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

"Litigating Habeas Petitions for Detained Immigrants Within the Fifth Circuit"

Presented June 25, 2020

Panelists:

- Kate Huddleston, Equal Justice Works Fellow, ACLU of Texas
- Ranjana Natarajan, Director of the Civil Rights Clinic and Clinical Professor, University of Texas at Austin School of Law
- Sirine Shebaya, Executive Director, National Immigration Project of the National Lawyers Guild
- 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 the Texas A&M School of Law webinar series, titled "Legal Issues in the Age of Coronavirus." We've covered many topics related to the pandemic so far. And today, we'll be discussing habeas litigation for immigrants during this pandemic, with a special focus on the Fifth Circuit. Just so you know, on July 9th we'll be having another immigration related webinar on the Supreme Court's DACA decision. You can find more information about our series at TAMULawAanswers.info.

I'll also give just a quick disclaimer before we start. While our panelists are all attorneys, they will be discussing the law generally, and nothing in the webinar should be considered as legal advice. So please consult your own legal advisor to address your own unique circumstances.

So I'm going to introduce each of our speakers very briefly. And then we'll dive right in. We have Ranjana Natarajan, who is the director of the Civil Rights Clinic at the University of Texas at Austin School of Law. We have Kate Huddleston, who is an Equal Justice Fellow at the ACLU of Texas.

And we have Sirine Shebaya, who is the Executive Director of the National Immigration Project of the National Lawyers Guild. And we're going to start with some nuts and bolts about habeas petitions. And then we're going to get into some of the specific litigation happening in Texas. So I'm going to turn this over to Ranjana to get us started.

- Great. Thanks, Fatma. Good afternoon, everyone. I'm really happy to be here and to share this webinar with you all. So I'm going to start discussing a little bit about the nuts and bolts of habeas. And from there, we'll go to talking specifically about habeas actions, addressing COVID-19 issues.

I realize that some of you on the webinar may be very familiar with these things, and others have had less experience with habeas. So we'll try to cover as much as we can. I do want to mention at the outset that AILA has some terrific resources, the American Immigration Lawyers Association, and we will share a link to their online series on habeas actions [https://www.aila.org/publications/videos/fearless-lawyering-videos/five-part-webinar-series-on-habeas-corpus]. I believe they have a five-part series that also goes more in-depth into these issues.

So as you may know, the writ of habeas corpus has its origin in common law, but is written into the Constitution at the Suspension Clause. And the point of the writ of habeas corpus is very simple. It has always served as a means to challenge the fact of detention by the executive. And that's where it provides habeas courts, which are typically federal district courts, the power to grant release from custody.

Now over the centuries, Congress has also enacted statutes preserving that habeas power for federal courts. And so we'll be talking about the statutes that are at issue in these immigration habeas cases. But as with the common law and constitutionally guaranteed habeas, the habeas statutes do the same thing, which is they allow a person to attack the legality of their custody when they're in custody and seek their release.

So there are many different types of federal habeas proceedings. One is a challenge to a state court conviction. A second is a challenge to a federal court conviction. We're not going to be dealing with those today. We're going to be talking about the statute that allows people to challenge the lawfulness and sometimes the conditions of their detention that doesn't relate to an underlying state or federal conviction.

So what kinds of detention are those? Military detention, and in our case, federal immigration detention. So that's really what we're going to be addressing. In order to file a habeas case to challenge immigration detention, you really only have to allege that you're in custody in violation of the Constitution, laws, or treaties of the United States.

These are the five different types of requirements that habeas petitioners have to show. And in almost every instance, the immigration habeas is going to just allege, hey, I'm in custody, in DHS custody, and my custody violates the Constitution or laws, including the Immigration and Nationality Act. We'll get into those claims as we keep going.

What are the types of challenges to immigration detention that people commonly bring? First, that the detention itself is not authorized by law. And I'll give you an example of that. That might be where, for example, you have a client who's actually a US citizen, you have a citizenship claim. And so he or she shouldn't be in detention in the first place.

Two, detention is unduly prolonged and lacks sufficient procedural safeguards. This is where we've seen a lot of cases across the country for people who've been in detention over a year, over two years, and sometimes much longer. Detention is indefinite-- so you may remember *Zadvydas*, and the cases that came about 20 years ago, when people were sometimes in detention for years, and there was no outcome, no end date to their detention, because the country to which they were supposed to be removed wouldn't take them back.

And then finally, sometimes the conditions of detention can expose a petitioner to a substantial risk of serious harm that couldn't be remedied without their release. And we'll be discussing that more as we talk about habeas as relating to COVID-19.

Typically, your causes of action in habeas include violations of Fifth Amendment due process. And remember, it's the Fifth Amendment that applies, because it's the federal government, and not the state, to which the Fourteenth Amendment would apply, or violations of the Immigration and Nationality Act. With regard to due process, and we'll talk about this a little bit later. Remember that the Fifth Amendment's due process clause protects people from arbitrary detention, which is where there's either no purpose, or it doesn't serve the stated purpose, and there's no real substantive basis for the detention.

Prolonged detention, which we talked about a minute ago, which is that it's disproportionate in time period to the stated purpose, often those will also lack-- that type of detention will also lack procedural safeguards. And then indefinite, which we discussed a minute ago. And then we'll talk about the INA violations that people typically allege as we go through this presentation.

So let's talk a little bit about the nuts and bolts of filing, and things to consider before filing, and how you make the actual filing. First, it's really important that everyone who wants to appear on the habeas is admitted to that federal district court. You don't need to be admitted to the circuit court. You don't need to be admitted to other federal district courts. But the court in which you filed the habeas, you need to be admitted.

You can be admitted regularly, or you can be admitted *pro hoc vice*. *Pro hoc vice* is often cheaper, and just means that you're only getting admitted to that court for that particular case. Every clerk's office at every district court, you can call them, and they will tell you about their instructions for how to get admitted if it's not already on their website. And typically, clerk personnel, at least in Texas, are pretty friendly, and can take you through the process if you have problems.

In addition, you want to think through the goals and the likelihood of success. As I've mentioned, the critical point in a habeas is to try to get your client's release. So if your goals include other things, that might be more difficult to accomplish in a habeas, it's important to weigh the likelihood of success. And we'll talk about the claims in a minute and what that means.

There typically is no statutory or constitutional exhausting requirements. But it's almost always useful to use some kind of administrative remedies beforehand. Because district courts like to hear that you tried to avail yourself of the administrative remedies, and they were futile, or that the agency didn't administer them properly. These can be actually good atmospherics for your habeas. So think about the use of administrative remedies, whether that's a parole request, a bond hearing, or other alternatives that may exist.

Finally-- not finally, but continuing, costs and timeline. Habeas is supposed to be an avenue to get expedited and quick immediate relief. Even then, it can take a few months, and sometimes several months to get a habeas determination, in other words, to get a final decision on a habeas from the district court. That's something to set your client's expectations about, and to know yourself as you go through the process.

The cost itself is typically very cheap. The cost of filing a habeas is something like $5 in most district courts. So it's supposed to be accessible to prisoners. And to people who don't have resources; that's a great thing. And your client and their family should know that. In terms of client and family expectations, costs and timeline are very important. And in the same way that immigration counsel often find that it might be hard to explain the minutia of the INA to the client. But they really do understand quite a bit once you start explaining.

Habeas works similarly. It's important to explain the process so they know what to expect beforehand. Sometimes I think the most important thing for the client to know is there is no, necessarily, a hearing. There's no sort of evidentiary hearing that might happen. We'll talk a little bit more about that. But clients who may have gone through asylum proceedings, or a cancellation, or removal hearing, for example, might expect a similar hearing in court for habeas. And that doesn't always happen.

In terms of the availability of attorney fees, they are available under the Equal Access to Justice Act if you succeed, and if you then make a claim that there was no substantial basis for the government's position. It's not always awarded. And often people choose to give up attorney fees just as part of settlement in order to get their clients out more quickly. But I just want to note that they are available.

