No. 20-55662

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KELVIN HERNANDEZ ROMAN, *et al*.,

Petitioners-Appellees,

v.

CHAD WOLF, *et al*.,

Respondents-Appellants.

On Appeal from the United States District Court, Central District of California,
Case No. 5:20-cv-00768-TJH-PVC

BRIEF OF *AMICI* LAW PROFESSORS ON THE REMEDIAL POWERS OF FEDERAL COURTS

Filed In Support of Petitioners-Appellees

Kelly M. Dermody
Yaman Salahi
LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP
275 Battery Street, 29th Floor
San Francisco, CA 94111-3339
Telephone: (415) 956-1000
Facsimile: (415) 956-1008

Attorneys for Amici Law Professors

Judith Resnik
New Haven, CT

Lucas Guttentag
Stanford, CA

Stephen Vladeck
Austin, TX

Of Counsel

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

Statutes

Rules

Treatises

Other Authorities

TABLE OF AUTHORITIES
(continued)

Page

I. STATEMENT OF INTEREST

Amici law professors teach and write about the federal courts, judicial authority, remedies, habeas corpus, and constitutional and immigration law. We believe our understanding of these areas of law can assist this Court in considering the power of federal courts to provide provisional relief to individuals who are detained in congregate housing and therefore at heightened risk of contracting COVID-19.[1]

II. SUMMARY OF ARGUMENT

COVID-19 presents a deadly threat to the well-being and lives of people who contract this disease. To reduce the risk and spread of COVID-19, our governments have instructed us to stay distant from one another and to take measures that entail extraordinary departures from daily routines and the normal functioning of all institutions.

Detention centers that house immigrants, pretrial detainees, or convicted individuals for sustained periods of time put many people into densely populated spaces in which maintaining safe distances from other detainees and staff is not done or ensured. A recently published study found that prisoners had a risk of

[1] No counsel for a party authored this brief in whole or in part, and no entity or person other than *amici* and its counsel made a monetary contribution intended to fund the preparation or submission of this brief. *Amici* appreciate research assistance by students Megan Hauptman and Madeline Silva (Yale Law School) and Ally Daniels (Stanford Law School).

contracting COVID-19 4.6 times higher than the general population and a risk of death 2.6 times higher than the general population.[2] Reports on immigration detention centers are parallel or worse.[3]

The unprecedented harm of COVID-19 in congregate housing raises important legal questions, including whether COVID-19 has, in certain settings, turned a detention that was not challenged as unlawful when begun into unconstitutional custody. Many courts have addressed aspects of these questions, and several have provided provisional remedies while they consider the merits of the many legal issues raised.

Interim relief tailored to individual situations can be particularly appropriate given the stunning spread of the disease and the rapidly changing information about risk factors. In habeas cases filed under 28 U.S.C. §§ 2241, *et seq.*, individuals (at times proceeding in multi-party, class actions, or other aggregate forms) contest the lawfulness of the fact of confinement or the manner of its

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[2] *See* Brendan Saloner et al., *COVID-19 Cases and Deaths in Federal and State Prisons*, 324(6) JAMA 602-603 (July 8, 2020), https://jamanetwork.com/journals/jama/fullarticle/10.1001/jama.2020.12528.

[3] *See* Dennis Kuo, et al., *The Hidden Curve: Estimating the Spread of COVID-19 among People in ICE Detention*, Vera Institute of Justice (June 2020), https://www.vera.org/the-hidden-curve-covid-19-in-ice-detention (simulation estimated number of COVID-19 cases was 15 times higher than reported by ICE); Michael Irvine, et al., *Modeling COVID-19 and Its Impacts on U.S. Immigration and Customs Enforcement (ICE) Detention Facilities*, 97(4) J. Urban Health 439-447 (2020), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7228433/ (estimating that in optimistic scenario, 72% of ICE detainees are expected to be infected over 90-day period).

execution. In response, some courts have admitted individuals to "bail" or have "enlarged" their custody. To make that custody determination, judges consider whether continued custody would undermine the effectiveness of habeas relief, were the writ granted. Deciding whether to admit a person to bail requires assessing the substantiality of the underlying legal claim and the risks and impact of continued confinement, given the constitutional obligation to keep detained individuals in safe settings.

The relief at issue here for civil detainees poses questions distinct from many recent cases involving class-wide injunctive relief, often on behalf of state prisoners serving sentences of conviction. As is familiar, in the last months, appellate courts in several circuits, including this Court, have limited some of the remedies ordered at the trial level. Before this Court now is a different kind of remedy, which is individualized provisional relief that has long been available in habeas; judges have, as Congress instructs, fashioned remedies as "law and justice require." 28 U.S.C. § 2243. That provision is familiar from the many cases in which the Supreme Court has invoked it as a font of power, and the principle repeatedly announced is that federal judicial power exists in habeas to craft remedies responsive to individual circumstances. The district court's decision at issue here, asking the parties to propose procedures for individualized assessments

of bail for immigrant detainees, is an illustration of an appropriate exercise of this infusion of equity in habeas proceedings.

III. ARGUMENT

A. Habeas Corpus Is A Remedy for People Seeking Release from Custody in Criminal, Immigration, and Other Contexts

For centuries, habeas corpus has provided relief from unconstitutional detention. The Constitution enshrined the writ of habeas corpus, which has a substantial common law history. Congress has recognized federal habeas authority in a sequence of enactments, beginning with section 14 of the Judiciary Act of 1789. *See generally* Paul D. Halliday, *Habeas Corpus: From England to Empire* (Harvard U. Press, 2012); Amanda L. Tyler, *Habeas Corpus in Wartime* (Oxford U. Press, 2017); Randy Hertz and James Liebman, *Federal Habeas Corpus Practice and Procedure* (2 vols., 7th ed. 2019); Hart & Wechsler, *The Federal Courts and the Federal System*, Chapter X1, 1193-1164 (Richard H. Fallon, Jr, John F. Manning, Daniel J. Meltzer & David Shapiro, 7th ed., 2015). These citations are the tip of a vast literature on the history and law of habeas corpus.

