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Cruel and Unusual Punishment: The Eighth Amendment and ICE Detainees in the COVID-19 Crisis

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**CRUEL AND UNUSUAL PUNISHMENT: THE
EIGHTH AMENDMENT AND ICE DETAINEES IN
THE COVID-19 CRISIS**

Nechelle Nicholas*

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I. INTRODUCTION

In early 2020, the COVID-19 virus spread quickly across the nation and inevitably into hundreds of U.S. Immigration and Customs Enforcement (“ICE”) detention centers and prisons across the country. Children and families who were already held

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in substandard prisons conditions before the virus¹ were suddenly presented with the impending COVID-19 pandemic. While ICE detainees fell victim to the virus,² so did prison staff,³ because CDC guidelines aimed at curbing the spread were impossible to implement. ICE officials threatened to place detainees in quarantine cells with COVID-19 positive inmates if they did not comply with deportation orders.⁴ Over 700 ICE domestic flights carried sick detainees from one ICE detention center to another, while other ICE flights transported ill detainees to various countries.⁵ Children were kept in detention centers despite release orders.⁶ ICE detainees were thrown in solitary confinement for requesting COVID-19 tests.⁷ As a result, numerous lawsuits challenged the conditions in ICE detention facilities and demanded the early release of children and families, including those with preexisting conditions who

1. See generally HUMAN RIGHTS WATCH ET AL., *CODE RED: THE FATAL CONSEQUENCES OF DANGEROUSLY SUBSTANDARD MEDICAL CARE IN IMMIGRATION DETENTION* (2018), <https://www.hrw.org/report/2018/06/20/code-red/fatal-consequences-dangerously-substandard-medical-care-immigration>.

2. See Farida Jhabvala Romero, *Half of All Detainees at Bakersfield ICE Facility Have Tested Positive for COVID-19*, KQED (Aug. 18, 2020), <https://www.kqed.org/news/11833925/half-of-all-detainees-at-bakersfield-ice-facility-have-tested-positive-for-covid-19>.

3. See Esmey Jimenez, *3 Staff Test Positive for Covid-19 at Tacoma's Immigrant Detention Center*, KUOW (Oct. 26, 2020, 2:13 PM), <https://www.kuow.org/stories/second-guard-tests-positive-for-covid-at-tacomass-immigrant-detention-center>.

4. See John Washington, *ICE Threatened to Expose Asylum-Seekers to COVID-19 If They Did Not Accept Deportation*, THE INTERCEPT (Feb. 6, 2021, 12:21 PM), <https://theintercept.com/2021/02/06/ice-covid-threat-asylum-deportation/>; see also Ray Levy Uyeda, *ICE Is Threatening to Expose Immigrants to COVID-19, Detainees Say*, MIC (Feb. 8, 2021), <https://www.mic.com/p/ice-is-threatening-to-expose-immigrants-to-covid-19-detainees-say-61252008>.

5. See Emily Kassie & Barbara Marcolini, *How ICE Exported the Coronavirus*, THE MARSHALL PROJECT (July 10, 2020, 5:00 AM), <https://www.themarshallproject.org/2020/07/10/how-ice-exported-the-coronavirus>.

6. See Jasmine Aguilera, *120 Children Remain in ICE Detention Despite Court Order for Them to Be Released Due to COVID-19 Concerns*, TIME (Aug. 17, 2020, 11:58 AM), <https://time.com/5878909/children-ice-covid-19-detention-court-order/>.

7. See Clarissa Donnelly-DeRoven, *Immigrants Detained by ICE Say They Were Punished for Requesting COVID-19 Tests*, THE INTERCEPT (Dec. 3, 2020, 1:00 PM), <https://theintercept.com/2020/12/03/etowah-ice-detention-covid-outbreak/>.

are more vulnerable to the virus.⁸ The results of these cases varied. In California, fifteen detainees with medical conditions filed a class action Fifth Amendment and civil rights suit against ICE alleging inadequate medical, mental health, and disability accommodations.⁹ The federal judge ruled in favor of the detainees and ordered ICE to consider releasing immigrants with medical conditions who were high-risk and noted that, “[t]he evidence suggests systemwide inaction that goes beyond a mere ‘difference of medical opinion or negligence.’”¹⁰

This Note will examine how the Cruel and Unusual Punishment Clause of the Eighth Amendment is implicated in the treatment of immigrant detainees and conditions at ICE facilities during the COVID-19 crisis. Parts I and II will consist of a brief overview of ICE facilities and recent COVID-19 cases. Part III will examine the relevant constitutional provisions which apply to medical care in prisons, namely the Due Process Clauses of the Fifth and Fourteenth Amendments and the Eighth Amendment. The barrier that detainees face, i.e., that they cannot file an Eighth Amendment claim to lessen time, will be identified in Part IV. In Part V, this Note will argue that a cognizable Eighth Amendment claim for early release could and should be made by immigrant detainees, because officials were deliberately indifferent to their medical needs through treatment and conditions which have shocked the human conscience.¹¹ Part V will also describe the additional difficulty for both Eighth Amendment and Due Process claimants to prove the heightened “deliberate indifference” requirement. This Note will conclude by recommending that the courts speak up on what immigrant detainees should do to resolve the looming circuit split and the reluctance of the Supreme Court to establish a rule on this issue.

8. See Suzanne Monyak, *Top Immigration Cases of 2020: Year in Review*, LAW360 (Dec. 21, 2020, 6:08 PM), https://www.law360.com/articles/1333361?e_id=2dedb027-654e-42b2-a487-f2b4759f7590&utm_source=engagement-alerts&utm_medium=email&utm_campaign=case_updates.

9. See *Fraihat v. U.S. Immigr. & Customs Enf't*, 445 F. Supp. 3d 709, 718 (C.D. Cal. 2020); see also Monyak, *supra* note 8.

10. *Fraihat*, 445 F. Supp. 3d at 745 (quoting *Bell v. Mahoney*, 2019 WL 6792793 (C.D. Cal. 2019)).