And finally, confidentiality issues. Obviously, people have clients with very extenuating circumstances, sensitive fact histories and stories, things that they may not want to release in public records. So habeas on behalf of immigrant detainees typically have additional confidentiality provisions that apply in federal district court. You will want to make sure that you talk to the district court clerk and be aware of those. There's a federal rule of civil procedure that addresses that. I believe it's 5.2. And you'll want to consult that beforehand as well. And clients are, of course, very interested in confidentiality, so you'll want to talk about that.

Next, I'd like to talk a little bit about habeas corpus procedure and the consecutive things that happen in a case. So the general run of things is the petitioner files a petition. The government files something called a return, which is typically a response or an opposition. The petitioner then files a reply, that's called a traverse under the statute. And then there might be an opportunity to take evidence, or depositions, discovery, if you want it, and if it's required. Typically, it's not, because often it's on the legal issues, but it can happen.

And there can be hearings that the court holds on the petition itself. Sometimes that happens. Sometimes district courts, at least in the Fifth Circuit, will issue a decision without holding a hearing, just on the papers alone. So those are both possibilities that exist. The statute itself says the petition has to be in writing, signed, verified by the petitioner or someone, typically the attorney, on their behalf. The petition has to allege the facts relating to the detention, name the custodian, the person who's holding petitioner in custody, and name the authority under which the petitioner is held, if you know it. So it's fairly bare bones.

That being said, here's what a usual petition contains. And we have not yet thrown samples into an online repository for everyone, but we're planning to do that after the session so that you will have access to samples. Because often, that's the most helpful way to do these things. So the habeas statute itself grants jurisdiction. That's 28 U.S.C. § 2241. There are additional provisions of law that people typically cite-- the All Writs Act, Federal Question Jurisdiction Mandamus Act, and the Suspension Clause.

I just want to note here, because one of the questions that we received was about why use habeas instead of Mandamus. I just want to clarify, habeas is really the most common and most widely used mechanism to get someone out of custody. Mandamus may be useful in a variety of other, let's say, ministerial actions that you're looking for the agency to perform. But when you're seeking release from custody, courts expect that the writ of habeas is what allows them to do that. And that's why you want to use the habeas procedure instead of Mandamus.

Venue is typically provided for under 28 U.S.C. § 1391, the district of the petitioner's detention. It can also be where the events substantially arose, et cetera. The proper respondents to sue is an interesting question. Always sue the warden, or the ICE official in charge of the detention center. That's your immediate physical custodian. And all the Supreme Court law in every circuit says that you must suit that person. There's no downside to suing other officials who actually sometimes have the authority to release, because we know that the warden, let’s say, of a particular detention center can't make this decision without referring to ICE or DHS.

So typically, people will sue the ICE field office director, the director of ICE, Secretary of DHS, and even Attorney General. The court sometimes may dismiss those non-warden respondents, and say they're not necessary, and they're not appropriate. But it's always better to include them than not. Of course, it brings up some additional service requirements. So that's something that everybody should sort of think about on the front end. But when I sue, we always try to include all of the agency respondents as well.

That's also helpful because if you're thinking about discovery, or evidence, or a hearing down the road, you want that agency respondents to be required to come to court and answer as well.

Finally, I guess I'll make a note about the proper respondents, even if you sue the warden, and the warden is actually a GO official or a Core Civic official, who is going to represent them will almost always be the U.S. Attorney's Office. And so, including all of the other government agency officials doesn't make things more complicated. It's always going to be the U.S. Attorney on the other side.

I mentioned this earlier, that you don't have to talk about-- you don't have to exhaust administrative remedies. But let. me-- I really can't put too fine a point on this. The statute doesn't require it. You can often allege that it would be futile to do so anyway if the statute did require it. And remember that you're claiming that the petitioner would be irreparably harmed if they had to exhaust because the irreparable harm arises from continued unlawful detention.

That being said, many courts have imposed a prudential exhaustion requirement. And so what we like to do is try to use the available administrative remedies before you file, whether it's a letter seeking parole, whether it's a request for a bond hearing. And then mention those in the petition to say, we were not required to exhaust administrative remedies. We tried anyway. The available administrative remedies were futile, or couldn't give us the relief we seek, and just keep moving in your petition.

I talked to already about the causes of action. They're typically under the INA and the Due Process Clause. In some rare cases, like when you have a citizen who is detained, you might also have a Non-Detention Act claim, but that's rare. Let me pause and talk about the relief requested. Typically, remember, the core relief is you're asking for immediate release from custody. But typically, you want to include things like assumed jurisdiction over the petition, require them to timely answer, set a hearing, and then issue declaratory relief as well, grant reasonable attorney fees, et cetera. So this is the kind of laundry list of relief that people typically request in the habeas petition.

Now, I think we've got a question in before the session about evidentiary hearings and also discovery. Like I said, in an individual habeas case, discovery and depositions are often rare. And that's because it comes down to a legal question about whether, for example, your client is properly detained under 236(c), or your client is properly within the statutory category that DHS claims. Or it might just be a prolonged detention claim.

And in the case of COVID petitions, which we'll talk about later, even though there are fact issues that are raised, it might be a question of, for example, is this prolonged at this point, and is the petitioner subjected to detention that is so dangerous to him or her that it exposes them to death or other serious injury. So while rare, discovery can happen.

The important thing to know is you can attach exhibits to the petition. You can supplement those later, as needed. The federal rules of evidence do apply. So you'll want to make sure that you make some sort of claim for why things are authenticated and admissible. And we typically do this by using, as you know, a lot of government documents. So you might use, for example, the notice of custody determination, the bond hearing ruling, the parole denial. Those are all agency records and are going to be automatically admissible.

Another point that's really important is how do you get a habeas court to timely consider and determine your habeas petition? This is a tough one. Because the default rule is 60 days for a respondent's response to your petition. And that's often so long that the danger might be far too high. So typically, people will file a motion for an order to show cause along with the petition, asking for a response. It could be anywhere from three days to 20 days under the habeas statute and the rules governing habeas that you seek.

And we've tried this with some success, with the district courts ordering the government to respond within 20 days, sometimes a little bit sooner. And some of the other presenters will talk about this as well. It's very difficult to get the respondents to immediately respond, within a day, or two, or three days. And it's really difficult to get the district court to push everything else on its docket aside and do the habeas first. But that doesn't mean that you shouldn't try. It's actually quite important.

So just a little bit more on nuts and bolts. So when you start the case, you'll want to file the petition, any exhibits, a civil cover sheet, and a motion for an order to show cause. Filing an additional brief is optional. Some people do it. Some people don't. And you can choose to put your legal arguments into the petition itself, or you can file a brief along with it. That's up to you.

As I said, the filing fee is typically $5, so you don't need to file a motion for *in forma pauperis*, which in our experience has been more trouble than it's worth when the filing fee is so low. You will have to do service on all the respondents. And you will have to do a request for summons to the district court. If some of this sounds unfamiliar, I have to say the clerks of the district court are really helpful.

And also, depending on where you are, someone has been doing federal immigration habeas petitions. And so I really encourage everyone to find through your AILA listserve people who have done it before, and walk through these nuts and bolts issues so that you're not kind of trying to figure it out on your own for the first time.

As we mentioned earlier, after the petition they'll get a response called a return. You'll get a traverse or a reply. There might be evidence in a hearing. There might be other motions. I'm not going to talk right now about motions for TROs or other preliminary relief, but we'll get to those when we talk about COVID cases. Finally, in terms of procedure here's what happens. In many of these cases, the district court will refer the case to a magistrate judge. The magistrate judge will issue something called a report and recommendation, which is sort of a pre decision.

The parties will get to make objections to that decision. So that sometimes strings out the process, but allows you to say something further about why it's correct or why it's incorrect. And then the district court will issue its decision. This is why, as I said at the outset, it can sometimes take three months or up to six months to get a decision even though a habeas case is supposed to be speedy.

I'm going to turn it over to Sirine to talk a little bit more in-depth about the claims that are brought in different types of habeas cases.

- OK, great. And Ranjana, are you going to keep sharing your screen for the slides.

- Yes, tell me when to go next slide, and I will.

