NOTES

AFFIRMATIVE DUTIES IN IMMIGRATION DETENTION

Detention has become an undeniably central part of immigration enforcement today.[1] In principle, the constitutional right to be free from deprivation of "life, liberty, or property, without due process of law"[2] extends to all "persons" within U.S. territory, regardless of citizenship.[3] In practice, due process for noncitizen detainees tends to be far more circumscribed.[4] Against this background, hundreds of immigrant detainees across the nation filed lawsuits during the COVID-19 pandemic, claiming that continued confinement in overcrowded and inadequate conditions amounted to a violation of their constitutional due process rights.[5] The litigation has forced courts to directly confront a critical issue that affects thousands, yet remains obscured by a lack of judicial guidance: the extent of substantive due process protection that the government owes to noncitizens held in its custody.

This Note analyzes this recent development and its wider implications. The discussion proceeds in three stages. Part I explains the theoretical background for constitutional challenges by noncitizens and describes the two competing frameworks that govern such claims. The first is the plenary power doctrine, under which courts grant special deference to political branches over decisions to admit or exclude noncitizens.[6] The second is the "aliens' rights tradition," characterized by a line of cases that apply heightened scrutiny to government action and affirm the status of noncitizens as "persons" protected under the

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[1] *See* César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346, 1348 (2014); Geneva Sands, *This Year Saw the Most People in Immigration Detention Since 2001*, CNN (Nov. 12, 2018, 10:02 PM), https://www.cnn.com/2018/11/12/politics/ice-detention/index.html [https://perma.cc/ZQE2-HWJ8] (noting that immigration authorities held an average of more than 42,000 people in custody each day in 2018).

[2] U.S. CONST. amend. V.

[3] Mathews v. Diaz, 426 U.S. 67, 77 (1976) ("There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons . . . .").

[4] *See* David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention*, 51 EMORY L.J. 1003, 1007 (2002).

[5] *See* Aditi Shah, *The Role of Federal Courts in Coronavirus-Related Immigration Detention Litigation*, LAWFARE (June 29, 2020, 9:01 AM), https://www.lawfareblog.com/role-federal-courts-coronavirus-related-immigration-detention-litigation [https://perma.cc/KM4M-GN3Z].

[6] *See* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 547 (1990) [hereinafter Motomura, *Phantom Norms*].

Constitution.[7] As scholars have previously observed, the two frameworks are meant to govern separate spheres, but the boundary is not always clear.[8] Part II turns to the specific context of substantive due process claims in immigration detention, particularly those cases that challenge the conditions of detention facilities or deprivations and mistreatment therein. As will be shown, cases addressing these claims reflect inconsistencies among courts. Part III describes the recent litigation arising from the COVID-19 pandemic. While recognizing that the fact-specific nature of the lawsuits limits their precedential value, this Note argues that the decisions collectively shift the emphasis away from the logic of judicial deference toward a recognition of the government's affirmative duty to protect and provide care for immigrant detainees.

I. CONSTITUTIONAL CHALLENGES BY NONCITIZENS

Since its foundational cases, the Court has adopted two contrasting approaches to the rights and obligations of noncitizens.[9] Under the plenary power doctrine, it has long recognized that, as a matter of sovereign prerogative, political branches have broad and near-exclusive authority over *immigration* law governing the admission and exclusion of noncitizens.[10] This heightened judicial deference developed alongside a competing "aliens' rights tradition," which extends constitutional protections

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[7] Margaret H. Taylor, *Detained Aliens Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine*, 22 HASTINGS CONST. L.Q. 1087, 1091 (1995) (internal quotation marks omitted); *see id.* at 1091–92. "Alien" is a statutory term used in U.S. immigration laws to refer to a noncitizen person and was once in widespread usage among scholars and practitioners. *See* D. Carolina Núñez, *War of the Words: Aliens, Immigrants, Citizens, and the Language of Exclusion*, 2013 B.Y.U. L. REV. 1517, 1527–28, 1551–54. The term has since been criticized for its negative and dehumanizing connotations, and a recent immigration reform bill proposed replacing the word with the term "noncitizen." *See* Nicole Acevedo, *Biden Seeks to Replace "Alien" with Less "Dehumanizing Term" in Immigration Laws*, NBC NEWS (Jan. 22, 2021, 3:34 PM), https://www.nbcnews.com/news/latino/biden-seeks-replace-alien-less-dehumanizing-term-immigration-laws-n1255350 [https://perma.cc/ZBE2-J4SZ]; *see also* Kevin R. Johnson, *The Social and Legal Construction of Nonpersons*, 28 U. MIA. INTER-AM. L. REV. 263, 270–81 (1996–1997); Núñez, *supra*, at 1529–44. Accordingly, this Note uses the term "alien" only to directly quote or refer to the original text in sources.

[8] *See* Taylor, *supra* note 7, at 1092.

[9] *See* T. ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP 27 (9th ed. 2021).

[10] *E.g.*, Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 609 (1889); *see also* Motomura, *Phantom Norms*, *supra* note 6, at 547 (defining immigration law and distinguishing it "from the more general law of aliens' rights and obligations, which includes, for example, their tax status, military obligations, and eligibility for government benefits and certain types of employment"). For extensive academic criticism of the doctrine, see Louis Henkin, Essay, *The Constitution and United States Sovereignty: A Century of* Chinese Exclusion *and Its Progeny*, 100 HARV. L. REV. 853, 862–63 (1987); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 255; and David A. Martin, *Why Immigration's Plenary Power Doctrine Endures*, 68 OKLA. L. REV. 29, 30 & n.2 (2015).

to noncitizens in matters unrelated to their admission and exclusion.[11] This Part summarizes the development of these two frameworks and discusses the limits of the plenary power–aliens' rights distinction.

A. Development of the Competing Frameworks

1. Plenary Power Doctrine. — The plenary power doctrine can be traced back to the *Chinese Exclusion Case*,[12] which involved a noncitizen laborer who temporarily left the United States with a certificate permitting his return.[13] After his departure, Congress declared the certificate void, effectively barring his reentry.[14] The Court upheld this action, noting that the federal government enjoys considerable independence and discretion to exclude foreigners.[15] *Fong Yue Ting v. United States*[16] extended this deference to the power to *expel*, by allowing Congress to deport Chinese laborers who lacked a certificate of residence and failed to prove their lawful status by testimony of a "credible white witness."[17] The full breadth of the plenary power doctrine was demonstrated in a series of 1950s cases. *United States ex rel. Knauff v. Shaughnessy*[18] first held that the wife of a U.S. citizen could be "permanently excluded without a hearing"[19] solely based on a finding that "her admission would be prejudicial to the interests of the United States."[20] In so doing, the Court infamously declared that, with regard to noncitizens seeking admission, "[w]hatever the procedure authorized by Congress is, it is due process."[21] *Shaughnessy v. United States ex rel. Mezei*[22] expanded upon *Knauff* by upholding the exclusion and

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[11] Taylor, *supra* note 7, at 1091 (internal quotation marks omitted); *see* Legomsky, *supra* note 10, at 256 ("[Immigration law] is the sphere in which the plenary power doctrine has operated. It should be distinguished from the more general law of aliens' rights and obligations."); Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1626 (1992) ("The stunted growth of constitutional immigration law contrasts sharply with the flowering of constitutional protections for aliens in areas other than immigration law.").

[12] 130 U.S. 581.

[13] *Id.* at 582; *see also* Motomura, *Phantom Norms*, *supra* note 6, at 550 ("The story of the plenary power doctrine's role in constitutional immigration law begins with . . . the *Chinese Exclusion Case*.").

[14] *See Chae Chan Ping*, 130 U.S. at 599.

[15] *See id.* at 606 (noting that the legislative department's determination that "the presence of foreigners of a different race" harms the country "is conclusive upon the judiciary"); *see also* Henkin, *supra* note 10, at 859 ("[B]oth [the *Chinese Exclusion Case*'s] holding and its sweeping dictum have been taken to mean that there are no constitutional limitations on the power of Congress to regulate immigration.").

[16] 149 U.S. 698 (1893).

[17] *Id.* at 729; *see id.* at 729–30.

[18] 338 U.S. 537 (1950).

[19] *Id.* at 539.

[20] *Id.* at 539–40; *see id.* at 547.

[21] *Id.* at 544.

[22] 345 U.S. 206 (1953).

detention of a long-term permanent resident returning from a trip abroad.[23]

The Court has since qualified the plenary power doctrine and alleviated its harshest effects in important ways.[24] Nonetheless, its early decisions continue to provide a "century of precedent" in favor of the government's broad discretion to expel or exclude,[25] on the basis of which protections for noncitizens have been significantly curtailed. Most recently, in 2018, *Trump v. Hawaii*[26] confirmed the endurance of the doctrine, with the majority applying a highly deferential standard of review to uphold a controversial travel ban despite allegations of discriminatory intent against Muslim immigrants and Islam.[27]

2. The Aliens' Rights Tradition. — The early plenary power cases were accompanied by sharply worded and powerful dissents.[28] The dissenters highlighted the need for a limiting principle, cautioning that the doctrine's sweeping scope "might . . . sanction[] . . . the most shocking brutality conceivable" toward noncitizens.[29] This concern gave rise to court decisions establishing that outside of immigration law, noncitizens are entitled to constitutional rights, which in turn place constraints on state action.[30] The earliest of such cases, *Yick Wo v. Hopkins*[31] upheld

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[23] *See id.* at 208, 215 (reasoning that Mezei would be "treated as if stopped at the border" for purposes of his due process claim, *id.* at 215); *id.* at 219 (Jackson, J., dissenting).