Today, federal courts have jurisdiction to entertain habeas petitions pursuant to 28 U.S.C. §§ 2241, *et seq.* Under current law, Congress has imposed additional procedural requirements for certain habeas petitions. For example, persons in state custody pursuant to a criminal conviction must comply with exhaustion requirements and time frames. *See* 28 U.S.C. § 2254. Individuals in federal

custody challenge their criminal convictions or sentences through motions filed under 28 U.S.C. § 2255. Individuals held in immigration, pre-trial, and post-conviction detention may bring claims pursuant to 28 U.S.C. § 2241 (the general habeas statute), and, at times, pursuant to 28 U.S.C. § 1331, providing jurisdiction for claims arising under federal law. *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018) (overturning Ninth Circuit's statutory interpretation of 8 U.S.C. §§ 1225 and 1226, and remanding for consideration of habeas petitioners' constitutional challenges to prolonged immigration detention).

B. Federal Courts Have Power in Habeas Proceedings to Provide Provisional Remedies, Including Conditional Release on Bail or Enlargement While the Merits Are Pending

At its core, the writ of habeas corpus has "provided a means of contesting the lawfulness of restraint and securing release." *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1969 (2020). Congress has specified that, in reviewing a habeas petition, a court "shall summarily hear and determine the facts, and dispose of the matter as law and justice require." 28 U.S.C. § 2243. The legal and equitable authority of federal courts to fashion remedies is both recognized by statute and, as many courts have written, predicated on inherent judicial powers, the writ's constitutional protections, and its common law history.

1. Habeas Is An Appropriate Remedy When Petitioners Claim that COVID-19 Renders Individuals' Congregate Confinement Unconstitutional

COVID-19 poses a new and painful context in which to undertake analyses of habeas petitions. Courts have had to address whether COVID-19 claims about the danger of congregate living are a challenge to the fact of confinement or its execution, as distinct from claims about conditions of confinement. Under current interpretations, when a person seeks release from confinement or revision of a sentence, habeas jurisdiction is both proper and required. *See, e.g.*, *Preiser v. Rodriguez*, 411 U.S. 475, 498-99 (1978) (contrasting habeas cases "challenging the fact or duration of . . . physical confinement itself" with cases challenging "the conditions of . . . prison life"); *Heck v. Humphrey*, 512 U.S. 477 (1994) (concluding that an individual may not use Section 1983 to attack a conviction as unconstitutional).

As case law reflects, in the state prison context, when release or a determination of the lawfulness of detention is not sought, federal jurisdiction can also rest on other bases. *See, e.g.*, *Muhammad v. Close*, 540 U.S. 749 (2004) (holding habeas exhaustion not required in Section 1983 challenges unrelated to the validity of a conviction or duration of a sentence), *Wilkinson v. Dotson*, 544 U.S. 74 (2005) (holding state prisoners could challenge constitutionality of state parole procedures under Section 1983), and *Nelson v. Campbell*, 541 U.S. 637,

643-47 (2004) (holding prisoner challenging manner of execution, as contrasted with the sentence of execution, could proceed under Section 1983).

In short, to respect the obligation imposed by Congress on state prisoners serving a criminal sentence to exhaust judicial remedies before filing federal habeas petitions, the Supreme Court has developed a distinction between *conditions* of confinement (typically pursued as civil rights actions) and the *fact* of confinement, including its duration or execution. Yet as the Court has also recognized, the lines are not always sharp. Moreover, because COVID-19 converts ordinary detention into a threat of contracting a potentially lethal illness, a detainee bringing a COVID-19 claim and asking for temporary release from dangerous prison conditions is properly relying on habeas. *See Wilson v. Williams*, 961 F.3d 829, 837, 840 (6th Cir. 2020) (petitioners alleging danger from COVID-19 in confinement could seek habeas relief "[t]o the extent [they] argue the alleged unconstitutional conditions of their confinement can be remedied only by release").

In short, because the harm comes *from* and therefore the challenge is *to* the fact of confinement itself, habeas corpus jurisdiction provides a route to consideration of the merits. Further, that a person's detention may have been lawful at the outset does not alter the propriety of seeking habeas relief. The Supreme Court decision of *Ford v. Wainwright*, 477 U.S. 399 (1986), provides an analogous situation. In *Ford*, a prisoner asserted in a habeas petition that his

sentence may have been constitutional when imposed but thereafter become unconstitutional. The *Ford* Court held that a prisoner who lost his cognitive capacity after receiving a capital sentence could not, consistent with the Eighth Amendment, be executed; instead, the district court had to hold an evidentiary hearing on his mental competency because Florida's evaluation procedures were constitutionally inadequate. *Accord Panetti v. Quarterman*, 551 U.S. 930 (2007).