- Perfect, that's perfect. OK, and before I turn to that, I also will just flag that for those of you who are members of the National Immigration Project, you can also email the project listserv. There are a lot of attorneys in all kinds of parts of the country, including the Fifth Circuit, who could potentially help you. And you can also reach out to us for technical assistance on habeas petitions, because we do have a few attorneys on staff who've been doing a number of those.

On the claims, I'll start in the order in which we've been proceeding. And I'll also caveat that by saying that COVID has given rise to new, complex, and creative ways to bring claims in habeas petitions. But that's something that's going to be addressed a little bit later on in the petition. Classically, I would say probably the most common habeas petition that gets filed for people in immigration detention is based on prolonged detention.

But so the first set of due process claims that you can make is that the detention of the person that you're representing is not authorized. It's unauthorized detention. One of the core bases for a civil detention in the immigration context is it's civil detention. It's not based on conviction of a crime or on the fact that you're still being prosecuted for a crime. It's purely for civil purposes.

And so the legitimate governmental objectives that have been recognized in this context are prevention of flight, so appearance at removal proceedings, basically, and/or a danger to the community. In each of those contexts there are arguments that can be made depending on the specific facts of your case about why the detention in this particular case is excessive in relation to those goals.

The due process limitations on civil detention is that it cannot be punitive. And that's where this question of whether the detention is excessive in relation to the legitimate goals comes up. Because that is actually the analysis that most courts will undertake in the context of determining whether detention constitutes unlawful punishment in the civil context. This is also true for pretrial detention. But here, we're focusing on immigration, so I'll stay with that focus.

The detention also cannot be arbitrary, which it's a very similar test. There's some slight variations on those two things. But the detention itself has to be based on a legitimate government interest. So there is some context, for example, where claims have been made that because of, for example, the very high appearance rates of people on ISAP or whatever, that when the only consideration is flight risk, if people have other circumstances that make their detention unjustified, that that's something that can render a detention that is otherwise lawful arbitrary.

The detention also cannot be indefinite. And that's actually the most typical claim I think that is raised in the context of the *Zadvydas* petitions. Many of you might be familiar with that case. There are, I would say, two sets of prolonged detention generally habeas petitions that are brought. One is for people who are still in removal proceedings. So they're pre final order. And the other is for people who have already gotten a final order of removal.

And in that context, the argument is essentially that if someone already has a final removal order, they've been detained for a very long time. And the government doesn't have a-- they're not going to be deported in the foreseeable future. That at that point, their detention has become indefinite. And that's actually what the Supreme Court held in *Zadvydus v. Davis* case, where it found that someone from Cuba who had been detained for more than six months, and who the government just didn't have a shot at being able to deport there, was being essentially detained indefinitely at that point. And that the Due Process Clause of the Fifth Amendment does not allow that kind of indefinite detention.

If the detention is prolonged, it has to be supported by a special justification, adequate procedural safeguards. I think this is the kind of claim that comes up most often in claims on behalf of people who are detained under 236(c), but whose detention has reached a certain length of time. So like the bright line rule in the Ninth Circuit, and I believe in the Second Circuit had been six months, now post a negative Supreme Court decision. In *Jennings v. Rodriguez*, I think it's a more individualized case by case consideration test that courts will apply. This was always the case in the Third Circuit.

And so other circuits, where there was this approach taken of looking at all the circumstances of a detention, and making an assessment about the reasonableness of the detention. And in that context, that the detention has gone on for a very long time, if the person has never had a bond hearing, a number of courts will order a bond hearing through the habeas vehicle. It's something that you can ask for. OK, can I get the next slide, please? Thank you.

So claims under the Immigration Nationality Act, those are dying slowly. They're not completely dead, but they're sort of a little bit so. There are certain limited contexts. It used to be the case before that people would bring prolonged detention claims under the INA. And the argument was that constitutional interpretation of the statute would require reading a time limit into the statute. And so, therefore, detention that had become excessively prolonged actually also violated the INA.

The Supreme Court in *Jennings v. Rodriguez* basically put the kibosh on that argument, and said, no, the statute doesn't have any time limitations, per 236, and so, basically that's not the argument. So now we've moved to only making constitutional arguments, due process arguments. That being said, there are some circumstances where you might be able to argue that there's been a violation of INA 236(a), which is the context where people are getting bond hearings.

The court in *Jennings v. Rodriguez* -- sorry, in the Ninth Circuit decision that *Jennings* arose out of at the Supreme Court, the Ninth Circuit had also said that if someone had gotten a bond hearing, and then had been denied bond, had been detained for 12 months or longer, they get to have another one. Because in those circumstances, their detention has also become excessively prolonged.

There are also other circumstances you can imagine where you could, for example, argue that someone-- kind of like you would in the Joseph context, you could argue in habeas that someone's detention under 236(c) is actually a violation of the statute, because they're not

properly categorized as people who fall under the mandatory detention statute. There's also arguments around violation of INA 235, 241. 235 applies to quote-unquote arriving aliens, or non-citizens as we like to call them. And then 241 applies to people who already have a final order of removal.

And there are a number of provisions under that. I think one of the most common 241 scenarios that comes up is people who have a final order of removal, a PFR pending, and a stay of removal from the circuit court, who really shouldn't be considered as falling under 241, but the government, wherever it can, where there's no circuit decision on that question, tries to say that they fall under 241, when in fact they should be under 236. And some of those folks should be getting bond hearings under 236. So that's a place where some of those arguments come up.

I'm going through these quickly. I'd be very happy to elaborate more in the Q&A, or even separately if you email me later. But this is just a preview of some of the claims that come up, can come up in this context. Can I get the next slide? Thank you.

OK, there's a couple of other types of habeas petitions that can be brought in the immigration context. There has now been a pretty lively debate about whether you can even bring conditions of confinement claims in habeas. I think that that debate has always been more pressing on the criminal side because of the applicability of the Prison Legal Reform Act, which has very specific restrictions on when it applies or doesn't. But it's transferred over a little bit to the immigration context because of the COVID situation. And I think Kate is going to talk a little bit more specifically about that in the Fifth Circuit.

But just as a high level point, you can bring claims for challenging conditions of confinement either through habeas or as a more traditional civil rights action. And there, what you're looking at is deprivation of the minimum civilized measures of life's necessities, so food, shelter, clothing, safety, including exposing people to a substantial risk of harm. And so the first thing that you have to establish in a conditions of confinement case is that people are being exposed objectively-- it's called like the objective component of the Farmer versus Brennan test-- to a substantial risk of harm.

And then the second factor that you typically have to show-- although in the civil detention context we have argued very aggressively that you don't have to show subjective deliberate indifference, but I'll still articulate that standard-- that the people who are in charge, so basically the warden, or ICE, or whoever it is that you're suing, were aware of that risk of harm, and consciously or recklessly disregarded it, so didn't do enough.

There's actually been some really interesting analysis in some of the COVID cases around the country of why simply saying in the immigration context, for example, that the facility took some measures to address the harm is enough. And then you can't show a deliberate indifference on that basis. So there have been some courts that have said, look, deliberate indifference is not equal to malice.

It just means that you haven't done enough to actually address the harm. And so if people are still facing that harm, that's sufficient to show deliberate indifference, even if you do have to show

the subjective component, which again, I think in the Ninth Circuit you clearly don't have to show. In some other circuits, it's still open to question. But it's something that has come up a lot in the recent litigation. Can I get the next slide?

OK, so another kind of due process claim that you can bring in habeas is a claim relating to inadequate medical care. I think that's something that Fatma probably knows 20 times more about than I do. But it's basically a situation where you say that there is serious medical need, either illness or injury, or in some cases mental health needs-- which I think SPLC and some other groups have been bringing cases about that in different parts of the country-- that there's injury to the plaintiff as a result of the people who are responsible, like the warden, the facility, ICE.

Again, all the actors that you might be suing in that context have been not acting as they should, and that there's been harm to the person with the medical need because of the acts or omissions, and also that there has been deliberate indifference to that risk of harm by the people in charge, by the defendants.

