LITIGATING IMMIGRATION DETENTION CONDITIONS:
AN INTRODUCTORY GUIDE[1]

This guide provides an overview of civil litigation related to conditions of confinement in immigration detention. The guide first provides a general description of immigration detention in the United States, types of facilities in which the federal government currently detains immigrants, and agency detention standards. The guide then examines constitutional standards applicable to the treatment of immigrant detainees and identification of proper defendants and claims for relief from constitutional violations. The guide finally identifies potential statutory claims to challenge conditions of confinement in immigration detention, and applicability of the Prison Litigation Reform Act (PLRA) to immigration detention.

I. Overview of Immigration Detention

Each year, the federal government detains hundreds of thousands of non-citizens who are awaiting decisions in their removal cases in a sprawling network of approximately two hundred jails and detention facilities across the country.

Immigrant detainees include recent border crossers, asylum seekers fleeing persecution in their home countries, undocumented community members, people who have overstayed their visas, and lawful permanent residents with criminal records. People typically arrive in immigration custody after being apprehended by Customs and Border Protection (CBP) if they express a fear of return or have a claim to lawful status in the United States; through interior enforcement operations directly conducted by Immigration and Customs Enforcement (ICE) or Homeland Security Investigations (HSI), including raids in their homes or workplaces, or on their way to school or church; or as a result of interactions with the criminal system, including arrest by local police, release, or the conclusion of their sentence.

Although the Department of Homeland Security (DHS) detains the vast majority of immigrants, other agencies, including the Department of Health and Human Services (HHS) also detain immigrants, including minors. The Department of Justice's (DOJ) Bureau of Prisons (BOP), also maintains Criminal Alien Requirement prisons exclusively for non-citizens in

[1] Last updated March 2024 by Eunice Cho, Senior Staff Attorney, ACLU National Prison Project, 915 15th St. NW, Washington, DC 20005, (202) 548-6616, echo@aclu.org. This document builds upon a previous 2022 version updated by Eunice Cho; a 2008 version authored by Tom Jawetz (2008), with additional adaptations based on John Boston, *Thoughts on Immigration Detention Conditions Litigation, Prepared for the Third Annual Immigration Roundtable, Yale Law School* (2013), and on COVID-19 related research compiled by My Khanh Ngo, ACLU Immigrants' Rights Project.

federal criminal custody, often for immigration status-related criminal convictions, such as illegal reentry.[2]

The widespread use of immigration detention is relatively recent: prior to the 1980s, the federal government rarely detained individuals for civil immigration violations.[3] As early as 1994, the federal government detained approximately 7,000 immigrants per day.[4] The enactment of the Antiterrorism and Effective Death Penalty Act (AEDPA)[5] and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) in 1996,[6] which broadened the grounds for mandatory detention of immigrants, transformed the immigration detention system. By 2014, the federal government held over 32,000 immigrant detainees per day.[7]

The number of immigrants detained by the federal government grew at an astronomical rate under the Trump administration. At its peak, the federal government detained over 52,000 people per day, exceeding the limit of 45,000 beds placed on the DHS by Congress in 2019.[8] ICE has detained fewer people during the COVID-19 pandemic, and the daily average population in ICE detention reached a low of approximately 13,000 people in the spring of 2021.[9] As of February 2024, ICE detains an average of over 38,000 people per day.[10]

Private prison companies operate the overwhelming number of immigration detention beds. As of 2023, 90.8 percent of the average daily population of people in ICE custody were held in facilities operated by private prison companies.[11] ICE has paid private prison corporations such as the GEO Group, Inc. and CoreCivic billions of dollars for ICE detention contracts in the past two decades. These companies rely heavily on government contracts for revenue. Revenue from contracts with ICE made up approximately 43.9 percent of revenue, or $1.05 billion for the GEO Group in 2022; CoreCivic similarly made $552.2 million in ICE detention contracts in 2022, representing 30 percent of its total revenue.[12] Other private prison

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[2] ACLU, WAREHOUSED AND FORGOTTEN: IMMIGRANTS TRAPPED IN OUR SHADOW PRIVATE PRISON INDUSTRY (2014), https://www.aclu.org/other/warehoused-and-forgotten-immigrants-trapped-our-shadow-private-prison-system?redirect=CARabuse.
[3] *See* Ana Raquel Minian, *America Didn't Always Lock Up Immigrants*, NEW YORK TIMES, Dec. 1, 2018, https://www.nytimes.com/2018/12/01/opinion/sunday/border-detention-tear-gas-migrants.html.
[4] *Containing Cost of Incarceration of Federal Prisoners and Detainees: Prisons and Related Issues, Hearings Before a Subcomm. of the Comm. On Appropriations*, 104th Cong. 1058 (1995) (statement of James A. Puelo, Exec. Assoc. Comm'r, Immigration & Naturalization Serv.).
[5] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440(a), 110 Stat. 1214 (1996).
[6] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 133, 110 Stat. 3009 (1996).
[7] U.S. IMMIGRATION & CUSTOMS ENF'T, WEEKLY DEPARTURES AND DETENTION REPORT 5 (2016).
[8] Hamed Aleaziz, *More than 52,000 People Are Now Being Detained by ICE, an Apparent All-Time High*, BuzzFeed News (May 20, 2019), https://www.buzzfeednews.com/article/hamedaleaziz/ice-detention-record-immigrants-border.
[9] TRAC Immigration, *ICE Detainees, Part A: ICE Detainees by Date and Arresting Authority*, https://trac.syr.edu/immigration/detentionstats/pop_agen_table.html (last visited Feb. 23, 2022).
[10] *Id*.
[11] Eunice Cho, *Unchecked Growth: Private Prison Corporations and Immigration Detention, Three Years Into the Biden Administration*, Aug. 7, 2023, https://www.aclu.org/news/immigrants-rights/unchecked-growth-private-prison-corporations-and-immigration-detention-three-years-into-the-biden-administration.
[12] *Id.*

corporations, such as MTC and LaSalle Corrections, also own and/or operate a number of ICE detention facilities.[13]

A. Types of Detention Facilities

The Department of Homeland Security detains the vast majority of immigrants under the custody of ICE and CBP. Immigration detention facilities include those operated by private prison corporations, family detention centers to hold mothers and children, and dedicated and non-dedicated local jails paid per bed by ICE or the U.S. Marshals under intergovernmental agreements.

CBP holds people caught attempting to cross the border in short-term facilities, mostly made up of municipal and county jails also under contract with private providers. CBP is permitted to hold detainees for up to 72 hours before transferring them to ICE (or the Office of Refugee Resettlement for unaccompanied minors).[14]

The Department of Health and Human Services Office of Refugee Resettlement (ORR) detains migrant children without their guardians in a separate set of facilities. ORR assumed responsibility for the care and custody of unaccompanied children in 2003 after years of advocacy following a settlement in *Flores v. Reno*. The *Flores* settlement, entered in 1997, established national standards for the treatment and placement of minors in what was then Immigration and Naturalization Service (INS) custody. The agreement required the government to release children from immigration detention without unnecessary delay in the custody of parents, other adult relatives, or licensed programs willing to accept custody; when this is not available, to place children in the "least restrictive" setting; and to implement standards relating to the care and treatment of children in custody. [15]

ICE also holds a number of immigrant detainees in U.S. Bureau of Prisons, U.S. Marshals facilities or other sites, including hotels and hospitals.[16]

B. Detention Standards

DHS and HHS have issued standards and guidance governing conditions of confinement in immigration detention.

