr. 28, 2020), *report and recommendation adopted*, No. 20-CV-783, 2020 WL 2750109 (D. Minn. May 27, 2020); Angelica C. v. Immigr. & Customs Enf't, No. 20-cv-913, 2020 WL 3441461, at *11 (D. Minn. June 5, 2020), *report and recommendation adopted*, No. 20-CV-913, 2020 WL 3429945 (D. Minn. June 23, 2020).

81. *Malam*, 452 F. Supp. at 650–51.

82. *Id.* at 651.

83. *Id.*; *see also* Wilson v. Williams, 961 F.3d 829, 838 (6th Cir. 2020) (accepting habeas jurisdiction where infections were rampant among inmates and staff and testing was limited).

84. Awshana v. Adducci, 453 F. Supp. 3d 1045, 1047 (E.D. Mich. 2020).

availability of cleaning supplies, and greater efforts to create distance between detainees."[85] A court in the District of New Mexico similarly held that the petitioner had not shown why the court could not "order improvements to his conditions of confinement, such as social distancing, mask use, disinfection, improved screening, or testing."[86]

Other courts have denied preliminary relief but explicitly left open the possibility for habeas jurisdiction if conditions cannot be corrected.[87] For example, in *Gayle*, which involved noncitizens at three South Florida detention centers, the court recognized that "[i]f no correction is feasible, then the remedy which the Eleventh Circuit relied upon would become illusory. If that were the case, then the [Court] would reconsider the conclusion that there is no habeas corpus release remedy for the detainees."[88] Likewise, a court in the Middle District of Georgia denied an emergency motion for preliminary injunctive relief but specifically noted that it might reconsider habeas relief if conditions "cannot be modified to reasonably eliminate those risks."[89]

As preventative measures improve, it will become only more difficult to demonstrate that there are *no conditions* of detention that would be constitutionally sufficient. Therefore, it is especially important to consider whether any alternative remedies to habeas exist as another rationale for extending habeas jurisdiction.

3. No Alternative Remedies Are Available

A completely different rationale given by a minority of district courts for exercising habeas jurisdiction is that, without access to habeas, detained immigrants "may have no vehicle by which to seek redress for the constitutional violations they allege."[90] Some have stressed that a *Bivens* cause of action is not a viable alternative because it provides a remedy of damages not a remedy of release.[91] Others have distinguished between a *Bivens* claim for damages and a *Bivens* claim for injunctive relief (i.e., an implied cause of action under the Constitution for injunctive relief),

85. Benavides v. Gartland, No. 5:20-cv-46, 2020 WL 1914916, at *5 (S.D. Ga. Apr. 18, 2020).

86. Acosta Ortega v. U.S. Immigr. & Customs Enf't, No. 2:20-cv-00522, 2020 WL 4816373, at *5 (D.N.M. Aug. 19, 2020).

87. *See, e.g.*, Gayle v. Meade, No. 20-21553, 2020 WL 1949737, at *26 (S.D. Fla. Apr. 22, 2020), *report and recommendation adopted in part*, No. 20-21553-CIV, 2020 WL 2086482 (S.D. Fla. Apr. 30, 2020), *order clarified*, No. 20-21553-CIV, 2020 WL 2203576 (S.D. Fla. May 2, 2020).

88. *Id.*

89. A.S.M. v. Donahue, No. 7:20-CV-62, 2020 WL 1847158, at *1 (M.D. Ga. Apr. 10, 2020).

90. Coreas v. Bounds, 451 F. Supp. 3d 407, 419 (D. Md. 2020) (citing Lee v. Winston, 717 F.2d 888, 892 (4th Cir. 1983)).

91. Awshana v. Adducci, 453 F. Supp. 3d 1045, 1047 (E.D. Mich. 2020); Angelica C. v. Immigr. & Customs Enf't, No. 20-cv-913, 2020 WL 3441461, at *10 (D. Minn. June 5, 2020), *report and recommendation adopted*, No. 20-CV-913, 2020 WL 3429945 (D. Minn. June 23, 2020) ("Release is not a remedy allowed for under a civil rights action.") (citing Preiser v. Rodriguez, 411 U.S. 475, 500 (1973)).

concluding that the petitioner could proceed with both a claim for injunctive relief and a habeas petition.[92]

But many more courts have *denied* habeas jurisdiction reasoning that an alternative civil rights remedy is available under either *Bivens* or Section 1983, relying on the Supreme Court's decision in *Preiser*.[93] The courts that have reached this conclusion have done so without actually analyzing the feasibility of a civil rights claim under either *Bivens* or Section 1983. For example, a court in the District of New Mexico found that the petitioner could not proceed with a habeas petition challenging conditions "in lieu of filing a 1983 [claim] to correct unconstitutional conditions of confinement," but never discussed whether a Section 1983 claim would actually be possible.[94] Another court found that the petitioner could proceed under *Bivens,* noting that "the unavailability of this preferred remedy [of release] does not leave a plaintiff or a petitioner without any remedy," but never analyzed whether *Bivens* would actually be viable under the Supreme Court's recent precedents.[95] Some district courts have even relied on tort-based remedies, either under the FTCA or state tort law, as alternatives to habeas.[96]

The reasoning provided by courts regarding alternative remedies is generally very cursory and ignores serious structural barriers that prevent immigration detainees from bringing civil rights and tort claims to challenge their detention conditions. The following Section examines these other remedies in detail and argues that they are not meaningful alternatives for many detained immigrants.

II. CIVIL RIGHTS REMEDIES AS POTENTIAL ALTERNATIVES

The argument that habeas is not available to challenge conditions of confinement because those claims should be brought as civil rights actions breaks down if a civil rights action is not actually viable. As explained below, a Section 1983 claim, which requires *state action*, often is not viable for federal immigration detainees, even if they are detained in local jails or in privately operated

92. *See, e.g.*, David Q. v. Tsoukaris, No. 20-7176, 2020 WL 4382282, at *9 (D.N.J. July 30, 2020); Romeo S.K. v. Tsoukaris, No. 20-5512, 2020 WL 4364297, at *7 (D.N.J. July 29, 2020) (citing Woodall v. Fed. Bureau of Prisons, 432 F.3d 235, 242 n.3 (3d Cir. 2005); *see also* Alirio R.R. v. Correia, No. 20-6217, 2020 WL 3249109, at *5 (D.N.J. June 16, 2020) (finding that "at a minimum," a detained immigrant vulnerable to COVID-19 must "be able to proceed under either [the habeas statute] or *Bivens*").

93. *See, e.g.*, Toure v. Hott, 458 F. Supp. 3d 387, 400 (E.D. Va. 2020) (citing Glaus v. Anderson, 408 F.3d 382, 387 (7th Cir. 2005)); *see also* Ibarra-Perez v. Howard, 468 F. Supp. 3d 1156, 1170 (D. Ariz. 2020) ("Were the Court forced to answer the question, it would rule that Counts Two, Three, and Four of the Petition are subject to dismissal because they are not cognizable in a § 2241 action."); Umarbaev v. Moore, No. 3:20-CV-1279, 2020 WL 3051448 (N.D. Tex. June 6, 2020); Shah v. Wolf, No. 3:20-CV-994, 2020 WL 4456530 (N.D. Tex. July 13, 2020).

94. Acosta Ortega v. U.S. Immigr. & Customs Enf't, No. 2:20-cv-00522, 2020 WL 4816373, at *4–5 (D.N.M. Aug. 19, 2020) ("Petitioner has not shown cause why the Court could not order (in a Section 1983 case) improvements to his conditions of confinement.").

95. *Toure*, 458 F. Supp. 3d at 400 (citing *Glaus*, 408 F.3d at 387).

96. *See, e.g.*, *Umarbaev*, 2020 WL 3051448.

detention centers pursuant to a contract with the municipality. A *Bivens* claim for damages may also not be feasible after the Supreme Court's decisions in *Abbasi* and *Hernandez*.[97]

A. Section 1983 Claims

Section 1983 of the Civil Rights Act of 1871 was enacted after the Civil War "to provide a federal forum for civil rights claims."[98] Section 1983 encompasses claims for damages, as well as for injunctive and declaratory relief, based on the deprivation of a federal constitutional or statutory right by persons acting under color of state law.[99] Liability "attaches only to those wrongdoers 'who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it.'"[100] In other words, the defendant must have "exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'"[101]

The defendants must also be personally involved in the alleged violation.[102] In *Monell*, the Supreme Court held that municipalities cannot be held liable under Section 1983 based only on a theory of *respondeat superior* (vicarious liability).[103] Some appellate courts have held that where the claim is against a municipality, the plaintiff must show that a policy or custom of the municipality was the "moving force" behind the deprivation of plaintiff's rights.[104] Appellate courts have applied *Monell*'s prohibition on vicarious liability under Section 1983 to private corporations as well.[105]

---

97. *See generally* Hernandez v. Mesa, 140 S. Ct. 735 (2020); Ziglar v. Abbasi, 137 S. Ct. 1843 (2017).

98. Will v. Mich. Dep't of State Police, 491 U.S. 58, 66 (1989); *see also* Nicole B. Godfrey, *Holding Federal Prison Officials Accountable: The Case for Recognizing a Damages Remedy for Federal Prisoners' Free Exercise Claims*, 96 NEB. L. REV. 924, 931 (2018).

99. 42 U.S.C. § 1983; West v. Atkins, 487 U.S. 42, 50–51 (1988) (holding that medical professionals who provide care to inmates in prison settings are acting under color of state law); Maine v. Thiboutot, 448 U.S. 1, 4–8 (1980) (holding that Section 1983 encompasses violations of purely statutory federal law, not just constitutional law). Congress can prohibit recourse to Section 1983 in legislation or by creating a comprehensive statutory scheme that is incompatible with individual enforcement under Section 1983. *See* Blessing v. Freestone, 520 U.S. 329, 341 (1997).

100. Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 191 (1988) (quoting Monroe v. Pape, 365 U.S. 167, 172 (1961)).

101. *West*, 487 U.S. at 49 (quoting United States v. Classic, 313 U.S. 299, 326 (1941)).

102. Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690–91 (1978).

103. *Id.*

104. Miller v. Sanilac Cnty., 606 F.3d 240, 255 (6th Cir. 2010) (quoting Powers v. Hamilton Cnty. Pub. Defender Comm'n, 501 F.3d 592, 606–07 (6th Cir. 2007)). Some courts have allowed Section 1983 actions against municipalities in cases involving their response to detainer requests from ICE, but that is a distinct issue from challenges to the conditions of immigration detention. *See, e.g.*, Creedle v. Miami-Dade Cnty., 349 F. Supp. 3d 1276, 1308–09 (S.D. Fla. 2018); Abriq v. Hall, 295 F. Supp. 3d 874, 878 (M.D. Tenn. 2018).

105. *See, e.g.*, Shields v. Ill. Dep't of Corr., 746 F.3d 782 (7th Cir. 2014) (explaining that all circuits that have considered the issue have applied *Monell* to private corporations but questioning whether that is based on sound reasoning).

Traditionally, Section 1983 claims pertaining to detention are brought by *state* prisoners against *state, city, or county* officials or municipalities.[106] Immigration detainees are in the custody of ICE, a federal agency that acts exclusively under color of federal law. ICE officers cannot be sued under Section 1983 because they are not acting under color of state law.[107] However, as explained in Part I, about thirty percent of immigration detainees are held in facilities that are operated either by cities or counties, and approximately seventy percent are in facilities that are privately operated.[108] If a detained noncitizen brings a Section 1983 claim against employees of these municipal or private operators, a critical threshold question is whether the defendants acted under color of state law.[109] This state law inquiry is fact-specific and requires examining "whether the State was sufficiently involved to treat the decisive conduct as state action."[110] This Section first examines challenges to bringing Section 1983 claims against detention facilities operated by local governments and then at privately operated facilities.