And in this context, I would just say that in addition to due process claims, there are sometimes Rehabilitation Act claims that can be brought in this context. And that we have actually included, in our COVID cases, we have several habeas group habeas petitions across the country on COVID, and we've included Rehabilitation Act claims and some of them. Because our basic argument is that the inability to socially distance, and the inability to protect yourself against the virus constitutes a lack of accommodation in this context for people with medical vulnerabilities. I'll stop there. And I think move to a different section.

- Thank you. So we're going to move from the nuts and bolts of the habeas to some of the COVID specific litigation. We'll just briefly touch on the national landscape about litigation, and then really focus on what's been happening within the Fifth Circuit. So I'll turn it back over to Sirine to just give us a little bit about the national landscape.

- Yes, so there has been, I think, an explosion of litigation, both habeas and some other kind of types of cases that arose out of the COVID-19 pandemic. And I think this is probably an obvious point, doesn't need to be said, but I'll still say it just in case. The reason this is so pressing is because COVID spreads really rapidly in congregate settings, like detention centers. And because detention centers don't have oftentimes the architecture even to be able to allow for things like social distancing, or all the things that we're being told that we should do.

We're staying at home. We're not going to the office. We're wearing masks. We're doing all that stuff. And some of those basic things are just not available in detention centers. And so from the beginning of the crisis, there was just like this push to try to get as many people, especially who are medically vulnerable, out of detention centers. And I would say there have been three types of cases that have been filed.

There have been individual, and more often, actually, multi-petitioner habeas petitions that have been filed. We have seven of those. The national ACLU and then various affiliates have them in I think, I don't know, 20 different states or something like that. And a lot of individual

practitioners have also been filing those habeas petitions on behalf of their clients. And typically, it's just the substantive due process claim. We've also, as I said before, included some Rehab Act claims. And the ask is release for those who are medically vulnerable. That's the most typical situation.

There have also been some class actions either with habeas claims or just civil rights claims and I think the Fraihat case is going to get specific-- or no, it's not, so I should probably mention it. So there's been a class action that was already pre-existing that was about medical accommodations that we were just talking about. And when the COVID pandemic hit, the groups who are litigating that that case moved to a preliminary injunction based on the current crisis, asking for custody redeterminations for everybody who falls into certain medically vulnerable categories. And the judge did order that.

And those Fraihats-- so called-- we're now all calling them Fraihat reviews, they were conducted, and basically almost nobody was released. And so now they have moved to-- they've filed another motion yesterday, I think, seeking much broader relief based on the fact that the government hasn't in good faith actually complied with the custody redetermination order that the judge had issued in that case. That's a big class action that's ongoing.

There are also some other class actions. We have one in Otay Mesa. There are others across the country. And the first one actually that was filed in that way was *Savino v. Sosa* in Boston, or Bristol, Massachusetts. That brought claims on behalf of everybody at the facility. The Savino case actually didn't differentiate. It just asked for release for everybody. In some other cases, including Otay Mesa, and other places, there's like differentiated asks.

So you're asking for release for the people who are medically vulnerable as the first step, and then conditions reforms of various kinds for everybody else in the facility. Oftentimes those conditions reforms include de-population to a level where social distancing is necessary. So they're tapered like that.

There've been some wins on the habeas front. Unfortunately, I think a lot of those have been appealed. Although in this *Savino* case, and in some other cases, like one in New Hampshire, I think, and one, I can't remember now where, judges have just started conducting bail hearings. So you filed a class action. You asked for expedited emergency bail hearings.

Bail hearings are conducted, and people get released as a result, many people, not all. And then moved into sort of a phase two of ordering conditions reforms, like universal testing, and social distancing, and things like that. And those cases haven't been appealed as quickly as some of the other cases that were just immediately ordering system wide relief that I think Kate is going to touch on later on.

Last, but not least, there have been some related lawsuits that are not-- that are not habeas petitions, but like Mandamus actions. The O.M.G. case that was filed in DC is sort of the standard bearer, I think, for that type of case. And again, I think Manoj was going to be here to talk about that, but unfortunately he wasn't able to be. And so that is also another case to keep an eye on, and see where it goes or if it provides some other form of release.

And I think the reason all of those cases are being filed is that people are really thinking this is a critical moment to try to use every tool in the toolbox to try to get people out or get them some relief from this horrible, lethal disease that they can't protect themselves against.

- Great, thank you, Sirine. And so now Kate is going to get us into a discussion about some of the Fifth Circuit specific cases starting with some of the Texas cases.

- OK, thanks Fatma. And thanks to Texas A&M for having me, of course. So I'm going to start by discussing Vazquez Barrera [Vazquez Barrera v. Wolf, 2020 WL 1904497 (S.D. Tex. Apr. 17, 2020)], which is the ACLU of Texas case in the Southern District of Texas. And I think it also gives a good sense of how these habeas cases are typically brought. Right now it's a pending class action. But it was originally-- we originally brought it as a group habeas petition. So I'll talk through the beginning of that, and the nuts and bolts of how we brought that claim.

So in early April, the ACLU of Texas, along with a law firm, Weil, Gotshal, and the ACLU National filed a lawsuit on behalf of medically vulnerable people who were detained at the Montgomery Processing Center, which is in Conroe, Texas, just outside of Houston. And the four people who we filed on behalf of were all medically vulnerable because they all had conditions that the CDC has identified as placing them at risk of severe illness or death from COVID-19.

So we brought a claim that was very much like the claims that Sirine described, solely seeking their release from detention due to the conditions of confinement at MPC, and the fact that they were being held at this detention center in the path of a global pandemic, without recourse to protect themselves, and to engage in the same sorts of protections that we all are familiar with, and we all engage with on a daily basis. And that's really the bedrock of these claims.

The idea is that a detention center, you're in a congregate setting. You're not able to socially distance. It may be that people at the detention center are not wearing masks. It may be that there are other particulars of the particular detention center related to hygiene, where you can't wash your hands. There's not access to soap. And so in light of all of the particular conditions at the detention center, there is no way for ICE to sufficiently protect you while you're detained in the facility, and release is required.

And so we secured a temporary restraining order and as a preliminary injunction on behalf of one of our medically vulnerable petitioners. The court ruled that we were likely to succeed on the merits because there is no reasonable relationship between being confined in immigration detention in the path of a deadly pandemic and the purposes of immigration detention, which are, as Sirine said, preventing flight risk and protecting public safety.

And that was the first decision in the Fifth Circuit that engendered a favorable decision for detainees in this context. We since have sought to convert the case to a class action. And we have a pending motion for a class certification. I'm happy to talk more about that in the Q&A as well. That is, again, on behalf of medically vulnerable detainees at the Montgomery Processing Center itself.

And I think some key points from our litigation are focusing on the specifics of the detention center is really important to bringing forth your claim. So what are the specific conditions at the particular facility that you're challenging? And why do those conditions mean that your client cannot adequately protect themselves? And the other thing to focus on is, is your client particularly vulnerable? What are the circumstances of their health that might make them particularly vulnerable to COVID-19, such that it's particularly important that they gain release, and because they're at a greater risk.

And then the final thing that I'll just close on for this is what is the intersection between COVID-19 and your facility at this point in time. So have people at the facility already contracted COVID-19? When we initially filed there were guards who had contracted COVID-19. Now a quarter of all detainees have tested positive for COVID-19. COVID-19 is rampant at many facilities in Texas. So that is something to focus on-- what is the scale and scope of the epidemic at your facility, and does that also indicate that defendants are going to be unable to protect people.

And I guess the last thing I'll close on, actually, is the CDC guidelines, and particularly, referring back to public health guidance as a touchstone. So that's sort of lessons learned from *Vazquez Barrera*.

- So, Sirine, do you want to talk about the *Dada* case and your Louisiana cases?

- Yes, so we filed, along with CCR, and Andrew Free, and Jeremy Jong, a case originally in the Eastern District of Louisiana called *Dada v. Witte*. That case covered facilities-- like a number of different detention facilities within the area of responsibility of the New Orleans field office. So it actually included Louisiana, Mississippi-- mostly Louisiana, but one detention center in Mississippi.