11. See *County of Sacramento v. Lewis*, 523 U.S. 833 (1998).

II. OVERVIEW

ICE was created in 2003 and is a division of the U.S. Department of Homeland Security (“DHS”).¹² Identification and arrest, domestic transportation, bond management, supervised release, detention, and alternatives to detention are all dealt with by the “Enforcement and Removal Operations” (“ERO”) directorate of ICE.¹³ There are over 200 ICE detention centers across the country, which are operated by private prison corporations and local jails that contract with ICE to detain immigrants.¹⁴ These detention centers house non-U.S. citizens if they are determined to require “custodial supervision”¹⁵ while they await removal proceedings.¹⁶ These detainees include non-U.S. citizens who currently face removal because of criminal allegations or because they are undocumented.¹⁷ ICE detainees also include non-U.S. citizens who arrive at the border or airports and request asylum.¹⁸

III. CONSTITUTIONAL LAW APPLICABLE TO ICE DETAINEES

A. The Eighth Amendment

Prisoners can file medical care claims under the Eighth Amendment, which states that “cruel and unusual punishments” shall not be inflicted¹⁹ and protects “all people” from such punishment.²⁰ “In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to

12. See U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, <https://www.ice.gov/history> (last visited Dec. 3, 2021).

13. See U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, <https://www.ice.gov/about-ice> (last visited Dec. 3, 2021).

14. See ACLU ET AL., JUSTICE-FREE ZONES: U.S. IMMIGRATION DETENTION UNDER THE TRUMP ADMINISTRATION 4 (2020).

15. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, DETENTION MANAGEMENT, <https://www.ice.gov/detention-management> (last visited Dec. 3, 2021).

16. See ACLU ET AL., *supra* note 14.

17. See *id.*

18. See *id.*

19. U.S. CONST. amend. VIII.

20. *Wilson v. Williams*, 961 F.3d 829, 839 (6th Cir. 2020).

evidence deliberate indifference to serious medical needs.”²¹ The Supreme Court in *Estelle v. Gamble* emphasized that it is only this heightened level of indifference that violates the Eighth Amendment.²² Thus, if a prisoner brings a 42 U.S.C. § 1983 civil rights action claiming “an inadvertent failure to provide adequate medical care” or that a physician has been negligent in diagnosing or treating a medical condition, those claims would not be considered “an unnecessary and wanton infliction of pain” or valid under the Eighth Amendment.²³

It has been established that the “deliberate indifference” framework of the Eighth Amendment consists of a subjective and objective prong.²⁴ Under the objective prong, a prisoner must prove “that he is incarcerated under conditions posing a substantial risk of serious harm.”²⁵ Under the subjective prong, there must be proof that an official knew of and disregarded “an excessive risk to inmate health or safety.”²⁶ The Supreme Court in *Farmer v. Brennan* adopted a “subjective recklessness” standard to satisfy the subjective prong and “as the test for ‘deliberate indifference’ under the Eighth Amendment.”²⁷ Under this standard, “the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.”²⁸ However, officials who knew of the substantial risk to inmate health or safety could escape liability “if they responded reasonably to the risk, even if the harm ultimately was not averted.”²⁹ Thus, it can be said that the objective prong analyzes the conditions of the confinement to determine if there is a substantial risk,³⁰ whereas the subjective standard analyzes the official’s state of mind when they are accused of inflicting cruel and unusual punishment.³¹

Even if harm has not occurred yet, a prisoner can still file a

21. *Estelle v. Gamble*, 429 U.S. 97, 106 (1976).

22. *See id.*

23. *Id.* at 104–05.

24. *See Wilson*, 961 F.3d at 839.

25. *Id.* at 840 (citations omitted).

26. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).

27. *Id.* at 840.

28. *Id.* at 837.

29. *Id.* at 844.

30. *See generally id.*

31. *See id.* at 838–39.

successful Eighth Amendment claim regarding the conditions of their confinement.³² The *Helling* court held that “[i]t would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them.”³³

B. The Fifth and Fourteenth Amendments

The Fifth Amendment provides that, “[n]o *person* shall be . . . deprived of life, liberty, or property, without due process of law” by the federal government.³⁴ Likewise, the Fourteenth Amendment provides for those same due process rights through the states.³⁵

Immigrant detainees have protection under the Due Process Clause of the Fifth and Fourteenth Amendments for the conditions of their confinement.³⁶ In theory, immigration detainees should be provided with a higher level of medical care, given that they are civil detainees and have not been convicted of a crime.³⁷ The Ninth Circuit noted that, “due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.”³⁸

IV. BARRIERS TO RELIEF UNDER THE EIGHTH AMENDMENT

32. See *Helling v. McKinney*, 509 U.S. 25, 33 (1993) (explaining that the Supreme Court and Courts of Appeals have recognized a remedy for unsafe conditions where a tragic event has not yet occurred, i.e., one need not wait for a tragic event to occur to file a claim for future harm under the Eighth Amendment claim).

33. *Id.*

34. U.S. CONST. amend. V (emphasis added).

35. See U.S. CONST. amend. XIV, § 1.

36. See, e.g., *Fraihat v. U.S. Immigr. & Customs Enft.*, 445 F. Supp. 3d 709, 741 (C.D. Cal. 2020) (ICE detainees brought three claims under the Due Process Clause of the Fifth Amendment for failure to monitor various practices during the COVID-19 pandemic); see also *Malam v. Adducci*, 452 F. Supp. 3d 643, 658 (E.D. Mich. 2020) (finding that immigrant detainee was likely to succeed on Fifth Amendment claim surrounding COVID-19 conditions).

37. See Carl Kenneth Lipscombe, *Tylenol and an Ice Pack: An Inadequate Prescription for HIV/AIDS in Immigration Detention Centers*, 11 CARDOZO PUB. L. POL'Y & ETHICS J. 529 (2013).

38. *Jones v. Blanas*, 393 F.3d 918, 931 (9th Cir. 2004) (quoting *Jackson v. Indiana*, 406 U.S. 715, 738 (1972)).

A. Civil Pretrial Detainees versus Criminal Detainees

Although U.S. citizens can file suits under the Eighth Amendment in order to lessen their time at prisons, courts have held that immigrant detainees cannot do so.³⁹ The right to file a writ of habeas corpus⁴⁰ is granted by the Constitution,⁴¹ and habeas corpus is mainly used “to seek the release of persons held in actual, physical custody in prison or jail.”⁴² “Habeas corpus proceedings are the proper mechanism for a prisoner to challenge the ‘legality or duration’ of confinement.”⁴³ Meanwhile, a civil rights action can be filed under various different statutes,⁴⁴ and “is the proper method of challenging ‘conditions of . . . confinement.’”⁴⁵ Both habeas corpus and civil rights actions can be filed under the Eighth Amendment.