[24] *See* Martin, *supra* note 10, at 50–55; Michael Scaperlanda, *Partial Membership: Aliens and the Constitutional Community*, 81 IOWA L. REV. 707, 725 n.90 (1996) (observing that since its early plenary power cases, "the Court has retired the language of total abdication" of judicial review).

[25] Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1982 (2020); *see id.* (first citing *Knauff*, 338 U.S. at 544; then citing *Mezei*, 345 U.S. at 212; and then citing Landon v. Plasencia, 459 U.S. 21, 32 (1982)). The Immigration and Nationality Act of 1952 (INA), Pub. L. No. 82-414, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.), previously distinguished "exclud[able]" noncitizens, who are arriving in the country and found ineligible for entry, *id.* § 212(a), from "deport[able]" noncitizens, who have entered but been found subject to expulsion, *id.* § 241(a). This focus on physical *entry* was replaced in 1996. Under the current statutory scheme, the key inquiry is whether noncitizens have been lawfully *admitted* into the country. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 240(a), 110 Stat. 3009-546, 3009-589 (codified as amended at 8 U.S.C. § 1229a).

[26] 138 S. Ct. 2392 (2018).

[27] *See id.* at 2418–19; *see also* Cristina M. Rodríguez, Trump v. Hawaii *and the Future of Presidential Power over Immigration*, 2017–2018 AM. CONST. SOC'Y SUP. CT. REV. 161, 188–90.

[28] *See, e.g.*, *Mezei*, 345 U.S. at 218, 224–28 (Jackson, J., dissenting); *Knauff*, 338 U.S. at 550–52 (Jackson, J., dissenting); *see also* Motomura, *Phantom Norms*, *supra* note 6, at 560.

[29] Fong Yue Ting v. United States, 149 U.S. 698, 756 (1893) (Field, J., dissenting).

[30] *See* Taylor, *supra* note 7, at 1132–33; *see also* Linda Kelly, *Preserving the Fundamental Right to Family Unity: Championing Notions of Social Contract and Community Ties in the Battle of Plenary Power Versus Aliens' Rights*, 41 VILL. L. REV. 725, 730–31 (1996); David A. Martin, *Graduated Application of Constitutional Protections for Aliens: The Real Meaning of* Zadvydas v. Davis, 2001 SUP. CT. REV. 47, 88 (noting the "difference between immigration law on the one hand, where a discount in protections may give the federal political branches a freer rein in decisions about aliens, and immigrant or aliens law on the other hand, where all persons must be treated equally"); Motomura, *Phantom Norms*, *supra* note 6, at 566–67.

[31] 118 U.S. 356 (1886).

a noncitizen's challenge to the discriminatory enforcement of a municipal ordinance, reasoning that the equal protection of laws under the Fourteenth Amendment is "universal in [its] application, to all persons within the territorial jurisdiction."[32] *Wong Wing v. United States*[33] extended this principle to the Fifth and Sixth Amendments, stressing that while Congress had broad power to exclude and expel noncitizens, it lacked authority to sentence them to "imprisonment at hard labor" prior to removal.[34] Since the latter "inflicts an infamous *punishment*," it triggered judicial scrutiny for compliance with constitutional constraints of *criminal* procedure.[35] In other words, the "punishment" of hard labor removed the case from the domain of immigration law to that of criminal law, where special judicial deference was not warranted.[36]

B. Limits of the Distinction

The plenary power–aliens' rights distinction thus turns on whether the subject matter in controversy lies within or beyond the scope of immigration law. Subsequent cases have challenged this dichotomy, however, with some scaling back the government's plenary power in the immigration context, and others restricting noncitizens' rights in the nonimmigration context.[37] Notably, *Landon v. Plasencia*[38] narrowed the Court's holding in *Mezei* by finding that permanent residents who *briefly* left the country were entitled to greater *procedural* due process protection in their exclusion hearings.[39] The Court reasoned that "once an alien gains admission to our country and begins to develop . . . ties[,] . . . his constitutional status changes accordingly."[40]

If *Landon* exemplifies a divergence from the strict application of the plenary power doctrine, *United States v. Verdugo-Urquidez*[41] may suggest a deviation from the aliens' rights tradition.[42] In *Verdugo-Urquidez*,

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[32] *Id.* at 369; *see id.* at 373.

[33] 163 U.S. 228 (1896).

[34] *Id.* at 238; *see id.* at 233–34.

[35] *Id.* at 234 (emphasis added).

[36] *See id.* at 237; *see also* Taylor, *supra* note 7, at 1134.

[37] *See* Kelly, *supra* note 30, at 731 & n.27.

[38] 459 U.S. 21 (1982).

[39] *See id.* at 33–34 (distinguishing *Mezei* as a case involving "extended" absence, *id.* at 33).

[40] *Id.* at 32.

[41] 494 U.S. 259 (1990).

[42] *See* Kelly, *supra* note 30, at 743–47 (analyzing *Landon* as "defeating the plenary power doctrine," *id.* at 743 (capitalization omitted), and *Verdugo-Urquidez* as "defeating the aliens' rights tradition," *id.* at 745 (capitalization omitted)); *see also* Mathews v. Diaz, 426 U.S. 67, 79–80 (1976) (finding that the government may allow federal Medicare benefits to some noncitizens but not to others "[i]n the exercise of its broad power over naturalization and immigration"). Scholars have suggested that both *Verdugo-Urquidez* and *Mathews v. Diaz*, 426 U.S. 67, illustrate the plenary power doctrine's extension into matters outside of immigration law. *See* Michael Scaperlanda, *Polishing the Tarnished Golden Door*, 1993 WIS. L. REV. 965, 994–1000; Taylor, *supra* note 7, at 1135–39.

the noncitizen-plaintiff sought to suppress evidence seized by federal agents from his Mexican residence while he remained incarcerated in the United States pending his criminal proceeding.[43] Rejecting this claim, the Court held that the Fourth Amendment does not extend to extraterritorial searches, adding that reliance on aliens' rights tradition cases such as *Yick Wo* and *Wong Wing* would be misplaced, as the plaintiff "had no previous significant voluntary connection with the United States."[44]

As both cases demonstrate, while the competing frameworks are meant to govern distinct realms, they often bleed into each other in seemingly inconsistent ways.[45] In light of this difficulty, critics have offered a variety of alternative theories.[46] One such theory focuses on "membership" or "community ties," broadly suggesting that noncitizens who have developed more connections with American society are entitled to greater due process.[47] In contrast, the "municipal law approach" focuses less on noncitizens' physical location or voluntary ties with the country and instead posits that constitutional rights may extend to noncitizens by virtue of them being required to comply with U.S. laws.[48]

II. SUBSTANTIVE DUE PROCESS IN IMMIGRATION DETENTION

A. Unsettled Questions

While the Court has recognized that both procedural and substantive due process challenges are available in the context of immigration

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[43] *See Verdugo-Urquidez*, 494 U.S. at 262–63.

[44] *Id.* at 271.

[45] *See* Stephen H. Legomsky, Essay, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 HASTINGS CONST. L.Q. 925, 930–34 (1995) (describing how lower courts have circumvented a strict application of the traditional version of the plenary power doctrine); Motomura, *supra* note 11, at 1627–28 (exploring how "[c]ourts have created an important exception to the plenary power doctrine by hearing constitutional claims sounding in 'procedural due process'"); Motomura, *Phantom Norms*, *supra* note 6, at 549 (discussing the "gradual demise of the plenary power doctrine"); Taylor, *supra* note 7, at 1145–56.

[46] *See* Kelly, *supra* note 30, at 748–51, 765–67 (providing a detailed summary of the main alternative theories); *see also* Linda S. Bosniak, *Membership, Equality, and the Difference that Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1058 (1994) (noting that the traditional "inside" versus "outside" immigration law framework "tends to obscure the complex and contested nature of the status of aliens").

[47] *See* David A. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165, 191–92 (1983), *reprinted in* 1986 IMMIGR. & NAT'Y L. REV. 177, 203–04; T. Alexander Aleinikoff, *Aliens, Due Process and "Community Ties": A Response to Martin*, 44 U. PITT. L. REV. 237, 244 (1983), *reprinted in* 1986 IMMIGR. & NAT'Y L. REV. 249, 256 ("[W]hat we 'owe' persons in terms of process is better understood as a function of what we are taking from them (community ties) than our relationship to them (membership in a national community)."); *see also* Scaperlanda, *supra* note 24, at 712–14, 713 nn.15–16 (examining and contrasting the paradigms of "membership" and "personhood").

[48] *See* Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 978 (1991).

detention,[49] the contours remain unsettled. One possible explanation for this uncertainty is the previously described "porous border between the plenary power doctrine and the aliens' rights tradition."[50] In immigration detention cases, courts are asked to separate the nature of the constitutional complaint from the "underlying predicate" of immigration detention;[51] this may be particularly complex when the remedy sought — whether that be parole into the country or relief from removal — seemingly interferes with the government's control over immigration.[52] Additional sources of ambiguity are the lack of definitive judicial guidance and the Court's sidestepping of constitutional questions, even for more frequently litigated issues such as the durational limits on detention.[53]

Of the various substantive due process issues related to immigration detention, this Note focuses on challenges to conditions of confinement and the deprivations and mistreatment therein. While these are separate claims, they are related in the sense that they all implicate the government's *duty* under the Constitution to protect and provide for individuals under certain circumstances.[54] Such claims warrant more attention than they currently receive, especially in light of the growing salience of constitutional claims in immigration law.[55]

In 1995, Professor Margaret Taylor observed that "[o]nly a handful of reported cases have decided the due process challenges to conditions

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[49] *See* Zadvydas v. Davis, 533 U.S. 678, 690 (2001) ("Freedom from imprisonment . . . lies at the heart of the liberty that [the Due Process] Clause protects."); *see also id.* at 694 (noting that *Wong Wing* "concerned substantive protections for aliens . . . not procedural protections"); Yamataya v. Fisher (The Japanese Immigrant Case), 189 U.S. 86, 100 (1903); Cole, *supra* note 4, at 1006–09.