The judge in that case said, no, the immediate respondent is actually the warden, not the ICE field office director, and kicked the case out. So then we filed three different cases, splitting that up, in Louisiana, the Western District of Louisiana, and Mississippi, and in Alabama. I'm not going to talk about the Alabama case because it's 11th Circuit. But for the two Fifth Circuit cases, *Dada v. Witte* basically covered five detention facilities in Louisiana, and was brought on behalf of 16 people who were medically vulnerable.

This was a case that ended up being heard before the magistrate judge who issued a favorable report and recommendation, recommending release of all of the petitioners in that case, except for two. One of them already had COVID-19. And the judge found that the medical care hasn't been alleged to be inadequate. And so for someone who already has COVID-19, the same prevention rationale doesn't apply. And for the other person, there was no confirmed COVID-19 in that facility, and so he found that the danger was not imminent.

But the analysis in *Dada v. Witte*, and the reason I think it's important to sort of posit that case for a second is, the report and recommendation that the judge issued has one of the best discussions that I've seen in the country, actually, about fact versus conditions of confinement, and why those cases, the COVID cases, are appropriately considered fact of confinement cases.

And he made two distinctions. He said, look-- and this is something that actually Judge Ellison in Texas, in the *Vazquez Barrera* case, had sort of gestured at. He had said, just because you have to talk about conditions to get to the ultimate point that the detention is unconstitutional doesn't mean this is fundamentally a conditions of confinement case. And so Judge Montes-Perez in Louisiana picked up on that point and fleshed it out. He said, look, for fact of confinement cases you have two basic things. Number one is you're asking for release. And number two, you're saying that the detention itself is the harm.

Whereas for conditions of confinement cases, what you're targeting is the conditions themselves. You're not just discussing them as symptoms of the harm, but you're discussing them as the actual harm. And what you're seeking is reform of those conditions. And since those COVID habeas petitions are not seeking reform, they're seeking release, and they're not saying that it's the conditions that are the problem, they're saying it's detention in these circumstances that rises to the level of unconstitutional confinement, that makes it properly a fact of confinement challenge.

So I think it's actually worth, if you're litigating in the Fifth Circuit, it's worth looking at that report and recommendation. The district judge ended up adopting it in full. And then by that point, the person who had COVID-19 had recovered. And so the judge also ordered him released, because as we had argued-- he adopted our argument in the objections and responses that there's no evidence yet that you become immune to COVID-19 if you've had it once, or that you will have it likely the second time if you had it once. And this person is medically vulnerable, so he should be released.

So he essentially ordered everybody released, except for the person was in a facility with no COVID. And I think that's another thing to think about and watch out for in these COVID cases. We have said prevention is important and it's inevitable that it will reach detention centers. We've basically lost on that argument in a couple of different places in the country, including the Fifth Circuit. But it's just something to consider.

I'll also briefly mentioned the other Fifth Circuit case that is Tamayo Espinoza, which unfortunately the judge didn't order released. But he did find that habeas is the proper vehicle, and that he has jurisdiction in habeas to consider the petition. So it's not another thing to look at in the Fifth Circuit for that point. Although, ultimately he found that the facility had controlled the spread, and that there wasn't enough evidence, and that there was a legitimate government objective.

That facility had at the time 15 cases. And now the cases are on the rise. And conditions seem to be deteriorating. So we are considering renewing our TRO in the Tamayo Espinoza case.

- Great, thank you. And so Ranjana, we'll go to you next. Would you like to talk about the El Paso case or the Laredo case?

- Yes. So we filed a multiple person habeas petition in El Paso on behalf of a number of detainees who are medically vulnerable. And in that case, we were actually able to get them out

before he issued any opinion. So I want to talk about just a different kind of instance of what happened.

As Kate mentioned, we filed a habeas petition. We filed the same sets of claims. We filed a motion for a TRO. So the motion for a TRO the greatest mechanism because it advanced a hearing quickly, and put it squarely before the judge. In that instance, the judge initiated a communication between the parties. And one of the things that the judge wanted to know is, if I let these people out, where will they go? Don't they have to quarantine? Because some of our petitioners had-- actually all of them had either been in contact with, or we alleged that they may have been in contact with someone who had COVID in the facility.

So he said, well, where are they going to go? We had actually addressed that in our petition. And in El Paso, as you as some of you may know, there's a terrific shelter called Annunciation House. Great set of people there who had been already constructing their facility and shaping their facility to help take care of people who might be COVID positive, and who had arranged for screening and other isolation requirements that might result. And so we had a ready answer for the judge, which really comforted him.

The surprise was the judge also wanted to take a tour of the facility. None of us had expected that. So he ended up touring the facility, along with Assistant US Attorneys Office, as well as one of-- two of our counsel, petitioner's counsel. And in that instance, the judge really wanted to make sure for himself that the conditions that we alleged-- for example, that the bathrooms were all communal, because it was a dormitory setting, that no matter how they changed the dorm beds, which is what they had tried to do was distance them, at that point their capacity was still high enough that they couldn't adequately protect people and provide the social distancing that was necessary.

He wanted to go see those things for himself. And so the government took him to a barrack at the facility, and then gave him a variety of information. And in fact, the government ended up giving him some information that was confusing, and had to cover their tracks later, and the judge was not appreciative of that. But in that instance, what happened was the judge really, I would say pressed the parties to consider settlement. And so as a result, the government agreed to release those detainees, and we were able to get them out to Annunciation House, get them tested. And then once they tested negative, to be then able to be reunified with their families.

So I want to say two things here. One is just to repeat what Kate said before because I think it's really important. I really think that, especially in the Fifth Circuit, we want to win these cases. So if we want to win them, we have to choose facilities where there's already COVID in the facility. That sharply increases the likelihood of our success. Two, where people are medically vulnerable. And not just medically vulnerable by our standards, but medically vulnerable by CDC standards.

So if you look at the CDC guidelines on who's medically vulnerable, you want your client to be, boom, right in the middle of that set of criteria. Because then you don't have to have your doctors arguing with why the CDC was wrong. That's not worth it. It's not worth going down that road.

And then three, you got to have a doctor, as Kate said, who's willing to look at your client's medical records, even if they are scant, even if you just have a page or two. You don't need to have 100 pages. But who are willing to look at that, and go yes, if this person has this, and this, and they've had it, and it's uncontrolled asthma, plus et cetera, yes, they are but medically vulnerable. And so those three things are really key if you're going to bring a case like this.

So I also want to talk about a case I was not involved in, TRLA, TCRP, and MALDEF filed a case in Laredo on behalf of three petitioners. In that case, two of them were medically vulnerable. We sued-- we've only sued for people who are medically vulnerable. In that case, two were medically vulnerable, but they were in Laredo. One was detained at Port Isabel, which is near Brownsville, which is another division of the same district court. So it's the Southern District of Texas, but it's in the Brownsville Division.

So listen to what the judge did in that case. The judge split the cases apart. It was a habeas case, multiple plaintiffs seeking relief, as well as seeking some change in conditions, because they had conditions that was preventing social distancing. In that case, the judge said, look, because normally you file a habeas in the place where your detention is, I don't think I should have the cases that are in Brownsville. I'm going to send that over to a Brownsville judge. So she separated the habeas petitions.

And the Brownsville case, what happened was the detainee won their immigration relief. And so they were released from detention without any decision from the habeas court. The two remaining parties in Laredo are currently briefing the issues. Now someone asked by the Q&A a very important question, which is, is the government required to answer your petition? Well, typically, yes. But typically, what they do is they'll file a motion to dismiss instead.

And so I think Kate would agree with this, Sirine would too. In almost all the cases, they will now file a motion to dismiss. So the first thing you will litigate is a motion to dismiss, which is based on all the facts as if they were taken as true in your petition, and really going to the legal issues. And so that's what's happening in the Laredo case, as expected.

- Great, thank you. I'll talk a little bit about our Prairieland case. We were supposed to have Manoj Govindaiah, who is the litigation director for RAICES on this panel. He was our co-counsel in that case. But since he wasn't able to make it, I'll just jump in and tell you a little bit about that. That was a case that was co-counseled with a private law firm called Lovey and Lovey in Chicago, a civil rights firm, and RAICES, and our clinic at Texas A&M.