1. Detention Facilities Operated by State or Local Governments

If an individual in federal custody is held in a city or county jail pursuant to a contract between the federal and municipal government, a key question is whether the person who allegedly violated the Constitution acted under color of state or federal law. When the "challenged action by state employees is nothing more than the application of federal rules, the federal involvement in those actions is so pervasive that the actions are taken under color of federal and not state law."[111] Under this standard, if the officials at a city or county jail are simply applying ICE's rules, such as ICE's COVID-19 Pandemic Response Requirements (PRR), a court may well conclude that the defendants were acting under color of federal law, not state law, and that there is therefore no liability under Section 1983.

---

106. *See* Martin A. Schwartz, *The* Preiser *Puzzle: Continued Frustrating Conflict Between the Civil Rights and Habeas Corpus Remedies for State Prisoners*, 37 DEPAUL L. REV. 85, 86 n.4, 98 (1988) (focusing on state prisoners because "the section 1983-habeas corpus issue normally arises in cases brought by confined state prisoners who are clearly in custody" but acknowledging that the issue may also arise in other contexts).

107. *Id.* at 86 n.4 ("Federal prisoners in federal custody may not seek relief against federal prison officials under section 1983 because these officials do not act under color of state law within the meaning of section 1983." (citing MARTIN A. SCHWARTZ & JOHN E. KIRKLIN, SECTION 1983 LITIGATIONS: CLAIMS, DEFENSES AND FEES § 5.6 (1986))).

108. *See* FREEDOM FOR IMMIGRANTS, *supra* note 16.

109. Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 191 (1988) (quoting Monroe v. Pape, 365 U.S. 167, 192 (1961)).

110. *Id.*

111. Rosas v. Brock, 826 F.2d 1004, 1007 (11th Cir. 1987); *see also* Askew v. Bloemker, 548 F.2d 673, 677 (7th Cir. 1976) (finding no state action in a raid conducted by officers employed by both federal and state agencies where the raid was completely instigated and controlled by the federal agency and occurred outside the state agency's jurisdiction).

But courts have also found that "[a] crucial inquiry is 'whether *day-to-day operations* are supervised by the Federal [or state] government.'"[112] Under this test, courts may find state action when a federal detainee is held in a state or local jail. For example, in a 1974 case involving a federal prisoner in a city jail, the Fifth Circuit reversed the district court's finding that the city jail was not "acting under color of State law, but [was] providing for the . . . safekeeping of the plaintiff in accordance with [a] Federal Contract."[113] The Fifth Circuit found that the proper focus of the inquiry was "not on the particular circumstances which brought the plaintiff under state control, but rather on the fact of that control and the manner of its exercise."[114] In that case, the federal contract did not authorize federal interference with the operation of the jail, and the jail officials supervised the plaintiff "by virtue of the positions conferred on them [under state law]," which led the court to conclude that they were state actors under Section 1983.[115]

Some courts have applied similar reasoning to cases involving detained immigrants. For instance, in *Newborgh*, which involved the death of an immigration detainee due to inadequate medical care, a court in the Eastern District of Virginia found state action by the jail authority, reasoning that it had "substantial control over its own operations."[116] In *Jarno*, a court in the same district also found state action where the immigration detainee alleged excessive force by the jail guards, reasoning that the federal contract did not specify how the jail should supervise its guards and that immigration detainees were not segregated from the jail's general population.[117]

With respect to detention conditions related to the COVID-19 pandemic, however, ICE issued PRR that apply to all facilities.[118] ICE's heavy involvement in developing measures for infection prevention and control, monitoring facilities, and requiring corrective plans where needed may lead courts to conclude that there is no state action when it comes to claims based on conditions related to COVID-19, even when the noncitizen is detained in a city or county jail. For example, the PRR provide that ICE will "conduct onsite in-person monthly spot checks" at detention facilities, provide written notice "[u]pon identification of a deficiency," and allow seven days for submission of a corrective action plan to ICE for approval.[119] The

112. Johnson v. Orr, 780 F.2d 386, 390 (3d Cir. 1986) (emphasis added) (citing Detore v. Loc. 245 Jersey City Pub. Emps. Union, 615 F.2d 980, 983 (3d Cir. 1980)).

113. Henderson v. Thrower, 497 F.2d 125, 125 (5th Cir. 1974) (per curiam).

114. *Id.* at 125–26.

115. *Id.* at 126.

116. Newbrough v. Piedmont Reg'l Jail Auth., 822 F. Supp. 2d 558, 573–74 (E.D. Va. 2011), *vacated in part*, No. 3:10CV867, 2012 WL 12931710 (E.D. Va. 2012).

117. Jarno v. Lewis, 256 F. Supp. 2d 499, 503 (E.D. Va. 2003).

118. *See generally* U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, ENFORCEMENT AND REMOVAL OPERATIONS, COVID-19 PANDEMIC RESPONSE REQUIREMENTS (Version 7.0, Oct. 19, 2021).

119. *Id.* at 8 (stating that if it is a "[l]ife/safety issue," then the corrective plan must be submitted within three days).

PRR also provide consequences for facilities that fail to take corrective steps.[120] For ICE-dedicated facilities, sanctions could include contract payment deductions, fixed fee deductions, or other types of nonpayment, and ultimately ICE could decide to terminate or not renew the contract.[121] For nondedicated facilities, ICE could decide to reduce its detained population at the facility or remove it altogether, on either a temporary or permanent basis.[122]

Additionally, the PRR require detention center operators to report all suspected and confirmed cases of COVID-19 to ICE, evaluate all new admissions to determine if they are at risk of serious illness from COVID-19, and notify ICE of the results of those evaluations.[123] ICE has also mandated facility operators to ensure sufficient supplies of hygiene products such as soap and hand sanitizer, facemasks and other personal protective equipment, and medical supplies.[124] Among other requirements are rules pertaining to testing, managing suspected and confirmed cases, and contingency plans for staffing.[125] This level of supervision and involvement by ICE may lead courts to conclude that any constitutional deprivations related to COVID-19 were based on federal action, not state action.

This is not to say that all arguments regarding state action are foreclosed. Arguments can still be made based on important decisions that the PRR leave to the facility operator's discretion. For example, the PRR state that COVID-19 screening should take place before entering the facility or just inside the facility "where practicable"; social distancing measures should be undertaken "to the extent practicable"; and facilities should "adopt the most effective cohorting methods practicable."[126] Furthermore, the PRR encourage facilities to make "efforts" to quarantine all new admissions and test all new intakes upon arrival, as well as to make "every possible effort" to isolate individuals suspected of having COVID-19.[127] When punitive solitary confinement cells are used for medical isolation, "efforts" should be made to provide similar access to the amenities (e.g., TV, reading materials, and commissary) available in the regular housing units.[128] Because this language is discretionary, not mandatory, it leaves some room for state action.

If the state action requirement were met, the doctrine of qualified immunity could prevent any remedy of damages, but it is not a defense in cases seeking injunctive relief.[129] The qualified immunity doctrine "strikes a balance between

120. *Id.* at 8–9.
121. *Id.* at 8.
122. *Id.* at 8–9.
123. *Id.* at 9–14.
124. *Id.* at 30–32.
125. *Id.* at 39–45.
126. *Id.* at 35, 38–39.
127. *Id.* at 40.
128. *Id.* at 22.
129. Pearson v. Callahan, 555 U.S. 223, 242 (2009); Harlow v. Fitzgerald, 457 U.S. 800, 806 (1982); *see also* John C. Jeffries, Jr., *Disaggregating Constitutional Torts*, 110 YALE L.J. 259, 263 (2000)

compensating those who have been injured by official conduct and protecting government's ability to perform its traditional functions."[130] Immunity is meant to "safeguard government, and thereby to protect the public at large, not to benefit its agents."[131] Section 1983 therefore allows damages against state officials in their personal capacity only when their conduct "violate[s] clearly established statutory or constitutional rights of which a reasonable person would have known."[132] In other words, state officials have immunity from damages when the law is uncertain.[133] Because the pandemic presents a new and dynamic situation, judges may be reluctant to find that conduct related to detention conditions and COVID-19 violates a clearly established constitutional right, foreclosing damages as a remedy. However, injunctive relief under Section 1983 would still be available.

2. Detention Facilities Operated by Private Companies

Cases involving noncitizens in ICE custody who are being held in *privately* operated detention facilities raise even more complicated issues. When ICE enters into Intergovernmental Service Agreements (IGSA) with state or local governments, the actual operation of the detention center may be subcontracted to a private company.[134] Although the Government Accountability Office (GAO) has noted that "ICE data does not allow us to reliably identify how many IGSAs are operated by private detention companies," GAO found that "as of the end of fiscal year 2019, at least 31 of the 108 IGSA facilities ICE used to hold detainees were operated by private operators."[135] Courts have held that private individuals, including employees of private prison companies, acting under a contract with a state to perform a traditional public function may be acting under color of state law.[136] In *Malesko*, where the Supreme Court declined to expand a *Bivens* damages

(arguing that the law of qualified immunity should be "refined and rethought" and explaining that "qualified immunity precludes damages for a substantial range of constitutional violations, especially where the underlying standards are murky or unclear").

130. Wyatt v. Cole, 504 U.S. 158, 167 (1992) (citing *Harlow*, 457 U.S. at 819).

131. *Id.* at 168.

132. Wilson v. Lane, 526 U.S. 603, 609 (1999) (quoting *Harlow*, 457 U.S. at 818).

133. Pamela S. Karlan, *The Irony of Immunity: The Eleventh Amendment, Irreparable Injury, and Section 1983*, 53 STAN. L. REV. 1311, 1323 (2001); John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87 (1999) (explaining that this distinction may contribute to the progressive development of constitutional rights); Carlos Manuel Vázquez, *Sovereign Immunity, Due Process, and the* Alden *Trilogy*, 109 YALE L.J. 1927, 1931–43 (2000) (discussing *Alden*'s contribution to the right-remedy gap).

134. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-21-149, IMMIGRATION DETENTION: ACTIONS NEEDED TO IMPROVE PLANNING, DOCUMENTATION, AND OVERSIGHT OF DETENTION FACILITY CONTRACTS 7, 11, 15–17 (2021). While ICE also contracts directly with private companies to operate detention centers, these so-called "Contract Detention Facilities" (CDFs) hold only 16% of the average daily detained population, compared to 55% in facilities operated under IGSAs. *Id.* at 11.

135. *Id.* at 17.

136. Rosborough v. Mgmt. & Training Corp., 350 F.3d 459, 461 (5th Cir. 2003) (per curiam) (finding that private prison firms and their employees are state actors); Street v. Corr. Corp. of Am.,

action to private correctional companies, it specifically noted that *state* prisoners "already enjoy a right of action against private correctional providers under 42 U.S.C. 1983."[137]

But there is a significant difference between private operators of state prisons and private operators of federal immigration detention centers, especially if the immigration detention center only holds immigration detainees. As of August 3, 2020, ICE's forty-four dedicated facilities had a total average daily population of 37,332, while the nondedicated facilities had a total average daily population of only 10,696. Consequently, if the private operators of ICE-dedicated facilities are considered to be acting under color of federal law, then seventy-eight percent of immigration detainees will be barred from Section 1983 claims due to the state action requirement.

