

# LITIGATING IMMIGRATION DETENTION CONDITIONS <sup>1</sup>

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## I. The Applicable Legal Standard (The Fifth Amendment Due Process Clause)

The constitutional standards that apply to *convicted prisoners* in the United States are well developed. Convicted prisoners are protected by the Eighth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, which prohibits the infliction of “cruel and unusual punishments” on convicted prisoners. To establish a violation of the Eighth Amendment, a prisoner must show both (1) a deprivation of a basic human need, *Helling v. McKinney*, 509 U.S. 25, 31-32 (1993), and (2) deliberate indifference, *Wilson v. Seiter*, 501 U.S. 294, 303 (1991). In the context of medical or mental health care, a prisoner must demonstrate “deliberate indifference to serious medical needs.” *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). The Eighth Amendment is also violated when prison officials “maliciously and sadistically use force to cause harm,” even where no serious injury results. *Hudson v. McMillian*, 503 U.S. 1, 9 (1992).

The standard that applies to *pre-trial criminal detainees* is less settled. Pre-trial criminal detainees in state custody are protected by the Due Process Clause of the Fourteenth Amendment against any conditions that constitute “punishment.” *Bell v. Wolfish*, 441 U.S. 520, 535 (1979). To determine whether a condition or restriction amounts to punishment in the constitutional sense, a court:

must decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose. . . . [I]f a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to punishment. Conversely, if a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of a governmental action is punishment that may not constitutionally be inflicted upon detainees qua detainees.

*Id.* at 538-39 (internal citations and quotation marks omitted). Many courts, though not all, have held that the two standards ultimately are equivalent in the context of challenges to conditions of confinement. See ACLU National Prison Project, *Litigating Prison and Jail Conditions*, July 14, 2008, 13-14 (collecting cases).

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Immigration detainees are *civil detainees* held pursuant to civil immigration laws. Their protections are thus derived from the Fifth Amendment, which similarly protects any person in the custody of the United States from conditions that amount to punishment. *See Wong Wing v. U.S.*, 163 U.S. 228, 237-38 (1896). Few courts have explored the precise contours of this protection. The Fifth Circuit held that immigration detainees should receive the same level of protection as pre-trial criminal detainees. *See Edwards v. Johnson*, 209 F.3d 772, 778 (5th Cir. 2000). *But see Medina v. O’Neill*, 838 F.2d 800, 803 (5th Cir. 1988) (“[A]n [excludable] alien is entitled ‘to be free from gross physical abuse at the hands of state or federal officials’ under the due process clause.”) (quoting *Lynch v. Cannatella*, 810 F.2d 1363, 1373 (5th Cir. 1987)). The Third Circuit held in an unpublished decision that immigration detainees are to receive the same due process protections as pre-trial criminal detainees. *See Dahlan v. Dep’t. of Homeland Sec.*, 215 Fed.Appx. 97, 100 (3d Cir. 2007). The Second Circuit—which holds that the level of protection depends upon a person’s immigration status—has nevertheless declined to decide whether the “unadmitted aliens” are entitled to the same level of protection as pre-trial criminal detainees, or whether they are entitled to the “gross physical abuse” standard announced in *Lynch*. *Arar v. Ashcroft*, --- F.3d ---, 2008 WL 2574470, \*24-25 (2d Cir. June 30, 2008).

However, the U.S. Court of Appeals for the Ninth Circuit has held that conditions of confinement for civil detainees must be superior not only to convicted prisoners, but also to pre-trial criminal detainees. *Jones v. Blanas*, 393 F.3d 918, 933-34 (9th Cir. 2004), *cert. denied*, 546 U.S. 820 (2005); *cf. Youngberg v. Romeo*, 457 U.S. 307, 321-32 (1982) (“Persons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish.”). If a civil detainee is confined in conditions that are identical to, similar to, or more restrictive than those under which pre-trial detainees or convicted prisoners are held, then those conditions are presumptively punitive and unconstitutional. *Jones*, 393 F.3d at 934; *cf. Agyeman v. Corrections Corp. of Amer.*, 390 F.3d 1101, 1104 (9th Cir. 2004) (noting that detention on noncriminal charges “may be a cruel necessity of our immigration policy; but if it must be done, the greatest care must be observed in not treating the innocent like a dangerous criminal.”).<sup>2</sup>

Significantly, the Ninth Circuit in *Jones* also held that civilly confined persons need not prove deliberate indifference to demonstrate a violation of their constitutional rights. *Id.*; *see also Hydrick v. Hunter*, 500 F.3d 978, 994 (9th Cir. 2007) (“[T]he Eighth Amendment provides too little protection for those whom the state cannot punish.” (emphasis in original, citations omitted)). This is consistent with the Supreme Court’s statement in *Youngberg* that the trial court “erroneously used the deliberate-indifference standard” when instructing the jury that the plaintiff—a civilly committed individual—had to prove deliberate indifference to his serious medical and mental health needs in order to prevail on that claim. *Youngberg*, 457 U.S. at 312 n.11.