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[13] ACLU, HUMAN RIGHTS WATCH, NATIONAL IMMIGRANT JUSTICE CENTER, JUSTICE FREE ZONES: U.S. IMMIGRATION DETENTION UNDER THE TRUMP ADMINISTRATION 15 (2020), https://www.aclu.org/report/justice-free-zones-us-immigration-detention-under-trump-administration.

[14] U.S. Border Patrol Chief David Aguilar, U.S. Border Patrol Policy, "Subject: Detention Standards," (reference No: 08-11267), 3 at § 6.2.4.1, January 31, 2008, available at https://www.documentcloud.org/documents/818095-bp-policy-on-hold-rooms-and-short-term-custody.html.

[15] Stipulated Settlement Agreement, *Flores v. Reno*, No. cv-85-4544-RJKK (C.D. Cal. Aug. 12, 1996), available at https://www.aclu.org/sites/default/files/assets/flores_settlement_final_plus_extension_of_settlement011797.pdf.

[16] Tara Tidwell Cullen, *ICE Released Its Most Comprehensive Immigration Detention Data Yet. It's Alarming*, https://immigrantjustice.org/staff/blog/ice-released-its-most-comprehensive-immigration-detention-data-yet (Mar. 13, 2018).

ICE Detention Standards. ICE has promulgated several different sets of detention standards to address the treatment of detainees, services, and operations in its facilities. These standards include: (1) the 2000 National Detention Standards (NDS);[17] (2) the 2008 Performance-Based National Detention Standards;[18] (3) the 2011 Performance-Based National Detention Standards, as amended in 2016;[19] and (4) the 2019 National Detention Standards.[20] All ICE-owned facilities are governed by PBNDS 2011. Contract detention facilities and state or local governmental facilities used by ICE under IGSAs are bound by varying versions of detention standards; there is no consistent national standard for all facilities.

Family Residential Standards. ICE Detention and Removal (DRO) has also promulgated the Family Residential Standards, updated in 2020,[21] to address the treatment of detainees in its family detention centers. These standards address topics including discipline, use of control measures and restraints, sexual assault prevention, the voluntary work program, food service, hunger strikes, medical care, education of children, access to counsel and administration.

U.S. Customs and Border Protection Standards. In 2015, CBP implemented the National Standards on Transport, Escort, Detention, and Search (TEDS), an agency-wide policy setting forth its first nationwide standards which govern CBP's interaction with detained people.[22] The TEDS include requirements related to transport, escort, detention, and search provisions, as well as sexual abuse assault prevention and response, care of at-risk individuals in custody, and personal property.

Office of Refugee Resettlement Standards. In 2015, DHHS ORR implemented *Children Entering the United States Unaccompanied*, regarding the placement, release and care of unaccompanied children in ORR custody. The guide, updated in 2021, covers placement of minors into ORR care facilities, required services, including health care and legal services, protections from sexual abuse and harassment, and program management.[23]

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[17] Immigration and Customs Enforcement, 2000 National Detention Standards (2000), available at https://www.ice.gov/detain/detention-management/2000.
[18] Immigration and Customs Enforcement, 2008 Operations Manual ICE Performance-Based National Detention Standards (2008), available at https://www.ice.gov/detain/detention-management/2008.
[19] Immigration and Customs Enforcement, 2011 Operations Manual ICE Performance-Based National Detention Standards (2011), available at https://www.ice.gov/detain/detention-management/2011; Immigration and Customs Enforcement, ICE Performance-Based National Detention Standards 2011, Rev. 2016 (2016), available at https://www.ice.gov/doclib/detention-standards/2011/pbnds2011r2016.pdf.
[20] Immigration and Customs Enforcement, National Detention Standards for Non-Dedicated Facilities, Revised 2019 (2019), available at https://www.ice.gov/doclib/detention-standards/2019/nds2019.pdf. *See also* Eunice Cho, *Summary of Changes to ICE National Detention Standards* (2020), https://www.aclu.org/fact-sheet/summary-changes-ice-national-detention-standards.
[21] Immigration and Customs Enforcement, Family Residential Standards (2020), available at https://www.ice.gov/doclib/frs/2020/2020family-residential-standards.pdf.
[22] U.S. Customs and Border Protection, National Standards on Transport, Escort, Detention, and Search (2015), available at https://www.cbp.gov/document/directives/cbp-national-standards-transport-escort-detention-and-search.
[23] Office of Refugee Resettlement, *Children Entering the United States Unaccompanied* (2021), available at https://www.acf.hhs.gov/orr/policy-guidance/children-entering-united-states-unaccompanied.

ICE Segregation Directive. In 2013, ICE issued *Review of the Use of Segregation for ICE Detainees*, an agency directive establishing policy and procedures for the review of ICE detainees placed into segregated housing (solitary confinement).[24]

ICE Directive on Pregnant Detainees. In 2021, ICE issued *Identification and Monitoring of Pregnant, Postpartum, and Nursing Individuals*, an agency directive that sets forth policy and procedures for ICE to identify, monitor, track, house, and release pregnant, postpartum, or nursing people in detention. The directive limits the use of restraints, and generally provides for the release of pregnant, postpartum, or nursing people from detention.[25]

ICE Directive on Release Planning for Detained Individuals with Serious Mental Disorders. In 2022, ICE issued *Identification, Communication, Recordkeeping, and Safe Release Planning for Detained Individuals with Serious Mental Disorders or Conditions and/or Who Are Determined to Be Incompetent by an Immigration Judge*, an agency directive establishing policy and procedures for the review of ICE detainees with mental health issues, including a requirement that detained individuals with serious mental health issues be provided with appropriate care, monitoring, and consideration of release or off-site treatment.[26]

ICE Detainee Deaths. In 2021, ICE released an updated directive, *Notification, Review, and Reporting Requirements for Detainee Deaths*, which outlines policies and procedures for the initial notification, review, and ongoing reporting about the death of individuals in ICE custody. The directive also provides for detainee deaths that take place shortly after release, but only when review is requested by the ICE director.[27]

IHSC Directives. The ICE Health Service Corps has issued its own set of internal directives regarding the provision of medical and mental health care of people in ICE detention. However, these directives have become publicly available only as the result of Freedom of Information Act (FOIA) requests and litigation by advocates, which have been published in various locations.[28]

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[24] Immigration and Customs Enforcement, 11065.1: Review of the Use of Segregation for ICE Detainees (Sept. 4, 2013), https://www.ice.gov/doclib/detention-reform/pdf/segregation_directive.pdf.

[25] Immigration and Customs Enforcement, Directive: Identification and Monitoring of Pregnant, Postpartum, or Nursing Individuals (Jul. 9, 2021), https://www.ice.gov/directive-identification-and-monitoring-pregnant-postpartum-or-nursing-individuals.

[26] Immigration and Customs Enforcement, 11063.2: Identification, Communication, Recordkeeping, and Safe Release Planning for Detained Individuals with Serious Mental Disorders or Conditions and/or Who Are Determined to Be Incompetent by an Immigration Judge (Apr. 5, 2022), https://www.ice.gov/doclib/news/releases/2022/11063-2.pdf.