In several cases involving ICE-dedicated detention facilities, courts have found that the privately operated detention facilities were performing a federal function, not a state function, even though the private company had a contract with the municipality.[138] For example, in *Doe v. United States*, the Fifth Circuit considered a case involving eight female immigration detainees who were sexually assaulted while being transported from the Hutto Detention Facility in Texas, which was operated by the Corrections Corporation of America (CCA) pursuant to a contract with the county.[139] The court applied a "public function" test to determine if CCA's actions were "fairly attributable to the State."[140] The court concluded that CCA was performing a *federal* function in "detaining aliens pending a determination of their immigration status pursuant to ICE specification" and that the county had almost no involvement in the detention center's day-to-day operations.[141] Accordingly, the court dismissed the Section 1983 claim against CCA.

Similarly, in another case involving the ICE-dedicated Hutto facility in Texas, the district court found "no dispute that CCA carried out purely federal functions," noting that the "sole purpose" of that facility was to "detain aliens pending a

102 F.3d 810, 814 (6th Cir. 1996) (same); Palm v. Marr, 174 F. Supp. 2d 484, 487–88 (N.D. Tex. 2001) (same); Giron v. Corr. Corp. of Am., 14 F. Supp. 2d 1245, 1250 (D.N.M. 1998) (holding that a private prison employee was a state actor subject to Section 1983 suit); *cf.* Lugar v. Edmondson Oil Co., 457 U.S. 922, 941–42 (1982) (permitting suit under Section 1983 against private corporations exercising state action).

137. Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 71–72 n.5 (2001); *cf.* Richardson v. McKnight, 521 U.S. 399, 413 (1997) (declining to decide whether private prison guards actually acted "under color of law" and were therefore liable under Section 1983).

138. *See* Doe v. United States, 831 F.3d 309, 313 (5th Cir. 2016); Doe v. Neveleff, No. A–11–CV–907, 2013 WL 489442, at *13 (W.D. Tex. Feb. 8, 2013); Guzman-Martinez v. Corr. Corp. of Am., No. CV–11–02390, 2012 WL 5907081, at *11 (D. Ariz. Nov. 26, 2012); Fabian v. Dunn, No. SA–08–cv–269, 2009 WL 2461207, at *5 (W.D. Tex. Aug. 6, 2009); Jama v. U.S. Immigr. & Naturalization Servs., 343 F. Supp. 2d 338, 362 (D.N.J. 2004); United States v. Thomas, 240 F.3d 445, 447–48 (5th Cir. 2001).

139. *Doe*, 831 F.3d at 313.

140. *Id.* at 314–16.

141. *Id.* at 316.

determination of their immigration status."[142] The court pointed out that "[w]hile maintaining a jail may at times be both a federal and state function, maintaining an immigrant detention facility is a purely federal function," stressing that "[n]either CCA nor Williamson County could run an immigration detention facility without the imprimatur of ICE."[143]

A district court reached the same conclusion about the Eloy Detention Center, another ICE-dedicated facility operated by CCA pursuant to a contract with the city of Eloy, Arizona. The court reasoned that "[e]ven if the contract between the City and CCA imposed extensive regulation and provided governmental funding, it would be insufficient to establish joint action," since "[t]he contract merely acted as a conduit for transferring regulation and funding from ICE to CCA."[144] Other cases have likewise held that the private operators of immigration detention centers are federal actors, since "the power to detain immigrants is derived solely and exclusively from federal authority."[145]

Immigration detainees have the best chance of establishing state action in cases against the employees of private correctional companies if the facility is not dedicated to ICE, meaning it holds both state prisoners and federal ICE detainees. In a case involving a federal prisoner who was detained at a county jail that held both state and federal prisoners, a court in the Western District of Texas held that a private correctional company, The GEO Group, could be sued under Section 1983.[146] The court found that the county had contracted with The GEO Group to perform a function that was "traditionally the exclusive providence of the state—confinement of prisoners—specifically, for the operation of the jail." Although the county also had a contract with the U.S. Marshals Service to house federal prisoners, the court concluded that the federal contract did not change the character of The GEO Group's function. By contrast, when a federal prisoner in a GEO Group-operated Bureau of Prisons facility dedicated exclusively to federal

142. *Doe*, 2013 WL 489442, at *13; *see also* Doe v. Neveleff, No. A-11-CV-907, 2013 WL 12098684 (W.D. Tex. Mar. 12, 2013) (adopting report and recommendation of magistrate judge).

143. *Doe*, 2013 WL 489442, at *14.

144. Guzman-Martinez v. Corr. Corp. of Am., No. CV–11–02390, 2012 WL 5907081, at *11 (D. Ariz. Nov. 26, 2012).

145. *See*, *e.g.*, Fabian v. Dunn, No. SA–08–cv–269, 2009 WL 2461207, at *5 (W.D. Tex. Aug. 6, 2009) (rejecting the argument that the employees of the private company operating the immigration detention center were state actors); Jama v. U.S. Immigr. & Naturalization Serv., 343 F. Supp. 2d 338, 362 (D.N.J. 2004) (holding that the private company's employees "were federal actors because they were employees of a corporation performing governmental functions pursuant to a contract with the INS"); United States v. Thomas, 240 F.3d 445, 447–48 (5th Cir. 2001) (holding that a guard at CCA facility, which contracted with INS to hold immigration detainees, was a "person acting for or on behalf of the United States" because he performed same duties and had same responsibilities as a federal corrections officer employed at a federal prison facility).

146. Alvarez v. Geo Group, Inc., No. SA-09-CV-0299, 2010 WL 743752, at *2 (W.D. Tex. Mar. 1, 2020).

prisoners filed a lawsuit under Section 1983, a court in the Western District of Texas found no state action.[147]

In short, for the twenty-two percent of immigration detainees in non-dedicated facilities that are privately operated, there may be some chance of satisfying Section 1983's state action requirement. However, for the remaining seventy-eight percent in privately operated ICE-dedicated facilities, the mere existence of a contract with the local government would not be enough to show state action and liability under Section 1983 would be foreclosed. Thus, even though the employees of private correctional companies do not enjoy qualified immunity,[148] they will nevertheless be protected from liability under Section 1983 for constitutional violations in ICE-dedicated facilities because their actions would not be "under color of state law."

B. Bivens Actions

Given the challenge in showing state action under Section 1983, it would seem logical to bring a *Bivens* action. In *Bivens*, the Supreme Court recognized an implied right of action to compensate a plaintiff whose constitutional rights were violated by *federal agents*, creating a federal counterpart to Section 1983.[149] However, this avenue is also obstructed for numerous reasons. To begin with, the Supreme Court has declined to extend *Bivens* to a *federal agency*, emphasizing that "the purpose of *Bivens* is to deter the officer," not the agency.[150] Additionally, the Court has declined to extend *Bivens* to private corporations or their employees involved in operating federal prisons or programs that contract with the Bureau of Prisons.[151]

147. *See generally* Barnett v. Geo Group, Inc., No. 1:15-CV-224, 2017 WL 3896363 (N.D. Tex. Aug. 10, 2017).

148. Richardson v. McKnight, 521 U.S. 399, 409–13 (1997) (holding that "private prison guards, unlike those who work directly for the government, do not enjoy immunity from suit in a Section 1983 case"). A separate question is whether private health care professionals who provide medical care to incarcerated individuals are entitled to qualified immunity under Section 1983. The Supreme Court has not directly addressed that issue, but it has found that a private attorney retained by a city was entitled to qualified immunity. *See* Filarsky v. Delia, 566 U.S. 377, 393–94 (2012). In the context of private health care providers in prisons, however, several appellate courts have found no qualified immunity under Section 1983. *See, e.g.*, Estate of Clark v. Walker, 865 F.3d 544 (7th Cir. 2017); McCullum v. Tepe, 693 F.3d 696 (6th Cir. 2012); Halvorsen v. Baird, 146 F.3d 680 (9th Cir. 1998); *see also* Spencer Bruck, Note, *The Impact of Constitutional Liability and Private Contracting on Health Care Services for Immigrants in Civil Detention*, 25 GEO. IMMIGR. L.J. 487, 499–503 (2011) (arguing that immigration detainees can bring Section 1983 claims against private medical providers). *But see* Leeks v. Cunningham, 997 F.2d 1330, 1336 (11th Cir. 1993) (per curiam) (holding that a private physician under contract to provide medical services to a county jail was entitled to qualified immunity in a case predating *Richardson*).

149. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 389 (1971) (creating an implied right of action for an injured plaintiff to sue federal officers for a violation of the Fourth Amendment).

150. Fed. Deposit Ins. Corp. v. Meyer, 510 U.S. 471, 485 (1994).

151. Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 71–74 (2001) (declining to extend *Bivens* to a private company that had a contract with the BOP to operate a halfway house for federal prisoners);

Consequently, ICE as an agency cannot be sued under a *Bivens* action. Nor can any of the private companies that operate immigration detention centers or their employees be sued under *Bivens*.[152] This leaves only individual ICE officers or possibly state or local officers who are found to be acting under color of federal law as potential defendants in a *Bivens* action.

The greatest impediment to a *Bivens* claim, however, is that the Supreme Court has applied *Bivens* narrowly to only a few contexts.[153] The *Bivens* case itself involved a Fourth Amendment claim based on unreasonable search and seizure by the Federal Bureau of Narcotics.[154] Subsequently, in *Davis,* the Court recognized a Fifth Amendment equal protection claim based on gender discrimination in employment.[155] The following year, in *Carlson*, the Court recognized an Eighth Amendment claim based on federal officials' failure to provide a prisoner with adequate medical care.[156] Since *Carlson*, the Supreme Court has declined to extend *Bivens* ten times, most recently in *Abbasi* and *Hernandez*.[157]

Abbasi clarified the *Bivens* analysis by setting forth a two-step framework.[158] First, the court must determine if the claim arises in a "new *Bivens* context," which requires determining if "the case is different in a meaningful way from previous *Bivens* cases."[159] Even a minor extension is considered an extension of *Bivens*.[160] A different constitutional right, a different statutory regime, or different defendants can all render a context meaningfully different than prior cases.[161] If the claim arises in a new context, the second step in the *Bivens* analysis is for the court to determine if there are any alternative remedies or "special factors" counseling hesitation in extending *Bivens* to the new context.[162]

The inquiry regarding "special factors" asks whether "there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy."[163] The focus is on separation-of-powers concerns, as the court must decide "whether

---

Minneci v. Pollard, 565 U.S. 118, 131 (2012) (declining to extend *Bivens* to the employees of a private correctional company).

152. *See Malesko*, 534 U.S. at 71–74; *Minneci*, 565 U.S. at 131.

153. *See generally* Davis v. Passman, 442 U.S. 228 (1979); Carlson v. Green, 446 U.S. 14 (1980).

154. *Bivens*, 403 U.S. at 389–92.

155. *See generally Davis*, 442 U.S. 228 (holding that the Fifth Amendment provided a damages remedy for a claim of gender discrimination).

156. *See generally Green*, 446 U.S. 14 (allowing a prisoner's estate to pursue an Eighth Amendment claim that federal officials failed to provide adequate medical care, resulting in the prisoner's death).

157. Hernandez v. Mesa, 140 S. Ct. 735, 743–50 (2020); Ziglar v. Abbasi, 137 S. Ct. 1843, 1857 (2017) (collecting the eight additional cases).

158. *Abbasi*, 137 S. Ct. 1843.

159. *Id.* at 1864.

160. *Id.*

161. *Id.* at 1864–65; *see also* Leading Case, Bivens *Actions*—Ziglar v. Abbasi, 131 HARV. L. REV. 313, 318 (2017) ("The new context inquiry is quite exacting . . . .").

162. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 396 (1971); *Abbasi*, 137 S. Ct. at 1857–60.

