



TEXAS A&M UNIVERSITY

School of Law

“TAMU Law Answers” Webinar Series:
LEGAL ISSUES IN THE AGE OF THE CORONAVIRUS

IMMIGRATION PRACTICE AND POLICY DURING THE PANDEMIC
Webinar Series

"Requesting Bond, Parole, and Custody Review During COVID-19"

Presented July 22, 2020

Panelists:

- Denise Gilman, Clinical Professor of Law at the University of Texas at Austin
- Sara Ramey, Executive Director of the Migrant Center for Human Rights
- Laura Rivera, Director of the Southern Poverty Law Center's Southeast Immigrant Freedom Initiative
- Erica Schommer, Clinical Professor of Law at St. Mary's University School of Law
- Moderator: Fatma Marouf, Professor of Law and Director of the Immigrant Rights Clinic, Texas A&M University School of Law

While the panelists are all attorneys, they will be discussing the law generally, and nothing in the webinar should be considered as legal advice. Attendees should consult their own legal advisor to address their own unique circumstances.

TRANSCRIPT:

- Hi, and welcome to Texas A&M School of Law series on Legal Issues in the Age of Coronavirus. Today, we're going to have our webinar on "Requesting Bond, Parole, and Custody Review during COVID-19," which is part of the series on "Immigration Practice and Policy during the Pandemic." For more information about our series, you can go to TAMULawAnswers.info. A quick disclaimer-- while our panelists are all attorneys, we'll be talking about the law generally, and nothing in this webinar should be considered as legal advice. So please consult your own legal advisor about your unique circumstances.

So we're going to go ahead and jump in. We have four great speakers today. We have Denise Gilman, who is a clinical professor of law at University of Texas at Austin, Sara Ramey who is the executive director of the Migrant Center for Human Rights; Laura Rivera, who is the director

of the Southern Poverty Law Center Southeast Immigrant Freedom Initiative, and Erica Schommer, who's a clinical professor of law at St. Mary's School of Law.

And my name is Fatma Marouf. I'm a professor of law, and I direct the Immigrant Rights Clinic at Texas A&M School of Law, and I'll be moderating today's discussion. So I'm going to go ahead and turn it over to Denise to get us started.

Thanks so much, Fatma, and thanks to all who are attending today. It's really exciting to see so many people interested in release from immigration detention issues. I'm going to start out by laying out a bit of the overall framework for a release and then focusing in a little bit on immigration court bond proceedings, or as I like to really insist on calling them, custody redetermination proceedings because it's not really supposed to be all about bond. And then, others will take other aspects of release up.

But we thought it might be helpful to just get a sense of where those listening in are. So we're going to launch a little quick poll to see if we can find out what type of work that you're up to. I believe that'll pop up on your screens any second. There you go.

As you're working on that, I'll just start us off in our thinking to let you know or to remind all of us just that we're on the same page about the extent to which custody redetermination proceedings and custody and release issues in general really built into a critical constitutional law framework. This is not just about the statute and regs. We're really talking about civil detention here and liberty interests such that detention as a constitutional matter really should be exceptional and should be justified by flight risk or danger. And there should be review and individualized determinations. And importantly, it should not be punitive, and that's an important place where the COVID issues might come into play if detention ends up being punitive because of the likelihood of infection and severe illness because of COVID.

OK, let's see. So can we get the poll results? I'm realizing maybe I don't have those. Oh, there they come. OK, great. OK, so a lot of you, a good majority, are doing a fair amount of detained work, but not everybody. Hopefully, there's some interest in getting involved in detained work for those of you who aren't doing it yet, but that's helpful to know.

And then a pretty good mix of interior and border crossers, but a majority of interior cases. OK, that's really helpful too, just because here in Texas, we do get pretty obsessed with border issues. At least here, in central down to south Texas, there's been such an emphasis in recent years on border crossers and expedited removal and asylum, which raise some unique issues which we will get into a little bit.

OK, so again, just to make sure that we're kind of all on the same page in terms of the framework, in addition to the constitutional standards, I want to talk about the general rule for custody and then go to some of the exceptions. So the general rule really is that in most cases there is first a DHS determination about custody, release, release on bond, or detention, and then, in most cases, the opportunity for an immigration court custody redetermination hearing. And again, that ties into that constitutional standard of needing a justification, needing individualized determination and review. But it's also in the regs, and it's all based on mostly INA 236(a).

To be clear, mostly what we're talking about here is kind of pre-final hearing categories of detention and release. Of course, for people with final removal orders-- and we may touch base on this a little bit too-- that whole set of issues is mostly under a separate statute, INA 241 and Supreme Court discussion of the limits of detention there. But it's different from the pretrial detention that we're mostly thinking about, I think.

So now let's distinguish in terms of the standards between interior enforcement and border. And so for the interior enforcement cases, people picked up within the United States, not right at the border and within the expedited removal standards-- although, as we know, those are in flux-- the general rule mostly applies for interior enforcement. So that's INA 236(A), 8 CFR 1236.8(C) for a DHS determination, and then 1236.8(D) for immigration court review. And the main exception for those in the interior is mandatory detention for certain criminal grounds under 236(C).

The border is where it gets more complicated, of course-- or, I don't know if it should be "of course," but it does. And the rule at the border is not that everybody gets in DHS determination first and then IJ review. For people who are in expedited removal during that credible fear or reasonable fear screening process, no opportunity for review at the immigration court level at all. DHS can still always release, but even there, it's pretty limited. And they mostly don't. And there's no opportunity for review if they don't during the credible fear or reasonable fear process.

If you're successful on credible fear or reasonable fear screening for refugee possibilities, the longstanding rule was that after a favorable credible fear you went back to the general rule. You got a DHS determination, and then you got IJ review of custody-- unless you were an arriving alien. And arriving is not just [? any ?] expedited removal subject. It's those who are actually arriving at a port of entry, knocking at the door, at the bridge. They, even if with a favorable credible fear, never really got IJ review of detention. But anybody who was EWI, who crossed, they would get IJ review.

Then the attorney general tried to knock out IJ review even for those who were EWI, Entry Without Inspection, in [?matter of MS?]. And then the courts got involved. And the Padilla litigation out in the Ninth Circuit, the court said that, no, there does have to be IJ review still for non-arriving folks who've passed a credible fear screening or related refugee screening. So bond hearings are still happening for those who enter without inspection after a favorable credible fear.

Interestingly, the Padilla case was not a statutory interpretation case. It's really a straight-up constitutional case. So those hearings are constitutionally required review of the justification for detention. And it might be worth reminding your judge about that. They're treating them basically as just regular old hearings. But it is interesting.