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<sup>2</sup>*See also Preval v. Reno*, 203 F.3d 821, \*1 (4th Cir. 2000) (Table) (remanding to give immigration detainee-plaintiff an opportunity to argue about the appropriate standard for reviewing his constitutional claims).

## II. Responding to Defendants' Arguments in Immigration Detention Conditions Lawsuits<sup>3</sup>

Defendants in immigration detention conditions lawsuits have raised several unique arguments challenging court jurisdiction, availability of class certification, and the propriety of prospective injunctive relief.

### A. Does 8 U.S.C. § 1252(e)(1)(B) Bar Class Certification?

In general the answer is no. Section 1252(e)(1)(B) prohibits courts from certifying a Fed. R. Civ. P. 23 class under very limited circumstances. By its own terms, the provision applies only to certain instances in which judicial review over expedited removal orders is sought. It is entirely inapplicable to civil lawsuits challenging conditions of confinement.

### B. Does 8 U.S.C. § 1252(f)(1) Strip Courts (Other Than the Supreme Court) of Jurisdiction to Grant Classwide Injunctive Relief in Conditions of Confinement Cases?

The answer generally should be no, but the Ninth Circuit has not ruled definitively on this issue.

#### 1. Plain Language

Section 1252(f)(1) “prohibits federal courts from granting classwide injunctive relief against the operation of [8 U.S.C.] §§ 1221-1231.” *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 481 (1999). Section 1252(f) must be interpreted narrowly, such that “terms . . . should be given their particular, precise meaning rather than interpreted more generally.” *Maharaj v. Ashcroft*, 295 F.3d 963, 965 (9th Cir. 2002) (citing *Andrieu v. Ashcroft*, 253 F.3d 477, 481-82 (9th Cir. 2001) (en banc)). *Accord Gilmore v. People of the State of California*, 220 F.3d 987, 997 n. 12 (9th Cir. 2000) (citing “the principle that a statute should not be construed to displace courts’ traditional equitable powers absent the clearest command to the contrary”) (internal quotation marks, citation omitted). Constitutional challenges to conditions of confinement seek court orders declaring defendants’ conduct unconstitutional and enjoining defendants from continuing to violate plaintiffs’ rights. Because they do not seek to enjoin “the operation of” any immigration laws, Section 1252(f)(1) is irrelevant.

#### 2. Legislative History

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<sup>3</sup>Because this outline is intended to address only requests for injunctive relief, it does not discuss issues related to damages claims. Therefore, the outline will not discuss the prohibition against bringing *Bivens* claims against private prison companies, *see Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2001), nor will it discuss whether *Bivens* claims can be maintained against individual employees of private prison companies, *see id.* at 65 (declining to address that question). The outline will also not address whether *Bivens* claims may be brought against commissioned corps officers of the U.S. Public Health Service. *See Castaneda v. U.S.*, 538 F. Supp. 2d. 1279, 1288-95 (C.D. Cal. 2008) (collecting cases and holding that *Bivens* claims can be maintained in such cases).

Legislative history reflected in the House report indicates that Section 1252(f)(1) is meant to prohibit lower courts from “enjoin[ing] procedures established by Congress to reform the process of removing illegal aliens from the United States.” H.R. Rep. No. 104 469, pt. 1, at 161 (1996). The report further states that section 1252(f)(1) “limits the authority of Federal courts other than the Supreme Court to enjoin the operation of *the new removal procedures established in this legislation.*” *Id.* (emphasis added). Those new removal procedures consist of a series of changes, including the introduction of expedited removal, designed to streamline the removal process; they have nothing whatsoever to do with the conditions of detention. *See, e.g.*, 8 U.S.C. § 1252(b).