163. *Abbasi*, 137 S. Ct. at 1858.

the Judiciary is well suited, absent congressional action or inaction, to consider and weigh the costs and benefits of allowing a damages action to proceed."[164] The Court has repeatedly stressed that "expanding the *Bivens* remedy is now a 'disfavored' judicial activity."[165] With respect to alternative remedies, the Court held in *Carlson* that the FTCA was not an adequate alternative remedy to *Bivens,* but in *Malesko* and *Minneci*, it deemed state tort law remedies to be adequate alternatives. Both steps of the *Bivens* analysis therefore present obstacles for noncitizens challenging the conditions of immigration detention.

1. New Context

The plaintiffs in *Abbasi* were noncitizens detained after the 9/11 attacks pending a determination of whether they had connections to terrorism.[166] They argued that the detention policy implemented by federal officials violated their Fifth Amendment due process and equal protection rights by keeping them in restrictive conditions of confinement based on their race, religion, ethnicity, or national origin.[167] The Court also noted that although the harsh detention conditions at issue were "as compelling as those at issue in Carlson," the case presented a new context because "Carlson was predicated on the Eighth Amendment and this claim is predicated on the Fifth."[168] Additionally, the Court found a new context because, unlike prior *Bivens* cases, *Abbasi* involved a challenge to "high level executive policy."[169]

The Supreme Court again declined to extend a *Bivens* damages remedy in *Hernandez v. Mesa*, which involved a cross-border shooting that gave rise to Fourth and Fifth Amendment excessive force challenges.[170] There, the Court stressed that "[a] claim may arise in a new context even if it is based on the same constitutional provision as a claim in a case in which a damages remedy was previously recognized."[171] Cases involving a "new category of defendants" are also considered an extension.[172] The Court found that the cross-border shooting of a Mexican boy by a Customs and Border Protection (CBP) officer was a "glaringly obvious" new context, even though it involved Fourth and Fifth Amendment claims like the *Bivens* case itself.[173]

Since *Abbasi,* almost all of the cases that were found to arise in the same context as prior *Bivens* cases involve a context that is *identical* to one of the Supreme

164. *Id.*
165. *Id.* at 1857.
166. *Id.* at 1851–52.
167. *Id.* at 1853, 1858.
168. *Id.* at 1864.
169. *Id.* at 1860.
170. Hernandez v. Mesa, 140 S. Ct. 735, 743 (2020).
171. *Id.*
172. *Id.* (quoting Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 68 (2001)).
173. *Id.* at 743–44.

Court precedents.[174] Courts examining *Bivens* claims in cases involving the due process rights of noncitizens in immigration detention have generally found that this is a new context.[175] Noncitizen plaintiffs have argued that *Davis* and *Carlson* together establish a *Bivens* remedy in this context, but courts have rejected that argument, since neither of those cases "dealt with the rights of noncitizens in immigration detention."[176] One court noted that this question was not even a "close call."[177]

Several circuit courts[178] and various district courts[179] have found that *Bivens* claims against immigration officials present a new context.[180] In *Tun-Cos*, for example, the Fourth Circuit reasoned that the case presented a new *Biven*s context because the ICE officers were a new category of defendants not previously recognized in *Bivens* claims, they were enforcing immigration laws rather than criminal laws, and the plaintiffs' Fifth Amendment claims had "no analogue" in the Supreme Court's prior *Bivens* precedents, since *Davis* involved an equal protection challenge in the employment context.[181]

Given these precedents, a challenge to immigration detentions related to the COVID-19 pandemic would almost certainly be considered a new context. To the extent the challenge involved immigration detention *policies,* it would be foreclosed by *Abbasi*. Like *Hernandez*, the claim would also be against a new category of federal officers, ICE agents. Even if the claim were based on the Fifth Amendment Due Process Clause like prior *Bivens* precedents, *Hernandez* made it clear that this would not be enough to make it the same context. Because a pandemic-related constitutional claim by someone in immigration detention would present a new context, courts would need to turn to the second step in the analysis.

---

174. Ojo v. United States, 364 F. Supp. 3d 163, 173 (E.D.N.Y. 2019) (noting that the court was aware of only one *non-identical* Bivens claim that was found to arise in the same context).

175. *See, e.g.*, K.O. v. U.S. Immigr. & Customs Enf't, 468 F. Supp. 3d 350, 364–65 (D.D.C. 2020), *appeal docketed sub nom.* K.O. v. Sessions, No. 20-5255 (D.C. Cir. filed Aug. 26, 2020).

176. *Id.* at 364.

177. *Id.* at 365.

178. *See, e.g.*, Tun-Cos v. Perrotte, 922 F.3d 514, 525–28 (4th Cir. 2019); Rroku v. Cole, 726 F. App'x 201, 206 (5th Cir. 2018) (per curiam); Alvarez v. U.S. Immigr. & Customs Enf't, 818 F.3d 1194, 1206 (11th Cir. 2016); Mirmehdi v. United States, 689 F.3d 975, 981 (9th Cir. 2012).

179. *See, e.g.*, Elhady v. Pew, 370 F. Supp. 3d 757, 768 (E.D. Mich. 2019) (finding that a Fifth Amendment claim to be free from non-punitive conditions and abuse by CBP officers was a new context under *Bivens*, but that special factors did not exist counseling hesitation); *cf.* Linlor v. Polson, 263 F. Supp. 3d 613, 620 (E.D. Va. 2017) (finding a new *Bivens* context where the right at issue was a Fourth Amendment violation by a TSA officer); Cuevas v. United States, No. 16-cv-00299, 2018 WL 1399910, at *4 (D. Colo. Mar. 19, 2018) (finding a new *Bivens* context where the right at issue was a non-medical Eighth Amendment claim).

180. Peña Arita v. United States, 470 F. Supp. 3d 663, 694–96 (S.D. Tex. 2020).

181. *Tun-Cos*, 922 F.3d at 525 (citing Davis v. Passman, 442 U.S. 228, 230–31 (1979)); *see also* Medina v. Danaher, 445 F. Supp. 3d 1367, 1371 (D. Colo. 2020) (following the reasoning in *Tun-Cos*).

2. Special Factors and Alternative Remedies

Under the second step in the *Bivens* framework, a court must ask whether any alternative remedy is available and if there are any "special factors" that counsel hesitation.[182] In cases touching on immigration, courts have generally found the existence of special factors based on sensitive issues of national security, diplomacy, and foreign policy, as well as separation-of-powers concerns related to Congress's comprehensive legislation in the area of immigration.[183]

Even before *Abbasi* and *Hernandez*, several circuits refused to recognize *Bivens* actions in the immigration enforcement context based on the existence of "special factors."[184] In *Mirmehdi,* the Ninth Circuit concluded that "[t]he complexity and comprehensiveness of the existing remedial system" and the tendency of immigration issues to affect national security are special factors counseling hesitation.[185] Similarly, in *Alvarez*, the Eleventh Circuit described "the breadth and detail of the Immigration and Nationality Act" and "the importance of demonstrating due respect for the Constitution's separation of powers" as special factors counseling hesitation.[186] And in *Tun-Cos*, the Fourth Circuit reasoned that "immigration enforcement . . . has the natural tendency to affect diplomacy, foreign policy, and the security of the nation, which . . . counsel hesitation in extending *Bivens*."[187]

Similarly, in *Maria S.*, the Fifth Circuit found that "judicial meddling in immigration matters is particularly violative of separation-of-powers principles."[188] There, the Fifth Circuit noted that "[d]espite its repeated and careful attention to immigration matters, Congress has declined to authorize damage remedies against individual agents involved in civil immigration enforcement."[189] The court found that "the institutional silence speaks volumes and counsels strongly against judicial usurpation of the legislative function."[190]

---

182. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 396 (1971); Ziglar v. Abbasi, 137 S. Ct. 1843, 1857–60 (2017).

183. *Abbasi*, 137 S. Ct. at 1861.

184. *See* Mirmehdi v. United States, 689 F.3d 975, 982 (9th Cir. 2012); Alvarez v. U.S. Immigr. & Customs Enf't, 818 F.3d 1194, 1210 (11th Cir. 2016); Tun-Cos v. Perrotte, 922 F.3d 514, 525–28 (4th Cir. 2019); Maria S. *ex rel.* E.H.F. v. Garza, 912 F.3d 778, 784 (5th Cir. 2019).

185. *Mirmehdi*, 689 F.3d at 982. *But cf.* Lanuza v. Love, 899 F.3d 1019, 1027, 1032 (9th Cir. 2018) (holding that special factors did not preclude a *Bivens* remedy for "an individual attorney's violation of [plaintiff's] due process rights in a routine immigration proceeding" by submitting false evidence because "[j]udges are particularly well-equipped to weigh the costs of constitutional violations that threaten the credibility of our judicial system").

186. *Alvarez*, 818 F.3d at 1210.

187. Tun-Cos v. Perrotte, 922 F.3d 514, 525 (4th Cir. 2019) (quoting *Mirmehdi*, 689 F.3d at 983).

188. *Maria S.*, 912 F.3d at 784.

189. *Id.* (quoting De La Paz v. Coy, 786 F.3d 367, 377 (5th Cir. 2015)).

190. *Id.* District court decisions in other circuits reflect similar reasoning. For example, in *El Badrawi*, the District Court in Connecticut held that special factors prohibited a *Bivens* claim by a noncitizen against ICE agents who arrested him on suspected immigration violations, as the case would

Post *Abbasi*, the arguments against extending *Bivens* are even stronger. *Abbasi* stressed that *Bivens* suits are inappropriate to challenge executive branch policies and specifically declined to extend *Bivens* to detention policy challenges, expressing concern about the sensitive discovery that would be involved in this type of action.[191] The Court explained that *Bivens* claims are intended to be "brought against the individual official for his or her own acts, not the acts of others."[192]

Because the COVID-19-related immigration detention challenges generally pertain to ICE policies, not the conduct of individual officials, it is highly unlikely that courts will extend a *Bivens* remedy to this context. As in *Abbasi,* adjudicating a *Bivens* claim in this context may require courts "to interfere in an intrusive way with sensitive functions of the Executive Branch."[193] In *Lanuza*, where the Ninth Circuit extended a *Bivens* claim related to an "individual attorney's violation of [plaintiff's] due process rights in a routine immigration proceeding" by submitting false evidence, the court stressed the difference between a challenge to the acts of an individual officer and one that ultimately seeks to alter a policy.[194]

Additionally, the Court in *Abbasi* found it relevant to consider whether Congress has given "frequent and intense" attention to the statutory regime at issue.[195] The fact that Congress has enacted extensive immigration legislation without providing for a damages remedy will likely weigh against extending *Bivens* to this context.[196] However, as one district court noted, "although the INA contains a comprehensive scheme governing the appeal of removal proceedings and the Attorney General's discretionary decisions, it does not provide a remedial scheme for violations committed by immigration officials outside of removal proceedings."[197]

Immigration detention also involves discretionary decisions by officials within the executive branch, including ICE officers and immigration judges who make

---

intrude on the executive's authority to make determinations relating to national security and affect the government's relationship with foreign powers. El Badrawi v. U.S. Dep't of Homeland Sec., 579 F. Supp. 2d 249, 264 (D. Conn. 2008).

191. Ziglar v. Abbasi, 137 S. Ct. 1843, 1860 (2017); *see also* Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 74 (2001) (explaining that the Court has "never considered [*Bivens*] a proper vehicle for altering an entity's policy," whereas "injunctive relief has long been recognized as the proper means for preventing entities from acting unconstitutionally").

192. *Abbasi*, 137 S. Ct. at 1860.

193. *Id.* at 1860–61.

