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EQUITABLE POWER AFTER AEDPA—LESSONS FROM THE PANDEMIC

Nancy J. King†

CONTENTS

I. EQUITABLE AUTHORITY UNDER § 2241 631
II. RESIDUAL EQUITABLE POWERS IN § 2254 AND § 2255 CASES..... 638

The Antiterrorism and Effective Death Penalty Act (AEDPA)[1] was the most significant statutory development in habeas law in more than a century. For this symposium reflecting on the statute's twenty-fifth anniversary, I submit that AEDPA's significance extends beyond its many restrictions on relief. It is also important for its preservation of the traditional, adaptable habeas remedy under 28 U.S.C. § 2241, and residual equitable authority of federal courts addressing petitions under 28 U.S.C. §§ 2254 and 2255. The role that this equitable power played in litigation by prisoners during the first year of the COVID-19 pandemic suggests how essential the writ's equitable foundations are to its historic function as a failsafe for future crises in confinement. Those foundations deserve clarification and protection.

I. EQUITABLE AUTHORITY UNDER § 2241

When Congress created new statutory provisions for attacks on state criminal judgments (§ 2254) and federal criminal judgments (§ 2255) in 1948, it retained 28 U.S.C. § 2241 as the traditional habeas remedy.[2] Nearly forty years later, AEDPA restricted review for prisoners challenging criminal judgments under §§ 2254 and 2255 but did not modify review for petitioners seeking relief under § 2241. That provision continues to provide that a federal court may grant a writ of habeas corpus if a prisoner "is in custody in violation of the Constitution or laws or treaties of the United States."[3] Section 2243 authorizes

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1. Pub. L. No. 104-132, 110 Stat. 1214 (1996).

2. Act of June 25, 1948, ch. 646, § 2241, 62 Stat. 869, 964–65 (codified as amended at 28 U.S.C. § 2241); *see, e.g.*, Medberry v. Crosby, 351 F.3d 1049, 1056–57 (11th Cir. 2003) (stating that the recodification left the basic grant of authority to issue writs of habeas corpus unchanged in § 2241).

3. 28 U.S.C. § 2241(c)(3).

courts to dispose of cases under § 2241 "as law and justice require."[4] "Section 2241 codifies traditional habeas corpus relief, which," as the Supreme Court has stated, "is, at its core, an equitable remedy."[5]

The flexibility of the traditional writ of habeas corpus has allowed federal courts to provide judicial review for claims of unconstitutional detention in various contexts until a more customized judicial remedy is developed.[6] Both state and federal prisoners continue to use petitions under § 2241 to challenge the constitutionality of government confinement when those challenges do not fall within either § 2254 or § 2255, including double-jeopardy challenges by state pretrial detainees,[7] and post-commitment decisions affecting when prisoners serving criminal sentences will be released.[8]

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4. *See also* Preiser v. Rodriguez, 411 U.S. 475, 487 (1973) ("Since 1874, the habeas corpus statute has directed the courts to determine the facts and dispose of the case summarily, 'as law and justice require.'" (quoting Rev. Stat. § 761 (1874), *superseded by* 28 U.S.C. § 2243)).

5. Holland v. Warden Canaan USP, 998 F.3d 70, 74 (3d Cir. 2021) (quoting Schlup v. Delo, 513 U.S. 298, 319 & n. 35 (1995).

6. *See* NANCY J. KING & JOSEPH L. HOFFMANN, HABEAS FOR THE TWENTY–FIRST CENTURY 22–27 (2010) (discussing pretrial detention and civil commitment).

7. *See e.g.*, Hoffler v. Bezio, 726 F.3d 144 (2d Cir. 2013) (reviewing a § 2241 claim that retrial would violate the Double Jeopardy Clause); Seay v. Cannon, 927 F.3d 776 (4th Cir. 2019) (same); Harrison v. Gillespie, 640 F.3d 888, 896 (9th Cir. 2011) ("[Section] 2241 is the proper vehicle for asserting a double jeopardy claim prior to (or during the pendency of) a successive trial.").

8. *See, e.g.*, *Preiser*, 411 U.S. at 499 n.14 (1973) ("If a prisoner seeks to attack both the conditions of his confinement and the fact or length of that confinement, his latter claim, under our decision today, is cognizable only in federal habeas corpus . . . ."). For examples of these "execution of sentence" claims by state prisoners, see *Gonzalez v. United States*, 792 F.3d 232, 238 n.31 (2d Cir. 2015) ("Section 2241 . . . is the proper means to challenge the execution of a sentence" (emphasis omitted) (citing Adams v. United States, 372 F.3d 132, 135 (2d Cir. 2004))); Montez v. McKinna, 208 F.3d 862, 865 (10th Cir. 2000); Moody v. Holman, 887 F.3d 1281, 1288 (11th Cir. 2018).

   But see Williams v. Kelley, 858 F.3d 464, 473 (8th Cir. 2017) ("[Section] 2254 is the only means by which a 'person in custody pursuant to the judgment of a State court' may raise challenges to the validity of his conviction or sentence or to the execution of his sentence." (quoting Singleton v. Norris, 319 F.3d 1018, 1023 (8th Cir. 2003))); In re Wright, 826 F.3d 774, 779 (4th Cir. 2016) ("[P]etitions of prisoners who are 'in custody pursuant to the judgment of a State court' should be treated as 'applications under section 2254' for purposes of § 2244(b), even if they challenge the execution of a state sentence.").