And we brought in on behalf of 11 petitioners. Before it went very far, three of them were released. And so it ends up being about eight petitioners. I should say, as Ranjana mentioned, we actually got eight people out without pursuing the habeas, just by asking ICE to release them. So always try that. I know many of us are used to that being a futile road, but these are strange times. And we were sort of surprised by how many people ICE released just by one email. So it's definitely worth trying. And then you can list it as something you did to exhaust your administrative remedies if it doesn't work.

I want to echo what Ranjana was saying about getting a medical expert. Not only did we have an expert when we filed, but when ICE responded by disputing the medical conditions that some of our clients said they had-- like two of them said they had asthma, and ICE said, no, you don't. They said, we did this test, and it shows you don't have asthma. We had an expert then say that whatever test they did was not enough to rule out asthma. So there's also ways to use a medical expert even after filing to supplement the record.

In terms of doing the fact gathering, it's really important to try to get criminal records up front. I know we were surprised, and it often happens. You're in a rush to file. You get what you can, but you don't always have everything. And so to the extent possible, talk to the attorneys who represented clients in their prior criminal proceedings or in their immigration proceedings, and get all of the documents you can so that you're prepared to address the issues of flight risk and danger to community. Because even if a judge is going to find that she has jurisdiction over your habeas and is ready to proceed, those things will still come up to be evaluated. And make sure you have that safe release plan.

So the Prairieland petition unfortunately did not end well for us, for reasons that we're going to get into shortly about jurisdictional questions. The judge decided it was a conditions of detention case, and that she had no jurisdiction over a habeas challenging conditions of detention. And Kate's going to talk about that in some depth, so I won't get into that too much here. She also found that you can't sue under the Fifth Amendment directly. So there has to be some intervening statute that allows you to sue.

Which there's a Fifth Circuit case called Hearth, H-E-A-R-T-H, that I can provide the cite for [Hearth, Inc. v. Department of Public Welfare, 617 F.2d 381, 382 (5th Cir. 1980)], that basically says you can sue directly for a constitutional violation if you have no other remedies. And the judge in our case just was kind of throwing around other possible things, like, oh, file a Section 1983, bring a Bivens claim, bring an APA claim. And none of those are really feasible for us. Certainly not a 1983 claim, which she kept bringing up, which has to be something done under color of state law. And of course, we have only federal law here.

So those are things that you might want to brief, or at least think about more before you file, in terms of including a little more briefing in your petition itself about why you can sue directly under the Fifth Amendment. Or if you're going to add an APA claim, just to cover all bases, go ahead and do that, and let the government try to dismiss that. Because the government in our case, during oral argument, suggested that we could bring an APA claim himself. So that was interesting.

And the APA provides a waiver of sovereign immunity, but courts have often still found they don't have judicial review, that that's unavailable under the APA in these circumstances. So we filed a TRO, and it was denied. And the judge threw out the whole case with the TRO, which is also an interesting procedural move. So we're in the process of preparing to file an appeal with the Fifth Circuit.

So I'm going to shift-- I think that kind of concludes our discussion of the cases we were involved with within the Fifth Circuit. But I do want us to get a little bit more into these hurdles,

these legal hurdles that have come to a head through this litigation. So I'm going to hand it back over to Kate to talk about that. And I'll weigh in on some of those points. Go ahead, Kate.

- OK, thanks, Fatma. So the Fifth Circuit has been a more challenging place than some other jurisdictions to bring ICE COVID claims in particular. And that's for a variety of reasons. The first one, and the one that I think is the meatiest and merits the most discussion is what we've alluded to already, which is whether claims that sound in conditions, that have to do with conditions at a detention facility, can ever be brought in habeas.

And the Fifth Circuit's case law is a little bit tricky on this aspect. As Sirine mentioned, *Dada* has gotten a successful result. And *Vazquez Barrera*, our case, has also gotten a successful result. Courts in the Fifth Circuit have split. And I think it's really important to present the argument in the most nuanced way possible to make sure that the court really understands what's at stake and the implications of the decision.

So as Ranjana mentioned at the very start, habeas is available to challenge unlawful detention by the executive branch. And that's sort of the core of habeas. What these cases are alleging is that medically vulnerable individuals require release because their continued detention, in light of COVID-19, violates the Constitution. And there is no set of facts under which their continued detention at a particular detention center, the detention center that you're challenging, can in fact be constitutional in light of the dangers posed by COVID-19 to that particular individual.

And so in this very unique set of circumstances, even though your habeas claim is predicated on the conditions of confinement, what you are seeking is release from custody. And what these cases have argued is that nothing less than release from custody will suffice. And in that set of circumstances, we think it's clear that habeas is available as a remedy.

So the Fifth Circuit's case law is a little bit distinct. And I'm going to do my best now to share a slide. That is likely to be a challenge for me, but we shall see. Excellent. Hopefully, you all can see that. And in the Fifth Circuit, there's a bright line rule that emerges from really these three major cases, and other cases over the past 20 to 30 years.

And that bright line rule is when the remedy that you are seeking is release, and if you get a ruling in your favor that entitles you to release, then habeas is an appropriate vehicle. And so setting aside whether habeas would be an appropriate vehicle in other circumstances, if what you're challenging is the fact of your confinement, even if that challenge is based on conditions, you still are entitled to release.

And so these three cases, *Poree*, *Coleman*, and *Carson*, together lead to that conclusion. So *Poree* is their most recent case and comes up a lot in the litigation. You'll see it cited in both *Vazquez Barrera* and in *Dada*. And *Poree* says that habeas is used to challenge the fact of confinement, and civil rights statutes are used to challenge conditions of confinement. But again, we find ourselves in sort of unique circumstances in which we are challenging the fact of confinement based on conditions of confinement. And *Poree* says the line here can be blurry, but if you're challenging the fact of confinement you can seek habeas relief.

And this question is, again, an open question. It's an open question at the Supreme Court, in so far as the Supreme Court has never held that certain claims must be brought under civil rights statutes. But the case law is a little bit blurrier than you might find in many other contexts. And so it's just important to rely on these three cases, and to explain that the rule extracted is really this rule about the remedy that you are seeking. And it doesn't really have to do with whether the label of conditions applies or not. Rather, it's what do you want as the result of your litigation.

And I think another key point in the circumstance is, sometimes people ask, well, won't this lead to floodgates? And won't this mean that everyone who has a conditions claim can bring a habeas claim? And really the thing to think about is habeas as a vehicle. And it doesn't necessarily mean that every single person who has a conditions claim has a claim that there is no set of circumstances under which they can get relief absent relief. And it is only in that very narrow set of circumstances that a habeas claim is clearly successful.

And whatever happens for other conditions claims in this narrow set of circumstances, it is appropriate to bring a habeas claim in light of this case law. So that's sort of the overarching argument. And that's really the major hurdle that we've encountered in the Fifth Circuit that I think is unusual to other circuits. But in addition to that, we've also encountered some hurdles of splitting petitioners, which I will turn it over to Fatma to talk about.

- Great, thank you. Yeah, so that was one thing that happened in our case, in at least one other case, where we filed a joint petition for 11 people, and the court split it into 11 petitions without too much explanation. There's also another case where the judge provided a little bit more reasoning, and basically cited the joinder rule, saying that you can only join cases if they arise out of a single transaction, or have a common question of law or fact, as well as the rules governing 254 cases. Rule 2(e) and 1(b) were cited.

And yet, as we know, other courts around the country have allowed them to be filed jointly. So even in our case where that they were split up, they allowed consolidated briefing. So I think that's one thing to ask for, to minimize your work so that you don't have to brief each case separately. I think the idea is if it's at least the same detention center, and you're going to be talking about conditions at that detention center, it makes a lot of sense to brief it once. And then we just included some of the individual facts about people's health conditions in the brief. But that's something to just be wary of as something that might happen.

OK, if there's no last thoughts from our panelists, we'll switch to Q&A here. Does anyone else have anything else they wanted to add to their presentations? OK, well, we'll just jump in with the Q&A. I'll start with some that we received before the webinar, and we'll add some that we got today. So one of the questions we got was whether you can bring a habeas for someone subject to mandatory detention. Anyone want to take that?