However, the roadblock that immigrant detainees face revolves around the fact that they are civil detainees⁴⁶ rather than criminal detainees, and therefore cannot file a habeas corpus claim to lessen their time under the Eighth Amendment.⁴⁷ Rather, immigrant detainees can only file a civil rights claim under the Eighth Amendment relating to the conditions of their confinement, usually after they are

39. *See generally* Calderon-Rodriguez v. Wilcox, 374 F. Supp. 3d 1024 (W.D. Wash. 2019).

40. *See* 28 U.S.C.A. § 2241 (West 2008).

41. *See* U.S. CONST. art. 1, § 9 cl. 2.

42. *Jones v. Cunningham*, 371 U.S. 236, 238–40 (1963) (noting that habeas corpus is not limited to situations where the applicant is in custody, but can be used by aliens, members of the military and other situations where one’s liberty is restrained).

43. *Badea v. Cox*, 931 F.2d 573, 574 (9th Cir. 1991); *see Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973) (“the essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and . . . the traditional function of the writ is to secure release from illegal custody.”).

44. *See, e.g.*, 42 U.S.C.A. § 1983 (West 1996).

45. *Cox*, 931 F.2d at 574.

46. *See* Homer D. Venters et. al., *HIV Screening and Care for Immigration Detainees*, 11 HEALTH AND HUM. RTS. J. 89 (2009) (noting that immigrant detainees are “non-criminal” immigrants who are detained because of a visa violation or other immigration issue, but not charged with any crime and do not enter the criminal justice system).

47. *See* Calderon-Rodriguez v. Wilcox, 374 F. Supp. 3d 1024 (W.D. Wash. 2019) (denying inmate’s Eighth Amendment habeas corpus claim because detainee was challenging length and not the conditions of his confinement); *see also* Spencer v. Haynes, 774 F.3d 467, 470 (8th Cir. 2014).

released.⁴⁸ Following a successful civil rights claim under the Eighth Amendment, the usual remedy would be to cease the conditions of confinement that the prisoner challenged, or monetary damages if the prisoner challenged past treatment.⁴⁹

B. The Circuit Split on Habeas Corpus Claims

Courts have noted that “the Supreme Court has not explicitly foreclosed” or even limited the use of habeas corpus to “conditions of confinement” claims.⁵⁰ Remarking on this, the Fifth Circuit in *Poree v. Collins* noted that the line between habeas corpus claims and civil rights claims—such as § 1983 claims—“is a blurry one.”⁵¹ Some circuits have limited habeas corpus claims to those that challenge the fact or duration of confinement,⁵² while others have not.⁵³ The Supreme Court has left for “another day the question of the propriety of using a writ of habeas corpus to obtain review of the conditions of confinement, as distinct from the fact or length of the confinement itself.”⁵⁴ This has resulted in a circuit split on the issue, with the Eighth⁵⁵ and Ninth⁵⁶ Circuits holding that habeas corpus claims should be limited to fact or duration of confinement, while the Fourth⁵⁷ and Fifth⁵⁸ Circuits refuse to

48. *See Cox*, 931 F.2d at 574.

49. *See* Alexander A. Reinert, *Release as Remedy for Excessive Punishment*, 53 WM. & MARY L. REV. 1575, 1583–84 (2012) (arguing that early release should be a remedy under the Eighth Amendment).

50. *Vazquez Barrera v. Wolf*, 455 F. Supp. 3d 330, 336 (S.D. Tex. 2020); *see also Poree v. Collins*, 866 F.3d 235, 242–43 (5th Cir. 2017); *see generally Boumediene v. Bush*, 553 U.S. 723 (2008).

51. 866 F.3d at 243 (quoting *Cook v. Tex. Dep’t of Criminal Justice Transitional Planning Dep’t*, 37 F.d 166, 168 (5th Cir. 1994)

52. *See generally Wilcox*, 374 F. Supp. 3d 1024.

53. *See Poree*, 866 F.3d at 243 (Fifth Circuit court not limiting “fact or duration” claims to habeas corpus actions).

54. *Bell v. Wolfish*, 441 U.S. 520, 526 n.6 (1979).

55. *See generally Spencer v. Haynes*, 774 F.3d 467 (8th Cir. 2014).

56. *See generally Badea v. Cox*, 931 F.2d 573 (9th Cir. 1991).

57. *See generally Vazquez Barrera v. Wolf*, 455 F. Supp. 3d 330 (S.D. Tex. 2020).

58. *See generally Poree*, 866 F.3d 235. *Cf. Carson v. Johnson*, 112 F.3d 818, 820–21 (5th Cir. 1997) (acknowledging the “blurry” line where a prisoner challenges an unconstitutional condition of confinement that affects the timing of his release from custody, and adopting a “simple, bright-line rule” to determine when § 1983 or habeas corpus action was the proper vehicle for a claim).

limit habeas corpus claims such requirements.

Immigrant detainees are similar to “pre-trial detainees,”⁵⁹ because both categories of detainees are confined without any convictions, and the Eighth Amendment does not apply to pretrial detainees.⁶⁰ For this reason, cases involving pretrial detainees will be used throughout this Note. “Although convicted prisoners and pretrial detainees are often housed in the same facilities, incarceration and detention are based on vastly different purposes and justifications.”⁶¹ The Supreme Court has held that “Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions[.]”⁶² Further, “[t]he State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law.”⁶³ The Supreme Court has also stated that pretrial detainees “may not be punished prior to an adjudication of guilt in accordance with due process of law.”⁶⁴ Therefore, because pretrial detainees have not been convicted, in theory, “[d]etention does not, in and of itself amount to *punishment*,” and courts have held that the Eighth Amendment’s prohibition of cruel and unusual punishment does not apply to pretrial detainees.⁶⁵ In *City of Revere v.*

59. Lipscombe, *supra* note 37, at 540 (noting that pretrial detainees are essentially persons who have been charged with a crime(s) and are placed in correctional facilities while they await trial and should not be “subjected to punitive conditions of detention” meant for convicted prisoners).