[27] Immigration and Customs Enforcement, 11003.4: Notification, Review, and Reporting Requirements for Detainee Deaths (Dec. 2, 2020), https://www.ice.gov/doclib/detention/directive11003-5.pdf.

[28] *See, e.g.* ICE Health Service Corps, ICE Health Service Corps (Index) (unspecified date), https://s3.documentcloud.org/documents/6795526/IHSC-Index.pdf. Several IHSC directives are located on documentcloud.org; we recommend a search for "IHSC," which results in a listing of relevant directives.

II. Applicable Constitutional Standards: Conditions in Civil Detention

A. Immigrant Detainees as Compared to Prisoners and Pre-Trial Detainees

The constitutional standards that apply to *convicted prisoners* in the United States are well developed. Convicted prisoners are protected by the Eighth Amendment to the United States Constitution which prohibits the infliction of "cruel and unusual punishments."

The Fourteenth Amendment also protects pretrial detainees in criminal custody. Pretrial detainees have due process rights that are "at least as great" as the Eighth Amendment protections afforded to prisoners. *City of Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 244 (1983). While convicted prisoners are protected only against "cruel and unusual punishment," pretrial detainees cannot be subjected to any conditions that constitute "punishment." *Bell v. Wolfish*, 441 U.S. 520, 535 (1979) (noting that "under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law."). As will be discussed further below, in light of this distinction, detainees may enjoy greater protection against mistreatment in custody than do convicted prisoners. *See Kingsley v. Hendrickson*, 576 U.S. 389 (2015).

Likewise, the Fourteenth Amendment protects people in civil confinement or detention (including people involuntarily committed to psychiatric hospitals). *Youngberg v. Romeo*, 457 U.S. 307, 314 (1982). People who have been civilly detained or committed "are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish." *Youngberg*, 457 U.S. at 321-22.

Immigrant detainees, even those with criminal records, are civil detainees held pursuant to civil immigration laws. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) ("The proceedings here at issue are civil, not criminal, and we assume that they are nonpunitive in purpose and effect."). Their protections are thus derived from the Fifth Amendment, which similarly protects any persons in the custody of the United States from conditions that amount to punishment. *Id.*; *Wong Wing v. U.S.*, 163 U.S. 228, 237-38 (1896); *see, e.g. Hernandez Roman v. Wolf*, 977 F.3d 935, 943 (9th Cir. 2020) ("The Fifth Amendment requires the government to provide conditions of reasonable health and safety to people in its custody."); *Hope v. Warden of York Cnty Prison*, 972 F.3d 310, 325 (3d. Cir. 2020) ("Petitioners are in federal custody pursuant to the [Immigration and Nationality Act] and housed in state facilities, so they are protected by the Due Process Clauses of the Fifth and Fourteenth Amendments.").

Many circuit courts have concluded that immigrant detainees should receive an equivalent constitutional standard of protection as pre-trial detainees. *See Charles v. Orange Cnty*, 925 F.3d 73 (2d Cir. 2019); *E.D. v. Sharkey*, 928 F.3d 299, 306-07 (3d Cir. 2019) ("This Circuit has long viewed the legal rights of an immigration detainee to be analogous to those of a pretrial detainee."); *Chavero-Linares v. Smith*, 782 F.3d 1038, 1041 (8th Cir. 2015); *Belbachir v. County of McHenry*, 726 F.3d 975, 979 (7th Cir. 2013); *Porro v. Barnes*, 624 F.3d 1322, 1326 (10th Cir. 2010); *Edwards v. Johnson*, 209 F.3d 772, 778 (5th Cir. 2000).

The Ninth Circuit has held that conditions of confinement for civil detainees must be *superior* not only to convicted prisoners, but also to pre-trial criminal detainees. *Jones v. Blanas*, 393 F.3d 918, 933-34 (9th Cir. 2004), *cert. denied*, 546 U.S. 820 (2005); *King v. Cnty. of Los Angeles*, 885 F.3d 548, 552, 557 (9th Cir. 2018) (finding presumption of punitive and thus unconstitutional treatment where conditions of confinement for civil detainees are similar to those faced by pre-trial criminal detainees). However, the Ninth Circuit has recently called into question, but has not decided, the application of this presumption to federal immigrant detainees. *Fraihat v. U.S. ICE*, 16 F.4th 613, 648 (2021). Although this question remains undecided, it is clear that the Ninth Circuit recognizes the distinction between prisoners and detainees, and has at least applied standards applicable to pre-trial criminal detainees under the Fourteenth Amendment to claims brought by immigrant detainees under the Fifth Amendment. *Hernandez Roman v. Wolf*, 977 F.3d 935, 943 (9th Cir. 2020) (quoting *Gordon v. Cnty of Orange*, 888 F.3d 1118, 1125 (9th Cir. 2018)); *Zepeda Rivas v. Jennings*, 845 Fed. Appx. 530, 534 (2021) (same).

B. Evolving Conditions Standards for Pretrial Detainees under *Kingsley v. Hendrickson*

As discussed above, pretrial detainees (and by extension, immigrant detainees) cannot be subject to any conditions that constitute punishment. *Bell v. Wolfish*, 441 U.S. 520, 535 (1979). A detention condition or practice may be unconstitutionally punitive if it (1) is intended to punish or is "imposed for the purpose of punishment"; or (2) is not "reasonably related to a legitimate nonpunitive governmental purpose" or is "excessive" in relation to the stated purpose. *Id.* at 538-39. Under this test, a pretrial detainee does not need to show proof of intent or motive to punish to prevail in establishing that unconstitutional punishment has taken place, as a pretrial detainee can also establish, through objective evidence, that the challenged condition or practice is not rationally related or is excessive in relation to the government's purpose.

Recently, courts have reconsidered the standards by which detention conditions can be found to be unconstitutional punishment. In 2015, the Supreme Court ruled in *Kingsley v. Hendrickson* that pretrial detainees enjoy greater protection against excessive force by staff than do convicted prisoners. *Kingsley v. Hendrickson*, 576 U.S. 389 (2015). Convicted prisoners must show a subjective intent of punishment in order to prevail in an Eighth Amendment excessive force claim: that prison officials have "maliciously and sadistically use[d] force to cause harm." *Hudson v. McMillian*, 503 U.S. 1, 9 (1992). *Kingsley*, however, established that pretrial detainees need not show that an officer was subjectively aware that their use of force was unreasonable—only that the officer's use of force was *objectively* unreasonable. *Kingsley*, 576 U.S. at 391-92. "[T]he appropriate standard for a pretrial detainee's excessive force claim is solely an objective one." *Id*. at 397.

Several circuit courts have extended *Kingsley* beyond excessive force to other claims brought by pretrial detainees, including medical care and other conditions of confinement.

Medical Care. In the context of medical care, to show a violation of the Eighth Amendment, convicted prisoners must first show that they have a serious medical need, and second, that an official had subjective knowledge of that need and disregarded the excessive risk to the

prisoner's health or safety. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976); *Farmer v. Brennan*, 511 U.S. 825, 835, 837 (1994). To prevail on the second prong, a prisoner must show that the official was aware of facts from which an inference of serious risk of harm could be drawn, and that the official actually drew that inference. *Farmer*, 511 U.S. at 837.