- I can take that, because a lot of our clients were in the COVID habeas petitions that we filed. I think traditionally, most habeas petitions in the immigration context have been brought on behalf of people who are mandatorily detained, because those are the people who are most likely to end up spending enormous amounts of time detained without a bond hearing, without procedural safeguards. So I think courts that see these habeas petitions are accustomed to considering the

question of whether the confinement of someone was subject to the mandatory detention statute may still be unconstitutional.

And a lot of courts have answered that question affirmatively in other contexts. And so in the COVID context, we basically have been arguing, as I think others, that it's the same thing. It doesn't matter. Just because you're under the mandatory detention statute doesn't mean that the government can unlawfully punish you. It doesn't mean that you can be detained in unconstitutional conditions. It doesn't mean that you're not medically vulnerable, and your life isn't at risk.

And courts have by and large-- well, the courts that have granted these petitions haven't said no for those with mandatory, by and large. I think there might have been one case where that did actually-- I think you might have Judge Ellison, actually, in Texas, who might have denied one person and granted two others. But anyway, I'm not sure, actually.

- The Constitution should trump the statute.

- Yeah.

- So--

- I think there's some--

- Yeah.

- Yes, there's some mixed bag about that that I just remembered from some of the early cases. But by and large, I think the courts have said that that's true.

- Yeah, and in *Vazquez Barrera* we have an explicit holding in a PI context, that people who are mandatorily detained under 1226(c) and 1231(a)(2) can still bring these habeas petitions, and the statutes are no bar to doing so.

- Can I just add to that? Because I think, Fatma, the point you made is really important. In other words, remember when Kate said, the idea behind this is you can't be punished if you're in immigration detention. And it would amount to punishment if we took civil detention scheme, but then altered it so that it is risking your life. And so if the likelihood of your death or imminent illness is such that that's what your detention imposes upon you, that that would amount to punishment.

And that's the constitutional protection that you have, that if you're in civil, non-punitive detention, they can't punish you. They can't turn it into punishment. And so threatening to deprive your life is basically like playing Russian roulette, and that is punishment that's forbidden by the Constitution. That always has to trump even a mandatory detention statute. Just wanted to--

- And just to add onto the constitutional stakes, also habeas requires a particularly clear statement from Congress that habeas will be precluded. And so in *Vazquez Barrera*, the court said the defendants haven't shown evidence of such a clear statement. And so the suspension clause has to apply in this context and it must be a habeas relief.

- Yes, absolutely. And I just want to correct what I said before. What had happened in that Judge Ellison case was that he denied release for one person on grounds of dangerousness, but not because that person was covered by the statute. It was a different analysis.

- Yeah, and that's entirely on the public interest prong of the preliminary injunction, does not go to likelihood of success on the merits, and merely a PI, public interest, weighing the individual context.

- We have another question about people who don't have any underlying medical conditions. Can we bring a habeas for them based on conditions? [INAUDIBLE]

- So all of us believe that detention is overused in this context and shouldn't be used at all. So I just want to make that really clear, in terms of where we come from. That being said, we don't need to lose cases. Because we want to be able to get people out of custody. The cases that are the strongest right now are where there's COVID in the facility, the facility is such that people are exposed to COVID. They can't prevent the exposure through social distancing, and masks, and other means, and frequent cleaning, and so forth, and the exposure is greatest for people who are medically vulnerable.

And so we've just seen from all of these cases that those three things really need to be in place in order to win before most district court judges. And I'm talking about most judges who are reasonable, and who have an open mind about whether these claims are available under the Constitution. They need to see those things. So it's probably not in anyone's interest to litigate the cases on behalf of people who are not medically vulnerable at this time, even if there are 50 or 60 COVID cases in the facility.

- I guess maybe the one caveat I would make to that is that the *Savino v. Sosa* case that was brought in Bristol, Massachusetts did make claims on behalf of everyone, and was successful, but that was a very different circuit and bench. The other qualifying point I would make about that is that some of the big class actions have been asking for release for medically vulnerable and conditions reforms for everyone else. And so that's something you might consider.

You might be able to say that even for someone who is not medically vulnerable, there should be at least conditions reform. But I think that you would have a very hard time convincing the court to actually release them.

- Yeah, and given the Fifth Circuit, and the way it has gone in the *Valentine* case, it just seems like you want to be able to win, and win quickly on behalf of the clients who are the most vulnerable. And so in the Fifth Circuit that just means people who are in fact medically vulnerable under the CDC guidelines.

We're familiar with the fact that all of this is a pretty big lift. It's not easy to do a habeas on behalf of four people, especially when you have to find medical experts. And so given that, it makes sense to put the time and effort in for a winnable case.

Fatma, can I answer another question that was in the Q&A?

- Go ahead.

- Which was about how do we find these medical experts? So a lot of the medical experts have been used in more than one case. So some of it has involved contacting the medical experts, let's say from Fraihat or from other cases, to say, are you available? In addition, I think people have been looking at local doctors, not only infectious disease specialists, but also family practitioners. People who could say, for example, I've looked at this person's medical file, and I know based on 20 years of practicing internal medicine, this person falls within this category that the CDC has already determined.

So there has got to be a combination of using those nationwide medical experts, but also a local expert who can just look at your client's case to figure out what can be done. And I really think this is where talking to people like Kate, like Sirine, like Fatma, who have done some of these cases, can be really helpful. Because we can all put you in touch with the doctors and other experts who we used.

- And on that point--

- Go ahead, Kate.

- On the point of non-medically vulnerable, I just wanted to add, I'm not aware, and I don't know if anyone else on the panel is aware, but I would be surprised if any non-medically vulnerable individual who has gotten court-ordered relief within the Fifth Circuit.

- No. It's been hard enough--

Yeah.

- Yeah, I will note that the O.M.G. litigation on behalf of family detention centers was filed in DC and not in the Fifth Circuit. And there was no-- there is still is no COVID in those centers. But it was also filed as a Mandamus. It's a little bit different. But because those were children involved, there are special considerations there.

- Fatma, there was also-- there was a question about *Thuraissigiam*.

- Yes.

- Does anyone want to-- it seems like we should say a few words. I can try, but other people should also chime in. So there's this horrible, horrible Supreme Court decision that came down this morning about the ability of people who have lost their asylum claims in the expedited

removal context to challenge through habeas as summary decision that doesn't give proper grounds for the decision. And unfortunately, the Supreme Court in that context said, no, you can't challenge through habeas. It's a terrible, terrible decision.

But it clearly falls outside the scope of this traditional habeas seeking release from confinement. Which I think even-- I read it very quickly, but even in the *Thuraissigiam* decision, I think part of the reasoning is that distinction, that there are limitations on how you can use habeas in the immigration context. And expedited removal context, there are specific jurisdictional bars that apply. And that this is not a challenge to the fact of confinement. And it's not trying to get out of detention.

So I think that we're still safe on this side of the fence. I would also say that in the immigration context, on the fact and condition stuff, we may be in slightly better territory because the Prison Legal Reform Act that was so critical in the *Valentine* decision doesn't apply. Because that statute is a very big and massive statute that creates all kinds of limitations on what kind of relief a district court can order in the prison context, and what steps you have to take before you can even go to court. Whereas, those things don't apply squarely in the immigration context. So that's just something to note about that distinction there also.

- Great. We have another question that came in that I'll take now, because it's a little bit related, about people with mental health issues or psychiatric illnesses, asking if there was any successful cases here in the Fifth Circuit, or where it's been alleged. I'll say that I know it's been alleged in several cases. I don't know any that have succeeded, at least not where the challenge was to COVID versus prolonged detention.

I have one that I filed yesterday that was based on prolonged detention, but actually intentionally left out the COVID related things for various reasons in that case. Mental health is covered by the Fraihat order. The Fraihat categories of people with vulnerabilities is much broader than the CDC's. So ICE would still have to do custody review for people with mental illness, but I'm not sure how compelling that would be to a district court judge, unless you can make that link to why they're at greater risk.