In addition to the question of the jurisdictional bases for federal court litigation, another issue in COVID-19 cases is whether the continued confinement becomes unconstitutional because of the health risks. When petitioners are civil ICE detainees, courts have analyzed the constitutionality under the Fifth Amendment's Due Process Clause. As one court recently explained, the test is whether custodians have taken sufficient steps to protect detainees' serious medical needs or an alternative placement is needed. *See*, *e.g.*, *Malam v. Adducci*, No. 20-10829, 2020 WL 3512850, at *13 (E.D. Mich. June 28, 2020) (underscoring that, in contrast to Eighth Amendment claims filed by convicted persons, adjudication of due process claims by civil detainees does not require a court finding of "an explicit intent to punish").

In the spate of COVID-19 cases, judges have also had to consider how to protect the status quo of a person's wellbeing. Recognizing the need for interim relief, district courts in this and other circuits have fashioned individualized bail

hearings for ICE detainees. *See*, *e.g.*, *Malam v. Adducci*, No. 20-10829, --- F. Supp. 3d ----, 2020 WL 2468481, at *9-17 (E.D. Mich. May 12, 2020) (ordering release with restrictions of two ICE detainees in part based on likelihood of demonstrating confinement was unconstitutional); *Malam v. Adducci*, No. 20-10829, 2020 WL 2616242 (E.D. Mich. May 23, 2020) (same for two additional detainees). When dealing with many people in particular detention centers, courts have fashioned processes to make provisional release decisions about individuals. *Malam v. Adducci*, No. 20-10829, 2020 WL 4496597 (E.D. Mich. Aug. 4, 2020) (establishing procedures to consider members of habeas class for interim bail); *see also Savino v. Souza*, No. 20-10617-WGY, --- F. Supp. 3d ---, 2020 WL 1703844, at *9 (D. Mass. Apr. 8, 2020) (establishing process to "entertain[] bail applications" from immigration detainees).[4]

2. Bail or Enlargement Are Longstanding Aspects of Courts' Habeas Jurisdiction Which May Be Used to Mitigate the Threat of COVID-19 Caused by Detention

COVID-19 is a new issue for courts. Exigency and urgency are not, which is why provisional legal and equitable remedies have a long history. Some, like temporary restraining orders and preliminary injunctions, are familiar procedures

[4] Courts handling these cases are confronting a host of additional issues, including whether Rule 23 criteria are met, the applicability of exhaustion requirements, the constitutional merits, and the import of the Prison Litigation Reform Act (PLRA). The risk to individuals in dense housing has prompted many courts to consider interim, provisional remedies.

that do not require additional explanation, even as they have prompted debate about when standards are met. *See* Fed. R. Civ. P. 65. Indeed, a good many decisions on the use of preliminary injunctions in COVID-19 cases have issued, including in this case. *See, e.g.*, *Castillo v. Barr*, No. 19-6123, --- F. Supp. 3d ----, 2020 WL 1502864 (C.D. Cal. Mar. 27, 2020) (granting temporary restraining order compelling release of immigration detainees); *see also Malam*, 2020 WL 2468481, at *9-17; *Zepeda Rivas v. Jennings*, No. 20-cv-02731-VC, 2020 WL 2059848 (N.D. Cal. Apr. 29, 2020); *Alcantara v. Archambeault*, No. 20cv0756 DMS (AHG), --- F. Supp. 3d ----, 2020 WL 2315777, at *8-9 (S.D. Cal. May 1, 2020); *Ortuño v. Jennings*, Case. No. 20- cv-2064-MMC, Docket No. 38, 2020 WL 1701724 (N.D. Cal. Apr. 8, 2020); *see also Valentine v. Collier*, No. 4:20-cv-1115, --- F. Supp. 3d ----, 2020 WL 1916883 (S.D. Tex. Apr. 20, 2020); *Wilson v. Williams*, No. 4:20-cv-00794-JG, 2020 WL 1940882 (N.D. Ohio Apr. 22, 2020),

Not all of the district court orders listed above remain in effect, as appellate courts have stayed or reversed preliminary injunctions. Those decisions, often in truncated proceedings without explanation, did not address individualized bail determinations. In *Valentine v. Collier*, for example, the Supreme Court declined to vacate the Fifth Circuit's stay of a district court's injunction ordering a Texas prison for geriatric prisoners to follow a protocol for frequent cleaning and education efforts. 140 S. Ct. 1598 (2020) (mem.). The Fifth Circuit had raised

concerns about whether the state prisoners needed, under the Prison Litigation and Reform Act (PLRA), to exhaust administrative remedies before pursuing Eighth Amendment claims. The PLRA exhaustion requirement does not apply to immigration detainees, and the *Valentine* case did not involve a request for release on a habeas petition. *Valentine v. Collier*, 956 F.3d 797, 804 (5th Cir. 2020). *See also Valentine v. Collier*, No. 4:20-CV-1115, 2020 WL 3491999, at *6-8 (S.D. Tex. June 27, 2020) (subsequently certifying class of state prisoners and holding that administrative grievance process was not capable of use to obtain swift relief).

In *Barnes v. Ahlman*, No. 20A19, --- S. Ct. ----, 2020 WL 4499350 (Aug. 5, 2020), the Supreme Court granted an application for a stay of a district court's preliminary injunction order pending disposition of the appeal in the Ninth Circuit, even though the Ninth Circuit had denied the request. *See Ahlman v. Barnes*, No. 20-55568, 2020 WL 3547960 (9th Cir. June 17, 2020). *Ahlman* involved a class of pre-trial and post-conviction detainees who were in state custody and who challenged conditions of confinement. Habeas relief and the process for assessing provisional release were not issues. *See Ahlman v. Barnes*, SACV 20-835, --- F. Supp. 3d ----, 2020 WL 2754938 (C.D. Cal. May 26, 2020).