Under *Kingsley*, however, the Second, Fourth, Sixth, Seventh, and Ninth Circuits have concluded that pre-trial detainees need not show the official's subjective knowledge of the risk of harm. Instead, these circuits have concluded that pre-trial detainees need only establish *objective* deliberate indifference—that the official knew *or should have known* that the conditions posed an excessive risk to the detainee, and intentionally or recklessly failed to act. *Miranda v. Cnty. Of Lake*, 900 F.3d 335, 352 (7th Cir. 2018) (concluding that "medical-care claims brought by pretrial detainees . . . are subject only to the objective unreasonableness inquiry identified in *Kingsley*"); *Short v. Hartman*, 87 F.4th 593, 605 (4th Cir. 2023); *Brawner v. Scott Cnty., Tennessee*, 14 F.4th 585, 596 (6th Cir. 2021); *Charles v. Orange Cnty*, 925 F.3d 73, 86-87 (2d. Cir. 2019); *Gordon v. Cnty. of Orange*, 888 F.3d 1118, 1120, 1122–25 (9th Cir. 2018); *Darnell v. Piniero*, 849 F.3d 17, 34-35 (2d Cir. 2017).

Other Conditions of Confinement. Circuit courts have also extended *Kingsley*'s objective standard to other pre-trial detainee challenges to conditions of confinement. *See, e.g., Hardeman v. Curran*, 933 F.3d 816 (7th Cir. 2019) (lack of water for drinking and sanitation); *Darnell v. Piniero*, 849 F.3d 17 (2d Cir. 2017) (environmental health and safety); *Castro v. County of Los Angeles*, 833 F.3d 1060 (9th Cir. 2016) (en banc) (failure to protect).

Limits to *Kingsley*. The Fifth, Eighth, Tenth, and Eleventh Circuits, however, have declined to extend *Kingsley* in some settings. *Cope v. Cogdill*, 3 F.4th 198 (5th Cir. 2021); *Strain v. Regalado*, 977 F.3d 984, 991 (10th Cir. 2020) (declining to extend to medical claims); *Swain v. Junior*, 961 F.3d 1276, 1285 n.4 (11th Cir. 2020); *Whitney v. City of St. Louis*, 887 F.3d 857, 860 n.4 (8th Cir. 2018); *Dang ex rel. Dang v. Sheriff, Seminole Cnty*, 871 F.3d 1272, 1279 n.2 (11th Cir. 2017); *Alderson v. Concordia Parish Corr. Facility*, 848 F.3d 415, 419 n.4 (5th Cir. 2017). Of the circuits that have declined to extend *Kingsley*, only the Tenth Circuit in *Strain* has done so in a reasoned way. *See Brawner*, 14 F.4th 596 (distinguishing *Strain*). *See also Griffith v. Franklin Cty.*, 975 F.3d 554, 589 n.1 (6th Cir. 2020) (Clay, J., concurring in part and dissenting in part) (noting that the Fifth, Eighth, and Eleventh Circuits are "unpersuasive" on *Kingsley* because they reached their conclusions "without analysis" or by "mechanically appl[ying] a circuit rule.").

C. Application of *Kingsley* Standard to Immigrant Detainees.

District courts have discussed the application of *Kingsley* in cases related to immigration detention, including in circuits where there is not yet a controlling appellate opinion on the question. Below is a summary of current caselaw:

First Circuit: The First Circuit has not yet decided whether *Kingsley* is applicable in cases beyond the excessive force context. However, several district courts in the circuit have concluded that the objective test established in *Kingsley* should apply in conditions of

confinement challenges brought by immigrant detainees. *See Yanes v. Martin*, 464 F. Supp. 3d 467, 469 n.3, 470 (D.R.I. 2020), *appeal dismissed*, No. 20-1762, 2020 WL 8482783 (1st Cir. Oct. 6, 2020) (concluding that "civil immigration detainees can establish a due process violation by showing that a government official 'knew, or should have known' of a condition that 'posed an excessive risk to health,' and failed to take appropriate action.") (citations omitted); *da Silva Medeiros v. Martin*, 458 F. Supp. 3d 122, 128 (D.R.I. 2020) ("Petitioners have the burden of showing a likelihood of success in proving that Respondents' conduct is 'objectively unreasonable.'") (citing *Kingsley*, 135 S. Ct. at 2473-74); *Gomes v. U.S. Dep't of Homeland Sec., Acting Sec'y*, 460 F. Supp. 3d 132, 148 (D.N.H. 2020) ("Based on the pertinent reasoning of *Kingsley* and the persuasive authority of other courts, it is likely that civil detainees no longer need to show subjective deliberate indifference in order to state a due process claim for inadequate conditions of confinement."); *Sallaj v. U.S. Immigr. & Customs Enf't*, No. CV 20-167-JJM-LDA, 2020 WL 1975819, at *3 (D.R.I. Apr. 24, 2020) (similar); *but see Savino v. Souza*, 459 F. Supp. 3d 317, 329 n.16 (D. Mass. 2020) (noting "the First Circuit has continued to conduct the subjective inquiry in due process cases even after *Kingsley*.").

Second Circuit: The Second Circuit has concluded that the *Kingsley* objective standard applies to pre-trial detention challenges to medical care and other conditions of confinement. *Charles v. Orange Cnty*, 925 F.3d 73, 86-87 (2d. Cir. 2019); *Darnell v. Piniero*, 849 F.3d 17 (2d Cir. 2017). Courts in the Second Circuit have broadly applied this standard in challenges brought by immigrant detainees. *See, e.g. Basank v. Decker*, 449 F. Supp. 3d 205, 214 (S.D.N.Y. 2020); *Coronel v. Decker*, 449 F. Supp. 3d 274, 284 (S.D.N.Y. 2020); *Jones v. Wolf*, 467 F. Supp. 3d 74, 84 (W.D.N.Y. 2020); *Ferreyra v. Decker*, 456 F. Supp. 3d 538, 550 (S.D.N.Y. 2020).

Third Circuit: The Third Circuit has not yet decided whether *Kingsley* is applicable in cases beyond the excessive force context. However, the Third Circuit noted in a challenge involving immigrant detainees, without analysis, that "[t]o establish deliberate indifference, Petitioners must show the Government knew of *and disregarded* an excessive risk to their health and safety. *Hope v. Warden York Cnty. Prison*, 972 F.3d 310, 329 (3d Cir. 2020) (citing *Nicini v. Morra*, 212 F.3d 798, 811 (3d Cir. 2000)) (emphasis in original). *See, e.g. Camacho Lopez v. Lowe*, 452 F. Supp. 3d 150, 161 (M.D. Pa. 2020) (applying traditional deliberate indifference test to immigrant detainee's inadequate medical treatment claim); *Jorge V. S. v. Green*, No. CV 20-3675 (SDW), 2020 WL 1921936, at *3 (D.N.J. Apr. 21, 2020) (same).

Fourth Circuit: The Fourth Circuit has not yet decided whether *Kingsley* is applicable in cases beyond the excessive force context. In *Coreas v. Bounds*, 451 F. Supp. 3d 407, 422 (D. Md. 2020), which involved medical care claims by immigrant detainees, the district court noted that "it is sensible, after *Kingsley*, to conclude that a different, less stringent standard should be applied to the claims of pretrial detainees relating to health and safety." However, the district court declined to reach the issue, concluding that it remained bound by pre-*Kingsley* caselaw in the circuit. *Coreas*, 451 F. Supp. 3d at 422 (citing *Hill v. Nicodemus*, 979 F.2d 987, 991-92 (4th Cir. 1992)). *See also Toure v. Hott*, 458 F.Supp.3d 387, 405-06 (E.D. Va. 2020) (applying traditional deliberate indifference standard to immigrant detainee medical claim).