And then the other set of cases that are a little more complicated at the border are the reinstatement of removal cases. So I just want to make sure that we at least mention those. And these are the ones where people have a prior deport order and then they cross back in irregularly, not at the bridge. Those cases, for the most part, even after a favorable screening, a favorable reasonable fear interview, have never had the opportunity for IJ review of detention. So it's always been completely in DHS's discretion.

But there are a couple of circuits now that say that that isn't right, that, in fact, once you pass a reasonable fear interview you are in regular removal proceedings at least for the time being, or you are in removal proceedings, and therefore, you should be eligible for a custody redetermination hearing before the immigration court-- not on the Fifth Circuit, where I'm guessing a lot of us are. So we should ask that question. But maybe an argument worth considering and thinking about trying to push forward here.

So that-- I just wanted to make sure we had the framework out there. I want to mention a couple of things about custody redetermination hearings before I pass the baton along. So the standard in IJ custody redetermination hearings is one where we're looking at those constitutional factors that are really the only ones that should be justifying detention. And they're also in the regulations and the statute, which is you're looking at flight risk and danger. So that's really what you want to be documenting and working on. In most circuits, under the statute and regs, the burden is on us, those representing the detainee, to prove up the lack of flight risk or danger-- although there's some interesting litigation on that, as well.

The BIA has said that this discussion of flight risk and danger and possibility for release is a broad consideration of many, many factors. There's a list of factors in the matter of Guerra BIA decision. But it's clear that you can bring in other factors. So I think it's absolutely appropriate to bring in risk of infection with COVID or other health considerations. Somebody mentioned in some of the pre questions that certain judges are saying they can't consider that. And I don't see how that could be the case.

It could be a bit of a double-edged sword. One, it could be a consideration about the need to get somebody out where justifications for detention would have to be even greater given the risks. And so if those justifications aren't there, release would be appropriate. It could be a question about dangerousness issues, or, is this person going to be safe? So we'd all be well advised to really document, for flight risk and for addressing any danger with COVID, where the person will be going and how they will be able to keep themselves and others safe.

Increasingly in bond hearings, there's been, at least in my experience, a lot of focus on eligibility for relief as part of the consideration of flight risk. So that's something else that you want to be documenting well. The idea is that if your client has a good asylum case, then they're much more likely to appear for their hearings. And then just want to leave, again, on remembering-- no IJ review in general except in certain jurisdictions for arriving folks or for reinstatement folks.

Last, just big picture thought on custody redetermination hearings is that they're tough. We have to really do a lot to document these cases. Unfortunately, representation rates are going up. This is the latest tracked data. But success at bond hearings is going down. Only about 50% of people are granted any opportunity for release even with monetary bond. And monetary bond amounts are going up pretty dramatically. So average is now \$8,500. I know a lot of us are seeing nothing below \$12,000, for the most part, except in really important circumstances.

And these hearings still are very focused on money bond just in general, which means that you're necessarily going to have high detention rates even after bond hearings in immigration court, because people can't always pay. So they stay detained, meaning that your release or your

detention is determined more by your wealth than-- rather than your risk. And we're going to talk a little bit more about litigation on that question.

It's worth noting that in the criminal justice system, there's been a huge move away from monetary bond as being the main gateway to release, partly because of that impact of not really relating to risk but relating to wealth, and also because it's pretty well established in the criminal justice world that money bond just isn't a very good incentive for appearing anyway. Or at least, certainly, there's no indication that \$3,000 is going to make you more likely to appear than \$1,500. It's just not established that that's true.

So there's interesting litigation on that front as well as, as I mentioned, on the burden of proof question and on eligibility for custody redetermination hearings for reinstatement cases. But we'll talk about some of those issues as we move forward. So I'm going to pass it to Laura to talk a little bit about some of that litigation, especially ability to pay, before we move on.

- Yes. Thank you, Denise. And good afternoon, everyone. I'm grateful to have this space to think and share with you. With respect to the ability to pay litigation, the SPLC, with a co-counsel in a private law firm, brought a challenge against the ICE headquarters and the Georgia-- Atlanta ICE field office for its failure to consider ability to pay. And I'll just share my screen to show you a little bit of a summary of the case.

It's called *Abiala v. Barr*. It's not a class action. It's on behalf of an individual who has since been released from custody thanks to some heroic efforts of folks to fundraise for his bond amount. However, the case remains pending. It's in the middle district of Georgia, before Judge Hugh Lawson. And what's distinct from some of the other ability-to-pay litigation is that among the named defendants are not only agents of the Executive Office for Immigration Review, but also ICE. And so the challenge extends not only to custody redeterminations by immigration judges and their failure to consider the ability of respondents to afford bail or to consider alternative conditions of release, but also ICE's custody determinations in the first instance.

So in that case, the government filed a motion to dismiss based in part on mootness grounds. And there was an oral hearing on the argument in March of this year, just as COVID was getting under way. And a decision on the case has been pending since then.

And I'll share with you somewhat outdated, now, figures on bond amounts. But we've only seen them grow higher, if you can believe it, for various detention centers that SIFI works with clients who are confined there, including Stewart, Folkston-- both in Georgia-- the Atlanta City Detention Center, which formerly confined about 400 people, but thanks to organizing efforts has largely moved away from confining people from ICE, and, finally, the LaSalle Detention Facility in Louisiana, in Jena, Louisiana, which I'm guessing or hoping that some of you on today's CLE do some detained work on behalf of folks in Louisiana.

So besides that-- I'm going to stop my screen share right now-- I'll mention that there was a victory in a sister case in a District of Maryland called *Miranda v. Barr*. And so I encourage all of you to look a little more into that case. What I can tell you about it is that it supports the arguments that Abiala, the plaintiff in the SPLC case, is raising-- that, first, plaintiff's release from detention does not moot the claims of a putative class. That action in Maryland was brought

as a putative class action. And, of course, just as in the criminal detention setting, the inherently transitory exception to mootness-- that doctrine grew out of claims brought by people in confinement. So it's squarely within the purview of the inherently transitory exception to mootness.

Secondly, the court there held that the government's jurisdictional arguments did not carry the day. Specifically, 1226(E) did not divest the court of jurisdiction, and 1252(A)2(b)2-- I know I'm getting a little wonky there. But if you're litigating in the federal courts then you're familiar with these jurisdictional bars.

The third and fourth findings are, due process requires consideration of a non-citizen's ability to pay and alternative conditions of release at immigration court redetermination hearings. As Denise was saying, need to get the focus solely off the bail money. There are powers inherent to the court to consider alternatives. And then, last, that rational basis review is inapplicable to plaintiffs' due process claim.

So that victory was significant and entitled the plaintiffs in that case to preliminary injunctive relief. And I believe that as these types of challenges proliferate across the country, certainly, looking to partners in the Fifth Circuit to develop that case law on behalf of so many in confinement.

So you'll be hearing more from me in a little while. But for now, I'm going to pass it along to Erica, who is going to give us an overview of how to file parole requests.