In *Marlowe v. LeBlanc*, No. 19A1039, --- S. Ct. ----, 2020 WL 2780803 (May 29, 2020), the Supreme Court denied a motion to vacate another Fifth Circuit's order, which had stayed a district court's temporary restraining order

requiring a state prison to implement social distancing measures in lieu of release. *See Marlowe v. LeBlanc*, 810 F. App'x 302 (5th Cir. Apr. 27, 2020). As with *Valentine*, *Marlowe* did not address the scope of habeas relief or provisional release; at issue were both Eighth Amendment claims and exhaustion issues specific to state prisoners. *Id.*

In contrast to these recent decisions on group-wide injunctive relief, the order reviewed here asks the parties to help the district court craft a procedure for case-by-case adjudication of the propriety of admitting individual immigrants to bail pending the merits decision. As we detail below, doing so is well within the authority of district courts who have the power to change the parameters of custody for detained persons. *See*, *e.g.*, *Ex parte McCardle*, 74 U.S. 506, 508 (1868) (noting habeas petitioner was "admitted to bail" pending review of appeal). That option was also part of habeas practice in prior centuries in England. *See* Halliday, *Habeas Corpus* at 13 (quoting 16th-17th century English Justice Yelverton that, when "anyone is brought into this court with his cause [of imprisonment] by habeas corpus, this court must examine the cause and may remand, bail, or discharge him as his cause deserves, which is much for the liberty of the subject"), 54 (between 1500 and 1800, "average rate of bail or discharge for all prisoners using habeas corpus was 53 percent"), 59-60 (explaining historical use of bail

pending review); Tyler, *Habeas Corpus in Wartime* at 73, 78-9 (discussing bail in English habeas practice).

In more recent decades, as reflected in the decisions discussed below, many federal judges have ordered release from confinement or a change in the place of custody to protect people's well-being pending their assessment of the merits of habeas petitions. And, when doing so, judges have used various terms for this provisional release. Often, as the district court did here, judges describe the remedy as "bail." *See also Savino*, 2020 WL 1703844, at *8-9 (certifying class of immigration detainees and explaining court's "authority to order bail for habeas petitioners under the reigning 'exceptional circumstances' of this nightmarish pandemic" (citation omitted)); *Savino v. Souza*, No. 20-10617-WGY, --- F. Supp. 3d ----, 2020 WL 2404923, at *7-10 (D. Mass. May 12, 2020) (granting preliminary injunction after finding petitioners were likely to demonstrate government violated their due process rights by failing to protect them from danger of COVID-19); *Avendaño Hernandez v. Decker*, No. 20-cv-1589 (JPO), --- F. Supp. 3d ----, 2020 WL 1547459, at *1 (S.D.N.Y. Mar. 31, 2020) (recognizing court's authority to "admit to bail" an immigration detainee and ordering release on bail).

This provisional relief can also be understood as "enlargement," a remedy particular to habeas jurisdiction. Hertz & Liebman, *Fed. Habeas Corpus Prac. &*

Proc. § 14.2. Enlargement removes a person from detention in a facility but the person remains *in custody, i.e.*, subject to restrictions on movement or other conditions. *See, e.g.*, *Kaplan v. Tod*, 267 U.S. 228, 230 (1925) (alien's "prison bounds were enlarged by committing her to the custody of the Hebrew Society"). The place of custody is changed and thus "enlarged" from a particular detention facility to, for example, a hospital, half-way house, home, or other setting, but the individual remains under restraint. *See, e.g.*, *U.S. v. Lombera-Valdovinos*, 429 F.3d 927, 930 n.2 (9th Cir. 2005) (alien whose custody was "enlarged" was still under restraint).

The power to bail or enlarge comes both from statutes and courts' inherent and constitutional authority in habeas. Congress has directed federal courts at all levels to decide habeas cases "as law and justice require." 28 U.S.C. § 2243. The Court has described that phrase as recognizing the flexible powers of federal judges to fashion appropriate relief in habeas. In 1894, the Supreme Court relied on this language to rule that "[t]he court is invested with the largest power to control and direct the form of judgment to be entered in cases brought up before it on habeas corpus." *In re Bonner*, 151 U.S. 242, 261 (1894).

More recently, the Court explained that it had " interpreted . . . congressional silence [regarding available habeas remedies]—along with the statute's command to dispose of habeas petitions 'as law and justice require,' 28

U.S.C. § 2243—as an authorization to adjust the scope of the writ in accordance with equitable and prudential considerations." *Danforth v. Minnesota*, 552 U.S. 264, 278 (2008). Indeed, our review of the Supreme Court's case law found dozens of decisions in which majorities or dissents invoked Section 2243 and recognized the broad authority it confers. Several of these decisions are icons of federal habeas law. *See, e.g.*, *Harris v. Nelson*, 394 U.S. 286, 290, 299 (1969); *Hilton v. Braunskill*, 481 U.S. 770, 775 (1987); *Boumediene v. Bush*, 553 U.S. 723, 822-23 (2008) (Roberts, J., dissenting). In the main, the Supreme Court has invoked this statute when assessing district courts' power to fashion remedies other than immediate release after finding that a state proceeding violated the U.S. Constitution. Yet throughout these many discussions, the principle of federal authority is constant: judges have the power to fashion remedies in habeas to fit the circumstances. Indeed, just a few years ago, the Supreme Court confirmed "that 'equitable principles' have traditionally 'governed' the substantive law of habeas corpus." *Holland v. Florida*, 560 U.S. 631, 646 (2010) (citation omitted).