194. Lanuza v. Love, 899 F.3d 1019,1027–29 (9th Cir. 2018); *see also* Jacobs v. Alam, 915 F.3d 1028, 1038 (6th Cir. 2019) (distinguishing between an "overarching challenge[] to federal policy," and a "claim[] against . . . individual officers for their alleged 'overreach'" (quoting *Abbasi*, 137 S. Ct. at 1862)); Rroku v. Cole, 726 Fed. Appx. 201, 206 (5th Cir. 2018) (per curiam) (holding that special factors existed because changing immigration detention policy is the role of the legislative branch).

195. *Abbasi*, 137 S. Ct. at 1862.

196. *See* Maria S. *ex rel.* E.H.F. v. Garza, 912 F.3d 778, 784 (5th Cir. 2019).

197. Diaz-Bernal v. Myers, 758 F. Supp. 2d 106, 128 (D. Conn. 2010) (finding no special factors).

bond determinations.[198] This context therefore raises separation-of-powers concerns related to immigration policy and enforcement similar to *Abbasi* and *Hernandez*.[199] Courts may also decide that immigration detention policies "implicate[] an element of national security," which was part of the Court's reasoning in *Hernandez*.[200] However, the court in *Hernandez* connected national security concerns to "the conduct of agents positioned at the border," not individuals detained within the United States.[201]

A final consideration in the *Bivens* analysis is whether any alternative remedy is available. In *Rroku*, an unpublished case that was brought pro se, the Fifth Circuit refused to extend a *Bivens* cause of action to a detained noncitizen who sued the ICE Field Office Director and the warden of the LaSalle Detention Facility in Louisiana where he had been detained for 513 days under harsh and dangerous conditions.[202] There, the court found that the petitioner could seek an alternative remedy through a state tort law claim.[203] In *Maria S.,* where a grandmother sued a CBP agent for coercing her granddaughter into signing a voluntary removal form, which resulted in her death in Mexico, the Fifth Circuit concluded that alternative remedies are available under the Immigration and Nationality Act, since noncitizens can apply for asylum, challenge the constitutionality of their removal proceedings, or seek a stay of removal.[204]

Overall, the two-part *Bivens* framework presents enormous obstacles for a claim involving constitutional violations related to immigration detention conditions and policies during the pandemic. And even if a case were to survive this two-step inquiry, the doctrine of qualified immunity would likely foreclose relief.

198. *Cf.* Turner v. Safley, 482 U.S. 78, 84–85 (1987) (describing "[r]unning a prison" as "an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government").

199. *See Maria S*., 912 F.3d at 784; Tun-Cos v. Perrotte, 922 F.3d 514, 526 (4th Cir. 2019); Medina v. Danaher, 445 F. Supp. 3d 1367, 1367–70 (D. Colo. 2020). *But see* Lanuza v. Love, 899 F.3d 1019, 1030–31 (9th Cir. 2018) (holding that the mere fact that the INA lacks an internal damages remedy does not counsel hesitation when finding an implied *Bivens* remedy against an ICE employee); Prado v. Perez, 451 F. Supp. 3d 306, 316 (S.D.N.Y. 2020) ("There are no material differences between the work of immigration enforcement and the work of criminal law enforcement that would counsel against the implication of a *Bivens* remedy here.").

200. Hernandez v. Mesa, 140 S. Ct. 735, 746 (2020).

201. *Id.* ("[T]he conduct of agents positioned at the border has a clear and strong connection to national security, as the Fifth Circuit understood.").

202. Rroku v. Cole, 726 F. App'x 201, 202 (5th Cir. 2018) (per curiam).

203. *Id.* at 206.

204. *Maria S*., 912 F.3d at 784.

3. Immunity

The main defense that federal officials raise to *Bivens* claims is qualified immunity.[205] As noted above, qualified immunity requires the plaintiff to show that the constitutional right in question is "clearly established" for the federal official to be liable for damages.[206] The "dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted."[207] In *Hernandez*, the Court stressed that this analysis is "limited to 'the facts that were knowable to the defendant officers' at time they engaged in the conduct in question," so "[f]acts an officer learns after the incident ends—whether those facts would support granting immunity or denying it—are not relevant."[208] Given the dynamic nature of the pandemic and evolving guidance from CDC and ICE, courts may well find that how federal officers responded did not violate a clearly established constitutional right, especially towards the beginning of the pandemic when their knowledge of COVID-19 was more limited.

Qualified immunity is not only a substantive issue to overcome, but it also creates an "immense procedural hurdle" because the Supreme Court has allowed interlocutory appeals of the immunity determination.[209] During the interlocutory appeal, federal defendants can also raise the additional issue of whether a *Bivens* action exists for the alleged conduct.[210] Lower courts have also expanded interlocutory appeals to include other issues.[211] Appealing these complex questions can "grind district court proceedings to a halt."[212] This type of dragged out litigation with lengthy interlocutory appeals makes a *Bivens* action particularly inappropriate for a life-threatening situation such as a pandemic that requires prompt relief for medically vulnerable individuals in detention.

Exacerbating the challenges of the qualified immunity doctrine, there is an additional barrier created by Section 233(a) of the Public Health Services Act.[213] Section 223(a) gives extraordinary, absolute immunity to employees of the Public Health Service (PHS), including those who administer health care in immigration

205. Some courts have applied the immunity doctrine to *Bivens* claims requesting injunctive relief as well as damages. *See* Patel v. Santana, 348 F. App'x 974, 976 (5th Cir. 2009) ("[I]njunctive relief against the BOP [is] a form of relief that would not be proper under *Bivens*.").

206. Saucier v. Katz, 533 U.S. 194, 200–02 (2001).

207. *Id.* at 202.

208. Hernandez v. Mesa, 137 S. Ct. 2003, 2007 (2017) (per curiam) (vacating the Fifth Circuit's qualified immunity finding but declining to decide whether the CBP officer was entitled to qualified immunity).

209. Bryan Lammon, *Making* Wilkie *Worse: Qualified-Immunity Appeals and the* Bivens *Question After* Ziglar *and* Hernandez, U. CHI. L. REV. ONLINE, July 24, 2020, at 1.

210. *See generally* Wilkie v. Robbins, 551 U.S. 537 (2007) (extending Hartman v. Moore, 547 U.S. 250 (2006)).

211. Lammon, *supra* note 209, at 7.

212. *Id.* at 1.

213. Public Health Services Act, 42 U.S.C. § 233(a).

detention centers through the ICE Health Corps.[214] In *Hui v. Castaneda,* the Supreme Court considered a *Bivens* action brought by the family members of an individual who died from advanced penile cancer after atrocious medical neglect in immigration detention by employees of the PHS.[215] Despite the horrific facts of that case, the Court held 9-0 that the PHS defendants had absolute immunity under Section 233(a) and that the only remedy was through the FTCA.[216]

In short, the substantive and procedural hurdles of qualified immunity doctrine, combined with the absolute immunity for employees of the ICE Health Corps, make *Bivens* a highly impractical and ineffective way for detained noncitizens to request relief during a pandemic.

4. Private Operators of Detention Centers

For noncitizens detained in privately-operated detention centers, two other Supreme Court cases compound the obstacles to *Bivens* actions posed by *Abbasi* and *Hernandez*.[217] First, in *Malesko*, the Court considered a *Bivens* action brought by a federal prisoner in the custody of the BOP who was serving the remainder of a criminal sentence in a halfway house operated by the private company Correctional Services Corporation (CSC) pursuant to a contract with the BOP.[218] Malesko alleged that he had fallen and injured himself as a result of CSC's failure to prescribe him necessary medications. In holding that *Bivens* should not be extended to allow recovery against CSC, the Court reasoned that the purpose of *Bivens* is to deter the officer who violates the constitutional right, not the company that employed the officer.[219] *Malesko* therefore left open the possibility that a *Bivens* claim could be brought against the individual employees of a private correctional company.[220] Additionally, the Court reasoned that Malesko had adequate alternative remedies available to him, such as a state tort negligence action, a federal lawsuit for injunctive relief, and the BOP's grievance program.[221]

Subsequently, in *Minneci*, the Court considered whether to extend *Bivens* to an Eighth Amendment damages action against the employees of a privately operated

214. *See generally* Hui v. Castaneda, 559 U.S. 799 (2010).

215. *Id.* at 805–12.

216. *Id.* at 812–13. *See generally* Adele Kimmel, Arthur Bryant & Amy Radon, Hui v. Castaneda*: Beyond Cruel and Unusual*, 44 LOY. L.A. L. REV. 297 (2010); Matthew Allen Woodward, Note, *License to Violate the Constitution: How the Supreme Court's Decision in* Hui v. Castaneda *Exposes the Dangers of Constitutional Immunity and Revives the Debate over Widespread Constitutional Abuses in Our Immigration Detention Facilities*, 32 HAMLINE J. PUB. L. & POL'Y 499, 452–53 (2011); Kate Bowles, Note, *Is the Doctor in? The Contemptible Conditions of Immigrant Detainee Healthcare in the U.S. and the Need for a Constitutional Remedy*, 31 J. NAT'L ASS'N ADMIN. L. JUDICIARY 169 (2011).

217. *See* Danielle C. Jefferis, *Constitutionally Unaccountable: Privatized Immigration Detention*, 95 IND. L.J. 145 (2020).

218. Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 70–74 (2001).

219. *Id.* at 69 (citing Fed. Deposit Ins. Corp. v. Meyer, 510 U.S. 471, 484–86 (1994)).

220. *Id.* at 65 (noting that the question of whether a *Bivens* action might lie against private individuals was not presented).

221. *Id.* at 72–74.

federal prison.[222] Once again, the Court relied on the existence of an alternative state tort remedy in declining to extend *Bivens*, recognizing differences in the remedy but concluding that state tort law would provide "roughly similar compensation."[223] While the Court acknowledged that there may be Eighth Amendment violations not covered by state tort law, it left that issue for another day.[224] The Court did not explicitly bar *all Bivens* claims against the employees of private prisons.[225] Nevertheless, several courts have interpreted *Minneci* expansively as barring all such claims.[226] As Danielle Jefferis has argued, *Malesko* and *Minneci* together "carved out a class of prisoners for whom there is no constitutional tort remedy," not only for federal prisoners but also for immigration detainees in privately-operated facilities.[227]

III. TORT-BASED ACTIONS AS POTENTIAL ALTERNATIVES

While courts and scholars have extensively discussed whether a tort-based action provides an adequate alternative remedy to a *Bivens* action for damages, there has been hardly any discussion of whether a tort-based action can provide an alternative remedy to a habeas petition. In *Carlson*, the Supreme Court found that the FTCA is *not* an equivalent remedy to *Bivens*, since Congress "made it crystal clear that it views FTCA and *Bivens* as parallel, complementary causes of action."[228] *Carlson* explained that the FTCA protects different rights than *Bivens*. While an FTCA cause of action is based on state tort law, a *Bivens* action is based on violation of a *constitutional right*.[229] Nevertheless, some courts have questioned whether *Carlson*'s FTCA analysis should be reexamined post-*Abbasi*.[230] Similarly, some district courts have found no subject matter jurisdiction over habeas petitions by detained immigrants reasoning that an alternative remedy in tort is available under the FTCA or state tort law.[231] This Section explains why neither an FTCA claim nor a state tort law claim may be a viable option.

222. Minneci v. Pollard, 565 U.S. 118, 120 (2012).

223. *Id.* at 130.

224. *Id.*

225. *Id.* at 131 (concluding that "where, as here, a federal prisoner seeks damages from privately employed personnel working at a privately operated federal prison, where the conduct allegedly amounts to a violation of the Eighth Amendment, and where that conduct is of a kind that typically falls within the scope of traditional state tort law (such as the conduct involving improper medical care at issue here), the prisoner must seek a remedy under state tort law").

226. Jefferis, *supra* note 217, at 173.

227. *Id.*

228. Carlson v. Green, 446 U.S. 14, 20 (1980).

229. *Id.* at 23.