[50] Taylor, *supra* note 7, at 1156; *see also id.* at 1145–56 (exploring how the plenary power doctrine improperly extends into challenges to conditions of confinement).

[51] Jean v. Nelson, 711 F.2d 1455, 1484 (11th Cir. 1983), *rev'd en banc*, 727 F.2d 957 (11th Cir. 1984), *aff'd*, 472 U.S. 846 (1985).

[52] In *Jean v. Nelson*, 711 F.2d 1455, the court initially applied the aliens' rights analysis to detainees challenging the discriminatory enforcement of the government's parole policy, reasoning that plaintiffs sought "not a right to admission[,] . . . but a right to be considered for parole in a nondiscriminatory fashion." *Id.* at 1484. On rehearing, it reached the opposite conclusion, noting that discretion to grant parole "is an integral part of the admissions process." 727 F.2d at 963; *see also* Motomura, *supra* note 11, at 1628–30, 1665–69 (highlighting cases in the "gray area" where the outcome may differ based on whether the court characterizes the claim as a "substantive" challenge to the government's decision to admit or expel or a "procedural" challenge to the manner in which such decision is made, *id.* at 1665).

[53] *See* HILLEL R. SMITH, CONG. RSCH. SERV., R45915, IMMIGRATION DETENTION: A LEGAL OVERVIEW 47–48 (2019), https://fas.org/sgp/crs/homesec/R45915.pdf [https://perma.cc/L4YZ-8QZG] ("While the Supreme Court has generally addressed challenges to the *duration* of immigration detention, [it] has not addressed challenges to the *conditions* of immigration confinement."); *see also id.* at 39–43 (discussing ambiguities over the constitutionality of indefinite detention during removal proceedings).

[54] *See infra* pp. 2494–95.

[55] *See* ALEINIKOFF ET AL., *supra* note 9, at vi (noting "the greater prominence of litigation against the federal government raising challenges grounded in statutes and the U.S. Constitution").

of confinement suffered by alien detainees," and even those "reflect[ed] confusion over which of the two competing lines of cases — the plenary power doctrine or the aliens' rights tradition — should govern."[56] More than two decades later, the problem persists. Such claims are often resolved through settlement agreements or consent decrees — as was the case in *Reno v. Flores*.[57] There is also no federal statute that explicitly sets forth the standard for conditions of immigration detention.[58] And while U.S. Immigration and Customs Enforcement (ICE) has published nationwide detention standards,[59] these are implemented through individually negotiated contracts, leading to varying degrees of protection across detention facilities.[60]

In the absence of clear judicial and statutory guidance, lower courts addressing constitutional challenges to immigration detention have looked to the case law governing similar claims by prisoners and pretrial

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[56] Taylor, *supra* note 7, at 1092; *see also id.* at 1092 n.25 (collecting cases where "courts have alluded to conditions problems at alien detention facilities, or have addressed conditions claims only tangentially in the midst of litigation challenging other aspects of [immigration] detention").

[57] 507 U.S. 292 (1993); *see id.* at 301 (declining to entertain challenges to conditions previously settled by a consent decree); *see also* Haitian Ctrs. Council Inc. v. Sale, 823 F. Supp. 1028 (E.D.N.Y. 1993), Harold Hongju Koh, Essay, *The "Haiti Paradigm" in United States Human Rights Policy*, 103 YALE L.J. 2391, 2397 n.32 (1994) (noting that the order in *Haitian Centers Council Inc. v. Sale*, 823 F. Supp. 1028, was vacated after the parties entered a settlement agreement). While the federal district court overseeing the *Flores* settlement agreement has sometimes ruled that the government failed to comply with the agreement's mandate to maintain "safe and sanitary" conditions for minors, these opinions do not address constitutional issues. *See, e.g.*, Flores v. Barr, No. CV 85-4544, 2020 WL 5491445, at *8–9 (C.D. Cal. Sept. 4, 2020); Flores v. Sessions, 394 F. Supp. 3d 1041, 1057 (C.D. Cal. 2017).

[58] *See* SMITH, *supra* note 53, at 47 ("[N]either the INA nor its implementing regulations currently provide any specific standards for the conditions of confinement.").

[59] *E.g.*, ICE, NATIONAL DETENTION STANDARDS (rev. ed. 2019), https://www.ice.gov/doclib/detention-standards/2019/nds2019.pdf [https://perma.cc/AG3F-HP9V]; ICE, PERFORMANCE-BASED NATIONAL DETENTION STANDARDS 2011 (rev. ed. 2016), https://www.ice.gov/doclib/detention-standards/2011/pbnds2011r2016.pdf [https://perma.cc/8676-5Y96].

[60] *See* DORA SCHRIRO & ELIZABETH TAUFA, AM. BAR ASS'N, ACCESS TO COUNSEL IN IMMIGRATION DETENTION IN THE TIME OF COVID-19, at 3 (2020), https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/access_to_counsel_covid_nds_2019.pdf [https://perma.cc/3T4N-X8PF] ("[National Detention Standards] 2019 has 13 fewer standards than does 2011 [Performance-Based National Detention Standards] . . . creating a second tier of standards, and . . . less protection for all the detainees assigned by ICE to facilities governed by these standards." (citations omitted)); ICE, PROGRESS IN IMPLEMENTING 2011 PBNDS STANDARDS AND DHS PREA REQUIREMENTS AT DETENTION FACILITIES 7–8 (2018), https://www.dhs.gov/sites/default/files/publications/ICE%20-%20Progress%20in%20Implementing%202011%20PBNDS%20Standards%20and%20DHS%20PREA%20Requirements_0.pdf [https://perma.cc/FK4N-XL6M] ("The application of new detention standards at any given detention facility requires negotiation with the contractor or locality operating the facility . . . ." *Id.* at 7.); U.S. GOV'T ACCOUNTABILITY OFF., GAO 15-153, IMMIGRATION DETENTION: ADDITIONAL ACTIONS NEEDED TO STRENGTHEN MANAGEMENT AND OVERSIGHT OF FACILITY COSTS AND STANDARDS 33–35 (2014), https://www.gao.gov/assets/670/666467.pdf [https://perma.cc/4TV4-QMK8] (finding that "ICE did not have documentation for reasons why standards vary across facilities," *id.* at 33 (capitalization omitted)).

detainees under the Fifth, Eighth, and Fourteenth Amendments.[61] As will be explored below, however, the legal standard for noncitizen detainees has been applied inconsistently, resulting in a patchwork of protections that is difficult to navigate. But before proceeding to such cases, it helps to first discuss *DeShaney v. Winnebago County Department of Social Services*,[62] in which the Court established the broader framework for when, and as to whom, the government owes an *affirmative* duty to protect and provide care under the Due Process Clause.

B. Theories of Substantive Due Process Violations

DeShaney was a tragic case involving a young child who had been repeatedly beaten by his father.[63] Social workers and local officers were allegedly aware of the possible abuse but failed to intervene.[64] DeShaney and his mother brought suit under the Fourteenth Amendment, arguing that the officials' "failure to act" had unconstitutionally deprived DeShaney of his liberty.[65] The Court rejected this claim and declared that the Due Process Clause "confer[s] no [general] affirmative right to governmental aid."[66] The *DeShaney* Court thus championed the notion that the Constitution delineates what the government *cannot* do, rather than what it must do; individuals generally have no enforceable positive rights against the government.[67]

Importantly though, the Court carved out two exceptions to the rule of no duty. First, under the "special relationship" doctrine,[68] it held that "when the State takes a person into its custody and holds him there against his will,"[69] this triggers a special custodial relationship giving rise to "a corresponding duty to assume some responsibility for his safety and general well-being."[70] Second, under what has become known as

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[61] *See, e.g.*, C.G.B. v. Wolf, 464 F. Supp. 3d 174, 208 (D.D.C. 2020) (considering precedent relating to pretrial criminal detainees for noncitizens' conditions of confinement claims).

[62] 489 U.S. 189 (1989).

[63] *Id.* at 191.

[64] *Id.*

[65] *Id.*; *see id.* at 193.

[66] *Id.* at 196; *see id.* at 203.

[67] *See* Jenna MacNaughton, Comment, *Positive Rights in Constitutional Law: No Need to Graft, Best Not to Prune*, 3 U. PA. J. CONST. L. 750, 750–51 (2001); *see also* Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983). For broader scholarly critique on this view, see Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2272–73 (1990); and Robin West, *Toward an Abolitionist Interpretation of the Fourteenth Amendment*, 94 W. VA. L. REV. 111, 139 (1991).

[68] *DeShaney*, 489 U.S. at 197 n.4 (discussing the "special relationship" doctrine).

[69] *Id.* at 199–200.