Atop statutory authorization to fashion appropriate remedies, the case law also confirms that, at the district court level, the authority for release pending a ruling on the merits stems from courts' inherent powers. *See*, *e.g.*, *Mapp v. Reno*, 241 F.3d 221, 226 (2d Cir. 2001) ("[a] district court has inherent power to enter an order affecting the custody of a habeas petitioner"); *see also Savino*, *supra*;

Avendaño Hernandez, *supra*. In addition, at the appellate level, the Federal Rules of Appellate Procedure authorize "bail," or other modifications of custody pending review on appeal; that Rule uses criteria familiar in the context of bail and provides that appellate courts may also determine that a petitioner be detained in "other appropriate custody." Fed. R. App. P. 23(b).

3. The Law of Enlargement and Bail in the Lower Courts

Because some orders providing provisional bail/enlargement relief do not result in opinions and the body of materials has been relatively small (*see* Hertz & Liebman, *Fed. Habeas Corpus Prac. & Proc.* § 14.2), we have gathered illustrative decisions from around the country. Some opinions address requests for release when habeas petitions were pending from state prisoners, and others from federal prisoners or people in immigration detention. Further, several appellate cases focus on whether a district court order on bail or enlargement was appealable as of right or subject to mandamus. We provide an overview of the law, the standards for granting bail/enlargement, and a discussion of COVID-specific cases.

a. Across the Circuits, Courts Have Held District Courts Have Authority to Order Release Pending Final Dispositions of Habeas Petitions

1. The Power to Order Interim Release

Twelve circuits have recognized district court authority to order release pending final disposition of a habeas petition. *See, e.g.*, *Woodcock v. Donnelly*, 470 F.2d 93, 94 (1st Cir. 1972); *Mapp*, 241 F.3d at 226; *Landano v. Rafferty*, 970

F.2d 1230, 1239 (3d Cir. 1992); *United States v. Perkins*, 53 F. App'x 667, 669 (4th Cir. 2002); *Calley v. Callaway*, 496 F.2d 701, 702 (5th Cir. 1974); *Dotson v. Clark*, 900 F.2d 77, 79 (6th Cir. 1990); *Cherek v. United States*, 767 F.2d 335, 337 (7th Cir. 1985); *Martin v. Solem*, 801 F.2d 324, 329 (8th Cir. 1986); *Pfaff v. Wells*, 648 F.2d 689, 693 (10th Cir. 1981); *Gomez v. United States*, 899 F.2d 1124, 1125 (11th Cir. 1990); *Baker v. Sard*, 420 F.2d 1342, 1342-44 (D.C. Cir. 1969).

This Court in 1989 also recognized the power of district courts to grant release pending a habeas decision if "special circumstances or a high probability of success" exist. *See Land v. Deeds*, 878 F.2d 318 (9th Cir. 1989).[5] Thereafter, *In re Roe* described the Circuit as not having ruled on the issue with respect to state prisoners. *See* 257 F.3d 1077 (9th Cir. 2001); *see also United States v. McCandless*, 841 F.3d 819, 822 (9th Cir. 2016) (holding that if district courts have power to order release pending resolution of habeas petition, "it is reserved for 'extraordinary cases involving special circumstances or a high probability of success'").

In the immigration context, this Court has approved provisional relief in the form of release from detention. In 2006, for example, the Court relied on Federal Rule of Appellate Procedure 23(b) to order the release of an immigration detainee pending disposition of the appeal on the habeas petition. *Nadarajah v. Gonzales*,

[5] Though *Land* uses the preposition "or," the weight of authority requires both prongs to be met.

443 F.3d 1069, 1083-84 (9th Cir. 2006). More recently and citing the COVID-19 crisis, this Circuit *sua sponte* ordered release of a petitioner from immigration detention pending a decision on her petition for review of a removal order. *See Xochihua-Jaimes v. Barr*, 962 F.3d 1065, 1066 (9th Cir. 2020) ("In light of the rapidly escalating public health crisis, which public health authorities predict will especially impact immigration detention centers, the court sua sponte orders that Petitioner be immediately released from detention and that removal of Petitioner be stayed pending final disposition by this court.").

District courts in the Ninth Circuit have debated whether they possess release authority. *Compare Hall v. San Francisco Sup. Ct.*, No. C 09-5299, 2010 WL 890044, at *2 (N.D. Cal. Mar. 8, 2010) ("Based on the overwhelming authority [of other circuit courts] in support, the court concludes for purposes of the instant motion that it has the authority to release Hall pending a decision on the merits.") *with United States v. Carreira*, 216 WL 1047995, at *2 (D. Haw. Mar. 10, 2016) ("[T]his Court declines to address the merits of Petitioner's bail requests in the absence of definitive guidance from the Ninth Circuit regarding the scope of this Court's bail authority.").

However, the weight of authority in the Ninth Circuit, including in cases dealing with confinement during the COVID-19 pandemic and in the immigration context, recognizes judicial authority to order interim release. *See, e.g.*, *Zepeda*

Rivas, 2020 WL 2059848, at *3 (in immigration detainees' litigation, holding that "[i]n extraordinary cases like this, federal judges have the authority to release detainees on bail while their habeas cases are pending"); *Bent v. Barr*, No. 19-cv-06123-DMR, --- F. Supp. 3d ----, 2020 WL 1812850, at *2-3 (N.D. Cal. Apr. 9, 2020); *Pimentel-Estrada v. Barr*, No. C20-495 RSM-BAT, --- F. Supp. 3d ----, 2020 WL 2092430 (W.D. Wash. Apr. 28, 2020) (ordering immediate release of immigration detainee pending final disposition on the merits); *Singh v. Barr*, No. 20-cv-02346-VKD, 2020 WL 2512410, at *5 (N.D. Cal. May 15, 2020) (same); *Alcantara*, 2020 WL 2315777, at *8-9 (granting temporary restraining order to release immigration detainees above the age of sixty or vulnerable to severe illness or death from COVID-19); *Ortuño*, 2020 WL 1701724 (ordering release with conditions of three immigration detainees due to the COVID-19 pandemic pending resolution of the merits); *see also Castillo*, 2020 WL 1502864; *Zhang v. Barr*, CV 20-00331, --- F.Supp.3d ----, 2020 WL 1502607, at *9 (C.D. Cal. Mar. 27, 2020); *Tam v. I.N.S.*, 14 F. Supp. 2d 1184, 1192 (E.D. Cal. 1998).