60. *See* E. D. v. Sharkey, 928 F.3d 299, 306–307 (3d Cir. 2019) (as a matter of first impression, Second Circuit court holding that immigration detainees are entitled to the same due process rights as pretrial detainees—in line with the Second, Fifth, Seventh, Eighth, and Tenth Circuits).

61. DeAnna Pratt Swearingen, *Innocent Until Arrested?: Deliberate Indifference Toward Detainees’ Due-Process Rights*, 62 ARK L. REV. 101, 102-03 (2009) (noting that while the purposes of incarceration include punishment, pretrial detention does not include punishment, but rather state interests such as ensuring that the offender appears at trial and guaranteeing the safety of the community during the trial itself). *See* United States v. Salerno, 481 U.S. 739, 748 (1987) (noting that “the Government’s regulatory interest in community safety can, in appropriate circumstances, outweigh an individual’s liberty interest.”).

62. *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983) (quoting *Ingraham v. Wright*, 430 U.S. 651, 671–672 n.40 (1977)).

63. *Id.* (alteration in original).

64. *Bell v. Wolfish*, 441 U.S. 520, 535 (1979).

65. Swearingen, *supra* note 61, at 111 (emphasis added).

Massachusetts General Hospital, the Supreme Court held that “[b]ecause there had been no formal adjudication of guilt” against the pretrial detainee who was alleging inadequate medical care, the Eighth Amendment did not apply there.⁶⁶ Rather, the Court used the Due Process Clause of the Fourteenth Amendment and held that a pretrial detainee’s due process rights “are at least as great as the Eighth Amendment protections available to a convicted prisoner.”⁶⁷

C. The Use of the “Deliberate Indifference” Requirement for Eighth Amendment and Due Process Claims

The Due Process Clauses of the Fifth and Fourteenth Amendments for pretrial detainees draw from the Eighth Amendment, which applies to convicted prisoners. In fact, courts have applied the Eighth Amendment “deliberate indifference” test—discussed *infra*—to claims by immigrant detainees.⁶⁸ “The Eighth Amendment prohibition on cruel and unusual punishment protects prisoners from the ‘unnecessary and wanton infliction of pain.’”⁶⁹ On the other hand, “[p]retrial detainee claims, though they sound in the Due Process Clause of the Fourteenth Amendment rather than the Eighth Amendment, are analyzed under the same rubric as Eighth Amendment claims brought by prisoners.”⁷⁰

In *Gordon v. Cnty. of Orange*, the Ninth Circuit specifically highlighted that the Supreme Court has not established a bright-line rule restricting the use of habeas corpus in “conditions of confinement” claims.⁷¹ The *Gordon* court noted that, “[w]hile [the Supreme Court] did ‘not necessarily answer the broader question of whether the objective standard applies to all § 1983 claims brought under the Fourteenth Amendment against individual defendants[,]’ logic dictates extending the objective deliberative indifference standard . . . to medical care

66. 463 U.S. at 244.

67. *Id.*

68. See *Gordon v. Cnty. of Orange*, 888 F.3d 1118, 1124 (9th Cir. 2018); *Villegas v. Metro. Gov't of Nashville*, 709 F.3d 563 (6th Cir. 2013).

69. *Villegas*, 709 F.3d at 568 (quoting *Barker v. Goodrich* 649 F.3d 428, 434 (6th Cir. 2011)).

70. *Id.* (emphasis added) (citation omitted).

71. See *Gordon*, 888 F.3d 1118.

claims [by pretrial detainees].”⁷² The *Gordon* court reasoned that a deliberate indifference standard should be used, given that § 1983 itself contains no state of mind requirement and claims brought by pretrial detainees are brought under the Fourteenth Amendment’s Due Process clause rather than the Eighth Amendment.⁷³ Citing the *Wilson* Supreme Court case, the *Gordon* court compared medical care claims to inadequate “conditions of confinement” cases.⁷⁴ The *Gordon* court held that a deliberate indifference test—which is one of the elements of an Eighth Amendment civil rights claim—applied to the Fourteenth Amendment Due Process claim by pretrial detainees.⁷⁵ Therefore, in essence, the court determined that the Eighth Amendment does not apply to medical care claims brought by pretrial detainees, while it used an exact Eighth Amendment deliberate indifference test to hold that the Fourteenth Amendment applied.⁷⁶ Other courts have noted this nuance, which serves as a slight explanation for why the Supreme Court has not blatantly restricted the use of habeas corpus claims in “conditions of confinement” cases.⁷⁷ This also serves as an explanation for why the Eighth Amendment should be used in habeas corpus claims—because the courts end up using an Eighth Amendment test, directly dealing with conditions of confinement, for claims of inadequate medical care by pretrial detainees.

The mere use of the Eighth Amendment deliberate indifference test in Due Process cases evinces even more of a need for immigrant detainees to be able to file Eighth Amendment claims under a habeas corpus action to lessen time because of the conditions of their confinement. However, embedded in the reason why the Eighth Amendment does not

72. *Id.* at 1124 (citing *Kingsley v. Hendrickson*, 576 U.S. 389 (2015) (emphasis added)).

73. *See id.* at 1124–25.

74. *See id.* at 1124 (citing *Wilson v. Seiter*, 501 U.S. 294, 301 (1991)).

75. *See id.*

76. *See id.*

77. *See, e.g., Castro v. Cty. of Los Angeles*, 833 F.3d 1060, 1071 (9th Cir. 2016) (creating “more than negligence but less than subjective intent” test which the court notes is different from the Eighth Amendment deliberate indifference test). This nuance seems to lead courts like *Castro* to create their own variations of the Eighth Amendment “deliberate indifference” test while trying to justify how those tests differ from the Eighth Amendment’s “deliberate indifference” test.

apply to the Fifth and Fourteenth Amendments is that the purpose of pretrial detention is not punishment—incarceration is. Likewise, the purpose of ICE detention is not punishment, because ICE detainees are in centers awaiting asylum or removal proceedings. However, the reality of the conditions in ICE facilities and the treatment of ICE detainees may not coincide with their purpose. The reality—discussed *infra*—is that pretrial detainees *and* ICE detainees are being punished unlawfully, and are thus being treated like incarcerated individuals, which begs the need for pretrial detainees to bring claims under the Eighth Amendment. The mere fact that this is happening and that even the question of the use of the Eighth Amendment arises is unjust and contrary to what the constitutional drafters envisioned.