- Thank you so much. Good afternoon, everyone. I'm grateful to be here and to talk about these issues with everyone. And I do want to say, while in general it's important to remember that ICE can release anybody they want whenever they want, they don't. And parole requests are really, really hard. I do think with COVID, some people have been more successful. But parole requests were getting so bad that for a while, we frankly stopped doing them because it just-- the time we were putting into them was not having any results. And if you're getting-- having to prep for a detained merits hearing quickly, sometimes you have to prioritize the work that you're doing.

But essentially, when we're talking about preparing a parole request, it is a formal written request that you're going to submit to ICE laying out the reasons why they should release your client. So there's a few different provisions of the regulations that you should look at when you are trying to figure out to prepare your parole requests. So we have 8 CFR 212.5(b), which applies to arriving aliens or those who have entered EWI and passed their credible fear.

Then we have the 8 CFR 1003.19-- you can read all the other little numbers, which is why I put these up here. That has a general authority of ICE to release people even subject to mandatory detention. And then in 236-- 236(a) essentially allows ICE to release someone who's not subject to mandatory detention on what's called conditional parole. And then 236(c)(2) has a provision about releasing people who are subject to mandatory detention. Specifically, it's supposed to be witnesses who are cooperating with some sort of investigation.

And so when you're looking at doing a request, read the statute. I'm going to talk specifically about the 212.5, because I think that's where many people fall into requesting parole under those

grounds. And so first, you have to show that your client is not a flight risk or a danger to the community. And then you have to show that their release is justified either for urgent humanitarian reasons or what's called significant public benefit. Unfortunately, there's not a definition of what those are. Or maybe that's fortunate, because you can make the argument that your client meets the definition.

And then the regs talk about five classes of people. So someone with a serious medical condition, pregnant women, juveniles, witnesses or people cooperating with law enforcement. And then there's this catch-all category of those whose continued detention is not in the public interest as determined by ICE. I do think that at least anecdotally there have been reports of people being released because of COVID that I think fall into the medical. And then ICE's basically, determination to release some people because they were trying to bring the numbers of people in the facilities down. So that is an area where, of course, ICE has discretion.

Now, there's a CFI-- a credible fear parole memo from 2009 that basically says that people who passed their credible fear should be released, that it's generally in the public interest to release those people. As a practical matter, that doesn't happen where I practice. And I think, around the country, it hasn't happened for a long time. But it is good to look at that memo and make those arguments if you have somebody that falls into that category. And give-- cite to their own authority that they're supposed to be following, and remind the officers what they're supposed to be following when you are putting together your request.

So in terms of what you should have for your parole request, you're going to write a letter. And you need to submit evidence to support your request. So the letter, first and foremost, should argue why your client is eligible, under what authority ICE can release your client. And it should be addressed to the deportation officer or the field office director or assistant field office director. And sometimes it's very difficult to find out who that is. The best advice is to ask someone who practices in that jurisdiction. And this is where all the Facebook groups and listservs are very helpful, because in some places, frankly, it really seems like ICE just hides the ball, and they don't make contact information available. So it makes it very difficult for you to even submit a request.

Always file your G-28, even if you have previously filed your G-28, because that is one of the number one reasons why you will be told that you didn't get a response, is because, oh, we don't have your G-28 on file-- even though you know you already filed it seven times.

And then you want to have a brief explanation of the procedural history, where things are at with your client's case. But in every packet, ICE wants to see some sort of identification for your client. If they have an ID document that's not in English, that has to be translated with a certificate of translation.

You need to have evidence of a sponsor or where your client is going to go. They're not going to release their client without knowing where they're going. If the sponsor is an individual, then that person should have-- should submit a copy of their identification. If they have legal status, if they're a permanent resident, copy of their LPR card. And proof that their address is actually their address. So if it's on their ID, great. If not, you can get a utility bill, copy of the lease-- something that shows that the person actually lives where they say they live.

We also have people who go to shelters. And so if your client is going to go to a shelter or some other setting, then, obviously, you don't need an identification from a particular individual. But you should have information about the organization or shelter where the person is going.

Increasingly, there will be requests to prove income from a sponsor-- so, basically, that the person is going to be financially supporting your client. And then you always want to document the not a danger and not a flight risk. And so examples on danger-- if there's criminal history, evidence of rehabilitation if that's available. If there hasn't been time for rehabilitation and you have someone, like, with a DUI, then you can submit evidence of an intent to go to rehab. The best thing is to actually show that they have contacted a place that is willing to do outpatient treatment as soon as they're released.

We've also submitted the Alcoholics Anonymous meetings that are within five miles of the house on Wednesday nights in Spanish that you can show they're planning on going to. You could-- if you have someone who has been detained for any length of time and they haven't had any disciplinary history in the detention center, you could highlight that. So try to get creative with what you can show as far as not being a danger.

And then on the flight risk aspect, anything that you have that shows ties to the community. So if they've lived in a particular city for a period of time, document that either with letters from community members, proof of their residence, letters from a church. Family ties are very important, so if they have US citizen children or family members with legal status. If those children are enrolled in school, I think that's a compelling thing. It's not very easy to run around and hide from law enforcement if you have three kids in elementary school that you're having to take out of school and re-enroll in school every time you move.

And then, as Denise mentioned in the custody redetermination hearings, if you have some sort of evidence of eligibility for relief, that can help. So, for example, if you have someone who's VAWA cancellation eligible, if you have a police report or a protective order, something that documents that domestic violence-- you're not submitting all of the evidence that you would submit at the merits, but it's something to show that there is a claim there. And that can help to go towards the flight risk.

There are lots of really, really great examples both for *pro se* people and for attorneys that are out there. Clinic has a really good, very thorough toolkit on requesting parole. And SPLC has a great practice advisory with samples based on *Fraihat*, which I'm going to turn it over to Laura in just a second to talk about that. The Florence Project also has it. So if you Google parole-- release from immigration parole requests, you will find good materials that will walk you through. And you can find sample sponsor letters and all sorts of things that will make it easier for you to get what you need from the sponsor and other people to put your packets together.

And the last thing right now that is very, very important in doing parole requests is submitting medical documentation. And I am now going to turn it over to Sara. And she's going to provide some expertise that she has about how to do that and how that is working in COVID, but also just in general, to try and support those requests for release.

- Thank you, Fatma, and to Texas A&M for having us join this call. This is an issue that The Migrant Center feels particularly passionate about, as well as myself individually. We hear almost daily calls from people who are medically at risk or otherwise scared because COVID is spreading very quickly at the South Texas Detention Complex.

So before I talk about medical documents, I'm just going to mention really briefly the asylum ban 2.0, because this has been affecting arriving aliens pretty much since the fall of last year. So as most listeners are probably aware, July 16 of last year the administration came out with a joint interim final rule basically creating a ban on asylum for anyone who had transitioned through a third country. And you can go ahead and read that on your own later. I won't belabor the details. There are some exceptions to that rule.