2. The Standard for Interim Release: Extraordinary Circumstances, Substantial Legal Claims, and the Need to Protect the Efficacy of Relief

A discrete question is the standard that courts apply when evaluating whether to enlarge the custody of a habeas petitioner. To obtain this provisional relief, a petitioner must demonstrate "extraordinary circumstances" and that the

underlying petition raises "substantial claims." *Mapp*, 241 F. 3d at 226.[6] Courts have also discussed that release is appropriate when "necessary to make the habeas remedy effective." *Id.*; *see also Landano*, 970 F.2d at 1239. As *Landano* explained, release was "available 'only when the petitioner has raised substantial constitutional claims upon which he has a high probability of success, and also when extraordinary or exceptional circumstances exist which make the grant of bail necessary to make the habeas remedy effective.'" 970 F. 2d at 1239. *See also Hall*, 2010 WL 890044, *1; *In re Souels*, 688 F. App'x 134, 135 (3d Cir. 2017).

That interim relief is needed to protect the efficacy of the ultimate habeas remedy has parallels in other contexts. Its rationale resembles the reason why in a subset of cases, the functional finality of an interim decision can permit immediate appellate review. Classic examples include qualified immunity and double jeopardy. If a litigant is correct, for example, and jeopardy attached, a post-conviction appeal cannot adequately vindicate that right. *See, e.g., Justices of Boston Mun. Ct. v. Lydon*, 466 U.S. 294, 303 (1984) (acknowledging that double jeopardy right "cannot be fully vindicated on appeal following final judgment");

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[6] This test stems in part from *Aronson v. May*, 85 S. Ct. 3, 5 (1964), in which Justice Douglas denied an application for release on bail pending review. He explained that "it is . . . necessary to inquire whether, in addition to there being substantial questions presented by the appeal, there is some circumstance making this application exceptional and deserving of special treatment in the interests of justice." *Id. See also Yanish v. Barber*, 73 S. Ct. 1105 (1953) (Douglas, J.) (same); *Petition of Johnson*, 72 S. Ct. 1028 (1952) (Douglas, J.) (same).

see also Mitchell v. Forsyth, 472 U.S. 511, 526-27 (1985) (explaining immunities from suit are "effectively lost" if immediate appeal from denial were unavailable). Likewise, interim relief for habeas petitioners protects their health while they await the substantive review of their claim.

Before the current crisis, a few cases focused on the health of a petitioner as illustrative of "extraordinary circumstances." For example, in *Johnston v. Marsh*, the petitioner, Alfred Ackerman, brought a habeas claim alleging that his Pennsylvania conviction was by a trial that lacked "due process." 227 F.2d 528, 530 (3d Cir. 1955). Ackerman asked for release pending the merits, and he argued that because of advanced diabetes, he was "rapidly progressing toward total blindness." *Id.* at 529. The district court authorized his release to a hospital. The prison warden filed writs of prohibition and mandamus with the Third Circuit, which rejected the respondent's arguments and affirmed that district courts possessed authority to order relocation while the habeas petition was pending. *Johnson v. Marsh* has been cited in more recent cases to illustrate that findings of extraordinary circumstances may "be limited to situations involving poor health or the impending completion of the prisoner's sentence." *Landano*, 970 F.2d at 1239. *See also In re Souels*, 688 F. App'x at 135-36 (denying release pending review of petition for writ of mandamus because petitioner "[did] not describe his medical

conditions in any detail or explain how he cannot manage his health issues while he is imprisoned").

Health is not the only extraordinary circumstance that has been the basis for enlargement. For example, in *United States v. Josiah*, William Josiah brought a writ of habeas corpus after the Supreme Court invalidated the residual clause of the Armed Career Criminal Act (ACCA) and altered the method for determining whether prior convictions qualify as violent felonies under the ACCA. Civ. No. 6-cv-00080, 2016 WL 1328101, at *2 (D. Haw. Apr. 5, 2016). Josiah, who was serving a federal prison sentence, argued that his prior convictions did not qualify as violent felonies and that he should not be subject to the fifteen-year mandatory minimum. The district court concluded that release was appropriate because the issue of retroactivity was pending before the Supreme Court and Josiah would have served his full sentence if the Supreme Court held its prior ruling retroactive. *Id.* at *4-6. In circumstances similar to *Josiah*, a district judge sitting in the Central District of Illinois issued three orders granting release to petitioners pending resolution of their habeas claims. *See Zollicoffer v. United States*, No. 15-03337, 2017 WL 76936 (C.D. Ill. Jan. 9, 2017); *United States v. Jordan*, No. 04-20008, 2016 WL 6634853 (C.D. Ill. Nov. 9, 2016); *Swanson v. United States*, No. 15-03262, 2016 WL 5422048 (C.D. Ill. Sept. 28, 2016). A related example comes from the district court in Connecticut, which authorized enlargement in 1978 in a

case alleging that the U.S. Parole Commission had unconstitutionally rescinded his parole. *See Drayton v. McCall (U.S. Parole Commission)*, 445 F. Supp. 305 (D. Conn. 1978), *affirmed in part*, *Drayton v. McCall*, 584 F.2d 1208 (2d Cir. 1978).