[70] *Id.* at 200. Explaining the rationale for this principle, the Court cited precedents involving claims by individuals in various custodial settings. *See id.* at 198–99 (first citing Estelle v. Gamble, 429 U.S. 97 (1976) (incarcerated prisoners); then citing Youngberg v. Romeo, 457 U.S. 307 (1982) (involuntarily institutionalized patients); and then citing City of Revere v. Mass. Gen. Hosp., 463

the "state-created danger" doctrine, courts have found the government liable for affirmatively placing individuals in danger or positions of vulnerability that they would otherwise not have faced.[71] In doing so, they point to language in *DeShaney* finding significant that the government neither "played [a] part in [the] creation" of the dangers that DeShaney faced, "nor did . . . anything to render him any more vulnerable."[72] While the elements of a state-created danger claim vary across circuits,[73] a state-created danger suit commonly requires government *action* as opposed to mere failure to act[74] and typically involves a higher level of culpability than deliberate indifference.[75] For instance, the doctrine has been applied to find police officers liable for abandoning a passenger in a crime-prone area while arresting a motorist,[76] and for kicking out an intoxicated bar patron and preventing him from getting into his car on an extremely cold night.[77] With this background in mind, the following sections examine how *DeShaney*'s two exceptions have developed in the context of constitutional challenges by noncitizens.

1. Special Relationship Doctrine. — The special relationship doctrine imposes a duty on the government to provide "basic human needs" including "food, clothing, shelter, medical care, and reasonable safety" for persons held in its custody.[78] This duty provides the basis for challenges by incarcerated and institutionalized individuals including immigrant detainees, who claim that confinement under the circumstances amounts to an unconstitutional "punishment[]" in violation of the Eighth Amendment and the Due Process Clauses.[79]

U.S. 239 (1983) (suspects in police custody)); *id.* at 199 n.6 (citing, inter alia, Bell v. Wolfish, 441 U.S. 520, 535 n.16 (1979) (pretrial detainees)).

71 Laura Oren, *Safari into the Snake Pit: The State-Created Danger Doctrine*, 13 WM. & MARY BILL RTS. J. 1165, 1167 (2005) ("In the years since 1989, most of the circuits have accepted the state-created danger doctrine in [diverse] fact situations."); *see* Erwin Chemerinsky, *The State-Created Danger Doctrine*, 23 TOURO L. REV. 1, 24–25 (2007) ("[E]very single circuit . . . has recognized that at least in some circumstances, based on the language of *DeShaney*, there is a basis for state-created danger.").

72 *DeShaney*, 489 U.S. at 201; *see* Oren, *supra* note 71, at 1166–67.

73 *See* Chemerinsky, *supra* note 71, at 26 (noting the "radical difference between the law in the Ninth Circuit in this area and the law in the Fifth Circuit").

74 *See* Oren, *supra* note 71, at 1167.

75 *See, e.g.*, Uhlrig v. Harder, 64 F.3d 567, 572 (10th Cir. 1995) (requiring "reckless or intentionally injury-causing state action which 'shocks the conscience'"); *see also* Oren, *supra* note 71, at 1168.

76 *See* Wood v. Ostrander, 879 F.2d 583, 588 (9th Cir. 1989).

77 *See* Munger v. City of Glasgow Police Dep't, 227 F.3d 1082, 1087 (9th Cir. 2000); *see also* Currier v. Doran, 242 F.3d 905, 923 (10th Cir. 2001) (applying the doctrine to a social worker who transferred two children to their potentially abusive father); Davis v. Brady, 143 F.3d 1021, 1023 (6th Cir. 1998) (applying the doctrine to police officers who abandoned the intoxicated plaintiff on a highway).

78 DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 200 (1989).

79 U.S. CONST. amend. VIII; *see id.* amends. V, XIV.

For prisoners, the controlling test is whether the government exhibited "deliberate indifference" to a basic human need.[80] This includes both an objective and a subjective component: the government must have knowingly disregarded an objectively substantial risk to the prisoner's health or safety.[81] For pretrial detainees, the standard is less clear.[82] While the Court has suggested that detainees awaiting trial without a conviction are entitled to "at least as great" protection as convicted prisoners are,[83] it has done so without specifying whether this standard requires equal or greater protection.[84] *Bell v. Wolfish*[85] clarified that, in any case, pretrial detainees may not be held in "punitive" conditions, which exist if they are (1) expressly intended to punish; (2) not rationally related to a legitimate government objective; or (3) excessive to that objective.[86] But lower courts have applied this test in different ways, with some "assimilat[ing] pretrial detainees' claims to those by convicted prisoners, applying the Eighth Amendment standards to both,"[87] and others suggesting that *Bell*'s reasonable-relationship test is purely objective.[88]

The case law for immigrant detainees has evolved largely parallel to that of pretrial detainees,[89] but with some critical deviations and added layers of complexity. Here too, the case law remains in flux,[90] and the fact-specific *Bell* test leads to varying

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80 Helling v. McKinney, 509 U.S. 25, 32 (1993) (quoting Estelle v. Gamble, 429 U.S. 97, 104 (1976)).

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

82 *See generally* Catherine T. Struve, *The Conditions of Pretrial Detention*, 161 U. PA. L. REV. 1009 (2013).

83 City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244 (1983); *see* Bell v. Wolfish, 441 U.S. 520, 545 (1979) ("[P]retrial detainees, who have not been convicted of any crimes, retain at least those constitutional rights that we have held are enjoyed by convicted prisoners.").

84 *See Revere*, 463 U.S. at 243–45; City of Canton v. Harris, 489 U.S. 378, 388 n.8 (1989) (noting that in *City of Revere v. Massachusets General Hospital*, 463 U.S. 239, the Court "reserved decision on the question whether something less than the Eighth Amendment's 'deliberate indifference' test may be applicable in claims by detainees"); Struve, *supra* note 82, at 1012.

85 441 U.S. 520.

86 *Id.* at 538; *see id.* at 538–39.

87 Struve, *supra* note 82, at 1012; *see also* Burrell v. Hampshire County, 307 F.3d 1, 7 (1st Cir. 2002); Lopez v. LeMaster, 172 F.3d 756, 759 n.2 (10th Cir. 1999); Thompson v. County of Medina, 29 F.3d 238, 242 (6th Cir. 1994) ("[D]etainees are . . . entitled to the same Eighth Amendment rights as other inmates.").

88 *See, e.g.*, Slade v. Hampton Rds. Reg'l Jail, 407 F.3d 243, 251 n.7 (4th Cir. 2005); Jones v. Blanas, 393 F.3d 918, 933–34 (9th Cir. 2004) (holding that conditions for civil detainees are presumptively punitive if similar to those for pretrial criminal detainees or convicted prisoners); Agyeman v. Corr. Corp. of Am., 390 F.3d 1101, 1104 (9th Cir. 2004); Brogsdale v. Barry, 926 F.2d 1184, 1187 & n.4 (D.C. Cir. 1991); *see also* Struve, *supra* note 82, at 1024–30.

89 *See, e.g.*, Doe v. Kelly, 878 F.3d 710, 720 (9th Cir. 2017); Edwards v. Johnson, 209 F.3d 772, 778 (5th Cir. 2000) ("We consider a person detained for deportation to be the equivalent of a pretrial detainee . . . ."); Al Najjar v. Ashcroft, 186 F. Supp. 2d 1235, 1243 (S.D. Fla. 2002).

90 In particular, recent decisions cite to the Court's holding in *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015), that a pretrial detainee bringing an *excessive force* claim need show only that the

outcomes.[91] In addition, though, the continued perplexity over whether the plenary power doctrine or aliens' rights tradition should govern amplifies uncertainties.[92] Some courts have concluded that the government's plenary discretion over the admission and exclusion of noncitizens should not affect noncitizens' protection from inhumane treatment while detained.[93] These opinions thus reaffirm the aliens' rights tradition and reinforce the notion that substantive due process claims based on the government's failure to protect fall outside the domain of immigration law.[94] In contrast, others have invoked plenary power reasoning to hold that detained noncitizens who have not yet been admitted into the country possess only a limited right to be free from "*gross* physical abuse" or "*malicious* infliction of cruel treatment."[95] In effect, these decisions markedly deviate from the generally applicable standard for pretrial detainees and establish a uniquely stringent standard for a significant number of noncitizens.[96]

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officer's use of force was objectively unreasonable. *Id.* at 2472–73; *see* C.G.B. v. Wolf, 464 F. Supp. 3d 174, 211 n.31 (D.D.C. 2020) (compiling cases that have extended *Kingsley*'s objective standard). The question of whether *Kingsley* also applies to conditions of confinement claims, however, remains unsettled. *See* Gomes v. U.S. Dep't of Homeland Sec., 460 F. Supp. 3d 132, 146–47 (D.N.H. 2020).

[91] *Compare* Justiz-Cepero v. INS, 882 F. Supp. 1582, 1584 (D. Kan. 1995) ("Although the conditions described by plaintiff are indeed harsh, it is apparent plaintiff's essential needs of food, clothing, shelter, and medical care were provided."), *with* Belbachir v. County of McHenry, 726 F.3d 975, 981–83 (7th Cir. 2013) (reversing summary judgment for defendant on claim that failure to place noncitizen on suicide watch amounted to deliberate indifference to risk of suicide).

[92] *See* Taylor, *supra* note 7, at 1092.

[93] *See, e.g.*, Castro v. U.S. Dep't of Homeland Sec., 835 F.3d 422, 449 n.32 (3d Cir. 2016) ("[W]e are certain that this 'plenary power' does not mean Congress or the Executive can subject . . . aliens to inhumane treatment." (citing Wong Wing v. United States, 163 U.S. 228, 237 (1896))); Martinez-Aguero v. Gonzalez, 459 F.3d 618, 623 (5th Cir. 2006) ("There are, however, no identifiable national interests that justify the wanton infliction of pain."); Lynch v. Cannatella, 810 F.2d 1363, 1374 (5th Cir. 1987).