So the parole memo that was being to some degree implemented in our jurisdiction-- although I know there are other jurisdictions where there was blanket parole denial for arriving aliens, and there have been some litigation on that, as well-- we basically were seeing denials on this basis. And we saw a higher level of rejections at the CFI, RFI stage, as well as people losing at the merits.

And so I would like to encourage all practitioners to go back and look at those cases. So you might have someone where you're thinking, I need to do a COVID release request because of the medical issues. But maybe what you should also be looking at is going back to the asylum office and doing a request for reconsideration or going to the IJ if there has been a merits decision, or even a decision on a negative CFI or RFI.

So this is something that-- it can be kind of another piece to consider in all of this. Recently, we've gotten two positive cases. They're both listed there. You can follow the links to get a copy of the decision. But both of these cases, one out of the Ninth Circuit and one out of the district court for the District of Columbia have basically said that this transit ban is unconstitutional.

And the Ninth Circuit [? case ?] has been stayed by the Supreme Court. The district court case is more limited in scope, but that has not been affected by the Supreme Court stay. So folks should definitely look into this issue. And I know practitioners around the country are developing materials and thinking about this. We're not sure how-- where this is going to go in the near or medium-term future, but definitely consider these arguments and see what you can get done in your jurisdiction.

So in working with medical experts, it helps, in our experience, to build a relationship with the expert over time so that you basically can streamline the process. And it will take, overall, less time from your side in setting things up, because there is a certain amount of training or mentorship involved in the process to really establish a good working relationship and, ultimately, get a good letter that's going to support your client.

So we're talking about basically two kinds of evaluations. These are from medical experts who can speak about the risk factors that the CDC has listed-- so asthma, anyone who's HIV positive, folks with heart conditions, kidney stones, et cetera-- who can say, well, we've evaluated these medical records. We've determined, based on our 10, 15 years of experience that this person is at increased risk of, one, contracting COVID and, two, if they do contract it, facing serious

consequences up to and including death. And in theory, ICE, I believe it was around the end of March, went through all of their cases. They asked their medical team to screen for people who were particularly at risk so that they could evaluate their cases for release.

And we did see a number of people released as a result of that process. But we're also seeing, then, people who were not released. And those typically, in our experience, are people who have BIA appeals pending, who are in reinstatement, or otherwise who ICE is hoping they can deport. But it does apply to some degree to arriving aliens who are going through the regular court process still.

So the other type of evaluation that you want to consider are psychological evaluations. And there's two types of psychological evaluations. There's a psychological evaluation where you would say, my client has PTSD. The COVID situation is exacerbating that condition and putting them further at risk of having a serious episode. And so if you've already been in contact with your client about this and you have a relationship with a medical expert, it may be as simple as going back to them and asking them to provide additional details. Also, would encourage you to consider, is there a psychological condition that's being created as a result of this situation?

And then, lastly, I think it's worth considering going back, again, to those public interest and humanitarian factors -- what is the impact of the situation on the family, on those US citizen children, on the community for that separation? So that could both be that the family is very concerned and they're experiencing their own PTSD. And you might get a letter explaining that. Or it could be that the family-- let's say the US citizen wife has lost her job because of COVID and now can't support their children. So all those factors are important to consider.

In terms of setting up the case, what we do is we get the facility medical report. We find it easiest to ask the individual to go directly to the medical center and get those. They say that they'll produce them within 10 days. Oftentimes, it is shorter. You can request as the attorney, but you do need a waiver, because otherwise it would be a HIPAA violation to release those reports. So typically we'll just-- even when we're representing, we'll ask that the individual get those for us.

And then we ask them also to do a detailed declaration, because the medical reports often lack a lot of detail. And we want that declaration to talk both about the medical challenges that person's facing as well as what they're experiencing the facility doing or not doing correctly with regards to COVID prevention and treatment and how that-- those two factors interact and build on each other in their particular case.

So we will send a summary of the medical reports to see if we can place it with a medical expert. Then we'll subsequently send them all the documents. Especially psychologists may want to speak directly with the individual. But they might not have contact with the person if they're just reviewing a physical medical record.

So we've found it helpful to give templates to the doctors that have already some citations and quotes, some of the CDC risk factors. We encourage them to cite to those resources as much as possible to keep the issues focused on the medical evaluation. A lot of times, the doctors that volunteer with us are very concerned about the situation and sometimes make very broad blanket statements about "everyone should be out of detention." And I think that, to some degree, can

undermine their credibility, because they start sounding more like advocates. So that's more our role in our cover letter.

Set the deadlines up front. And then make sure that that-- you have the CV with the individual's qualifications. We also do a summary paragraph right at the beginning highlighting, 20 years of experience, specialist in treatment of asthma, for example. And then we want to keep in touch with the provider to let them know the results, work with them on building their own templates that are going to be effective for use in the future.

We also, as a group of folks, talked about setting realistic expectations with the clients and-- as well, to some degree, as the doctors, that ICE is going to be relying a lot on their own medical experts. And so this isn't a golden ticket to getting released by any means. It's just one important piece in what sometimes can be a very difficult fight.

We would also suggest that you might want to submit your packet in various ways. So there are some emails that sometimes will work depending on your jurisdiction. You may have direct contact with that individual's deportation officer. That's usually the best thing. We don't hand deliver anymore because of COVID. We're not going to the facility in person. But if you're mailing, obviously, certified mail. CCing the AFOD is a good idea.

I also like to give a copy to the client, because sometimes ICE will go talk to them and they'll say, "oh, we haven't received it" even though I have email confirmation. And so the client can just hand over a copy. They should have their own copy for their file. But they can just hand over a copy to ICE and say, well, I'm filing right now. I have everything. Here you go. We'd like to get a decision.

And those decisions should be within about five to seven days. ICE typically is supposed to be making-- the DO's supposed to make a recommendation within five days. And then the supervisor signs off on that in, typically, a couple of days. So if you haven't heard in two weeks, you should follow up.

We want to speak briefly about some ethical issues in working with detained clients. So one is, make sure to be upfront with the clients about your visitation policy. So if you will not be seeing them in person, it's good to let them know that so they don't develop false expectations. If you're planning on visiting them and then their dorm goes into lockdown for COVID quarantine, you may not be able to see them at all. So make sure that they're aware of that. You may want to call ahead to the facility to double check that. The situations change pretty quickly.

Setting up a phone plan-- we have a time every day that individuals can call us to check in. If you're working with a particular client on a particular issue, you may want to set up a weekly call with them and otherwise have a way for them to get a hold of you if anything-- they hear any updates, because unfortunately, in our experience, a lot of times ICE will update the client about something and will not contact us. And it typically seems that if it's bad news, they'll contact us, and if it's good news, they'll contact the client. So sometimes our client magically calls from outside detention. It's like, OK, well, we didn't know that that was going to be granted, but great. So really having that good communication is super important.