Another case involved enlargement related to military detention. *See Gengler v. U.S. through its Dep't of Def. & Navy*, No. 1:06-cv-0362, 2006 WL 3210020, at *6 (E.D. Cal. Nov. 3, 2006). As that court explained, a "district court has the inherent power to enlarge a petitioner on bond pending hearing and decision on his petition for writ of habeas corpus." *Id.* at *5. The judge also noted that a "greater showing must be made by a petitioner seeking bail in a criminal conviction habeas 'than would be required in a case where applicant had sought to attack by writ of habeas corpus an incarceration not resulting from a judicial determination of guilt.'" *Id.* at *6 (citation omitted). The court used the test of "exceptional circumstances and, at a minimum, substantial questions as to the merits." *Id*. The court found "exceptional circumstances;" the petitioner had been admitted to business school, had been granted permission by his commanding officer to attend, and would be forced to drop out if his custody were not enlarged. The court also ruled that "substantial questions as to the merits" existed because of alleged government errors in drafting the petitioner's military service agreement. *Id*.

b. Interim Relief in Times of COVID-19

As of this writing, an increasing number of reported cases discuss COVID-19-based requests for enlargement, release, or bail while a habeas corpus proceeding is pending. One compendium can be found at UCLA Law Covid-19 Behind Bars Data Project, *available at* https://docs.google.com/spreadsheets/d/1X6uJkXXS-O6eePLxw2e4JeRtM41uPZ2eRcOA_HkPVTk/edit#gid=708926660. Rather than an exhaustive account, we provide a few illustrative decisions involving bail/enlargement based on COVID-19.

An example of this remedy in an individual Section 2255 Motion comes from the Southern District of New York, where a judge granted on consent a motion "for bail." The judge ordered immediate release under specified conditions pending adjudication of the merits of the motion. *See United States v. Nkanga,* No. 18-CR-00730 (S.D.N.Y. Apr. 7, 2020).

Another case involves a class action in the Northern District of Ohio. *See Wilson v. Williams*, No. 4:20-cv-00794-JG, 2020 WL 1940882, at *1 (N.D. Ohio Apr. 22, 2020). Seeking to represent a class of all current and future prisoners of the Elkton Federal Correctional Institution (FCI) and a subclass of the medically vulnerable population, petitioners argued that continued incarceration subjected all FCI Elkton prisoners to substantial risk of harm in violation of the Eighth

Amendment. On April 22, 2020, the federal district court granted in part the request for emergency relief, which included enlargement of a subclass of prisoners challenging the manner in which the sentence was served and hence cognizable as a habeas petition. *Id*. The Sixth Circuit denied a stay soon thereafter. *See Wilson v. Williams*, No. 4:20-CV-00794, 2020 WL 2308441, at *1 (6th Cir. May 8, 2020). Subsequently reviewing the case on the merits, the Sixth Circuit agreed that the petitioners could seek relief through habeas but rejected the grant of a preliminary injunction. The court held that the district court had erroneously concluded the petitioners were likely to succeed in demonstrating that the respondents were deliberately indifferent to their medical needs. *Wilson*, 961 F.3d at 837, 840. (Justice Sotomayor had stayed the district court's order pending Sixth Circuit review. *Williams v. Wilson,* No. 19A1047, --- S. Ct. ----, 2020 WL 2988458 (June 4, 2020) (mem.)). On the other hand, in a state prison class action, a district court declined to provide provisional relief. *See Money v. Pritzker*, No. 1-20 CV 02094, --- F. Supp. 3d ----, 2020 WL 1820660, at *1, *18. (N.D. Ill. April 10, 2020).

Another example of a grant of provisional relief comes from a series of decisions in the District of Connecticut where petitioners challenged confinement at the three facilities that comprise FCI Danbury. In *Martinez-Brooks v. Easter*, No. 3:20-cv-00569-MPS, 2020 WL 2405350 (D. Conn. May 12, 2020), the district

court granted in part the request for a temporary restraining order and required "the Warden at FCI Danbury to adopt a process for evaluating inmates with COVID-19 risk factors for home confinement and other forms of release that is both far more accelerated and more clearly focused on the critical issues of inmate and public safety than the current process." *Id.* at *1. Discussing enlargement, he also ordered expedited discovery and a hearing on the preliminary injunction. *Id.* at *2. *See also Martinez-Brooks v. Easter*, No. 3:20-cv-00569-MPS, 2020 WL 2813072, at *3 (D. Conn. May 29, 2020) (holding "substantial risk to the health of these medically vulnerable inmates and the prevalence of COVID-19 . . . make bail necessary to make the habeas remedy effective"). As of this writing, a provisional settlement has been proposed and a hearing on class certification and the fairness of the settlement has been scheduled, *sub nom Whitted v. Easter*, No. 3:20-cv-00569 (MPS), 2020 WL 4605224 (D. Conn. Aug. 11, 2020).