V. THE CONSTITUTION AND MEDICAL CARE: COVID-19 CLAIMS

A. The Difficulty of Proving “Deliberate Indifference”

Eighth Amendment “inadequate medical care” claims have been struck down by courts, mainly because of the difficulty to prove the subjective prong, i.e., that officials acted with deliberate indifference to a prisoner’s medical needs. Courts have recognized claims of deliberate indifference to various medical needs and issues: exposure to tobacco smoke;⁷⁸ vulnerability to suicide due to mental health conditions;⁷⁹ vulnerability due to insulin-dependent diabetes;⁸⁰ sexual reassignment surgery for transgender inmates;⁸¹ *inter alia*. On the other hand, courts have failed to uphold medical care claims for the various medical needs listed above and for medical needs such as abortion and HIV/AIDS treatment. One such instance was the court’s rejection of the plaintiff’s claim in *Bryant v. Maffucci*, which expounded that because health care at the correctional facility was geared towards “gender neutral medical needs, the medical customs and policies exhibited a systemic

78. See *Helling v. McKinney*, 509 U.S. 25, 34–35 (1993).

79. See *Palakovic v. Wetzel*, 854 F.3d 209, 224 (3d Cir. 2017).

80. See *Natale v. Camden Cnty. Corr. Facility*, 318 F.3d 575 (3d Cir. 2003).

81. See *De’lonta v. Johnson*, 708 F.3d 520, 525 (4th Cir. 2013).

deficiency with regard to the health care requirement unique to women, and that its treatment of abortion can only be characterized as deliberate indifference.”⁸² In strong disagreement with this claim, and moreover, with the appellate court subsequently affirming, the district court laid out the various steps that the correctional facility took which were not deliberately indifferent.⁸³ These steps included the procedure for pregnant inmates at the prison, where it was routine for them to be provided with sonograms, to make a formal request for an abortion, an examination to determine when the abortion is to be performed, as well as actual performance of the abortion at a medical center located in the county.⁸⁴

Similarly, claims of inadequate medical care for the treatment of HIV/AIDS have been struck down by courts because the subjective prong required under the Eighth Amendment was not satisfied. For example, in *Bigoski-Odom v. Firman*, the court held that the defendant doctor was not deliberately indifferent to an inmate for a temporary five-month discontinuation of her HIV/AIDS medications.⁸⁵ Similar to *Bryant*, the court looked at the evidence and pointed out all the defendant’s actions, which lacked a disregard for the plaintiff’s serious medical need due to HIV/AIDS. Specifically, the court noted that the defendant “examined and treated [the] plaintiff . . . obtained advice from specialists, and . . . followed that advice.”⁸⁶ Further, the court indicated that the evidence showed the plaintiff’s medication was discontinued because the plaintiff had pancreatitis, and the doctor provided the plaintiff with additional medications “designed to prevent opportunistic infections” during that time.⁸⁷ Further, the plaintiff was sent to outside specialists, and placed on a liquid diet, among other treatments, for her complaints of abdominal pain.⁸⁸

The difficulty in proving the subjective prong allows government officials who are defendants in Eighth Amendment

82. 729 F. Supp. 319, 326 (S.D.N.Y. 1990), *aff’d*, 923 F.2d 979 (2d Cir. 1991).

83. *See id.* at 326–27.

84. *See id.*

85. *See* No. 2:12-CV-0197-KJM-CMK-P, 2017 WL 5998226 (E.D. Cal. Dec. 4, 2017).

86. *Id.* at *5.

87. *Id.*

88. *See id.*

and Due Process cases to indicate the actions that they have taken, much like what the courts have done to strike down Eighth Amendment claims. However, courts have identified the impossibility of being able to prevent prisoners from contracting COVID-19 in overcrowded and communal facilities. As the *Brann* court posited in a Due Process case filed by pretrial detainees at Rikers Island due to the COVID-19 crisis, “[r]easonable care’ and ‘mitigation’ obligations are not satisfied by tossing a bucket of water on a four-alarm house fire, or by placing a band-Aid [sic] on a compound bone fracture.”⁸⁹ Rather, “[r]easonable care to mitigate must include an effort to employ an *effective* ameliorative measure.”⁹⁰ The court specifically noted that “[p]risoners with dangerous conditions are dramatically at risk. For some of them, *only release* can offer protection.”⁹¹ More importantly, the *Bryant* court identified that officials and correctional facilities need “not provide the most efficient system for inmates” to have access to medical care.⁹² This supports the notion among the courts, which is that federal and state officials are only constitutionally required to provide “minimally adequate care” to incarcerated individuals.⁹³ Government officials can therefore counter immigrant detainees’ claims with this line of argument whenever prison conditions are challenged and can ultimately be successful.

The common reason for courts striking down inadequate medical care claims is because of the heightened standard put on plaintiffs to prove the subjective prong—that officials had a state of mind in which they knew of a risk of serious harm to an inmate’s health and disregarded it.⁹⁴ Moreover, the courts have varied in how they have ruled on immigrant detainees’ claims of inadequate medical care under the Eighth Amendment and the Due Process Clauses of the Fifth and Fourteenth Amendments. However, the common denominator lies in the difficulty of satisfying the subjective prong, i.e., the state of mind component,

89. *People ex rel. Stoughton v. Brann*, 122 N.Y.S.3d 866, 872 (N.Y. Sup. Ct. 2020).

90. *Id.*

91. *Id.* (emphasis added).

92. *Bryant v. Maffucci*, 729 F. Supp. 319, 327 (S.D.N.Y. 1990), *aff’d*, 923 F.2d 979 (2d Cir. 1991).

93. *Harris v. Thigpen*, 941 F.2d 1495, 1504 (11th Cir. 1991).

94. *See generally* *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

of an Eighth Amendment claim.