And then consider the extent of the representation. We might need to look at bringing in congressional representatives, going to the press to put pressure on ICE to move forward on some of these cases. You may be considering a habeas corpus petition down the road. So the client just needs to know about the other options, especially if there's the habeas claim they might want to file, and then whether or not you're able to help with that.

The other thing is for folks who are going to immigration court-- speaking to them about televideo hearings, making sure that they know and feel empowered to say if they can't hear things on the record and otherwise walking them through that process before that happens.

So our [contact information](#) is here if anyone has questions or wants-- we have a number of [templates and resources](#) on these things. So if folks want to reach out, feel free to do so. And I will turn it over to Laura.

- Thank you so much, Sara. And I'm going to hopscotch just a little bit and take us back to square focus on parole. As Erica mentioned, winning parole is very difficult under the current administration and the current moment, despite the COVID pandemic disproportionately affecting people in confinement and the dangers that they face in custody. One silver lining is that we have seen a reduction in the total numbers of people in confinement nationwide from a peak of over 50,000 people to about 22,000 people as of July 17, according to ICE. And if you're interested to track those numbers, to track ICE's representations about the number of confirmed positive cases of COVID by facility, you can check that out at ice.gov/covid19. And I'm sure that our wonderful host will provide all of you with this [list of resources](#) after the webinar concludes.

I want to tell you a little bit about an overview of the situation in one slice of the Fifth Circuit, that being Louisiana. And if you let me share my screen with you again, I'm going to focus on an impact litigation case that is pending that impacts a large class of people confined by the New Orleans ICE field office.

The name of the suit is *Heredia-Mons v. McAleenan*. It is actually pending in the District of Columbia. And it is a sister case to a suit brought by the ACLU Immigrants' Rights Project in which the petitioner's name is Damus, D-A-M-U-S. Basically, this case is challenging ICE's systematic denials of parole to so-called arriving aliens-- I'm calling them arriving asylum seekers-- in violation of the 2009 parole directive. That directive sets forth a series of procedural and substantive safeguards for arriving asylum seekers, people who present at ports of entry who are subject to-- who seek asylum, who take a credible fear interview, who receive a positive finding.

The judge in that case provisionally certified a class of people meeting those criteria-- the port of entry, the seeking asylum, passing the CFI, and being denied parole by the New Orleans ICE field office. And the suit was filed in May of last year. And in September of last year, the judge entered a preliminary injunction against the New Orleans ICE field office. So any of the five states under his jurisdiction, its agents are ordered to not deny parole to any provisional class member unless they are conducting a case by case determination for that individual based on the specific factors laid out in the directive. And those mirror the factors that Erica laid out. We're talking about flight risk and we're talking about risk to public safety.

The third factor that she covered, which is also germane here, is the identity-- establishing identity. And the directive, which is available online, makes clear that original identity documents are not required. So I saw question over the chat about that. ICE may-- and I believe the language of the director-- the directive says shall consider copies, non-originals of identity documents. But they may require additional forms of corroboration of identity. If all you have is a copy of a birth certificate, for example, or a photocopy of a passport, then you may have the burden of scrounging up another identity document, even if it is a copy, to add to the strength of corroboration.

So what's happened since September 2019? I wish I could say that ICE realized the error of its ways and started granting individualized consideration to every applicant, but that is not true. They have, by and large, flouted the directive. If you take a look at the numbers at the bottom of this list on the slide, you see that for the first-- I think it's nine months or eight months since the injunction was entered, you've got only a 13% grant rate.

Now, is that better than what was happening immediately before the suit, where every-- almost every single parole was denied? Yes. But it's a far cry from how things used to be, where parole was so liberally used that there was a presumption that people who fit this criteria would not have to await their merits hearing in custody. So there's a long way to go here.

And I don't have to belabor the point with the statistics. And again, this can be included in your materials. But as part of the lawsuit, ICE has had to produce monthly data reports. And very recently, in May of this year, the plaintiffs sought contempt. They asked the court to hold the government in contempt of court for failing to adhere to the order. And they asked the judge to appoint a special master to oversee compliance with the order and with the parole directive.

So these numbers are the most recent figures produced by defendants in that litigation. And they are publicly available through a PACER filing. And you can see that you've got a very large number of people seeking parole for the first time and seeking determination. We're talking about 2,000 people in this time period trying to seek release from custody through this means, and partially because of the boom in the expansion of detention in Louisiana.

When SIFI was first active in providing services in Louisiana, we focused on two detention centers, Pine Prairie and LaSalle. And that's where the majority of people held in ICE custody were confined, with the exception of the Alexandria staging facility, which was the place where people with final orders would be sent and actually placed on airplanes for deportation. Since then, there's been an explosion of detention. There's more than 12 jails that are holding people in ICE custody, as I'm sure many of you are aware. And so a lot of the people that are sent to Louisiana and to the Mississippi Adams County facility are in this posture and are members of the class. So that's, in part, why you see such large numbers of people seeking release on parole.

The feedback that we get from community organizations and family members of people who apply *pro se* for parole is, we don't know what we're doing wrong. We've been denied three or four times based on flight risk. We must not be including the right paperwork. So they would go to-- come to us as experts, or maybe somebody like the other panelists, and look for that wisdom on, what specific documents do you need? Is it verification of your address or of your citizenship or immigration status? And the bottom line is that, in the New Orleans ICE field office, you

could put together the most excellent package, and flight risk is being used as a pretext to continue to deny parole to a large number of individuals.

So the motion for contempt is pending. There may be an evidentiary hearing coming up. And the good news is that just today, the judge in that case granted the plaintiff's motion for discovery into noncompliance. And what does that mean? That means that the plaintiffs are going to be able to get more details about these parole denials to look into the data a little bit more clearly to see who's being disproportionately impacted. And so as that unfolds, we'd be happy to share broadly what we learn and what is publicly available, of course.

I think there was one other thing that I was tasked with talking about. And that was *Fraihat*. And I'll just tell you a little bit about that without slides. After the judge in that case, Judge Jesus Bernal in California, entered a preliminary injunction, the class counsel in that case encouraged attorneys all over the country to seek custody determinations under the *Fraihat* case. So I'm hoping that some or many of you have availed yourself of that and tried to advocate for clients that have some of the COVID vulnerabilities that Sara was raising up.

And just to manage expectations, I'll again say that the position the government is taking in the litigation is that, notwithstanding the court's preliminary injunction order, there is no legal obligation for ICE to conduct individualized custody determinations based on the order. So the parties are fighting about that in court. There was a hearing on it last week as part of a different motion to enforce in the *Fraihat* case. The plaintiffs are hopeful that the judge will decide to modify the order to make it clear that, yes, this order is mandating ICE to give individualized review to people who are sick and who have some of these CDC guideline vulnerabilities.