[94] *See* Kwai Fun Wong v. United States, 373 F.3d 952, 972 (9th Cir. 2004) (noting that precedent relating to "the narrow question of the scope of procedural rights available in the admissions process . . . is not necessarily applicable with regard to other constitutional rights"); Chi Thon Ngo v. INS, 192 F.3d 390, 396 (3d Cir. 1999).

[95] Medina v. O'Neill, 838 F.2d 800, 803 (5th Cir. 1988) (emphases added) (quoting *Lynch*, 810 F.2d at 1374); *see, e.g.*, Gisbert v. U.S. Att'y Gen., 988 F.2d 1437, 1442 (5th Cir. 1993); Adras v. Nelson, 917 F.2d 1552, 1559 (11th Cir. 1990) (concluding that "severe overcrowding, insufficient nourishment, [and] inadequate medical treatment" did not constitute "'gross' physical abuse" (internal citation omitted)); Correa v. Thornburgh, 901 F.2d 1166, 1171 n.5 (2d Cir. 1990) (stating that excludable noncitizens are entitled to "little or no" due process protection); *Medina*, 838 F.2d at 803 ("The stowaways alleged neither that cruel treatment was maliciously inflicted upon them nor that they suffered gross physical abuse. They stated no claim for violation of due process rights."); *see also* Taylor, *supra* note 7, at 1152–54.

[96] *See* Taylor, *supra* note 7, at 1152; *see also id.* at 1149 ("*Adras*, like *Medina*, extracted language from *Lynch* to set an unusually high threshold for excludable aliens seeking to challenge the conditions of their confinement.").

2. State-Created Danger Doctrine. — Claims by noncitizens under the state-created danger theory have similarly been shaped by the enduring influence of the plenary power doctrine. A particularly clear illustration of this impact is the Third Circuit's decision in *Kamara v. Attorney General of the United States*,[97] where a noncitizen challenged the government's deportation order by contending that removal to his home country would affirmatively subject him to the likelihood of torture.[98] Rejecting this argument, the court explained that granting such a claim "would impermissibly tread upon the Congress' virtually exclusive domain over immigration."[99] It added that, as a matter of law, "the state-created danger exception has no place in our immigration jurisprudence."[100] Several courts have followed suit, citing *Kamara* for its categorical approach to foreclose the state-created danger exception as a theory of due process violation.[101]

Critically, others have gone further and extended *Kamara* to quite distinguishable facts. In particular, similar reasoning has been invoked to strike down claims by so-called "alien informants" who assist U.S. law enforcement and face a risk of retribution in their home country as a result of such activity.[102] In one such case, a noncitizen argued that his cooperation with the U.S. government's drug investigation implicating members of the Nigerian military created a risk of torture if he were to be deported.[103] The district court allowed his claim to proceed, stressing that the plenary power doctrine was inapplicable, since at issue was not a "right to *remain* in the United States, but the right to live and . . . be free from state sanctioned torture, the danger of which . . . the executive *created*."[104] The court thus treated the availa-

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97 420 F.3d 202 (3d Cir. 2005).

98 *See id.* at 206–07, 216.

99 *Id.* at 217–18.

100 *Id.* at 217.

101 *See, e.g.*, Paulino v. Att'y Gen., 445 F. App'x 558, 561 (3d Cir. 2011); Beibei Zhang v. Holder, 358 F. App'x 216, 218 (2d Cir. 2009); Vicente-Elias v. Mukasey, 532 F.3d 1086, 1095 (10th Cir. 2008); *see also* Daniel J. Moore, Comment, *Protecting Alien-Informants: The State-Created Danger Theory, Plenary Power Doctrine, and International Drug Cartels*, 80 TEMP. L. REV. 295, 325 (2007) ("The Third Circuit . . . h[eld] that the plenary power doctrine categorically bars the recognition of state-created danger claims in deportation proceedings.").

102 *See* Medina-Araujo v. Whitaker, 754 F. App'x 432, 434–36 (7th Cir. 2018); Williams v. Att'y Gen., 219 F. App'x 258, 265 (3d Cir. 2007); Vasquez v. Att'y Gen., 208 F. App'x 184, 188 (3d Cir. 2006); Carias v. Harrison, Nos. 13-CT-3264, 14-CT-3104, 2017 WL 1155749, at *13–14 (E.D.N.C.), *aff'd*, 705 F. App'x 181 (4th Cir. 2017); Rosciano v. Sonchik, No. CIV01-0472, 2002 WL 32166630, at *5–6 (D. Ariz. Sept. 9, 2002). *See generally* Moore, *supra* note 101 (describing alien-informant cases and suggesting that the state-created danger doctrine be available for noncitizens who assisted the government in reliance on explicit assurances against deportation and whose removal would entail significant and foreseeable danger).

103 Enwonwu v. Gonzales, 438 F.3d 22, 24, 35 (1st Cir. 2006).

104 *See* Enwonwu v. Chertoff, 376 F. Supp. 2d 42, 70 (D. Mass. 2005) (emphases added).

bility of the state-created danger doctrine as a separate and distinct inquiry from whether the remedy sought implicated the government's control over immigration.[105] On appeal, however, the First Circuit reversed, echoing *Kamara*'s language that entertaining such a claim would be "an impermissible effort to shift to the judiciary the power to expel or retain aliens."[106] From this determination, it reached a sweeping conclusion that, regardless of whether a *citizen* might have a substantive due process right not to be exposed to state-created danger, a *noncitizen* facing removal has no such right.[107]

III. TOWARD AN AFFIRMATIVE DUTY TO PROTECT

A. The Recent Litigation

While the COVID-19 pandemic has devastated many communities, incarcerated and institutionalized individuals have felt some of its worst effects.[108] Immigration detention facilities run by ICE were responsible for over 245,000 coronavirus cases between May and August 2020 alone, and detainees reported an infection rate thirteen times higher than that of the general population.[109] This urgent reality has led to more than 100 lawsuits by immigrant detainees across the country challenging their conditions of confinement.[110] Broadly, the suits argue that the detention facilities fail to comply with public health guidance by the Centers for

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[105] *Cf.* Morgan v. Gonzales, 495 F.3d 1084, 1093 (9th Cir. 2007) ("The state-created danger doctrine may . . . be invoked to enjoin deportation."); Wang v. Reno, 81 F.3d 808, 810–11, 818 (9th Cir. 1996) (concluding that the government owes a constitutional duty to protect a noncitizen who was paroled into the country to testify in a drug conspiracy trial and as a result faced a risk of future torture).

[106] *Enwonwu*, 438 F.3d at 30; *see also id.* ("The [state-created danger] theory itself simply is not viable . . . .").

[107] *See id.*

[108] *See* Brendan Saloner et al., Research Letter, *COVID-19 Cases and Deaths in Federal and State Prisons*, 324 JAMA 602, 602–03 (2020); *see also* Ashoka Mukpo, *What's It Like to Be in Immigration Lockup During a Pandemic?*, ACLU (Aug. 24, 2020), https://www.aclu.org/news/immigrants-rights/whats-it-like-to-be-in-immigration-lockup-during-a-pandemic [https://perma.cc/4REB-WGVT].

[109] *See* GREGORY HOOKS & BOB LIBAL, DET. WATCH NETWORK, HOTBEDS OF INFECTION 24 tbl.5, 25–26 (2020), https://www.detentionwatchnetwork.org/sites/default/files/reports/DWN_Hotbeds%20of%20Infection_2020_FOR%20WEB.pdf [https://perma.cc/GE82-2M8P]; John Washington, *ICE Mismanagement Created Coronavirus "Hotbeds of Infection" in and Around Detention Centers*, THE INTERCEPT (Dec. 9, 2020, 1:00 PM), https://theintercept.com/2020/12/09/ice-covid-detention-centers [https://perma.cc/5RUH-8LMQ].

[110] *See* Shah, *supra* note 5; *see also* Monique O. Madan, *ICE Ignores Coronavirus Guidelines in Detention, Federal Lawsuit Says. "Many Will Die.,"* MIA. HERALD (Apr. 13, 2020, 9:40 PM), https://www.miamiherald.com/news/local/immigration/article241966876.html [https://perma.cc/MA7E-X3CL]; Joshua Matz, *The Coronavirus Is Testing America's Commitment to People's Constitutional Rights*, THE ATLANTIC (Apr. 20, 2020), https://www.theatlantic.com/ideas/archive/2020/04/coronavirus-jails-constitutional-rights/610216 [https://perma.cc/QB2P-R2TJ].

Disease Control and Prevention[111] (CDC) and ICE's Pandemic Response Requirements (PRR).[112]

The litigation is ongoing and varied in form; however, the typical litigant moves for a temporary restraining order (TRO) seeking injunctive and declaratory relief in the form of temporary release and/or implementation of measures to improve the conditions of confinement.[113] Under the standard for granting a TRO, the immigrant-detainee plaintiff is required to show (1) likelihood of success on the merits; (2) likelihood of irreparable harm in the absence of relief; (3) favorable balance of equities; and (4) furtherance of the public interest.[114] Procedurally, the motions are filed under 28 U.S.C. § 2241, which allows federal judges to grant a writ of habeas corpus if the petitioner is held "in custody in violation of the Constitution."[115] While many are filed as separate habeas petitions, there have been a number of class actions seeking relief on a wider scale and providing important context for the litigation

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111 *See* Shah, *supra* note 5; *see also Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, CTRS. FOR DISEASE CONTROL & PREVENTION (Feb. 19, 2021), https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html [https://perma.cc/M54Y-PSR9] (recommending that facilities take measures including pre-intake screening, provision of sufficient hygiene supplies, and social distancing).