B. Recent COVID-19-related Suits by Immigrant Detainees

Many of the recent circuit court decisions have been unpublished, most likely due to the recent nature of COVID-19 claims by immigrant detainees. In one of these unpublished opinions, *Hernandez Roman v. Wolf*, the Ninth Circuit held that the lower court had the jurisdiction to hear ICE detainees' class action, which sought declaratory, injunctive, and habeas corpus relief amid the COVID-19 pandemic.⁹⁵ Although the *Hernandez* court remanded these issues back to the lower court, it relied on the case law which has upheld that "[t]he Fifth Amendment requires the government to provide conditions of reasonable health and safety to people in its custody."⁹⁶ The court admittedly agreed with the district court that the Government failed to meet their Fifth Amendment duty, because at the time of the lower court's issuance of an injunction, the facility was so crowded that social distancing was impossible, detainees had inadequate access to masks, hand sanitizer and soap, guards were not required to wear masks, "detainees were responsible for cleaning the facility with only dirty towels and dirty water," and detainees had to sleep with less than six feet between them.⁹⁷ The court went on to hold that "[t]he Government was aware of the risks these conditions posed, especially in light of high-profile outbreaks at other facilities," and still failed to remedy the conditions.⁹⁸

In a recent 2020 case, immigrant detainees filed a habeas corpus petition seeking immediate release claiming that due to their age and health, their continued detention during the COVID-19 pandemic put them at fatal risk.⁹⁹ *Hope v. Warden*

95. See 829 F. App'x 165, 167–68 (9th Cir. 2020) (explaining that the plaintiffs (many of which had no criminal record) claimed that conditions at the Adelanto ICE Processing Center in California "placed them at an unconstitutional risk of contracting COVID-19." Furthermore, they plead that Adelanto's failure to implement protective measures such as social distancing, sanitation, and providing sufficient masks and soap violated their Fifth Amendment due process rights.).

96. *Id.* at 172.

97. *See id.*

98. *Id.*

99. *See Hope v. Warden York Cnty. Prison*, 972 F.3d 310 (3d Cir. 2020).

tackled the habeas corpus “barrier” that immigrant detainees face, which this Note addresses. Specifically, the court acknowledged that it has “never held that a detainee cannot file a habeas corpus petition to challenge conditions that render his continued detention unconstitutional.”¹⁰⁰ This indicates the court’s openness to allow ICE detainees to be able to file habeas corpus actions to lessen their time because of the conditions they face in detention centers. The *Hope* court further looked to the statute itself, which grants the writ of habeas corpus, and noted that the language of the statute—28 U.S.C. § 2241—justifies the use of a habeas corpus writ by non-prisoner detainees.¹⁰¹ For instance, the court noted that § 2241(e) excludes enemy combatant detainees from filing a writ of habeas corpus.¹⁰² The court posited that this suggests that where the § 2241(e) exclusion does not apply, i.e., to immigrant detainees, the habeas corpus writ may be used.¹⁰³ The *Hope* court then went on to hold that the petitioners properly challenged their conditions of confinement under a habeas corpus writ.¹⁰⁴ While holding that the petitioners had a cognizable habeas corpus claim to seek early release because of COVID-19 concerns, the court was careful to caution on the purpose of a habeas corpus petition, which should only be used in extraordinary circumstances.¹⁰⁵

Although the *Hope* court held that the petitioners had a cognizable habeas corpus action for early release, it also held that the petitioners failed to establish that the Government was “deliberately indifferent” toward their medical needs under their Fifth, Fourteenth, and Eighth Amendment claims.¹⁰⁶ In determining this, the court analyzed “whether the Government imposed the challenged conditions for the express purpose of

100. *Id.* at 324.

101. *See id.*

102. *See id.*

103. *See id.* This interpretation of § 2241 goes to the fact that the statute explicitly excludes a certain category of detainees, i.e., enemy combatants, from using a habeas corpus writ, with no mention or exclusion of immigrant detainees from filing such writ. *See id.*

104. *See Hope*, 972 F.3d at 324–25.

105. *See id.* at 324 (the court classified the circumstances that existed in March 2020 because of the COVID-19 crisis were in fact extraordinary and that the petitioners’ habeas corpus claim was not improper because they used the habeas corpus petition to seek only release on the basis that unconstitutional confinement conditions required it).

106. *Id.* at 331.

punishment, and if not, whether they are rationally connected to a legitimate purpose”¹⁰⁷ Because the petitioners argued broadly that the Government had no legitimate interest in detaining them, the court held that they did not show a substantial likelihood of success on their unconstitutional punishment claim.¹⁰⁸ In the alternative, the petitioners argued that the Government acted with deliberate indifference, which effectively deprived them of their substantive due process—the *Hope* court also struck down this argument based on an analysis of the facts.¹⁰⁹ The court was not convinced by the lower court’s criticism of the Government for not doing enough to combat COVID-19, which it saw as insufficient to establish deliberate indifference.¹¹⁰ The court further noted that a “failure to eliminate all risk” did not establish deliberate indifference, and highlighted that the record showed that the “Government increased its efforts to minimize risk by improving hygiene and decreasing exposure even as information on the virus changed.”¹¹¹

The *Hope* decision is a good illustration of the juxtaposition that district courts face when dealing with COVID-19 related claims by immigrant detainees. The *Hope* court remarked on this by stating that it “acknowledge[d] difficulties faced by trial courts in emergent matters and the need to act immediately, particularly during a pandemic.”¹¹² However, “exigent circumstances do not empower a court to jettison fundamental principles of due process or the rules of procedure that govern such matters.”¹¹³

C. The Eighth Amendment Applied to the Treatment of ICE Detainees

107. *Id.* at 328 (citing *Bell v. Wolfish*, 441 U.S. 520, 539 (1979)).

108. *See id.* at 328–29.

109. *See id.* at 329–31.

110. *See id.* at 330.

111. *Id.* at 330–31. *Accord* *Wilson v. Williams*, 961 F.3d 829, 840 (6th Cir. 2020) (officials who knew of the substantial risk to inmate health or safety could escape Eighth Amendment liability “if they responded reasonably to the risk, even if the harm was not ultimately averted.” (citing *Farmer v. Brennan*, 511 U.S. 825, 834 (1994))).

112. *Hope*, 972 F.3d at 334.