230. *See* Ojo v. United States, 364 F. Supp. 3d 163, 174–75 (E.D.N.Y. 2019) (citing other sources).

231. Umarbaev v. Moore, No. 3:20-CV-1279, 2020 WL 3051448, at *2, *6 (N.D. Tex. June 6, 2020).

A. Federal Tort Claims Act

The FTCA was enacted in 1946 and is not a civil rights statute, but it provides a cause of action against the United States for monetary compensation for harm "caused by the negligent act or omission" of federal employees.[232] The FTCA creates liability for the United States when federal employees, acting within the scope of their employment, commit acts that would be actionable under *state tort law* if committed by a private party.[233] Consequently, courts must consult state law to determine whether the United States is liable for the torts of its employees under the FTCA.[234] In order to bring a claim under the FTCA, the plaintiff must first present the administrative claim to the appropriate federal agency within two years of when the cause of action occurred and must then file the claim in federal court within six months of the agency's action.[235]

Courts have held that the FTCA does not waive sovereign immunity in circumstances governed exclusively by federal law where there is no private analogue for the government's action.[236] For example, in *Caban*, where the plaintiff alleged false imprisonment by immigration officers, the Second Circuit found no FTCA liability, reasoning that the immigration officers had materially different duties than private citizens and acted in accordance with federal law, even if a private person could be liable under state law for wrongfully detaining the plaintiff.[237] Similarly, in *Watson*, the Second Circuit found no private analogue for an FTCA claim against immigration officers who failed to comply with ICE's own regulations for investigating an assertion of citizenship, resulting in three-and-a-half years of detention.[238] The Eleventh Circuit also found no comparable private liability under state law to support an FTCA claim against immigration agents in a case involving the use of pepper spray to disperse a crowd.[239]

Additionally, the waiver of sovereign immunity provided by the FTCA is limited by numerous exceptions.[240] The exceptions commonly invoked by the government in cases involving immigration detention pertain to independent

232. 28 U.S.C. § 2672 (2006).

233. *See* 28 U.S.C. §§ 1346(b)(1), 2674; Fed. Deposit Ins. Corp. v. Meyer, 510 U.S. 471, 477 (1994).

234. *Meyer*, 510 U.S. at 478.

235. 28 U.S.C. §§ 2675(a), 2401(b). The six-month time limit is subject to equitable tolling. United States v. Wong, 575 U.S. 402, 412 (2015).

236. Paul David Stern, *Tort Justice Reform*, 52 U. MICH. J.L. REFORM 649, 683–84 (2019); 28 U.S.C. § 1346(b).

237. Caban v. United States, 728 F.2d 68, 74 (2d Cir. 1984); *see also* Woodbridge Plaza v. Bank of Irvine, 815 F.2d 538, 543 (9th Cir. 1987) (reasoning that FDIC's liability is unlike that of a private individual under California law and therefore finding no private analogue). *But see* Liranzo v. United States, 690 F.3d 78, 86 (2d Cir. 2012) (finding a private analogue for federal action through false imprisonment).

238. Watson v. United States, 865 F.3d 123, 126–27 (2d Cir. 2017).

239. Dalrymple v. United States, 460 F.3d 1318, 1327–28 (11th Cir. 2006).

240. 28 U.S.C. § 2680(a).

contractors, discretionary functions, and due care.[241] These exceptions are all construed strictly in favor of the government.[242] There is also an exception for intentional torts, including assault and battery, false imprisonment, false arrest, abusive of process, and malicious prosecution.[243] But an exception to that exception exists for law enforcement officials, which can include immigration officials, so the intentional torts exception is not usually an obstacle.[244]

First, the independent-contractor exception can preclude claims against a private correctional company that contracts with ICE. [245] For example, in one case, the Third Circuit found that the detention facility was an independent contractor to which the government had delegated its duty of safekeeping.[246] Therefore, the independent contractor exception to the FTCA applied and sovereign immunity barred the court from exercising jurisdiction.[247] However, in cases where courts found that ICE had delegated some but not all of its responsibilities to an independent contractor, the courts refused to apply the independent-contractor exception.[248]

Even if the independent-contractor exception does not apply, the discretionary exception can block claims related to immigration detention conditions or policies.[249] The discretionary exception applies if the challenged act involves an "element of judgment" and the judgment is "'of the kind the discretionary function exception was designed to shield."[250] The Ninth Circuit has found that the type of detention falls within the discretionary-function exception to waiver of sovereign immunity.[251] The Ninth Circuit has also held that the discretion inherent in the formulation of federal immigration policy is not actionable under the FTCA.[252]

Assuming a claimant overcomes the independent-contractor exception and discretionary exception, there is still the "due care" exception, which "prevents the United States from being held liable for actions of its officers undertaken while

241. *Id.*

242. McMahon v. United States, 342 U.S. 25, 27 (1951).

243. 28 U.S.C. § 2680(h).

244. *See generally* Medina v. United States, 92 F. Supp. 2d 545 (E.D. Va. 2000); Ramirez v. United States, 998 F. Supp. 425 (D.N.J. 1998); Caban v. United States, 671 F.2d 1230 (2d Cir. 1982).

245. *See* Note, *Improving the Carceral Conditions of Federal Immigration Detainees*, 125 HARV. L. REV. 1476, 1491 (2012); Maunica Sthanki, *Deconstructing Detention: Structural Impunity and the Need for an Intervention*, 65 RUTGERS L. REV. 447, 473 (2013).

246. E.D. v. United States, 764 F. App'x 169, 172–73 (3d Cir. 2019).

247. *Id.*

248. Edison v. United States, 822 F.3d 510, 518 (9th Cir. 2016); Haskin v. United States, 569 F. App'x 12, 15 (2d Cir. 2014).

249. *See* United States v. Gaubert, 499 U.S. 315, 322–23 (1991).

250. *Id.*

251. Mirmehdi v. United States, 689 F.3d 975, 984 (9th Cir. 2012).

252. Maffei v. Nieves-Reta, 412 F. Supp. 43, 44 (S.D. Cal. 1976), *aff'd*, 549 F.2d 807 (9th Cir. 1977) (mem.).

reasonably executing the mandates of a statute."[253] Where the statute requires a mandatory course of action, sovereign immunity has not been waived if "the officer exercised due care in following the dictates of that statute or regulation."[254] Courts have found that the "due care" exception applies to immigrants challenging their mandatory detention under the INA.[255]

The independent contractor, discretionary functions, and due-care exceptions to the waiver of sovereign immunity for FTCA claims, combined with the general absence of a private action analogue for exclusively federal actions, create a series of challenges that would be extremely difficult to overcome in a case related to immigration detention policies and practices.

B. State Tort Claims

In the COVID-19-related habeas litigation brought by detained noncitizens, some district courts found that state tort law provides an alternative remedy to habeas relief and denied jurisdiction on that basis.[256] However, pursuing a state tort claim separate from the FTCA would not be feasible for a detained noncitizen whose claim is against the federal government. The FTCA *requires* tort actions against the federal government to be litigated in federal court.[257] Furthermore, if the United States, a federal agency, or a federal officer were sued in state court, they would undoubtedly use their independent authority to remove the action to federal court.[258]

Additionally, the main claim in the COVID-19-related habeas litigation is that the detention is punitive in violation of the Fifth Amendment Due Process Clause.[259] This is not an area generally covered by state law and there is no obvious state tort that would apply in these cases. While someone who is injured or dies in detention due to medical malpractice may be able to bring a state tort claim, punitive detention conditions more generally are not actionable in tort.[260]

As Maunica Sthanki has noted, an action "based on the claim that detention conditions rise to the level of punishment impermissible by the Due Process Clause of the Fifth Amendment is not one that is generally covered by state law."[261] John Preis has likewise argued that prison conditions may violate the Constitution without being a tort.[262] With respect to constitutional claims in general, Preis

253. Welch v. United States, 409 F.3d 646, 651 (4th Cir. 2005).

254. *Id.* at 652.

255. *See* Gonzalez v. United States, No. CV-12-01912, 2013 WL 942363, at *3 (C.D. Cal. Mar. 11, 2013).

256. Umarbaev v. Moore, No. 3:20-CV-1279, 2020 WL 3051448, at *2, *6 (N.D. Tex. June 6, 2020).

257. *See* 28 U.S.C. § 1346(b)(1) (2013) ("[T]he district courts . . . shall have exclusive jurisdiction of civil actions on [tort] claims against the United States, for money damages.").

258. 28 U.S.C. § 1442(a)(1).

259. *See supra* notes 60–96.

260. *See* Sthanki, *supra* note 245, at 473 n.168.

261. *Id.*; *see also* Note, *supra* note 245, at 1486–89.

262. John F. Preis, *Alternative State Remedies in Constitutional Torts*, 40 CONN. L. REV. 723, 753–54 (2008).

explains that it is "unlikely that tort law will contain doctrines that can adequately capture behavior understood to be unconstitutional," since "[t]ort law generally addresses interactions between private individuals and constitutional law addresses interactions between the government and private individuals."[263]

Even if state tort law could theoretically provide an alternative remedy, there are practical obstacles. In *Bivens*, the Supreme Court noted that state law can be "inconsistent or even hostile" to federal constitutional law.[264] Because many state court judges are elected, not appointed, they may be more influenced by public opinion.[265] Additionally, the three states where the majority of noncitizens are detained—Texas, Louisiana, and Arizona—have highly restrictive tort policies.[266] Texas, in particular, where a quarter of the nation's immigration detainees are located, "is one of the states—perhaps the state—in which tort reformers have had the most success."[267]

Given the variation in state tort laws, there are also strong policy reasons against recognizing state tort claims as alternative remedies to habeas. The variation in state law would result in a lack of uniformity in access to habeas as a form of relief for detained immigrants, as well as lack of uniformity in the accountability of the government, depending on where the noncitizen happened to be detained. This lack of uniformity would undermine basic principles of fairness.[268] Such consequences are important to consider in deciding what remedies should be considered adequate alternatives to the Great Writ.[269]

---

263. *Id.* at 750; *see also* Sheldon Nahmod, *Section 1983 Discourse: The Move from Constitution to Tort*, 77 GEO. L.J. 1719, 1738–50 (1989) (addressing the deleterious "implications of tort rhetoric"); Richard Henry Seamon, *U.S. Torture as a Tort*, 37 RUTGERS L.J. 715, 758 (2006) ("Using tort law to remedy torture [by the U.S. government] is like using nuisance law to handle the generation and disposal of hazardous wastes. In each situation, the problem is simply much bigger and badder than the problems for which the law was designed."); Christina Brooks Whitman, *Emphasizing the Constitutional in Constitutional Torts*, 72 CHI.-KENT L. REV. 661, 686 (1997) ("It is dangerous to define constitutional claims as a narrow subset of tort law because tort law has been particularly ineffective in dealing with precisely the sorts of interests and injuries that are at the center of constitutional law.").

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

265. Note, *supra* note 245, at 1490 (citing Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1127–28 (1977)).

266. Sthanki, *supra* note 245, at 473. *See generally* Frank L. Maraist & Thomas C. Galligan, Jr., *Burying Caesar: Civil Justice Reform and the Changing Face of Louisiana Tort Law*, 71 TUL. L. REV. 339 (1996) (describing various tort reforms passed in Louisiana); David A. Anderson, *Judicial Tort Reform in Texas*, 26 REV. LITIG. 1 (2007) (describing tort reform in Texas).

267. Anderson, *supra* note 266, at 4.

268. Cristina M. Rodríguez, *Uniformity and Integrity in Immigration Law: Lessons from the Decisions of Justice (and Judge) Sotomayor*, 123 YALE L.J.F. 499, 501 (2014) (explaining that uniformity "facilitates equal treatment" by treating similarly situated parties in like ways).