112 *See, e.g.*, C.G.B. v. Wolf, 464 F. Supp. 3d 174, 224 (D.D.C. 2020); *see also* ICE, COVID-19 PANDEMIC RESPONSE REQUIREMENTS (6th ed. 2021), https://www.ice.gov/doclib/coronavirus/eroCOVID19responseReqsCleanFacilities.pdf [https://perma.cc/AS9J-D2CR] (setting forth preventative measures that must be taken by all detention facilities and recommended best practices).

113 *See* Shah, *supra* note 5; *see also, e.g.*, *C.G.B.*, 464 F. Supp. 3d at 196–97.

114 *See* Toure v. Hott, 458 F. Supp. 3d 387, 396 (E.D. Va. 2020). The last two factors "merge when the Government is the opposing party." Nken v. Holder, 556 U.S. 418, 435 (2009).

115 28 U.S.C. § 2241(c)(3); *see id.* § 2241(a). While outside the scope of this Note, a key threshold issue precluding relief has been the circuit split over whether a habeas petition under § 2241 is an appropriate vehicle to assert conditions challenges, which the Court has left as an open question. *See* Aslanturk v. Hott, 459 F. Supp. 3d 681, 691 (E.D. Va. 2020) (describing the circuit split); *see also* Preiser v. Rodriguez, 411 U.S. 475, 499–500 (1973). Another threshold issue that courts remain divided over is "[w]hether the INA's jurisdictional bars preclude [courts] from ordering ICE to release noncitizens" whose parole requests have been denied. *C.G.B.*, 464 F. Supp. 3d at 221; *see, e.g.*, *id.* (contrasting courts that have exercised jurisdiction to order release when based on a *constitutional* challenge from those that consider this as an impermissible restraint on the agency's discretionary authority).

at large.[116] For instance, the district court in *Fraihat v. ICE*[117] certified a nationwide class including "[a]ll people who are detained in ICE custody who have one of the [CDC-recognized] Risk Factors placing them at heightened risk" of contracting COVID-19.[118] Similarly, in *Flores v. Barr*,[119] the district court overseeing the longstanding *Flores* Settlement Agreement ordered the release of all minors who had been detained at ICE-managed family residential centers for over twenty days.[120]

Unlike *Flores*, which involved whether the government breached its *contractual* obligations under a settlement agreement, many of the lawsuits address *constitutional* challenges under the Due Process Clause. The claims center around two distinct but related theories of substantive due process that derive from the principle established in *DeShaney*[121] — namely, that the government must care for those who are unable to care for themselves "by reason of the deprivation of [their] liberty."[122] Specifically, plaintiffs have alleged that ICE's inadequate response to the pandemic renders continued detention (1) an unconstitutional punishment[123] and (2) a violation of the government's *affirmative* duty to provide detainees with reasonable protection.[124]

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116 *See, e.g.*, Savino v. Souza, 453 F. Supp. 3d 441, 443–44 (D. Mass. 2020) (habeas class action of ICE detainees at one detention center); Zepeda Rivas v. Jennings, 445 F. Supp. 3d 36, 38 (N.D. Cal. 2020) (habeas class action of ICE detainees at two facilities), *aff'd*, Nos. 20-16276, 20-16690, 2021 WL 631805 (9th Cir. Feb. 18, 2021); Gomes v. U.S. Dep't of Homeland Sec., 460 F. Supp. 3d 132, 135 (D.N.H. 2020). Such cases face unique challenges. *See C.G.B.*, 464 F. Supp. 3d at 184–85, 206–07 (rejecting class certification of transgender detainees held in ICE custody given differences in each noncitizen's health status and posture within the detention statutory scheme, as well as each facility's precautionary measures); *id.* at 198 & n.14 (discussing the divergence of authority over whether courts may issue class-wide relief under 8 U.S.C. § 1252(f)(1), which "bars courts from enjoining 'the operation of' the INA's detention provisions on a class-wide basis," *C.G.B.*, 464 F. Supp. 3d at 198 (quoting 8 U.S.C. § 1252(f)(1))).

117 445 F. Supp. 3d 709 (C.D. Cal.), *amended by* No. CV 19-1546, 2020 WL 6541994 (C.D. Cal. Oct. 7, 2020).

118 *Id.* at 736.

119 No. CV 85-4544, 2020 WL 3488040 (C.D. Cal.), *modified*, No. CV 85-4544, 2020 WL 6804512 (C.D. Cal. Nov. 12, 2020).

120 *Id.* at *3.

121 *See* Jones v. Wolf, 467 F. Supp. 3d 74, 82 (W.D.N.Y. 2020) (noting that "[t]he petitioners' claim [was] best understood as an amalgam of two theories of substantive Due Process violations: unconstitutional conditions of confinement and deliberate indifference to serious medical needs"); *see also* Habibi v. Barr, 445 F. Supp. 3d 990, 996 (S.D. Cal. 2020); Coreas v. Bounds, 451 F. Supp. 3d 407, 421 (D. Md. 2020); Pimentel-Estrada v. Barr, 458 F. Supp. 3d 1226, 1243 (W.D. Wash.), *amended by* 464 F. Supp. 3d 1225 (W.D. Wash. 2020).

122 DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 199 (1989) (quoting Estelle v. Gamble, 429 U.S. 97, 104 (1976)).

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

124 *DeShaney*, 489 U.S. at 200; *see also* cases cited *supra* note 121. Less commonly, due process claims have also been brought under the state-created danger doctrine. *See* Castillo v. Barr, 449 F. Supp. 3d 915, 919 (C.D. Cal. 2020); Gayle v. Meade, No. 20-21553, 2020 WL 1949737, at *27 (S.D. Fla.) (discussing but ultimately rejecting "the possibility that other detainees with COVID-19 are (or could be, under a creative legal theory) the third parties from whom ICE should be providing

To assess the likelihood of success on the merits of either claim, courts ask whether the condition or deprivation in question is punitive under the *Bell* test.[125] Given the difficulty of showing an express punitive intent and in light of precedents recognizing the government's legitimate interest in immigration detention,[126] the relevant inquiry often becomes whether the conditions are "excessive" in relation to that objective.[127] Under this excessiveness inquiry, courts look to whether the government acted with "deliberate indifference to the challenged condition[]" or deprivation.[128] And here the courts remain divided[129]: some apply an objective test and inquire whether the government placed the detainee at "substantial risk of suffering" without taking "reasonable" mitigatory measures[130] while others additionally require a subjective mens rea showing that the government actually knew of such risk.[131]

In either case, the inquiry considers "the totality of circumstances," which inevitably invites different conclusions based on various permutations of factors such as the petitioner's health or the specific precautions taken by each detention facility.[132] For instance, a young and healthy petitioner in a private cell may be denied relief, whereas an elderly petitioner with underlying medical conditions in a shared cell may

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protection"), *report and recommendation adopted in part*, No. 20-21553-CIV, 2020 WL 2086482 (S.D. Fla. Apr. 30, 2020). Other claims include those brought under the Administrative Procedure Act, 5 U.S.C. §§ 551, 553–559, 701–706, *see* C.G.B. v. Wolf, 464 F. Supp. 3d 174, 224 (D.D.C. 2020) (assessing plaintiffs' argument that ICE's failure to abide by the PRR was "arbitrary and capricious"), and procedural due process claims seeking a speedy bond hearing for individualized risk assessment of COVID-19, *e.g.*, Coronel v. Decker, 449 F. Supp. 3d 274, 287 (S.D.N.Y. 2020).

125 *See Jones*, 467 F. Supp. 3d at 82–83 (citing *Bell*, 441 U.S. at 538).

126 *See* Demore v. Kim, 538 U.S. 510, 528 (2003) ("[D]etention . . . serves the purpose of preventing deportable criminal aliens from fleeing prior to or during their removal proceedings . . . .").

127 *Jones*, 467 F. Supp. 3d at 83–84 ("The central dispute is therefore whether the petitioners' detention . . . under current conditions . . . is 'excessive' . . . .").

128 *Id.* at 84 (quoting Darnell v. Pineiro, 849 F.3d 17, 29 (2d. Cir. 2017)).

129 *See* Gomes v. U.S. Dep't of Homeland Sec., 460 F. Supp. 3d 132, 146–47 (D.N.H. 2020) (noting the circuit split as to the appropriate standard for claims by pretrial detainees concerning government actions).

130 Castillo v. Barr, 449 F. Supp. 3d 915, 922 (C.D. Cal. 2020); *see, e.g.*, C.G.B. v. Wolf, 464 F. Supp. 3d 174, 211 n.31 (D.D.C. 2020); Pimentel-Estrada v. Barr, 458 F. Supp. 3d 1226, 1247–48 (W.D. Wash.), *amended by* 464 F. Supp. 3d 1225 (W.D. Wash. 2020); *Gomes*, 460 F. Supp. 3d at 148.

131 *See, e.g.*, Coreas v. Bounds, 451 F. Supp. 3d 407, 423 (D. Md. 2020); *Jones*, 467 F. Supp. 3d at 84–85; Coronel v. Decker, 449 F. Supp. 3d 274, 284 (S.D.N.Y. 2020); Aslanturk v. Hott, 459 F. Supp. 3d 681, 699–700 (E.D. Va. 2020); Toure v. Hott, 458 F. Supp. 3d 387, 405 (E.D. Va. 2020).