Sixth Circuit: The Sixth Circuit has concluded that *Kingsley* is applicable in the context of medical care claims for pre-trial detainees. *Brawner v. Scott Cnty.*, 14 F.4th 585, 596 (6th Cir. 2021). Prior to *Brawner*, however, a district court had already concluded that *Kingsley*'s objective standard is applicable in immigration detention challenges. *Malam v. Adducci*, 469 F. Supp. 3d 767, 789 (E.D. Mich. 2020).

Seventh Circuit: The Seventh Circuit has adopted *Kingsley*'s objective inquiry standard in *Hardeman v. Curran*, 933 F.3d 816 (7th Cir. 2019). District courts have applied this standard in cases involving immigrant detainees. *See Ochoa v. Kolitwenzew*, 464 F. Supp. 3d 972, 986 (C.D. Ill. 2020); *Ruderman v. Kolitwenzew*, 459 F. Supp. 3d 1121, 1135 (C.D. Ill. 2020), *appeal dismissed*, No. 20-2312, 2020 WL 8184876 (7th Cir. Oct. 2, 2020); *Favi v. Kolitwenzew*, No. 20-CV-2087, 2020 WL 2114566, at *9 (C.D. Ill. May 4, 2020), *appeal dismissed*, No. 20-2372, 2020 WL 8262041 (7th Cir. Oct. 5, 2020); *see also Galan-Reyes v. Acoff*, 460 F. Supp. 3d 719, 724 (S.D. Ill. 2020) (citing *Kingsley*)

Ninth Circuit: The Ninth Circuit has adopted *Kingsley*'s objective standard for pre-trial detainees in *Castro v. Cty of Los Angeles*, 833 F.3d 1060, 1071 (9th Cir. 2016) and *Gordon v. Cty of Orange*, 888 F.3d 1118, 1124-25 (9th Cir. 2018). This standard also applies to immigration detention. *Hernandez Roman*, 977 F.3d at 943. However, the Ninth Circuit has noted that the "'reckless disregard' standard is a formidable one," requiring more than "mere lack of due care," "an inadvertent failure to provide adequate medical care," or "[m]edical malpractice." *Fraihat v. U.S. ICE*, 16 F.4th at 636. *See, e.g. Juarez v. Asher*, 556 F. Supp. 3d 1181, 1188 (W.D. Wash. 2021); *Pimentel-Estrada v. Barr*, 458 F. Supp. 3d 1226, 1243 (W.D. Wash. 2020).

Tenth Circuit: District courts in the Tenth Circuit have concluded that *Kingsley's* reasoning specifically applies to conditions of confinement claims in immigration detention. *Essien v. Barr*, 457 F. Supp. 3d 1008, 1014–15 (D. Colo. 2020) ("The reasoning in *Kingsley* holds even more true in the *civil* detention context, such as immigration detention. Moreover, in this respect, the Court sees no distinction between an excessive force claim and a conditions-of-confinement claim."); *Gomez-Arias v. U.S. Immigr. & Customs Enf't*, No. 20-cv-00857, 2020 WL 6384209, at *9 (D.N.M. Oct. 30, 2020) ("In order to prevail, Petitioner must demonstrate at a minimum that the conditions at Otero are objectively unreasonable.") (citing *Kingsley*, 576 U.S. at 397); *Betancourt Barco v. Price*, 457 F. Supp. 3d 1088, 1098 (D.N.M. 2020) (applying *Kingsley* to immigration detention). *But see Strain v. Regalado*, 977 F.3d 984, 991 (10th Cir. 2020) (declining to extend *Kingsley* to medical claims in pre-trial detention setting).

District of Columbia: The District Court of the District of Columbia has concluded that the *Kingsley* standard applies to challenges brought by immigrant detainees. *C.G.B. v. Wolf*, 464 F. Supp. 3d 174, 211 (D.D.C. 2020) ("The Court is persuaded, both by the language of *Kingsley* and by its fellow courts, to apply the *Kingsley* standard here as well. Accordingly, Plaintiffs need not prove deliberate indifference."). *See also O.M.G. v. Wolf*, 474 F. Supp. 3d 274, 287 (D.D.C. 2020) (applying *Kingsley* standard to immigration detention); *D.A.M. v. Barr*, 474 F. Supp. 3d. 45, 64 (D.D.C. 2020).

D. **Pre-*Kingsley* Immigrant Detention Medical and Mental Health Claims**.

Although detainee claims arise under a due process argument, prior to *Kingsley,* courts frequently analyzed medical and mental health claims under the same rubric as Eighth Amendment claims brought by prisoners. Earlier cases raising constitutional medical and mental health care claims in the immigration detention context have applied the same deliberate indifference standard applied in cases brought by prisoners. *See, e.g. Belbachir v. County of McHenry*, 726 F.3d 975 (7th Cir. 2013) (where asylum seeker in immigration detention died by suicide, court reversed dismissal of one defendant under deliberate indifference standard); *Newbrough v. Piedmont Reg'l Jail Auth*., 822 F. Supp. 2d 558, 574-76 (E.D. Va. 2011) (applying deliberate indifference standard in wrongful death suit and rejecting more protective standard, analogizing immigrant detainees to pretrial detainees); *Villegas v. Metropolitan Gov't of Nashville,* 709 F.3d 563, 568-69 (6th Cir. 2013) (applying deliberate indifference standard to claim brought by immigrant detainee shackled during labor and post-partum); *Rosemarie M. v. Morton*, 671 F. Supp. 2d 1311 (S.D. Fla. 2002) (granting preliminary injunction against ICE; deliberate indifference standard applied to claim for failure to provide gynecological care).

III. Identifying Defendants and Appropriate Claims When Challenging Immigration Detention Conditions

A. Identifying Defendants Based on Detention Contract Structure

The complexity of contracting arrangements for immigration detention raises the possibility of multiple defendants in challenges to conditions of confinement. Depending on the contracting arrangement for the facility, potential defendants can include: (1) federal government defendants; (2) local government entities; and (3) private prison companies.

ICE utilizes a number of contracting mechanisms for its detention purposes, which may determine who can serve as potential defendants in litigation.[29]

1. Service Processing Centers (SPC): Facilities owned by ICE and generally operated by contract detention staff.
2. Contract Detention Facility (CDF): Facilities owned and operated by private companies and contracted directly by ICE.
3. Intergovernmental Service Agreement (IGSA): Facilities, such as local and county jails that hold ICE detainees (as well as other prisoners or pre-trial detainees) under an IGSA with ICE. (Can also be referred to as Non-Dedicated IGSAs).
4. Dedicated Intergovernmental Service Agreement (DIGSA): Facilities dedicated to holding only ICE detainees under an IGSA with ICE.