113. *Id.*

Although the case law mostly supports the rule that immigrant detainees cannot file a habeas corpus action under the Eighth Amendment, the conditions of confinement in ICE detention centers and conduct of ICE and prison officials establish a cognizable Eighth Amendment claim for the conditions of confinement (a permissible civil rights claim). Both the objective and subjective prongs of an Eighth Amendment claim are satisfied in how immigrant detainees have been and still are treated during the COVID-19 crisis. Immigrant detainees are legally able to make an Eighth Amendment claim regarding the conditions of their confinement through civil rights claims, but courts have struck down attempts by immigrant detainees to make habeas corpus claims under the Eighth Amendment.¹¹⁴ Thus, immigrant detainees are faced with filing Eighth Amendment claims only *after* they are released about the conditions of their detention. Efforts to obtain the remedy of early release under the Eighth Amendment have been struck down by various courts.¹¹⁵

Notwithstanding these barriers to immigrant detainees receiving less time in detention under an Eighth Amendment claim, both the objective and subjective elements of a successful Eighth Amendment “deliberate indifference”¹¹⁶ claim are satisfied in the COVID-19 context. Under the objective prong, the existence of a serious medical need, which is so obvious that a layperson would realize the need for a physician’s attention, must be shown by the plaintiff.¹¹⁷ COVID-19 has presented a “serious medical need” for persons with and without underlying medical conditions. More specifically, the Centers for Disease Control (“CDC”) lists a number of conditions that pose an “increased risk of severe illness from the virus that causes COVID-19” to “persons of any age.”¹¹⁸ The CDC further defines

114. *See* Calderon-Rodriguez v. Wilcox, 374 F. Supp. 3d 1024 (W.D. Wash. 2019) (holding that Eighth Amendment doesn’t apply to alien’s habeas corpus claim that his lengthy detention violated Eighth Amendment).

115. *See generally id.*; Toure v. Hott, 458 F. Supp. 3d 387, 399 (E.D. Va. 2020), *appeal dismissed*, No. 20-6695, 2020 WL 9596387 (4th Cir. Oct. 6, 2020); Ndudzi v. Perez, 490 F. Supp. 3d 1176, 1182 (S.D. Tex.), *reconsideration denied*, 509 F. Supp. 3d 943 (S.D. Tex. 2020)

116. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

117. *See* *Farrow v. West*, 320 F.3d 1235, 1243 (11th Cir. 2003).

118. *See* *People with Certain Medical Conditions*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/need->

“severe illness” as hospitalization, ICU admission, intubation or mechanical ventilation, or death.¹¹⁹ The CDC recommends social distancing specifically stating that “COVID-19 spreads mainly among people who are in close contact (within about 6 feet) for a prolonged period.”¹²⁰ Further, the CDC recommends that social distancing is to be practiced “in combination with other everyday preventative actions,” which include wearing masks, frequent hand-washing, avoidance of touching one’s face with unwashed hands.¹²¹

Once the objective prong of the Eighth Amendment is proven, the plaintiff must prove the subjective prong, which requires a showing of officials’ deliberate indifference to an inmate’s serious medical needs.¹²² The subjective prong requires proof of an official’s state of mind which “entails something more than mere negligence” or ordinary lack of due care for the prisoner’s interests of safety, but less than purposeful acts or omissions.¹²³ The actions by officials towards immigrant detainees concerning the lack of medical care and disparate treatment proves that the officials were more than aware of prisoners’ suffering and denied them humane treatment.¹²⁴ What has occurred and is still occurring at ICE detention centers across the country satisfies the subjective prong. The ACLU, along with other human rights organizations, released a report on the conditions of confinement in new ICE detention centers opened after January 2017.¹²⁵ This followed the organizations’ previous report on deaths in immigrant detention from 2015 to 2017, in which they found that more than half the deaths in

extra-precautions/people-with-medical-conditions.html (last visited Jan. 8, 2021).

119. *See id.*

120. *Why Practice Social Distancing*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html> (last visited Apr. 25, 2021).

121. *What is Social Distancing*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html> (last visited Apr. 25, 2021).

122. *See Estelle v. Gamble*, 429 U.S. 97, 106 (1976).

123. *Farmer v. Brennan*, 511 U.S. 825, 835 (1994).

124. *See De'lonta v. Johnson*, 708 F.3d 520, 525 (4th Cir. 2013) (holding that transgender inmate had a plausible claim that prison officials knew of her serious medical need of gender dysphoria and disregarded it in contravention of the Eighth Amendment amidst continuing symptoms despite treatment).

125. *See* ACLU ET AL., *supra* note 14.

immigrant detention from December 2015 to April 2017 were linked to the neglectful medical care of immigrants.¹²⁶ Under the subjective prong, the defendants must have known of a substantial risk of serious harm and must also draw the inference from facts that such risk exists.¹²⁷ Along with knowledge, they must have disregarded that risk.¹²⁸ Circumstantial evidence showing that a risk was obvious, specifically, that the risk was obvious to a reasonable man, can allow a factfinder to conclude that a prison official knew of a substantial risk.¹²⁹ Although the ACLU report does not detail the conditions of detention centers during the COVID-19 crisis, their findings “document the state of a system that was never prepared to safely handle the crisis situation the world now faces.”¹³⁰ The facts which the ACLU found “concerning” in light of the COVID-19 outbreak included understaffing and cost-cutting in medical units which were “dangerously unprepared for emergencies;” immigrant’s lack of access to proper hygiene; unsanitary conditions in living units which consisted of beds, dining facilities, and restroom facilities for up to 100 people all in one room; and virtually impossible odds for asylum seekers to receive the release.¹³¹

With regard to understaffing and cost-cutting, medical staff at a Louisiana detention center told researchers that a request to see an outside doctor for a broken bone could be seen within a week.¹³² Other persons at other detention centers reported that they did not receive the necessary medication and waited days to see doctors.¹³³ At another correctional facility, in what was described to the researchers as the clinic’s “emergency room,” the room only had a stretcher and no basic emergency room medical equipment.¹³⁴

126. *See id.* at 31; *see generally* HUMAN RIGHTS WATCH ET AL., *supra* note 1 (this “neglectful care” which resulted in deaths included delays, substandard care, botched emergency response, inappropriate use of solitary confinement, and inadequate mental health care).

127. *See Farmer*, 511 U.S. at 837.

128. *Id.*

129. *Id.* at 842; *see also* *Mata v. Saiz*, 427 F.3d 745, 752 (10th Cir. 2005).

130. ACLU ET AL., *supra* note 14, at 4.

131. *Id.* at 4.

132. *See id.* at 6.

133. *See id.* at 36.