132 Cristian A.R. v. Decker, 453 F. Supp. 3d 670, 685 (D.N.J. 2020) (quoting Hubbard v. Taylor, 399 F.3d 150, 160 (3d Cir. 2004)); *see id.* at 685–86.

prevail.[133] Likewise, what constitutes a "reasonable" measure of protection depends on the specific factual context.[134]

As to the remaining factors under the TRO standard, some decisions have found that the likelihood of irreparable harm is "speculative" or "too attenuated" when petitioners lack preexisting medical conditions, or when there are no confirmed cases of COVID-19 at the particular facility.[135] The analysis of the balance of equities and the public interest similarly hinges on a weighing of factors including the potential public health impact of releasing the detainee[136] and the strength of the government's interest in keeping the individual detained, which in turn varies depending on whether the detention was mandatory or discretionary under the statutory immigration scheme.[137]

As such, the lawsuits involve fact-intensive analyses and have produced considerably different outcomes — ranging from orders granting

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[133] *Cf. C.G.B.*, 464 F. Supp. 3d at 213 (noting that conditions of confinement claims in the COVID-19 context are evaluated "on a sliding scale" that considers "an individual detainee's age and specific health conditions, the conditions at her detention facility, and the legal basis and factual circumstances of her detention").

[134] *See id.* at 212 ("Plaintiffs do not articulate precisely what 'reasonable safety' means in the context of detention during a global pandemic."); O.M.G. v. Wolf, 474 F. Supp. 3d 274, 287 (D.D.C. 2020) ("[T]he government's obligation to provide 'reasonable safety' does not require that detention facilities reduce the risk of harm to zero . . . ." (internal quotation marks omitted) (citing *C.G.B.*, 464 F. Supp. 3d at 211–12)).

[135] *Aslanturk*, 459 F. Supp. 3d at 700; *see id.* at 697; Habibi v. Barr, 445 F. Supp. 3d 990, 999–1000 (S.D. Cal. 2020) (cautioning against granting relief to the "generic detainee," *id.* at 1000 (quoting Lopez-Marroquin v. Barr, 955 F.3d 759, 761 (9th Cir. 2020) (Callahan, J., dissenting))); *Coreas*, 451 F. Supp. 3d at 426; Ortuño v. Jennings, No. 20-cv-02064, 2020 WL 1701724, at *4 (N.D. Cal. Apr. 8, 2020) (finding that vulnerable individuals were likely to incur irreparable injury).

[136] *Compare Habibi*, 445 F. Supp. 3d at 1000 (finding release not in the public interest as petitioner was in quarantine due to his exposure to COVID-19), *with A.R.*, 453 F. Supp. 3d at 689 (noting that "the public interest . . . supports the release of Petitioners before they contract COVID-19 to preserve critical medical resources").

[137] *See, e.g.*, *Coreas*, 451 F. Supp. 3d at 429 (suggesting that the government's general interest in immigration enforcement was not as strong as its specific interest in *mandatory* detention of detainees who had been convicted of serious crimes and posed a flight risk); *C.G.B.*, 464 F. Supp. 3d at 211. Under the statutory detention framework, the Department of Homeland Security has discretion to detain noncitizens pending removal proceedings or as part of efforts to secure their removal. *See* SMITH, *supra* note 53, at 8 (explaining the INA's detention provisions). Noncitizens removable on grounds of specific crimes or terrorist-related activities, or those seeking initial entry and believed to be removable, face mandatory detention. *See id.*

immediate release,[138] to orders denying relief upon findings that the particular condition was not "excessive,"[139] to orders dismissing the petition based on a threshold issue of jurisdiction.[140] Yet others have admonished "blanket release from immigration detention" as an inappropriately broad remedy[141] and granted the motion only in part, mandating narrower remedies such as the cure of deficient conditions or compelled compliance with specific preventive measures.[142]

B. Limits and Implications

Before analyzing the wider implications of the recent lawsuits, it helps to first acknowledge a number of limitations. Perhaps most obviously, the fact-specific analyses and inconsistencies among courts may lessen the precedential impact of any particular outcome. One might also argue that the cases, taken together, have limited future application,

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[138] *See, e.g.*, Sallaj v. ICE, No. CV 20-167, 2020 WL 1975819, at *4 (D.R.I. Apr. 24, 2020). In *Pimentel-Estrada v. Barr*, 458 F. Supp. 3d 1226 (W.D. Wash. 2020), the court granted a detainee immediate release "on reasonable conditions of supervision." *Id.* at 1253. In a subsequent determination, the court converted the TRO into a preliminary injunction and ordered that the "continued release be conditioned only on [the detainee's] compliance with federal, state, and local laws, and his keeping ICE reasonably informed of his current residence and mailing address." Pimentel-Estrada v. Barr, 464 F. Supp. 3d 1225, 1237 (W.D. Wash. 2020). In *Thakker v. Doll*, 451 F. Supp. 3d 358 (M.D. Pa. 2020), the court ordered immediate release of petitioners who were at a high risk of infection due to age and/or underlying health conditions. *See id.* at 365, 372. The court subsequently determined that some, but not all, of the immigrants should be granted continued release. *See* Thakker v. Doll, 456 F. Supp. 3d 647, 661, 666 (M.D. Pa. 2020) ("Because each Petitioner presents a unique set of circumstances that we must balance against the public interest, we shall consider Petitioners individually . . . .").

[139] *See, e.g.*, Dawson v. Asher, 447 F. Supp. 3d 1047, 1050–51 (W.D. Wash. 2020) (concluding that plaintiffs failed to meet burden of proof where there was no evidence that anyone at the facility had COVID-19 and the government had taken specific precautionary measures); Hope v. Warden York Cnty. Prison, 972 F.3d 310, 329, 331 (3d Cir. 2020).

[140] *See, e.g.*, *Habibi*, 445 F. Supp. 3d at 997 (finding the court lacked jurisdiction to review the immigration judge's discretionary determination as to the detainee's flight risk).

[141] O.M.G. v. Wolf, 474 F. Supp. 3d 274, 277 (D.D.C. 2020); *see id.* at 285.

[142] *See, e.g.*, Jones v. Wolf, 467 F. Supp. 3d 74, 80 (W.D.N.Y. 2020) (holding that "[i]mmediate release . . . [was] not the appropriate remedy — at least at this juncture" and instead requiring the government to "submit a detailed plan to the Court . . . demonstrating how [it would] provide those petitioners who are vulnerable . . . with a living situation that facilitates 'social distancing'" (emphasis omitted)). Other courts have signaled that they would be willing to consider granting a narrower remedy than release if petitioners suggested one. *See, e.g.*, *O.M.G.*, 474 F. Supp. 3d at 285–86 (citing to cases that require a plaintiff seeking injunction to show that the court-ordered remedy is "specifically tailored" and not a "global remedy," *id.* at 285 (citations omitted)); Toure v. Hott, 458 F. Supp. 3d 387, 401–02 (E.D. Va. 2020).

given that COVID-19 itself presents a unique challenge with unparalleled urgency, requiring extraordinary measures.[143] Yet another limitation could be the difficulty of extending cases that grant *predeprivation* equitable relief to *postdeprivation* damages claims.[144]

Despite these caveats, analyzing lower court decisions and identifying common themes is both important and instructive, especially in the absence of definitive Supreme Court guidance.[145] This section highlights one such crosscutting theme: the explicit recognition by courts that — even if the facts of the particular case require denial of relief — the government nonetheless owes an *affirmative* duty to protect and provide adequate care for noncitizen detainees.[146] Given the rarity of cases that directly recognize and address the scope of such a duty,[147] the new slew of decisions that foreground an affirmative duty to protect noncitizens is significant in itself. If anything, this rhetoric marks a shift away from the narrative that the government owes a bare minimum to noncitizens — a notion still prevalent in legal and political discourse, partly due to the longstanding doctrine that the admission of noncitizens is a "matter of pure permission, of simple tolerance, and creates no obligation,"[148] and the related notion that even after they set foot on American soil, the default expectation is for noncitizens to remain self-sufficient.[149]

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143 *Cf.* Savino v. Souza, 459 F. Supp. 3d 317, 332 (D. Mass. 2020) (observing that, while the government generally has competing responsibilities to "guard the health and safety of those incarcerated within its facility, as well as protect the outside public from dangerous detainees," in the pandemic context, such a "dichotomy is somewhat misleading" since the government's duties to the public "are jeopardized by locking up as many inmates as possible" and causing a viral outbreak); Shah, *supra* note 5 (suggesting that the pandemic context has led to "a modified definition of 'public interest'").

144 *Cf.* Ziglar v. Abbasi, 137 S. Ct. 1843, 1861 (2017) (noting the different concerns involved when a court provides constitutional protection under its traditional equitable power compared to when it allows monetary damages against government officials).

145 *Cf.* Erwin Chemerinsky, *Government Duty to Protect: Post*-DeShaney *Developments*, 19 TOURO L. REV. 679, 679–80 (2003) ("To make sense of the post-*DeShaney* developments, one must recognize that certain patterns have begun to emerge in lower court cases.").

146 *See, e.g.*, *Savino*, 459 F. Supp. 3d at 327 (citing to *DeShaney* as the "cardinal principle" underlying the detainees' claim); Castillo v. Barr, 449 F. Supp. 3d 915, 920 (C.D. Cal. 2020) (citing to *DeShaney* after stating that "[t]he law is clear — the Government cannot put a civil detainee into a dangerous situation, especially where that dangerous situation was created by the Government"); Ousman D. v. Decker, No. 20-2292, 2020 WL 1847704, at *5 (D.N.J. Apr. 13, 2020) (agreeing that *DeShaney* requires the government to furnish reasonable safety to detainees); D.A.M. v. Barr, 474 F. Supp. 3d 45, 63–64 (D.D.C. 2020) (while noting that "[d]ue process only requires . . . 'reasonable safety,' not perfect safety," *id.* at 63 (quoting DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 200 (1989)), recognizing that *DeShaney* imposes an affirmative duty nonetheless).