[29] For a chart outlining the five types of facilities and demographic break-down of people held at each, see DHS OFFICE OF INSPECTOR GENERAL, OIG-19-18: ICE DOES NOT FULLY USE CONTRACTING TOOLS TO HOLD DETENTION FACILITY CONTRACTORS ACCOUNTABLE FOR FAILING TO MEET PERFORMANCE STANDARDS 3 (2019), available at https://www.oig.dhs.gov/sites/default/files/assets/2019-02/OIG-19-18-Jan19.pdf.

5. U.S. Marshals Service Intergovernmental Agreement (IGA): Facilities contracted by U.S. Marshals Service that ICE also agrees to use as a contract rider.

Type of Contract	Description	Potential Defendants
Service Processing Centers (SPC)	Facilities owned by ICE and generally operated by contract detention staff.	Federal government, contract prison operator (typically private prison company)
Contract Detention Facility (CDF)	Facilities owned and operated by private companies and contracted directly by ICE.	Federal government, contract prison owner/operator (typically private prison company)
Intergovernmental Service Agreement (IGSA)	Facilities, such as local and county jails that house ICE detainees (as well as other prisoners or pre-trial detainees) under an IGSA with ICE. (Can also be referred to as Non-Dedicated IGSAs).	Federal government, local government entity, private prison company (if any)
Dedicated Intergovernmental Service Agreement (DIGSA)	Facilities dedicated to housing only ICE detainees under an IGSA with ICE.	Federal government, local government entity, private prison company (if any)
U.S. Marshals Service Intergovernmental Agreement (IGA)	Facilities contracted by U.S. Marshals Service that ICE also agrees to use as a contract rider.	Federal government, local government entity, private prison company (if any)

B. Constitutional Claims Based on Challenges to Conditions of Confinement by Immigrant Detainees

Immigrant detainees may contemplate bringing a variety of claims to obtain injunctive and declaratory relief, habeas relief, and damages, for constitutional violations. However, appropriate claims will depend on the defendant in question, and the specific facts at hand.

1. Federal Government Defendants

Most prisoner civil rights suits are brought under 42 U.S.C. § 1983, which enables plaintiffs to sue state or local officials for violations of the Constitution or federal statutes. Section 1983, however, applies only to those acting under color of state, not federal law, and is unavailable for immigrant detainees in suits against the federal government.

Injunctive and Declaratory Relief. Immigrant detainees may sue the federal government for injunctive relief to remedy constitutional violations. 28 U.S.C. § 1331 provides federal courts with jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." *Hernandez Roman v. Wolf*, 977 F.3d 935, 941 (9th Cir. 2020) ("Courts have long recognized the existence of an implied cause of action through which plaintiffs may seek equitable relief to remedy a constitutional violation."); *Simmat v. U.S. Bureau of Prisons*, 413 F.3d 1225, 1230–32, 1236 (10th Cir. 2005) (observing that "[f]ederal courts have long exercised the traditional powers of equity, in cases within their jurisdiction, to prevent violations of constitutional rights," and holding that federal courts have jurisdiction under 28 U.S.C. § 1331 over federal prisoners' constitutional claims for injunctive relief against prison officials); *Mitchum v. Hurt*, 73 F.3d 30, 35 (3d Cir. 1995) ("the power of the federal courts to grant equitable relief for constitutional violations has long been established."); *Hubbard v. E.P.A.*, 809 F.2d 1, 11 (D.C. Cir. 1986) ("there is a "presumed availability of federal equitable relief against threatened invasions of constitutional interests."); *Porter v. Califano*, 592 F.2d 770, 781 (5th Cir. 1979) (individuals "have a right to sue directly under the constitution to enjoin . . . federal officials from violating [their] constitutional rights."). *See also* Z*iglar v. Abbasi*, 137 S. Ct. 1843, 1862-63 (2017) (noting that noncitizen detainees could seek injunctive relief to challenge unconstitutional conditions of confinement). 5 U.S.C. § 702 also waives immunity for equitable claims against federal agencies and officers in their official capacities. *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996); *Muniz-Muniz v. U.S. Border Patrol*, 741 F.3d 668, 673 (6th Cir. 2013).

Under the Administrative Procedures Act (APA), immigrant detainees may also seek relief against federal agencies for constitutional violations, to compel agency action, and to strike down agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," if not authorized by statute, violate legally required procedure, or other reasons described in 5 U.S.C. § 706. Only "final agency action for which there is no other adequate remedy in a court" is reviewable under the APA. 5 U.S.C. § 704. Immigrant detainees have found some success in APA challenges for failure to enforce its Performance Based National Detention Standards (PBNDS). *See Torres v. DHS*, 411 F. Supp. 3d 1036, 1068-69 (C.D. Cal. 2019) (failure to abide by PBNDS in access to counsel challenge); *Innovation L. Lab v. Nielsen*, 342 F. Supp. 3d 1067, 1079 (D. Or. 2018) (failure to abide by PBNDS for access to counsel); *Gayle v. Meade*, No. 20-21553-CIV, 2020 WL 2086482, at *6 (S.D. Fla. Apr. 30, 2020) (finding violation for ICE's failure to comply with PBNDS's requirements to abide by CDC guidelines during COVID-19 pandemic). *But see C.G.B. v. Wolf*, 464 F. Supp. 3d 174, 227 (D.D.C. 2020) (rejecting immigrant detainees' APA challenge regarding COVID-19 conditions); *A.S.M. v. Warden, Stewart Cnty Detention Ctr.*, 467 F. Supp. 3d 1341, 1353-56 (M.D. Ga. 2020) (same); *O.M.G. v. Wolf*, No. CV 20-786 (JEB), 2020 WL 7264049, at *4 (D.D.C. Dec. 10, 2020) (same); *Americans for Imm. Justice v. U.S. Dep't Homeland Sec.*, No. 22-3118, 2023 WL 1438376, at *17 (D.D.C. Feb. 1, 2023) (rejecting legal service providers' APA claim regarding failure to abide by detention standards regarding access to counsel).

Immigrant detainees may seek a writ of mandamus under 28 U.S.C. § 1361, as well as declaratory relief under 28 U.S.C. § 2201(a).

Release from Detention. Immigrant detainees have successfully secured release from detention based on unconstitutional conditions of confinement, most notably in light of the COVID-19 pandemic. In these cases, courts granted release pursuant to individual (or group) habeas petitions under 28 U.S.C. § 2241, often based on consideration of a motion for temporary restraining order or preliminary injunction. *See, e.g. Asmed B. v. Decker*, 460 F. Supp. 3d 519 (D.N.J. 2020); *Basank v. Decker*, 449 F. Supp. 3d 205, 214 (S.D.N.Y. 2020); *Coreas v. Bounds*, 458 F. Supp. 3d 352 (D. Md. 2020); *Essien v. Barr*, 457 F. Supp. 3d 1008, 1014–15 (D. Colo. 2020); *Ochoa v. Kolitwenzew*, 464 F. Supp. 3d 972 (C.D. Ill. 2020); *Prieto Refunjol v. Adducci*, 461 F. Supp. 3d 675 (S.D. Ohio 2020); *Thakker v. Doll*, 451 F. Supp. 3d 358, 363-64 (M.D. Pa. 2020); *Vazquez Barrera v. Wolf*, 455 F. Supp. 3d 330 (S.D. Tex. 2020).