### 3. *Federal Caselaw*

In *Ali v. Ashcroft*, the Ninth Circuit actually did consider this question and held that section 1252(f)(1) was inapplicable where the injunctive relief sought pertained not to “the *operation* of [8 U.S.C.] § 1231(b) but rather *violations* of the statute.” *Ali v. Ashcroft*, 346 F.3d 873, 886 (9th Cir. 2003) (emphasis in original), *withdrawn on other grounds sub nom. Ali v. Gonzales*, 421 F.3d 795 (9th Cir. 2005). *Accord Tefel v. Reno*, 972 F. Supp. 608, 618 (S.D. Fla. 1997) (noting that plaintiffs “seek to enjoin constitutional violations and policies and practices of the Defendants. . . . Rather than seeking to enjoin the statute, they are seeking its implementation under the appropriate standard.”), *vacated on other grounds*, 180 F.3d 1286 (11th Cir. 1999); *Grimaldo v. Reno*, 187 F.R.D. 643, 647-48 (D. Colo. 1999) (“Here, Plaintiff does not seek to enjoin the operation of §§ 1221-1231. Rather, they [sic] seek to enjoin alleged constitutional violations by the INS in its administration of § 1226 and/or its own regulations.”).

#### **C. Do Persons Who Have Effected Entry into the United States Possess Greater Substantive Due Process Protections Than Those Who Have Not?**

This is an open question. Several courts (including the Ninth Circuit) suggest that the answer is probably no, while other courts have held that the answer is yes. This question arises because of the “entry fiction,” which is the doctrine by which individuals physically detained within the United States but who were apprehended at the border are deemed not to have made an entry. The Ninth Circuit describes the “entry fiction” as a “narrow doctrine that primarily determines the *procedures* that the executive branch must follow before turning an immigrant away.” *Wong v. U.S. Immigration and Naturalization Serv.*, 373 F.3d 952, 973 (9th Cir. 2004) (emphasis in original); *cf. Lynch v. Cannatella*, 810 F.2d 1363, 1372-73 (5th Cir. 1987) (noting that the “due process clause protects all ‘persons’ not merely those who are citizens or legal residents” and holding that “[t]he ‘entry fiction’ . . . determines the aliens’ rights with regard to immigration and deportation proceedings. It does not limit the right of excludable aliens detained within United States territory to humane treatment.”). The “entry fiction” applies very differently to substantive, rather than procedural, due process protections because it is intended to protect the sovereign power of the United States to exclude non-citizens from its borders before they have entered. *See, e.g., id.* at 1374 (the sovereign’s interest in self-determination “plays virtually no role in determining whether the constitution affords any protection to excludable aliens while they are being detained by state officials and awaiting deportation.”). *Accord Martinez-Aguero v. Gonzalez*, 459 F.3d 618, 623 (5th Cir. 2006) (holding that because there are “no identifiable

national interests that justify the wanton infliction of pain,” the application of the “entry fiction” is “specifically limited . . . to immigration and deportation matters.”); *Xiao v. Reno*, 837 F. Supp. 1506, 1550 (N.D. Cal. 1993), *aff’d sub nom. Wang v. Reno*, 81 F.3d 808 (9th Cir. 1996) (“Wang’s substantive due process claim does not implicate the federal government’s sovereign prerogative to choose who will, and who will not, be permitted to enter the United States.”). *But see Arar*, 2008 WL 2574470, \*22 n. 26 (an immigrant’s status is relevant to procedural *and* substantive due process claims).

**D. Does the Prison Litigation Reform Act Apply to Conditions Lawsuits Filed by Immigration Detainees?**

The Prison Litigation Reform Act (PLRA) erects incredible obstacles to the initiation and pursuit of litigation challenging prison and jail conditions. Such obstacles take the form of onerous administrative exhaustion requirements, 42 U.S.C. § 1997e(a), and physical injury requirements, 42 U.S.C. § 1997e(e), and limit recovery of attorneys’ fees, 42 U.S.C. § 1997e(d), and scope and duration of injunctive relief, 18 U.S.C. § 3626. However, the PLRA’s provisions apply only to “prisoners” within the meaning of that law, and civil immigration detainees do not fall within that definition. The PLRA does not, therefore, apply to conditions lawsuits filed by immigration detainees. *See, e.g., Agyeman v. I.N.S.*, 296 F.3d 871, 887 (9th Cir. 2002) (immigration detainees); *LaFontant v. I.N.S.*, 135 F.3d 158, 165 (D.C. Cir. 1998) (same); *Ojo v. I.N.S.*, 106 F.3d 680, 683 (5th Cir. 1997) (same).

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