And sometimes the link is that they might become more symptomatic. They might become more suicidal, or manic, or pose a greater-- that their symptoms might be such that their health is now endangered, not necessarily because of being infected, but because of the stress created by being detained during a pandemic, and the impact that has on their own mental health. But I want to open this up to others to weigh in on their thoughts on this issue, if anyone has anything to add.

- The only thing I would add there is it circles back to the question about medical experts and public health experts. If you have a gray area or threshold sort of case, it's even more important to make sure that you have like a really solid medical expert who can weigh in on why. Given the CDC-- like we've had medical experts in some cases say, given the CDC criteria and this new research that's coming out, this person should be considered medically vulnerable. So tying the dots or drawing that connection.

And in addition to what Ranjana articulated about that, I would just flag that there has been-- Carlos Franco-Paredes, very early on, did like a general declaration that he allowed anybody who wants to to use. It's a little bit dated, but I think it's possible that he could be asked to update it or something like that. So there are some general use things that are available. And we've included the Paredes Franco one in the practice advisory that [INAUDIBLE] issued early on about release strategies. It also includes humanitarian parole requests and bond determination requests. So you should take a look at that if it's helpful. And obviously, especially when you have threshold, gray area cases, you should also have your own doctor, who is here, who can say this client is medically vulnerable. But it can sort of stand in.

- Can I add something to that that Sirine's point reminded me of? Which was when we filed our El Paso case, we also did some research into how the disease was spreading or being handled in El Paso. So one of the things that was important was not only how many beds does this facility have, what can they do if people get sick, or if the number of cases spreads within the facility, but also how many hospital beds are available at the hospitals in the community and how full are they. So you really want to paint a picture of the broader risk as well. Because as we all know, when there are disease cases in the facility, well, the COVID spreads to not only the detainees, but the staff, who then take it out into the community, and so it increases community spread.

So knowing how the case numbers were growing in the community at the time, and also knowing what their ICU bed capacity was is useful information for the court. And we did the thing that Sirine said, which is we looked at the general declarations that were already available. And then we updated them. So in fact, Dr. Franco-Paredes helped us update his declaration.

Because as we learn more and more about the disease, the doctors are learning far more about the disease than we are. And so they're able to provide even more information about transmission and recovery rates, that should be also incorporated as we go. So some of the information from April is still good today, even though it's end of June. And then some of it, they can even add more useful stuff for the court.

- I just want to loop back to the larger Fraihat point and severe mental illness. I think this also goes back to Ranjana was talking about early on, regarding administrative exhaustion or really also alternate avenues. So some people have submitted a Fraihat custody redetermination letter on behalf of their clients, and have gained successful release for their clients that way. And so advocating directly with ICE, even though ICE is supposed to be conducting these Fraihat redeterminations independently, putting all of the evidence very clearly before the agency, and gaining release that way.

- Great. In terms of fact gathering, we've touched on several things. Is there anything else about what facts we should gather about conditions at the detention center that people want to give advice on? We talked about the number of beds, social distancing possibilities, that could be in the dorms or at meals, in the law library, wherever, throughout the facility, the availability of medical beds in the community. Are there other things that you would recommend gathering evidence about?

- One of the things that we looked at is commingling between people who had been exposed to someone who had COVID and people who had not, and/or commingling among people who had tested positive for COVID and people who had not. And so whether that's, as you said, Fatma, commingling during meals or commingling at the bathrooms. The other thing that came up in our facility was that people shared tablets to make family phone calls. And so all the tablets were in an area.

And part of this is that because it's a dormitory setting, social distancing is hard to not just accomplish, but enforce. So there's no mechanism to enforce social distancing. And so, therefore, just like you and I might have three other people in our home with whom really it's sort of functionally difficult to socially distance, we're talking about 30 or 40 people in a similar setting, in the dormitory setting at these facilities.

So I think it's a good idea, as you say, Fatma, to include as much of that information as possible, and not assume that that's not going to be relevant. Let's assume it's all going to be relevant to showing how, gosh, you can't get hand sanitizer at the moment you need it. There isn't additional soap when you want it. There's no way you can have a toilet to yourself or a sink to yourself. That's not possible in the dorm setting.

And also, you're going to sit next to this person as they hand you the tablet so you can make a phone call to your family member. So painting the picture of all the ways in which people are in close proximity to each other can be very beneficial for the court.

- I completely agree with Ranjana. And just to add on to that, in thinking about social distancing, we have declarations in our litigation from detainees about their particular conditions, and especially about the capacity of their dorm room, and the percentage of capacity that they're at. So it may be that the government says, oh, the facility is at 30% capacity. That doesn't really matter to your client if they're in a dorm that's at 66% capacity. And so looking at your client's information on a really granular level.

And additionally, we have declarations from other people who have visited the facility and can speak to the structure of the facility about, as Ranjana mentioned, the congregate environment, are people detained in dormitories, would social distancing be possible in the dormitory, how many tables are people using, the number of bathrooms, and the number of toilets, and the number of sinks, whether they share common objects, like microwaves, or phones. So looking to all of that granular information.

And then also, as Ranjana mentioned, looking at whether otherwise compliance with the CDC guidelines is possible, so hygiene, particularly access to soap, access to paper towels, handwashing, education also on social distancing, and education on hygiene. So has the detention facility explained to everyone what social distancing is and how to do it. Additionally, looking at how the facility staff are interacting with those who are detained. Because the facility staff are likely to be a vector for COVID coming into the facility. So are staff members regularly wearing masks? Are they interacting with different dormitories, including both COVID positive dormitories and other dormitories?

And then finally, as Ranjana mentioned, looking at exposure. And I would really recommend going to the CDC website and looking at the CDC's guidance for correctional facilities and detention facilities regarding cohorting and detaining people together or not if they have been exposed to the virus. And there's a case in the Southern District of Florida, called *Gayle v. Meade*, in which the court held that this cohorting practice of detaining a bunch of people who have been exposed to COVID-19 together is itself evidence of deliberate indifference on the part of ICE. So looking to all of those factors and really using the CDC guidance as the touchstone.

- Great, thank you. One other question we had was about communicating securely with clients. I know in our case when people were in quarantine in Prairieland, they lost access to a confidential attorney-client line. They were given a phone, but it was a monitored phone. Has anyone else had issues communicating securely with detained clients? And how do you handle it?

- Yeah, this is happening across the board, especially when certain dorms are on lockdown because of COVID. One of the things we've had some success with, especially in cases where we've already gotten one good decision and are now moving to a class allegations or something like that, is to get the US Attorney to help us make contact with our clients.

Because I do think that it kind of looks bad if we start filing things on the docket saying we can't reach our clients. And so sometimes, and it depends on the attorney on the other side, but sometimes the US Attorneys will facilitate. Like they'll kind of push on the facility, and say, you have to facilitate a legal call. And then some facilities have sort of switched midway through to allow only legal calls during lockdowns, or something like that. It kind of depends on the facility and also who your counterpart is in the litigation. But those are some things you can try.

- Another question, is there any possibility of being re-detained after the pandemic is over?

- Yeah, I'm glad somebody asked that. We actually told our clients about that, in terms of setting expectations, which is that it is possible that they will re-detain you, or try to re-detain you once the pandemic is over. And also that if you get out, that they may try to impose additional supervision restrictions down the line as well. So I think people do need to be prepared for that.

- And then we have a question about a situation where removal proceedings are terminated, but the person is still detained. What arguments can you make there? Would they be different? So the rule proceedings are over, but the person is still detained. I don't know if that's because removal is not possible, so just detain [INAUDIBLE]. We don't have more information, but anyone have thoughts on that?

- That sounds like a classic *Zadvydas* type habeas petition, where the person's post removal order, but maybe their country won't take them back. And so those are still very viable prolonged detention habeas cases, even in the Fifth Circuit, or as much in the Fifth Circuit as anywhere else. So I would definitely look back at *Zadvydas*.

- Great, thank you, everyone. I will just give some concluding remarks. Just so you know, this video and the slides will be available on the website, which is TAMULawAanswers.info by next week. And you can also find previous videos and slides from our series posted there.

I'd love to thank all of our speakers. And as I said, there will be additional information posted on the website for participants. So do check back with that. Thank you, everyone.

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.