134. ACLU ET AL., *supra* note 14, at 7.

The report further found that immigrants are held in “sordid conditions without access to proper hygiene products or facilities.”¹³⁵ For instance, at a detention center in Louisiana, the researchers received reports that people were not provided with soap to bathe, or cleaning supplies for their cells or bathrooms.¹³⁶ In a different detention center in Louisiana, people reported black mold on the walls and leaks that would soak beds.¹³⁷ Meanwhile, in Arizona, people reported water leaking into cells, gray drinking water, clogged toilets that were a foot from the beds, and poor ventilation.¹³⁸ Across the detention centers, people did not receive meals that accommodated their health needs, such as diabetes.¹³⁹

Officers have threatened, used physical force, tear-gassed, pepper-sprayed, and locked immigrants in solitary confinement for minor infractions.¹⁴⁰ In a Louisiana detention center, it was reported that there were guards that would hit immigrant detainees and refuse to feed them.¹⁴¹ In Arizona, it was reported that, “a Salvadoran was grabbed by the head and slammed against the wall for taking papers out of his belongings” on his first day of detention, while in another incident, officers called immigrants at the facility “rats.”¹⁴²

These reports of the conditions at some of the facilities across the country satisfy both the objective and subjective prongs of a successful Eighth Amendment claim, in line with the ACLU’s findings that detention centers were in a state which were never prepared to safely handle a pandemic, such as COVID-19.¹⁴³ It is not surprising that in the COVID-19-era, immigrant detainees are filing suits against ICE, alleging claims which detail prison conditions that are identical to the pre-

135. *Id.* at 8.

136. *See id.*

137. *See id.*

138. *See id.*

139. *See id.*

140. *See id.* at 7–8.

141. *See id.* at 7 (describing that at this detention center, one man watched “an officer yell ‘mother f—er’ at a Guatemalan immigrant and then grab him by his neck.” Also, in a separate incident, the man witnessed an officer “hit an immigrant so hard he thought he heard the sound of the man’s ribs break.”).

142. *Id.* at 8.

143. *See id.* at 4.

COVID-19 conditions that the ACLU reported on in ICE facilities.¹⁴⁴

VI. CONCLUSION

Courts have struck down suits by immigrant detainees seeking early release based on their conditions of confinement. This has been due to the holdings by some circuits that habeas corpus claims for early release are limited to the duration and fact of confinement and not to “conditions” of confinement. However, the COVID-19 pandemic has presented the U.S. with record-number cases and deaths, which increase daily. Even before the pandemic, ICE detainees were held in conditions which shock the human conscience and satisfy both the objective and subjective prongs of the Eighth Amendment. The COVID-19 pandemic has worsened these conditions and rendered it impossible to follow CDC guidelines in crowded and unhygienic detention centers. For these reasons, early release through an Eighth Amendment claim should be a plausible remedy for immigrant detainees to whom officials have been deliberately indifferent before and during this health crisis.

Some scholars have even suggested a “new standard” for pretrial detainees because their rights are “fundamentally different than those of a convicted prisoner,” and their rights must be viewed through the “lens of the Due Process Clause, [and] not the Eighth Amendment.”¹⁴⁵ Other scholars have recognized the barrier that the “deliberate indifference” requirement (for both Eighth Amendment and Due Process claims) poses to challenging pandemic conditions and have suggested that the subjective prong should be completely abandoned.¹⁴⁶ With a “purely objective standard,” immigrant detainees can be more successful in their claims as there is “little

144. See, e.g., *Fraihat v. U.S. Immigr. & Customs Enf't*, 445 F. Supp. 3d 709 (C.D. Cal. 2020) (ICE detainees alleging inadequate medical and mental health care and disability accommodations).

145. Swearingen, *supra* note 61, at 116 (suggesting a two-part test similar to the Eighth Amendment test and a burden-shift to the state to prove that the denial of medical care was the “least-burdensome means of achieving a legitimate state interest.”).

146. See Hannah T. Nguyen, *Time to Ditch Deliberate Indifference: COVID-19, Immigrant Challenges, and the Future of Due Process*, 50 GEO L. REV. 17 (2020).

dispute” as to the objectively serious risk that the COVID-19 pandemic poses.¹⁴⁷ The courts have already looked to the CDC guidelines and have mentioned that there is “no doubt” that prison officials are aware of the obvious and “grave threats posed by the pandemic.”¹⁴⁸ Even looking ahead to post-pandemic times, the abandoning of the “deliberate indifference” requirement would be helpful to both immigrant detainees and judicial efficiency, as the conditions in detention facilities and the “looming threat of COVID-19” will continue to pose a serious risk to health and safety.¹⁴⁹

The circuits seem to be split on whether to restrict habeas corpus claims to time and duration and not have it apply to conditions of confinement civil rights claims. Further, the Supreme Court has repeatedly refused to establish a bright-line rule restricting habeas corpus claims to time and duration of confinement. Moreover, the courts that *do* restrict immigrant pretrial detainees from bringing Eighth Amendment claims for the conditions of confinement use the *same* deliberate indifference test (required by the Eighth Amendment) to rule in Due Process claims. The courts’ behavior regarding the issue in this Note necessitates the need to reevaluate how immigrant detainees can bring their cases in light of the COVID-19 pandemic. Rather than completely adopting a strict rule or even eliminating the deliberate indifference requirement, courts should allow immigrant detainees to bring habeas corpus claims to lessen their time as well as conditions of confinement civil rights claims while they are still detained. Given that immigrant detainees have been facing serious risks to their health and safety long before the COVID-19 pandemic, and now face even more risks during the pandemic, it is imperative that the circuits resolve their split and for the Supreme Court to speak up, so that immigrant detainees can be afforded more alternatives to relief.

If the courts do indeed speak up, immigrant detainees will no longer have to wait until they are released to file conditions of confinement civil rights claims and will be able to gain early release through the Eighth Amendment. Even if they are not

147. *Id.* at 22.

148. *Id.* at 24 (citing *Awshana v. Adduci*, 453 F. Supp. 3d 1045, 1054 (E.D. Mich. 2020)).

149. *Id.* at 25–26.

released early, if given the ability to file Eighth Amendment claims while detained, government officials will have the opportunity to improve the substandard conditions in ICE facilities and can be held accountable.