269. Alex Reinert, *Procedural Barriers to Civil Rights Litigation and the Illusory Promise of Equity*, 78 UMKC L. REV. 931, 933 (2010) (observing that "important strategic consequences flow from decisions to seek different kinds of remedies").

IV. INJUNCTIVE RELIEF AS A POTENTIAL ALTERNATIVE

The tort actions discussed above would only result in damages, not release from detention or changes in the conditions of detention. Damages are normally a retrospective remedy for an injury that has already occurred, while injunctive relief is designed to be a prospective remedy for ongoing or future violations.[270] Damages may also be an inferior remedy in certain situations involving the deprivation of constitutional rights.[271] Injunctive relief helps expose government misconduct, in part because it is not barred by sovereign immunity and can provide a "fuller" remedy than damages.[272] As John Jeffries Jr. has argued, the possibility of injunctive relief also allows courts to be more future looking and reform minded.[273]

The unique benefits of injunctive relief, combined with the overwhelming hurdles presented by the causes of action for damages discussed above, should, at a minimum, encourage courts to ensure that an avenue for injunctive relief remains available before rejecting habeas jurisdiction.[274] Courts considering COVID-19-related habeas petitions filed by immigration detainees have discussed at least two possible sources of injunctive relief that could result in release: (1) an implied cause of action directly under the Fifth Amendment, which can also be framed as a federal court's inherent equitable authority to restrain constitutional government conduct; and (2) a claim under the Administrative Procedure Act (APA). These are explored below.

A. Implied Cause of Action Directly Under the Fifth Amendment

For over a century, the Supreme Court has recognized the inherent authority of federal courts to grant equitable relief for constitutional violations, including injunctive relief.[275] In *Bivens*, Justice Harlan's concurrence confirmed the

---

270. 1A C.J.S. *Actions* § 28 ("There are two types of relief that can be sought in a civil action: (1) retrospective relief, such as money damages, and (2) prospective relief, such as injunctive or declaratory relief.").

271. Karlan, *supra* note 133, at 1329. *See generally* Jeffries, *supra* note 129.

272. Karlan, *supra* note 133; Lawrence Rosenthal, *A Theory of Governmental Damages Liability: Torts, Constitutional Torts, and Takings*, 9 U. PA. J. CONST. L. 797, 828–29 (2007); *see also* Schneider v. Smith, 390 U.S. 17, 21, 24 (1968) (holding that sovereign immunity does not prevent injunctive relief).

273. Jeffries, *supra* note 133, at 113.

274. *Cf.* Alirio R.R. v. Correia, No. 20-6217, 2020 WL 3249109, at *5, *9 (D.N.J. June 16, 2020) (considering a COVID-19-related habeas petition and concluding that either "a *Bivens* claim for injunctive relief" or habeas must be available, if not both, and that both types of actions required the same substantive analysis: whether the petitioner is entitled to injunctive relief due to a violation of the Fifth Amendment).

275. Osborn v. Bank of U.S., 22 U.S. (9 Wheaton) 738, 838–44 (1824); *Ex Parte* Young, 209 U.S. 123, 149, 155–56 (1908) (holding that subject matter jurisdiction of federal courts empowers them to enjoin potentially unconstitutional acts by state officials); *see also* Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 74 (2001); Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 491 n.2 (2010); Bell v. Hood, 327 U.S. 678, 684 (1946) ("[I]t is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution."); Larson v. Domestic & Foreign Com. Corp., 337 U.S. 682, 689–90 (1949) (noting that federal officials

"presumed availability of federal equitable relief against threatened invasions of constitutional interests."[276] In *Malesko*, the Supreme Court contrasted "the *Bivens* remedy [i.e. damages], which we have never considered a proper vehicle for altering an entity's policy," with injunctive relief, which "has long been recognized as the proper means for preventing entities from acting unconstitutionally."[277]

Further, in *Abbasi*, the Court noted the possibility of injunctive relief, distinct from *Bivens* or habeas relief, stating that plaintiffs' challenge to policy decisions concerning the conditions of confinement could be addressed through a motion for an injunction.[278] As Seth Davis has observed, "federal courts permit private parties to sue directly under the Constitution for injunctive relief as a matter of course, but are much more wary of implied damages remedies under the *Bivens* doctrine."[279] Generally, courts will only reject an implied cause of action for injunctive relief if Congress has specifically prohibited it.[280]

Accordingly, a few district courts have concluded that noncitizens challenging their detention during the COVID-19 pandemic have an implied cause of action directly under the Fifth Amendment even if habeas fails on jurisdictional grounds.[281] In *Malam,* for example, a district court in the Eastern District of Michigan reasoned that although the *Bivens* remedy of damages should not be extended to new contexts if there are special factors counseling hesitation, "there is no corresponding

may be subject to "suits for specific relief"); RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 856 (David L. Shapiro et al. eds., 4th ed. 1996) ("[A]t least since Brown v. Board of Education . . . injunctive remedies for constitutional violations have become the rule.").

276. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 404 (1971) (Harlan, J., concurring).

277. *Malesko*, 534 U.S. at 74; *see also Free Enter. Fund*, 561 U.S. at 491 n.2; *Bell*, 327 U.S. at 684 ("[I]t is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution."); *Ex Parte Young*, 209 U.S. at 149, 155–56 (holding that subject matter jurisdiction of federal courts empowers them to enjoin potentially unconstitutional acts by state officials); John F. Preis, *In Defense of Implied Injunctive Relief in Constitutional Cases*, 22 WM. & MARY BILL RTS. J. 1, 38–42 (2013) (arguing that Congress and the federal courts have viewed implied injunctive relief as permissible and appropriate since the Founding). *See generally* David Sloss, Ex Parte Young *and Federal Remedies for Human Rights Treaty Violations*, 75 WASH. L. REV. 1103 (2000).

278. Ziglar v. Abbasi, 137 S. Ct. 1843, 1862–63 (2017).

279. Seth Davis, *Implied Public Rights of Action*, 114 COLUM. L. REV. 1, 8 (2014); *see also* Jefferis, *supra* note 217, at 167 ("Federal prisoners may bring actions in federal court for equitable relief—injunctions and declaratory judgments—directly under the Constitution, and they may seek damages under certain 'implied' causes of action for constitutional torts."); Michael G. Collins, *"Economic Rights," Implied Constitutional Actions, and the Scope of Section 1983*, 77 GEO. L.J. 1493, 1510 (1989) ("Implied actions under the Constitution and under the federal question statute for equitable relief against state or federal officers have never generated much controversy during this century, and the Court frequently has acknowledged their lengthy tradition.").

280. Preis, *supra* note 262.

281. Malam v. Adducci, 452 F. Supp. 3d 643, 651–52 (E.D. Mich. 2020); Mohammed S. v. Tritten, No. 20-CV-783, 2020 WL 2750109, at *2 n.5 (D. Minn. May 27, 2020); Urdaneta v. Keeton, No. CV-20-00654, 2020 WL 2319980, at *7 (D. Ariz. May 11, 2020); Angelica C. v. Immigr. & Customs Enf't, No. 20-cv-913, 2020 WL 3441461, at *11 (D. Minn. June 5, 2020).

limitation on the Constitution as a cause of action to seek injunctive or equitable relief."[282] The court relied on the power of federal courts to grant equitable relief for constitutional violations, finding no sovereign immunity in this situation.[283] Similarly, in *Zepeda Rivas*, a district court in the Northern District of California concluded that, "[i]f ICE were correct that habeas relief is not available here, then the plaintiffs would be entitled to relief under the equitable power of federal courts to restrain unlawful executive action."[284]

However, other courts have refused to find an implied cause of action directly under the Fifth Amendment.[285] Within the Fifth Circuit, district courts have relied on *Hearth*, which observes that "the federal courts, and this Circuit in particular, have been hesitant to find causes of action arising directly from the Constitution."[286] There, the court framed the issue as pertaining to separation of powers, noting that "the framers of the Constitution saw fit to entrust the job of legislating to the Congress."[287] The court explained the *Bivens* remedy as "necessitated primarily by the absence of alternative remedies."[288] Consequently, district courts have reasoned that noncitizens seeking release due to COVID-19 have failed to show an absence of other remedies (e.g. the civil rights remedies discussed above) and therefore cannot claim a cause of action for injunctive relief directly under the Fifth Amendment.[289] However, if, as argued above, the civil rights remedies are often illusory, then considering a direct cause of action under the Fifth Amendment would be consistent with *Hearth*.

Within the Eleventh Circuit, district courts have applied an Eleventh Circuit precedent called *Gomez* in holding that release is not a possible form of injunctive relief based on either a cause of action directly under the Fifth Amendment or under the APA.[290] *Gomez* found that even if the prisoner prevailed in his habeas petition, which was based on inadequate medical treatment in violation of his Eighth

282. *Malam*, 452 F. Supp. 3d at 651–52 (citing *Abbasi*, 137 S.Ct. at 1862).

283. *Id.*

284. Zepeda Rivas v. Jennings, 465 F. Supp. 3d 1028, 1036 (N.D. Cal. 2020) (first citing Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320, 326–27 (2015); then citing Sierra Club v. Trump, 929 F.3d 670, 694 (9th Cir. 2019); then citing Solida v. McKelvey, 820 F.3d 1090, 1096 (9th Cir. 2016); and then citing *Abbasi*, 137 S.Ct. at 1862).

285. *See* Sacal-Micha v. Longoria, No. 1:20-CV-37, 2020 WL 1815691, at *8 (S.D. Tex. Apr. 9, 2020); Umarbaev v. Moore, No. 3:20-CV-1279, 2020 WL 3051448, at *5 (N.D. Tex. June 6, 2020) (quoting *Sacal-Micha*, 2020 WL 1815691, at *8); Shah v. Wolf, No. 3:20-CV-994, 2020 WL 4456530, at *6 n.3 (N.D. Tex. July 13, 2020); *see also* Codner v. Choate, No. 20-cv-01050, 2020 WL 2769938, at *7 (D. Colo. May 27, 2020) (rejecting the argument that the court has inherent equitable authority to remedy unconstitutional government conduct).

286. Hearth, Inc. v. Dep't of Pub. Welfare, 617 F.2d 381, 382 (5th Cir. 1980) (per curiam).

287. *Id.*

288. *Id.*

289. *See, e.g.*, *Umarbaev*, 2020 WL 3051448, at *5–6.

290. Gayle v. Meade, No. 20-21553, 2020 WL 1949737, at *24–26 (S.D. Fla. Apr. 22, 2020) (citing Gomez v. United States, 899 F.2d 1124, 1125–26 (11th Cir. 1990).

Amendment, he still would not be entitled to release.[291] Instead, the relief would be to require discontinuance of any improper practices.[292] The difficulty with this approach is that the court would have to fashion some remedy to the problem of continued detention while the government fixes the conditions creating a constitutional problem, assuming it is not a quick fix.[293]

Since over sixty percent of noncitizens are detained within the Fifth and Eleventh Circuits, with particularly high numbers in Texas, Louisiana, and Georgia,[294] *Hearth* and *Gomez* present significant obstacles to injunctive relief. Outside of the Fifth and Eleventh Circuits, courts may be more open to granting injunctive relief in the form of release. Yet there is often still some reluctance to recognizing inherent authority to grant injunctive relief, which Akhil Reed Amar attributes to "a lingering doubt about whether remedy-fashioning is a more legislative than judicial function, and from an awareness of the special political vulnerability of federal judges in suits involving coercive relief against agents in coordinate branches of government."[295]

B. Claims Under the Administrative Procedure Act

A claim for injunctive relief could also be brought under the Administrative Procedure Act, which provides a cause of action for non-monetary relief to individuals who are "suffering legal wrong because of agency action."[296] However, the APA itself does not grant subject matter jurisdiction to federal courts.[297] Thus, if a court did not recognize habeas jurisdiction, it would need to recognize a separate basis for jurisdiction, such as an action directly under the Fifth Amendment or a writ for an injunction.[298]

There are several requirements for bringing a claim under the APA. The suit must challenge "final agency action," and there must be "no other adequate remedy in a court."[299] Assuming these two requirements are met, agency action is still unreviewable if there is a statutory prohibition to judicial review or if the action is

291. *Gomez*, 899 F.2d at 1126.