That said, irrespective of what the government is saying in court to Judge Bernal, we have seen some *Fraihat* releases in Louisiana. We have seen some in Georgia. And just in our personal experience, the cases that tend to do better are for people who are not post-order, for people who were not held under mandatory detention, and in cases where we can bring to bear some type of political pressure, whether it be through a partnership with community organizers, or some congressional advocacy, or a combination of factors that raise the stakes on that particular person's case.

Yeah. So I'll leave it there. And I wonder if I should turn it over to Sara on some discussion of congressional outreach and media. Does that sound right?

- Yeah.

- I'm happy to talk about that a little bit. So the first thing to know is that for a member of Congress or a local representative to reach out to ICE on behalf of your client, they need to have a confidentiality waiver signed. And I'm happy to provide copies if people want to email me-- of that waiver. You may be able to find it also just by googling. So you do need to talk to your client about that. You can select what information you want to provide to Congress. But I feel like it's mostly a good idea to provide it all.

A member of Congress isn't going to want to advocate for your client if they have a significant criminal history. So you do have to make the same arguments that the other panelists have been

talking about with regards to rehabilitation, plan for attending an AA meeting, et cetera. And so you're advocating, really, on two fronts. First, you're advocating with the agency. And then you're advocating to get the representatives on board. And you do have to have some knowledge, or it's helpful to have some knowledge of what the position of that representative is in your community. So having a senator versus a local rep make the call might be more powerful. But if that local rep is well respected and it's their jurisdiction, they might have more sway with ICE.

So we found this to be fairly effective, but it does take some work to make it a priority case for the individuals in elected office. And so really developing good relationships with at least one of their staffers to raise these cases to their awareness, I think, can be very helpful. It might be something that folks even want to consider doing before you have that emergency case that you need to get filed within three days. So for those folks who maybe aren't doing detention work but may in the future, or even for your non-detained cases, building those relationships can be really helpful down the road.

The other thing is the press. I don't think that in individual cases, at least in our experience, it's been particularly helpful to go to the media. But I do think we can change the conversation around these issues. We can bring awareness to these issues. And you can then use a media piece to then go to a member of Congress, because elected officials are very concerned about their public profile. And some of them are very concerned about immigration issues, especially here in Texas, and have taken strong stands on some of these issues. So you do have to know the rep, if they want to go at things from an immigration standpoint or more from a medical community safety standpoint. But having that press backing in that can, I think, be helpful for them to get them on board.

And I would still encourage people to speak with the press, regardless, about these cases, because we have an election coming up. And it's important that folks in the community know what our government is doing. I'm pretty sure that all the panelists would agree with me when I say that there's a lot of-- there's a real lack of transparency in ICE decision making. There's very little accountability and any sort of due process, really, in terms of how parole decisions, specifically, are made. So the more that we can get our government to be consistent and accountable to the public, the better. So I hope that's helpful to get people thinking about some other options.

- Great. Thank you. Was there anything else that the panelists wanted to add before we move on to the Q&A portion? So we'll just go right in, then. We've been receiving and answering questions during the webinar, and I've been keeping track of some of the ones that have not yet been answered, as well as some that have come before the webinar. So I'll just ask these in general, and whoever wants to answer can do so.

Is the distance-- I'll start with some questions about parole. "Is the distance to the sponsor an issue? If the sponsor's in another state, does that matter?" In your experiences? I'm seeing shaking of heads, so anybody want to address that?

- I can take it. I've never seen the distance to the sponsor be an issue as long as you can explain how you know the sponsor. There are judges who are very concerned with that. And then I think with ICE, what is more likely to be an issue right now with COVID is them just wanting to know

that you have a plan of how, for example, your client is going to get from Pearsall, Texas to North Carolina. And so you may-- sometimes that means they're going to reach out and talk to the sponsor directly. Or sometimes they'll ask you, what's the arrangement? And I don't know if this has been happening at other facilities, but right now, at Pearsall, where we do work, they will not let anybody pick somebody up after posting bond or winning their case when they're going to get released. No individual-- individual can go pick a person up. They are-- everybody gets transported by ICE either to the bus station or to the airport.

- Thank you. What about countries that aren't accepting people back right now because of the pandemic? How do you prove that the country's not going to take them back, and does that weigh into the parole or bond determination that you've seen? So specifically, we had a question about Cuba, but I think it's more generally applicable than that.

- I can answer the question with respect to the Cubans, because we had a number of Cuban clients. My opinion based on the research is that a very strong argument can be made that parole under 212.5, 8 CFR 212.5, is a parole for purposes of accruing time for the Cuban Adjustment Act. And it's my speculation that part of the disproportionate rate of denials of parole to Cuban asylum seekers is based in part on that aim of preventing people from adjusting status by accruing the requisite time.

- I can just speak to another case involving an individual from Jamaica where we e-mailed the consulate and got an email back saying that they were not accepting anybody at this time. [INAUDIBLE] that ICE did not release them. And there's-- we subsequently filed a habeas on that issue that's pending. So I know on many of the questions, people ask, what can we do if parole's denied? Habeas is always another option. And we did do a separate webinar on habeas that is available on the website. So if you're interested in that alternative, feel free to watch that recording, which is free, as well.

- I can also just add that if folks are looking at the Q&A, there's a separate tab for answered questions. And as we mention there, there's a 90-day review process that happens after that post-- that order. So you can-- in our experience, ICE won't release anyone during those 90 days, even if the country does not have diplomatic relations with the US and it's clear that that's-- no deportation is going to happen. So I would still encourage people to put in those requests and then maybe go to federal court, but typically, we've seen for the Eritrean cases, the Venezuelan cases, Cuban cases at various points in time, the government has still kept them those 90 days and then has sort of automatically released them after those 90 days, just to give a sense of the-- at least in our area, how the government's processing those situations.

- Great. "In situations where ICE does not give any explanation or reason for its denial, what steps can be taken? Is it worth me filing again or moving on to a habeas, or do you try to actually get an explanation from ICE?"

- I guess I would say maybe all of the above. You might try actually talking to an officer and trying to discuss, negotiate, argue, find out more and then supplement if you can, maybe filing a new request. Somebody asked, is there any way to challenge the lack of justification or a consideration? That's the hard part, right. I mean, yes, there-- we keep saying there are these constitutional standards that they're supposed to be giving individualized determination and all

that. The problem is, where do you bring that up? And because there's no IJ custody redetermination for so many of these kinds of cases, and even then that's pretty limited, it means that there's just no recourse even if you're right that they should have provided individualized determination. And so really, your only option may be a habeas in some of those instances.