147 *E.g.*, Sanusi v. Dep't of Homeland Sec., No. 06 CV 2929, 2010 WL 10091023, at *14 (E.D.N.Y. Dec. 1, 2010) (noting how "[t]he Second Circuit has not explicitly determined the extent of substantive due process rights afforded to excludable aliens"), *report and recommendation adopted as modified*, No. 06 CV 2929, 2014 WL 1310344 (E.D.N.Y. Mar. 31, 2014).

148 Fong Yue Ting v. United States, 149 U.S. 698, 708 (1893).

149 *See* Mathews v. Diaz, 426 U.S. 67, 80 (1976) (reasoning that there could not be "even a colorable constitutional claim to a share in the bounty that a conscientious sovereign makes available to

More concretely, though, the recent addition to case law provides much-needed clarity for litigants with regard to the availability of substantive due process claims under *DeShaney*'s two exceptions. This development has practical significance for immigration detention litigation more broadly. For instance, cases that expressly recognize noncitizen detainees' constitutional right to safety and medical care help counter the qualified immunity defense, which shields government officers from suit if their conduct does not violate a "clearly established" right and often poses a substantial hurdle for noncitizens seeking monetary damages under 42 U.S.C. § 1983.[150]

Furthermore, while the bulk of the pandemic-related lawsuits rely on *DeShaney*'s special relationship doctrine,[151] recognizing a broader affirmative duty to protect also reinforces claims under the state-created danger doctrine, insofar as the two are derived from the same underlying principle. This, in effect, weakens *Kamara*-like cases that categorically foreclose the state-created danger doctrine for noncitizen detainees facing deportation.[152] That is, if *DeShaney*'s first exception can be invoked to grant *release* (albeit temporary) from custody, it is unclear why the second exception "has no place" simply because the remedy sought is relief from removal.[153] Establishing the validity of the state-created danger doctrine has potentially wide-ranging implications, as demonstrated by the groundbreaking ruling in *J.P. v. Sessions*,[154] where a dis-

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its own citizens and *some* of its guests"); *cf.* 8 U.S. CITIZENSHIP & IMMIGR. SERVS., USCIS POLICY MANUAL, pt. G, ch. 1 (2021) https://www.uscis.gov/policy-manual/volume-8-part-g [https://perma.cc/V5NA-W9EC] ("Self-sufficiency is a basic principle of U.S. immigration law and policy. . . . Aliens should not depend on public resources to meet their needs." (footnotes omitted)).

150 *See, e.g.*, E.D. v. Sharkey, No. CV 16-2750, 2017 WL 2126322, at *9 (E.D. Pa. May 16, 2017) (indicating that qualified immunity would be available if the "right at hand" were defined as "the right to have a non-custodial and non-supervisory government officer protect an immigration detainee from sexual assault of which he is aware," since no precedent clearly established such a right); E.A.F.F. v. United States, 955 F. Supp. 2d 707, 736, 759 (W.D. Tex. 2013) (granting summary judgment to defendants in a suit alleging physical and sexual abuse in detention on the basis of qualified immunity after noting that plaintiffs were required to show that "the allegedly violated constitutional rights were clearly established at the time of the incident," *id.* at 736 (citing Harlow v. Fitzgerald, 457 U.S. 800, 818 (1989)), and that "the defendant's conduct was objectively unreasonable in the light of that then clearly established law," *id.* (citing Tolan v. Cotton, 713 F.3d 299, 305 (5th Cir. 2013))), *aff'd sub nom.* E.A.F.F. v. Gonzalez, 600 F. App'x 205 (5th Cir. 2015); *cf.* Petition for Writ of Certiorari at 8, Anderson v. City of Minneapolis, 141 S. Ct. 110 (2020) (mem.) (No. 19-656) (discussing the impact of a circuit split on the application of the qualified immunity defense to the state-created danger doctrine).

151 *See, e.g.*, Jones v. Wolf, 467 F. Supp. 3d 74, 82 (W.D.N.Y. 2020).

152 *See supra* pp. 2497–99.

153 Kamara v. Att'y Gen., 420 F.3d 202, 217 (3d Cir. 2005); *see id.* at 217–18.

154 No. CV18-06081, 2019 WL 6723686 (C.D. Cal. Nov. 5, 2019).

trict court invoked the doctrine to mandate government-provided mental health services for immigrant families who were forcibly separated at the border.[155]

Another noteworthy aspect of the pandemic litigation is that several of the cases directly addressed and expressly rejected the argument that "noncitizen immigration detainees are entitled to lesser due process protections than citizens."[156] Critically, others went further and concluded that for purposes of substantive due process analysis, *excludable* noncitizens and *removable* noncitizens are treated alike.[157] As one court explained: "[All] petitioners claim that the government is forcing them to live in conditions that fall below acceptable societal standards of decency. By holding [excludable petitioners] in detention, the respondents have *assumed* a burden they cannot ignore — [their] status as . . . excludable alien[s] notwithstanding."[158] Echoing the language in *DeShaney*, these opinions have offered a straightforward explanation for placing all noncitizens on an equal footing with citizens: "[T]he power to incarcerate *implies* the duty to protect."[159] That is, the government's duty to protect arises not from the detainee's individual legal status, "but from the limitation which [the government] has imposed on [the detainee's] freedom to act on his own behalf."[160]

These decisions thus directly challenge precedents that have held excludable noncitizens to the uniquely high standard of "gross physical abuse" or "malicious infliction of cruel treatment."[161] A broader impli-

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[155] *See id.* at *35–36, *40 (reasoning that "[d]efendants took affirmative steps to implement the zero-tolerance policy in which immigrant parents were separated from their children . . . [and] this conduct caused severe mental trauma to parents and their children," *id.* at *36); *see also* Miriam Jordan, *U.S. Must Provide Mental Health Services to Families Separated at Border*, N.Y. TIMES (Nov. 6, 2019), https://nyti.ms/2Cn1luy [https://perma.cc/CWQ7-BLLZ].

[156] C.G.B. v. Wolf, 464 F. Supp. 3d 174, 210 n.30 (D.D.C. 2020) (pronouncing itself "deeply skeptical" of that argument and proceeding to "assume[] that Plaintiffs are entitled to the same substantive due process rights as citizens"); *see also* Coreas v. Bounds, 451 F. Supp. 3d 407, 420 (D. Md. 2020) (rejecting the government's plenary power argument as "unpersuasive"); *cf.* Toure v. Hott, 458 F. Supp. 3d 387, 402 (E.D. Va. 2020) (assuming for the purposes of analysis that immigrant detainees receive due process protections commensurate with those of citizens).

[157] Jones v. Wolf, 467 F. Supp. 3d 74, 83 n.6 (W.D.N.Y. 2020) ("[T]his Court does not find that [petitioner's] interests as an excludable alien are materially lower than those of removable aliens for purposes of this analysis and . . . the injunctive relief ordered . . . ." (emphasis omitted)).

[158] *Id.* (emphasis added); *see also* D.A.M. v. Barr, 474 F. Supp. 3d 45, 62–63 (D.D.C. 2020) (rejecting the government's argument that petitioners did not have substantive due process rights since they were excludable); Cristian A.R. v. Decker, 453 F. Supp. 3d 670, 683 n.20 (D.N.J. 2020) ("Respondents emphasize that they have lawfully exercised their discretionary authority to detain Petitioners during their removal proceedings. *This detention triggers* a corresponding obligation under the Constitution to provide for Petitioners' reasonable safety and medical needs[.]" (emphasis added)).

[159] Savino v. Souza, 459 F. Supp. 3d 317, 320 (D. Mass. 2020) (emphasis added).

[160] DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 200 (1989).

[161] *See* sources cited *supra* notes 95–96 and accompanying text.

cation, however, is that by extending *DeShaney*'s rationale to the context of immigration detention, they implicitly reject the plenary power doctrine as inapplicable to substantive due process claims alleging the government's failure to protect or provide care. That is, the opinions subtly but clearly shift away from cases that withhold due process protections from noncitizens based on the subject matter in controversy, or otherwise tailor protections based on noncitizens' level of "voluntary connection[s]" to the community.[162] Instead, by adopting *DeShaney*'s rationale in full, the decisions identify the locus of protections for noncitizens as the *government's* involuntary control over them and its causal role in creating or exacerbating the danger in question.

CONCLUSION

This Note has examined an issue that is increasingly important yet continues to suffer from an unfortunate lack of clarity: the extent of the government's duty to protect noncitizens in immigration detention. Parts I and II discussed the broader constitutional framework and examined how the case law in this area often tolerates ambiguity and apparent inconsistencies. Part III considered how recent challenges to conditions arising from the COVID-19 pandemic may suggest a shift in the legal landscape. As scholars have previously noted, constitutional principles in immigration law are shaped by unprecedented events that test the limits of immigration jurisprudence and compel courts to seek "new answers to . . . fundamental questions."[163] This Note suggests that the COVID-19 pandemic is one such event. The decisions that recognize immigrant-detainee claims under *DeShaney* collectively stand for the proposition that the government, by virtue of its own actions, assumes a positive constitutional duty to protect and care for those individuals that it detains — irrespective of their citizenship status.

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[162] United States v. Verdugo-Urquidez, 494 U.S. 259, 273 (1990); *see id.* at 272–73.

[163] Motomura, *Phantom Norms*, *supra* note 6, at 546.