292. *Id.*

293. Janet Cooper Alexander, *Jurisdiction-Stripping in a Time of Terror*, 95 CALIF. L. REV. 1193, 1229 (2007) (describing the problem of "hav[ing] to fashion some response to the government's request for continued detention while it fixed the constitutional problem").

294. *See* FREEDOM FOR IMMIGRANTS, *supra* note 16.

295. Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1508 (1987).

296. 5 U.S.C. § 702; *see* Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230 n.4 (1986) (recognizing that the APA creates a private right of action).

297. Califano v. Sanders, 430 U.S. 99, 105–07 (1977) ("[T]he APA nowhere contains an explicit grant of jurisdiction to challenge agency action in the federal courts."); Air Courier Conf. of Am. v. Am. Postal Workers Union, 498 U.S. 517, 523 n.3 (1993) (stating that the judicial review provision of the APA is not jurisdictional).

298. 5 U.S.C. § 703 (providing that judicial review of agency action under the APA may proceed by "any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus").

299. 5 U.S.C. §§ 702, 704.

committed to agency discretion by law.[300] Once the requirements for judicial review are met, the court must set aside any agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[301]

In some cases, detained noncitizens have tried to argue that ICE's failure to abide by its COVID-19 Pandemic Response Requirements (PRR) is arbitrary and capricious under the APA.[302] In these cases, the noncitizens relied on the *Accardi* doctrine, which stands for the "proposition that agencies may not violate their own rules and regulations to the prejudice of others."[303] Internal agency guidance that is intended to be binding falls within the ambit of the *Accardi* doctrine.[304] The government responded that the PRR do not constitute agency action, much less "final agency action," nor are they the type of rules encompassed by the *Accardi* doctrine, which has traditionally been applied only to procedural rules.[305]

In a case brought by transgender immigration detainees called *C.G.B.*, the D.C. District Court agreed with the government that the PRR do not represent "final agency action," relying on precedents explaining that "[w]hile a single step or measure is reviewable, an on-going program or policy is not, in itself, a final agency action under the APA."[306] The court stressed that the plaintiffs had not identified "any discrete final agency decision not to implement the PRR," explaining that allegations of general insufficiencies in complying with the PRR lacked the specificity needed for agency action.[307]

In another case that was brought by the National Immigration Project of the National Lawyers Guild against both the Department of Homeland Security and the Executive Office for Immigration Review challenging policies that affected access to counsel during the pandemic, the D.C. District Court likewise found no "final agency action" under the APA, concluding that the government's choices about how best to respond to a pandemic were discretionary and therefore unreviewable.[308] There, the court noted "the rapidly changing situation related to the COVID-19 pandemic."[309] The court also stressed that ICE's policies are implemented "based on the particularized circumstances present at detention centers."[310]

---

300. 5 U.S.C. §§ 701(a)(1)–(2).

301. 5 U.S.C. § 706(2)(A).

302. *See, e.g.*, C.G.B. v. Wolf, 464 F. Supp. 3d 174, 224–27 (D.D.C. 2020).

303. Battle v. F.A.A., 393 F.3d 1330, 1336. (D.C. Cir. 2005). *See generally* United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260 (1954).

304. Damus v. Nielsen, 313 F. Supp. 3d 317, 337–38 (D.D.C. 2017).

305. *C.G.B.*, 464 F. Supp. 3d at 225.

306. *Id.* (quoting Cobell v. Norton, 240 F.3d 1081, 1095 (D.C. Cir. 2001)).

307. *Id.*

308. Nat'l Immigr. Project of Nat'l Laws. Guild v. Exec. Off. Immigr. Rev., 456 F. Supp. 3d 16, 30–32 (D.D.C. 2020).

309. *Id.* at 25.

310. *Id.* at 31.

A third case brought in D.C. also reached the same conclusion. In *D.A.M.*, the district court found that petitioners were unlikely to succeed with the argument that ICE's failure to follow its own policies as well as CDC guidance in responding to the COVID-19 pandemic is arbitrary and capricious in violation of the APA.[311] Because these guidelines set out substantive standards for how to handle the pandemic, rather than procedural requirements, the court reasoned that they do not fall within the ambit of the *Accardi* doctrine.

Some courts have found that the arguments based on the *Accardi* doctrine are unlikely to succeed due to the flexible language in ICE's and CDC's COVID-19-related guidance.[312] Others have found that the government's decisions about what measures to take to mitigate the risk of COVID-19 are unreviewable because they are discretionary.[313] For example, a court in the Southern District of Texas applied the exception to judicial review for discretionary decisions.[314] Jurisdictional issues may also arise under 8 U.S.C. § 1252(g), which prohibits courts from hearing "any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence [removal] proceedings, adjudicate cases, or execute removal orders against any alien."[315] Although challenges to *detention conditions* do not "arise from" any of these three discrete categories,[316] the government frequently invokes § 1252(g) as a jurisdictional bar in conditions cases.[317]

Insofar as judicial review under the APA requires that there be "no other adequate remedy in a court," the Supreme Court has cautioned that this language should be read narrowly, so as not "to defeat the central purpose of providing a

311. D.A.M. v. Barr, 474 F. Supp. 3d 45, 66 (D.D.C. 2020).

312. *See, e.g.*, Gayle v. Meade, No. 20-21553, 2020 WL 1949737, at *28 (S.D. Fla. Apr. 22, 2020) ("CDC Guidelines contain a substantial amount of flexibility and courts . . . have relied on this adaptability when denying applications for release of inmates or detainees."); Benavides v. Gartland, No. 5:20-cv-46, 2020 WL 3839938, at *11 (S.D. Ga. July 8, 2020) (finding that CDC guidance "was not intended to be followed with rigid precision").

313. Sacal-Micha v. Longoria, No. 1:20-CV-37, 2020 WL 1518861, at *7 (S.D. Tex. Mar. 27, 2020).

314. *Id.*

315. 8 U.S.C. § 1252(g) (2005).

316. Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 482 (1999) (concluding that § 1252(g) "applies only to three discrete actions that the Attorney General may take" and finding it "implausible" that the language of § 1252(g) "was a shorthand way of referring to all claims arising from deportation proceedings").

317. *See, e.g.*, D.A.M. v. Barr, 474 F. Supp. 3d 45, 60 (D.D.C. 2020) (rejecting the government's argument that § 1252(g) bars review of challenges related to the conditions of deportation, specifically the transportation of detained immigrants during the COVID-19 pandemic); Innovation L. Lab v. Nielsen, 342 F. Supp. 3d 1067, 1076–77 (D. Or. 2018) (rejecting the government's argument that jurisdiction was barred under § 1252(g) where Plaintiffs raised constitutional claims about detention conditions before removal proceedings commenced). *But see* Thakker v. Doll, No. 1:20-CV-480, 2020 WL 9349674, at *8 (M.D. Pa. Aug. 24, 2020) (finding that § 1252(g) posed a jurisdictional issue and denying a motion for a preliminary injunction where the plaintiffs challenged conditions related to transport during the COVID-19 pandemic for purposes of deportation), *report and recommendation adopted in part, rejected in part*, No. 1:20-CV-480, 2021 WL 780301 (M.D. Pa. Mar. 1, 2021).

broad spectrum of judicial review of agency action."[318] The D.C. Circuit has described the adequate-remedy question in the APA context as a practical one that requires asking whether the alternative remedy would afford the same relief to plaintiffs as suit under the APA.[319] Nevertheless, a court that concludes that a remedy under Section 1983, *Bivens*, a state tort claim, or a claim directly under the Fifth Amendment is available may decide that there is no judicial review under the APA. In habeas litigation related to the COVID-19 pandemic, district courts generally have not found a likelihood of success on an APA claim.[320]

CONCLUSION

If courts refuse to recognize jurisdiction over habeas petitions brought by detained noncitizens seeking release due to life-threatening conditions, this vulnerable population may be left with no remedy at all. In the *Bivens* context, courts and scholars have contemplated the difference between practical, meaningful remedies and merely theoretical ones. As this Article has shown, the same issue is arising in the habeas context with respect to petitions brought by detained noncitizens and requires more than a cursory evaluation.

The best way for courts to protect detained individuals is to exercise jurisdiction over conditions-based and fact-based habeas petitions alike, as four circuits have already done. For courts that are unwilling to embrace that approach, however, it is critical to at least consider whether meaningful alternative remedies are available before rejecting habeas jurisdiction. This Article cautions against relying on a vague, generalized notion that challenges to the conditions of detention should be made through civil rights claims, much less tort claims.

Simply recognizing habeas *jurisdiction* in petitions brought by detained noncitizens would not automatically mean that the petitioner should be released. The petitioner would still have to satisfy the rigorous requirements of showing deliberate indifference in order to establish a due process violation. That analysis is the same, whether the vehicle is a habeas petition, Section 1983 claim, *Bivens* claim, or a direct action under the Constitution.

Additionally, *after* exercising jurisdiction, courts have considered numerous factors in determining whether a petitioner should be released, such as whether the petitioner is at higher risk of contracting or becoming severely ill with disease, whether social distancing is possible, and the steps taken by ICE to mitigate the harm.[321] Ultimately, whether release is an appropriate remedy depends on an

318. Bowen v. Massachusetts, 487 U.S. 879, 903–04 (1988).

319. *See, e.g.*, Women's Equity Action League v. Cavazos, 906 F.2d 742, 751 (D.C. Cir. 1990); Council of and for the Blind v. Regan, 709 F.2d 1521, 1532 (D.C. Cir. 1983).

320. At best, some courts have declined to reach the APA claim. *See, e.g.*, Guerrero v. Decker, No. 19 Civ. 11644, 2020 WL 1244124, at *5 n.3 (S.D.N.Y. Mar. 16, 2020).

321. Singh v. Hoover, No. 1:20-CV-00627, 2020 WL 1904470, at *3 (M.D. Pa. Apr. 17, 2020).

individualized assessment of the facts of a case. Finding subject matter jurisdiction is just the first step that would allow a court to consider these issues.

Given the prominent, unparalleled role of habeas corpus in U.S history and the Constitution, access to the Great Writ should not be cut off simply because another alternative exists, especially if the alternative is not meaningful. Courts have recognized that it would be unconstitutional for Congress to completely preclude judicial review of a constitutional challenge to conditions of confinement. Yet rejecting habeas jurisdiction may have the exact same effect, leaving detained noncitizens no practical path to challenge their conditions of confinement, even during a life-threatening pandemic.

Requiring detained noncitizens to rely on alternative remedies would also create disparities based merely on where a noncitizen happens to be detained—whether in a state or locally operated jail, a privately operated detention center, or in a federally operated facility, for purposes of a civil rights action, and which state for purposes of a tort action. These differences also allow ICE to manipulate access to civil rights and tort remedies through discretionary transfers between detention facilities. Habeas, on the other hand, is a vehicle that does not depend on the type of detention center and does not vary like state tort laws. By exercising habeas jurisdiction over conditions claims, courts would ensure access to a life-saving remedy for all detained immigrants nationwide.