I wanted to-- I realized that I, in my push to try to get through stuff, I didn't show-- and it might be useful on this, in thinking of what is reviewable. I'll just put up for just one second for those who find flowcharty things useful-- not everybody does-- a bit of a flowchart. And I'll make sure to include this in materials that are available afterward.

- Great.

- So I'll just leave that up there for a second.

- Thank you. [INAUDIBLE] material. So we'll definitely post that one. Thanks.

- If I may just add one point on the recourse if you receive no answer or it's denied for no reason-- again, I would point to there's the 'basis under the law' arguments that you can make, and then there's the organizing or political response to a pattern. So basis under law-- if your client is a so-called arriving alien, then the text of the parole directive that ICE is bound to comply with says that a reason should be provided in writing. And it could be a summary as a checklist in which a DO checks a box. And that's a lot of what clients receive. Or it can have a little bit more detail of enumerating a little bit more reasons for why the person's a flight risk, let's say.

And then on the second point of, how can we all respond as advocates, I think that the AILA chapters have been, even in the recent past, really fruitful places for advocates to name patterns. So if, in a particular jurisdiction, nobody's getting a response, that could be a time to write a letter to the AFOD or the field office director through your AILA ICE liaison and try to get some traction on a system-wide movement on that.

- Great. Thank you. We've seen, and I think some of you have as well, the use of solitary confinement cells for people who are in quarantine or maybe have a pending COVID test. Does that factor into your requests for parole or bond at all? And how have you tried to challenge that, if you have?

It's a difficult issue. I know in our habeas, we brought it up in some of our habeases because that also prevented people from having confidential calls with counsel. But it does seem to be a problematic action, because solitary confinement has been considered a form of torture, especially prolonged. And so it's just something to find out, to ask your clients where they're being detained, if they are in a regular type of quarantine large cell or if they're actually just being used in a-- if they're in a punitive solitary confinement cell as part of their quarantine.

Does anybody want to say anything more about that issue?

- I can just say that I think, going back to what Denise said, immigration detention is supposed to be civil detention. It's not supposed to be punitive. And one of the things, unfortunately, that happens in immigration detention centers-- when people get put in solitary for any reason, even

if there are situations where people "ask" to be put in solitary because of different reasons, once you're in solitary the rules about solitary apply to you as if you're there because you're being punished. So it does raise those issues of punishments.

And so I think that's something to flag if it's happening. Unfortunately, I can see a federal judge in a habeas case taking that very seriously. I don't really see ICE treating the case any differently, unfortunately. I don't think it should be like that. But I could see them saying, like, well, that's for his own protection and thinking that they're doing the right thing by segregating like that.

- So we have a couple questions here on the Q&A. One person saying they were denied for lack of original documents. I know we said that you shouldn't have to provide original documents. What arguments can be made if ICE nevertheless denies an application for that reason? Is there anything we can cite to, or is there maybe an underlying issue that they-- submitting other documents, other ID documents, maybe, would be helpful?

- So I think-- oh, Erica, do you want to go?

- Go ahead, Denise.

- Well, so I think-- Laura already mentioned the idea of, if you don't have an original document, then perhaps trying to get multiple non-original documents as a way of bolstering identity. And I do think that can sometimes work. And then sometimes ICE will insist on it. And so then we go back to that question of whether or not there's any potential for review available to you or not.

I will note that this has come up some in the cases where people do have the right to an IJ custody redetermination hearing, at least in San Antonio-- Erica and Sara, if you all want to chime in. Some judges put it on the release order when they do issue a bond that would normally be paid. And so then when the person tries to go and actually pay and get released, they have trouble if they don't have an original document. And so that's something that's very important to know going into your bond hearing in immigration court as to whether or not you're going to be able to get original ID and how to address it.

We have had some luck, if we explain to the judge the situation, getting them not to put that condition on the order or making clear that it can be an original birth certificate that doesn't have a photo on it. Whatever it is that you think you're going to be able to get, have that explicitly put on there, because otherwise ICE will interpret the IJ's order as restrictively as possible. In some instances, ICE has the original documents. And so where we believe that to be the case, we try to get the judge to make sure to put that on the order, as well.

And then I just was going to mention that this all segues into a problem that I think is underdiscussed by all of us as advocates about even once you get a decision that should lead to your client's release-- a bond decision on the judge or some-- a release decision from DHS, issues that come up in just trying to get your client out. And I do think we should all be brainstorming about that. And that is another time where the solitary confinement and testing for COVID has come in. I know of at least a couple of cases where that has led to a delay, where people are eventually released, but they-- ICE is saying, no, there's a COVID question so we're not going to release them now.

- And we have another question here. We had some questions, a few of them, about post-order detention. This person is asking, should you request parole first for somebody who has a final order and is being detained before you seek a habeas, and does it really matter? Can you go straight to a habeas?

So there's no exhaustion requirement for habeas. You do not have to seek parole. I think it's pretty unlikely to get parole in this situation because of the flight risk issue if someone has a final order. I think if parole was requested in the past or there was a bond hearing, if this person wasn't subject to mandatory detention, you've clearly gone through some administrative procedures. And in any case, it's not required to exhaust. So I would probably go straight to habeas if it was me. I don't know if you all have other thoughts or additional thoughts on this.

- I think if there were some really compelling medical-- like, if the client clearly fell into one of the *Frailhat* subclasses, like the person is over 55 and diabetic, I would request an order of supervision, release on an order of supervision under that. But I wouldn't wait-- I wouldn't wait more than two days before I'd filed the habeas if I had everything ready to go.

- So some more questions we had on bond-- reconsideration requests we've addressed a little bit. But has anyone done reconsider-- [INAUDIBLE] reconsideration based on COVID as a changed circumstance, and has there been any luck with that?

- We have not. I've heard people have done it and that some people did get another hearing, but then the result of the hearing was no different. I think that the most important thing to consider before you do that is, why was your client denied bond in the first place? If your client was denied bond because the judge found that your client's a danger to the community, unfortunately, I don't see how COVID changes that analysis.

Unless you have new evidence that you think does change the original reasons why the judge found danger, flight risk, or no jurisdiction, then it-- unfortunately, it doesn't seem like the judges have been very open to that. Again, I would repeat what Sara said about the transit ban. If you have somebody who was at their [INAUDIBLE] hearing would only have been eligible for withholding her [? CAT ?], and now they're eligible for asylum, that is a favorable change in the law that maybe would factor in in the overall determination if it was a flight risk issue.

- I think-- just trying to read these questions here. Answered these. So some other questions we had-- in terms of clients who have already tested positive or maybe are symptomatic, do you-- well, if they're symptomatic, would you disclose that? It's an ethical question. And if they've already tested positive, does that make it harder than to request release based on health conditions, or is their compromised immune system still compelling, or are there other compelling health-related issues that can be brought up?