In other cases, district courts conducted bail hearings and allowed release of immigrant detainee habeas petitioners due to dangerous conditions of confinement pursuant to their "inherent power to release the petitioner pending determination of the merits." *Savino v. Souza*, 453 F. Supp. 3d 441, 453 (D. Mass. 2020) (quoting *Woodcock v. Donnelly*, 470 F.2d 93, 94 (1st Cir. 1972)); *see also Gomes v. U.S. Dep't of Homeland Sec.*, 460 F. Supp. 3d 132, 144 (D.N.H. 2020); *Yanes v. Martin*, 464 F. Supp. 3d 467, 469 (D.R.I. 2020); *Zepeda Rivas v. Jennings*, 445 F. Supp. 3d 36 (N.D. Cal. 2020); *Malam v. Adducci*, No. 20-10829, 2021 WL 836532, at *1 (E.D. Mich. Mar. 4, 2021) (quoting *Nash v. Eberlin*, 437 F.3d 519, 526 n.10 (6th Cir. 2006)).

Immigrant detainees also successfully secured release pursuant to the court's inherent power to exercise injunctive relief in light of constitutional violations under 28 U.S.C. § 1331. *See Hernandez Roman v. Wolf*, 977 F.3d 935, 942 (2020) ("the district court's power to grant injunctive relief included the authority to order a reduction in population, if necessary to remedy a constitutional violation."); *Zepeda Rivas v. Jennings*, 845 Fed. Appx. 530, 535 (9th Cir. 2021) (concluding that district court had authority to enter injunctive relief resulting in release); *Malam v. Adducci*, 452 F. Supp. 3d 643 (E.D. Mich. 2020) (finding authority to issue injunctive relief to remedy constitutional violations and ordering release); *Fraihat v. U.S. Immigr. & Customs Enf't*, 445 F. Supp. 3d 709, 751 (C.D. Cal. 2020), *rev'd and remanded*, 16 F.4th 613 (9th Cir. 2021) (district court order that ICE conduct custody determinations for medically vulnerable detainees); *Alcantara v. Archambeault*, 613 F. Supp. 3d. 1337 (S.D. Cal. 2020)(ordering release).

The issue of who is the proper defendant/respondent in a habeas claim for immigrant detainees is "in considerable disarray." *Vasquez v. Reno*, 233 F.3d 688, 629 (1st Cir. 2000) (describing cases, and concluding that warden is proper custodian). The Supreme Court has left open the question as to who is the proper respondent to a habeas petition filed by an immigrant detainee pending deportation, noting a circuit split. *Rumsfeld v. Padilla*, 542 U.S. 426, 435 n.8 (2004). For this reason, immigrant detainees seeking release under a habeas petition should consider naming the warden of the facility, Field Office Director, and/or ICE, according to the applicable circuit caselaw.

Damages. Immigrant detainees may also consider seeking damages from the federal government under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671 *et seq.* and *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The FTCA is a statutory cause of action that allows suits for money damages based on the negligent acts or omissions of federal employees, and allows recovery of damages from the United States.[30] In *Bivens*, the Supreme Court recognized the availability of damages for constitutional violations committed by federal officers acting under color of federal law or authority. *Bivens* claims must be brought against federal officers in their individual capacities.[31]

The FTCA is likely a more direct vehicle to recover damages for most cases challenging immigration detention conditions against the federal government. First, the FTCA is the only available remedy for medical negligence by employees of the U.S. Public Health Service (PHS), as *Bivens* suits cannot be brought against individual PHS employees for medical negligence in a detention facility. *Hui v. Castaneda*, 559 U.S. 799, 810-13 (2010). (The ICE Health Service Corps (IHSC), which offers medical services to some, but not all, immigration detention facilities, includes some PHS members). Second, the Supreme Court has drastically limited the availability of *Bivens* remedies, including for non-citizens challenging conditions of confinement under the Fifth Amendment. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1863-64 (2017).

2. Local Government Defendants

Immigrant detainees are under the custody of DHS, a federal agency. However, federal immigrant detainees who have suffered constitutional or statutory violations in a facility subject to a contract with a local jurisdiction may bring suit under 42 U.S.C. § 1983 for monetary, declaratory, or injunctive relief against local officials under *Monell v. Dep't of Social Servs.*, 436 U.S. 658 (1978). This scenario could arise in facilities where the federal government has signed an Intergovernmental Service Agreement (IGSA) with a state or local government for a detention facility. For example, an immigrant detainee held in a county jail under contract with ICE, or an immigrant held in a privately-operated detention center subject to an IGSA between ICE and a local county, may sue the local government under Section 1983.

Section 1983 liability arises when a "person" acting "under color of" state law deprives another of federal rights. 42 U.S.C. § 1983. "Local government units" are "included among those persons to whom [Section] 1983 applies." *Monell*, 436 U.S. at 690. To adequately allege a claim under *Monell*, plaintiffs must show that "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by" the locality, or that constitutional deprivations result from "governmental

[30] For an in-depth practice advisory on FTCA claims in the immigration context, see National Immigration Litigation Alliance and NIPNLG, *Federal Tort Claims Act: Frequently Asked Questions for Immigration Attorneys* (2021), https://immigrationlitigation.org/wp-content/uploads/2021/02/2021.2.17-FTCA-PA-FINAL.pdf.

[31] For an in-depth practice advisory on *Bivens* claims in the immigration context, see National Immigration Litigation Alliance and American Immigration Council, *Bivens Basics: An Introductory Guide for Immigration Attorneys* (2021), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/bivens_basics_an_introductory_guide_for_immigration_attorneys_0.pdf.

'custom' even though such a custom has not received formal approval through the body's official decision-making channels." *Id.* at 690–91. *See, e.g. Doe v. United States*, 831 F.3d 309, 317-18 (5th Cir. 2016) (recognizing that immigrant detainees have basis under Section 1983 to bring suit against county with ICE detention contract, but dismissing for failure to meet *Monell* criteria).[32]

Immigrant detainees should also consider state tort claims to recover damages against local government entities.

3. Private Prison Corporations

Immigrants are often detained in facilities owned or operated by private prison corporations and suffer injury at the hands of officers employed by private prison corporations. Private prison companies often argue that they are not state actors and that they cannot be held liable for constitutional violations. This is generally incorrect.

In the context of Section 1983, a contractor acting "under color of state law" can be held liable as a state actor. As the Supreme Court concluded in *West v. Atkins*, 487 U.S. 42, 50 (1988), "[t]he traditional definition of acting under color of state law requires that the defendant . . . exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" In *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 71 n.5 (2001), the Court noted that those held under state authority in private prisons "enjoy a right of action against private correctional providers under 42 U.S.C. § 1983." At least one court has concluded that federal prisoners can hold a private prison company liable for constitutional injury under Section 1983 in the context of an intergovernmental service agreement where the county contracted with the private prison corporation, and also the U.S. Marshals Service for the custody and care of federal prisoners. "Because the GEO Group acted pursuant to its contract with the County, it acted in performance of a function traditionally the exclusive province of the state, and thus acted as a state actor." *Alvarez v. Geo Grp., Inc*., No. SA-09-CV-0299 OG (NN, 2010 WL 743752, at *2 (W.D. Tex. Mar. 1, 2010). *But see Doe v. United States*, 831 F.3d 309, 315 (5th Cir. 2016) (distinguishing facts from *Alvarez*); *Martinez v. GEO*, 2020 WL 2496063, at *17 (C.D. Cal. Jan. 7, 2020) (concluding that private prison company was not a state actor for purposes of § 1983 because it exercised powers "traditionally reserved to ICE.").