Before concluding our discussion of provisional remedies, we recognize that these cases arise in the context of wide-ranging debates about other issues related to federal judicial authority. Whether the focus of discussion is on nation-wide injunctions or other forms of equitable relief, jurists and commentators disagree about the scope of federal judicial power.[7]

[7] *See, e.g.*, *Trump v. Hawaii*, 138 S. Ct. 2392, 2424-29 (2018) (Thomas, J., concurring) (arguing against district court authority to enter nationwide injunctions); *id.*, at 2446 n.13 (Sotomayor, J., dissenting) (arguing nationwide

In contrast, the issue here and the body of law detailed by *Amici* rest on a long-established tradition of legal and equitable relief that characterizes habeas jurisdiction. *See, e.g.*, *Holland*, 560 U.S. at 646 (holding equitable tolling applies to habeas petitions by state prisoners and affirming that equitable principles "have traditionally 'governed' the substantive law of habeas corpus"). Moreover, Congress has by statute confirmed this authority to dispose of habeas petitions "as law and justice require." 28 U.S.C. § 2243.

IV. CONCLUSION

COVID-19 is an unprecedented event that raises the legal question of whether, in light of the government mandates for social distancing, detention that was lawful when imposed cannot constitutionally continue where the setting puts an individual in a position of untenable risk. Thus, habeas corpus—which addresses the continuing constitutionality of detention or incarceration and offers the possibility of release and enlargement—properly provides a jurisdictional basis and appropriate remedies. Federal judges have flexible legal and equitable authority in habeas proceedings to release, enlarge, and alter the custody of individuals. Thus the order below, seeking to develop a process for doing so, ought not be stayed. Indeed, federal judges have the obligation and the authority to

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injunction was "necessary to provide complete relief to the plaintiffs" (citation and quotation omitted)); *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2412 n.28 (2020) (Ginsburg, J., dissenting) (arguing Administrative Procedure Act contemplates nationwide injunctions).

interpret statutes and the Constitution to preserve the lives of people living and working in prisons.

Date: August 17, 2020

Respectfully submitted,

By: */s/ Kelly M. Dermody*

Kelly M. Dermody
Yaman Salahi
LIEFF CABRASER HEIMANN
& BERNSTEIN, LLP
275 Battery Street, 29th Floor
San Francisco, CA 94111-3339
Telephone: (415) 956-1000
Facsimile: (415) 956-1008
kdermody@lchb.com
ysalahi@lchb.com

Counsel for Amici Law Professors

Judith Resnik
127 Wall St.
New Haven, CT 0651

Lucas Guttentag
559 Nathan Abbott Way
Stanford, CA 94305

Stephen Vladeck
727 E. Dean Keeton St.
Austin, TX 78705

Of Counsel

APPENDIX: LIST OF *AMICI* LAW PROFESSORS

Institutional affiliations are noted for identification purposes only; the views expressed here are those of the individuals.

Janet Cooper Alexander
Frederick I. Richman Professor of Law, Emerita
Stanford Law School

Erin Chemerinsky
Jesse H. Choper Distinguished Professor of Law
University of California, Berkeley, School of Law

Lucas Guttentag
Professor of the Practice of Law
Stanford Law School
Martin R. Flug Lecturer in Law & Senior Research Scholar
Yale Law School

Bernard E. Harcourt
Isidore and Seville Sulzbacher Professor of Law and Professor of Political Science
Columbia Law School

Helen Hershkoff
Hebert M. and Svetlana Watchell Professor of Constitutional Law and Civil Liberties
New York University Law School

Randy Hertz
Professor of Clinical Law
New York University Law School

Aziz Z. Huq
Frank and Bernice J. Greenberg Professor of Law
University of Chicago Law School

Lee Kovarsky
Bryant Smith Chair in Law
University of Texas School of Law
Yosef Osheawich Professor of Law

James S. Liebman
Simon H. Rifkind Professor of Law
Columbia Law School

Gillian Metzger
Harlan Fiske Stone Professor of Constitutional Law
Columbia Law School

Hiroshi Motomura
Susan Westerberg Prager Professor of Law
School of Law
University of California, Los Angeles

Doug Rendleman
Robert E. R. Huntley Professor of Law, Emeritus
Washington and Lee Law School

Judith Resnik
Arthur Liman Professor of Law
Yale Law School

Fred O. Smith, Jr.
Associate Professor
Emory Law School

Amanda L. Tyler
Shannon C. Turner Professor of Law
University of California, Berkeley, School of Law

Carlos M. Vázquez
Scott K. Ginsburg Professor of Law
Georgetown University Law Center

Stephen I. Vladeck
A. Dalton Cross Professor in Law
University of Texas School of Law

Charles D. Weissselberg
University of California, Berkeley, School of Law

CERTIFICATE OF COMPLIANCE

This brief contains 6,493 words, excluding the items exempted by Fed. R. App. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6). I certify that this brief is an amicus brief and complies with the word limit of Fed. R. App. P. 29(a)(5) in that it contains fewer than 6,500 words. All parties have consented to the filing of this amicus brief pursuant to Fed. R. App. P. 29(a)(2).

Date: August 17, 2020

Respectfully submitted,

By: */s/ Kelly M. Dermody*

Kelly M. Dermody
Yaman Salahi
LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
275 Battery Street, 29th Floor
San Francisco, CA 94111-3339
Telephone: (415) 956-1000
Facsimile: (415) 956-1008
kdermody@lchb.com
ysalahi@lchb.com

Counsel for Amici Law Professors

CERTIFICATE OF SERVICE

I hereby certify that on August 17, 2020, I caused the following to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit, via the appellate CM/ECF system:

(1) Brief of Amici Law Professors; and

(2) this Certificate of Service.

Participants in the case will be served by the appellate CM/ECF system.

Date: August 17, 2020

By: */s/ Kelly M. Dermody*
Kelly M. Dermody