- So I think I'd be inclined, in most cases-- everything depends-- to reveal it and discuss it. I assume we're mostly talking about an IJ hearing, because IJ would be the one who wouldn't necessarily know about that, presumably. If it's a back and forth on parole with DHS, they already know and have it clear in their records.

I'd probably reveal it for a couple reasons. One, I think DHS would probably bring it up. And two, I think you could actually end up-- you might need something from the IJ acknowledging that that was considered in then going back and actually securing the release if you got an order. Otherwise, you might have ICE say, well, yeah, the judge ordered release, but now they've got COVID, and so we're just not going to release them. They might even try, I suppose, to do a changed circumstances motion with the judge. That's my instinct. But again, it depends on the circumstances.

I think it all goes to, really, the importance of making the arguments around, yes, there is obviously a contagiousness consideration, but that contagiousness consideration actually still militates in favor of release because the person, if released-- and you want to provide evidence of this-- is going to be going to a place where they can quarantine and can receive appropriate health care where they will not be putting at risk the detention population and staff at the facility and will not be receiving-- I would probably argue it this way-- receiving medical attention at expense to the federal government that is less likely, in the end, to be effective at containing the disease and ensuring that the-- that its impacts are limited. So I think I would still raise it as a favorable factor, but acknowledging that for some judges there is going to be a negative aspect to it that you need to address.

- Thank you. We just got another question about, I think, identity documents again. So this has come up a number of times. And I know I have current cases with this issue, as well. Client in this case is saying the documents are legitimate, and they're having trouble getting other evidence. And ICE is keeping him detained based on obstructing his own removal, I guess. So these are tough cases. Anyone have any suggestions for this individual? This person has been detained more than a year.

This could be, again, a habeas, right? This is somebody who's a year post final order. It's a *Zadvydas* situation. So if ICE is refusing to release him under a supervised order or some other reason, there's the habeas option. Anyone else?

- I don't have easy answers, but a little bit more detail to tease out, Fatma, about the theory on habeas. So if, under the *Zadvydas* case, your client's removal is not reasonably foreseeable, then you can make out a claim. The 180-day timeline is post removal period, so after the expiration of the removal period. And many times, ICE will turn around and argue, now, wait a minute, the removal period has not expired because your client has failed to cooperate, failed to comply in obtaining his own travel documents.

And I'm trying to research right now the issue of, what deference is ICE due on its construction of a failure to cooperate term? Because I see judges in-- federal judges in jurisdictions deferring to ICE's [? bare ?] allegations in these template declarations submitted in habeas proceedings. So again, I don't have an answer. But what I'm brainstorming is all the different ways that you can document your client's attempts at good faith compliance. He's procured these documents. Has he talked to the embassy? Has he refused to talk to the embassy when ICE pushes them to do so? And make it an issue of fact in the habeas case.

- Great. Those are great suggestions. I think in this case, it looks like the home country's contesting the validity of the identity document. So that makes it even a little bit more complicated.

- I would want to know if there were any other forms of identity documents that were available. I know the person said that there's no secondary evidence available in this case. And then I would want to know if a forensic evaluation had been conducted. And maybe talk to-- if it's one ID card and it's in ICE possession, talk to ICE about, if they haven't run their own forensics and you don't want to put in a request for them to do that, if there's a way that they can send it to your forensics lab that you pay for, because short of that and habeas, I'm not really sure what else you can do.

- We also got in a-- we got a question about individuals subject to the MPP who are reporting for their hearing, it appears. And when they come back to the border to report, ICE is amending the MTA to charge them as an arriving alien. [INAUDIBLE] what to do about that. And can you request reclassification in that? Is that just ICE's discretion? Or how do you challenge a categorization of somebody as an arriving alien, especially in that situation?

- I saw that one ahead of time and I was interested by it, because I was a little bit curious as to whether this was a question about trying to challenge the placement in MPP-- In other words, trying to-- because people have done that, basically asked for an immigration court custody redetermination hearing for somebody who's still stuck in Mexico in MPP to say they should have never been placed in MPP properly, and then treating MPP-- even though the person's not in a physical detention center-- as detention. And there's some good support for that theory in the regs. So that's one possibility of what this was all about.

But then a second possibility would be-- and we've seen this, too, where somebody is in MPP, they get out of MPP, they get brought into the US. They're put into regular US-side 240 proceedings, but they're detained. And there, you're trying to figure out whether-- under the rules that we talked about at the beginning, whether the person is eligible for an IJ custody redetermination hearing to get out of that regular old detention center or not.

If you're in that second world, then it becomes critically important to determine whether the arriving alien designation is appropriate or not. I think it's clearly wrong to-- if somebody originally EWied, crossed the river, and then the only reason they came back and presented over the bridge is because DHS told them they had to show up for their hearings for MPP, I don't see how they can be treated as an arriving alien. But that is definitely what DHS has been doing-- either double charging them from the beginning or when they come back for their hearings, reissuing the NCA.

There have been some successes on this, I know, out in California, in the Ninth Circuit, where people have been able to-- it's not a-- they haven't argued it as, by discretion, this should get recategorized. They've made the legal arguments that, no, this is an improper categorization. They are not properly an arriving alien.

I think people-- I know people have tried it also in Texas. And I don't know of anybody who's succeeded on that. There were a couple of judges at first who were interested in the issue, but then I think in the end the-- either in terms of getting out of MPP in the first place or getting out

of detention if put into regular 240, they haven't really been willing to reconsider the NTA. So that just means, then, that the only people who get out of detention are paroled out. And I do know of at least one case where somebody got DHS parole after getting out of MPP, getting into regular detention. Took ages.

- Great. Thank you. There was this one last question that I think Erica already did answer about the public charge rule being applied. And I know, Erica, you said to submit the income of the sponsor. But I guess we didn't address more generally, is this a practice that you all are seeing in other parts of the country besides in the Rio Grande Valley?

- I haven't seen it argued as a public charge, but I have definitely-- I've had ICE argue in custody redetermination hearings that there's insufficient proof of the sponsor's income that they're going to be able to support-- to support the client, or that-- I've seen them also argue, well, yes, the individual was working, but he was working without authorization. And he's not going to be able to do that. So where if you have the breadwinner detained of the family, then who's going to financially support? So I haven't seen the public charge terminology used, but that is something that I have seen TAs argue.

- Great. Thank you all so much. I would like to thank all of our speakers for today. Just as a reminder, all of the slides for this webinar and the recording will be available on the website TAMULawAnswers.info. We have a couple more webinars coming up in the series on the changing role of technology in immigration court as well as-- what's our other one, now? Oh, human rights-- abuses at the border. So looking forward to seeing some of you again at that.

While the panelists are all attorneys, they will be discussing the law generally, and nothing in the webinar should be considered as legal advice. Attendees should consult their own legal advisor to address their own unique circumstances.