The Supreme Court, however, has held that private prison corporations that contract with the federal government cannot be held liable for *damages* under *Bivens*. *Malesko*, 534 U.S. at 70-74. Likewise, individual employees of private prison corporations that contract with the federal government cannot be held liable for damages under *Bivens*. *Minneci v. Pollard*, 565 U.S. 118, 125 (2012). Instead, federal prisoners and detainees can bring state tort law actions against private prison corporations and their employees. *Minneci*, 565 U.S. at 125 (concluding that federal prisoner's "Eighth Amendment claim focuses upon a kind of conduct that typically falls

[32] *See, e.g.* Angelina Chapin, *The Mother of a Toddler Who Died After Leaving ICE Custody Is Suing an Arizona City*, Huffington Post, Feb. 28, 2019, https://www.huffpost.com/entry/yasmin-juarez-ice-eloy-arizona_n_5c7822fae4b0952f89df9dc5 (noting that the City of Eloy terminated its IGSA with ICE and CoreCivic after receiving notice of suit).

within the scope of traditional state tort law."); *Malesko*, 534 U.S. 72-73 (noting availability of tort remedy).

Notably, the Supreme Court distinguished the availability of *Bivens* damages from injunctive relief for constitutional violations in suits against private prison corporations and their employees. As the Court noted in *Malesko*, federal prisoners "have full access to remedial mechanisms . . . including suits in federal court for injunctive relief." *Id.* at 74. As the Court explained, "unlike the *Bivens* remedy, which we have never considered a proper vehicle for altering an entity's policy, injunctive relief has long been recognized as the proper means for preventing entities from acting unconstitutionally." *Id. See also Torres v. United States Dep't of Homeland Sec.*, 411 F. Supp. 3d 1036, 1057 (C.D. Cal. 2019) ("because GEO performs the federal function of holding immigration detainees, the conditions of confinement at its facilities are the result of 'state action' and it may be liable for constitutional violations."); *Bromfield v. McBurney*, 2008 WL 2746289, at *5 (W.D. Wash. July 8, 2008) ("[B]ecause the power to detain immigrants is derived solely and exclusively from federal authority, the GEO defendants, in effect, acted as the government's alter ego in detaining plaintiff, and the fact that the task of detaining plaintiff and other immigrants was temporarily delegated to the GEO defendants does not convert that detention into anything other than an exclusively governmental function.").

Injunctive relief for constitutional violations against individuals in federal custody is available not only against a private prison corporation, but also its employees. *See, e.g. Juarez v. Asher*, No. C20-700 JLR-MLP, 2021 WL 1946222, at *4 (W.D. Wash. May 14, 2021) (concluding that warden of private ICE detention facility "may be sued for injunctive relief" based on constitutional violation, and concluding that the warden may be automatically substituted in his official capacity under Fed. R. Civ. P. 25(d)); *Picone v. United States Marshal Serv.*, No. 4:15CV2033, 2016 WL 5118303, at *4 (N.D. Ohio Sept. 21, 2016) (concluding that federal prisoners may sue employees of private prisons for injunctive relief from constitutional violations); *Diaz v. Dixon*, No. 5:13-CV-00130-C, 2014 WL 1744110, at *4 (N.D. Tex. May 1, 2014) (same); *Montes v. McAdam*, No. C14-005-C, 2014 WL 5454843, at *2 (N.D. Tex. Oct. 27, 2014) (same); *Hernandez v. Dixon*, No. 5:12-CV-00070-BG, 2012 WL 6839329, at *2 (N.D. Tex. Dec. 12, 2012) (same).

C. Statutory Claims

Immigrant detainees may also consider statutory claims to challenge conditions of confinement. Briefly, these statutes include:

- Section 504 of the Rehabilitation Act, 29 U.S.C. § 794. Section 504 provides that "no otherwise qualified individual with a disability in the United States . . . shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency . . . ." The Rehabilitation Act applies to all federal agencies and federal detention centers.

- The Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq*., provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by such entity. 42 U.S.C. § 12132. The provisions of the ADA apply to state and local governments, so claims under the ADA may be additionally available to immigrant detainees in facilities under contract with local government entities.

- Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb-bb-4. The RFRA, which governs federal institutions, provides that the government may not "substantially burden" a person's exercise of religion unless it demonstrates that doing so "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000(bb-1).

- Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc. The RLUIPA governs state or local institutions that accept federal funds, as well as privately operated prisons that contract with government agencies that receive federal funds. 42 U.S.C. § 2000cc-1; *Dean v. Corrections Corp. of America*, 540 F. Supp. 2d 691, 693-94 (N.D. Miss. 2008). RLUIPA adopts the same legal standard as RFRA.

- Trafficking Victims Protection Act (TVPA), 18 U.S.C. § 1589. The TVPA prohibits all people in the United States against forms of coerced labor, which includes labor coerced "by means of force, threats of force, physical restraint, or threats of physical restraint," "by means of serious harm or threats of serious harm," "by means of the abuse or threatened abuse of law or legal process," or "by means of any scheme, plan, or pattern intended to cause the person to believe that, if that person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint." 18 U.S.C. § 1589(a)(1)-(a)(4).

  State law claims, including tort claims, are available against private prison companies and their employees, and local governments that contract with ICE. Notably, California Gov't Code § 7320 requires that "any private detention facility operator shall comply with, and adhere to, the detention standards of care and confinement agreed upon in the facility's contract for operations." This state statute applies to immigration detention facilities operated by private prison companies, and also provides that an injured person may bring a civil claim for relief for tortious action in violation of contract standards, and may recover attorneys' fees and costs. *See Murillo Vega v. Management and Training Corp*., No. 21-cv-1770, 2023 WL 3012568 (S.D. Cal. Apr. 19, 2023) (denying Defendant's motion for summary judgment on former detainee's claim for intentional infliction of emotional distress after year of solitary confinement in violation if PBNDS).

IV. Does the Prison Litigation Reform Act Apply to Conditions Lawsuits Filed by Immigrant Detainees?

The Prison Litigation Reform Act (PLRA) erects significant obstacles to the initiation and pursuit of litigation challenging prison and jail conditions. Such obstacles take the form of onerous administrative exhaustion requirements, 42 U.S.C. § 1997e(a), and physical injury requirements, 42 U.S.C. § 1997e(e), limits on recovery of attorneys' fees, 42 U.S.C. § 1997e(d), and limits to the scope and duration of injunctive relief, 18 U.S.C. § 3626. Most of the PLRA's provisions apply only to suits brought "with respect to prison conditions . . . by a prisoner," as that term is defined, and civil immigration detainees do not fall within that definition. The PLRA does not, therefore, generally apply to conditions lawsuits filed by immigration detainees. *See*, *e.g.*, *Agyeman v. I.N.S.*, 296 F.3d 871, 887 (9th Cir. 2002) (immigration detainees); *LaFontant v. I.N.S.*, 135 F.3d 158, 165 (D.C. Cir. 1998) (same); *Ojo v. I.N.S.*, 106 F.3d 680, 683 (5th Cir. 1997) (same); *Cohen v. Clemens*, 321 Fed. Appx. 739, 743 (10th Cir. 2009) (same).

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