   Federal prisoners also use § 2241 to challenge administrative decisions regarding sentences. *See, e.g.*, Muniz v. Sabol, 517 F.3d 29, 32, 40 (1st

Section 2241 continued to serve this backup role during the COVID-19 pandemic for medically vulnerable prisoners, at least in some federal courts. When the pandemic struck, prisoners turned to the courts for protection from the deadly virus using an assortment of statutory remedies. As the invaluable analyses of Lee Kovarsky and Brandon Garrett have so ably shown,[9] most of these efforts, including habeas petitions seeking release under § 2241, failed for a variety of reasons. But some habeas class actions did succeed in securing judicial oversight of unconstitutional detention. Successful petitioners alleged that, given their specific medical vulnerabilities, *any* confinement violated their right to be free from cruel and unusual punishment under the Eighth Amendment.[10] These federal habeas cases were small in number compared to cases granting relief by state and federal courts using other

Cir. 2008) (finding § 2241 appropriate for federal prisoners to challenge delay in transfer to community corrections centers (CCCs) as contrary to statutory duty of Bureau of Prisons (BOP), as prisoners sought relief from manner of execution of sentence); Jiminian v. Nash, 245 F.3d 144, 146 (2d Cir. 2001) (finding execution of a sentence may include "such matters as the administration of parole, computation of a prisoner's sentence by prison officials, prison disciplinary actions, prison transfers, type of detention and prison conditions"); McClain v. Bureau of Prisons, 9 F.3d 503, 504–05 (6th Cir. 1993) (improper calculation of credit for pretrial detention); Amodeo v. FCC Coleman - Low Warden, 984 F.3d 992, 999 (11th Cir. 2021) (finding that "cases in which a federal prisoner seeks 'to challenge the execution [as opposed to the legality] of his sentence, such as the deprivation of good-time credits or parole determinations'" fall within § 2241 rather than § 2255 (alternation in original) (quoting McCarthan v. Dir. of Goodwill Indus.-Suncoast, Inc., 851 F.3d 1076, 1092–93 (11th Cir. 2017) (en banc))). The Court has agreed to review the extent to which § 2255's "savings clause" has preserved access to § 2241 for federal prisoners raising claims of innocence. *See* Jones v. Hendrix, No. 21-857, 2022 WL 1528372, at *1 (U.S. May 16, 2022) (mem.), *granting cert. to* 8 F.4th 683 (8th Cir. 2021).

9. *See* Brandon L. Garrett & Lee Kovarsky, *Viral Injustice*, 110 CALIF. L. REV. 117, 143 (2022); *see also* Lee Kovarsky, *Pandemics, Risks, and Remedies*, 106 VA. L. REV. ONLINE 71 (2020); Jenny E. Carroll, *COVID-19 Relief and the Ordinary Inmate*, 18 OHIO ST. J. CRIM. L. 427 (2021); Michael L. Zuckerman, *When the Conditions Are the Confinement: Eighth Amendment Habeas Claims During COVID-19*, 90 U. CIN. L. REV. 1 (2021). For other collections, see UCLA PRISON L. & POL'Y PROGRAM, *COVID-19 Related Legal Filings and Court Orders*, in UCLA LAW: COVID BEHIND BARS DATA PROJECT (2022), https://docs.google.com/spreadsheets/d/1X6uJkXXS-O6eePLxw2e4JeRtM41uPZ2eRcOA_HkPVTk/edit#gid=708926660 [https://perma.cc/FF6X-NWAW]; *Litigation Hub*, HEALTH IS JUST., https://healthisjustice.org/litigation-hub/ [https://perma.cc/2KAA-DR42] (last visited March 22, 2022); and *The Most Significant Criminal Justice Policy Changes from the COVID-19 Pandemic*, PRISON POL'Y INITIATIVE (March 10, 2022), https://www.prisonpolicy.org/virus/virusresponse.html [https://perma.cc/U3PP-LHE9].

10. *See infra* note 16.

remedies such as compassionate release.[11] But they deserve attention as illustrations of the role that § 2241 can play in extraordinary times.

The pathway to judicial review for prisoners asserting confinement in violation of the Eighth Amendment under § 2241 was not open in all circuits. This inconsistent treatment reflected divisions over which claims of unconstitutional detention must be filed as habeas actions, rather than as civil-rights suits under either § 1983 or *Bivens* actions. Where circuit precedent that suggested that habeas was unavailable for any claim involving conditions of detention, regardless of the relief sought, petitioners faced a dead end.[12] Elsewhere, courts declined to dismiss for this reason, noting that the Supreme Court has yet to consider the validity of a conditions-based claim for release under § 2241,[13] and that in *Preiser v. Rodriguez*,[14] the Court held that a state prisoner's challenge "to the fact or duration of his confinement," must be filed as a habeas action, not a suit under § 1983.[15] They concluded that medically vulnerable prisoners properly filed their petitions under § 2241 when they challenged "the fact of confinement" by seeking

11. Garrett & Kovarsky, *supra* note 9, at 149-50.

12. District courts within the Ninth Circuit disagreed on the appropriate analysis. *See* Harrison v. Broomfield, No. 2:20-cv-01838 GGH P, 2020 WL 5797871, at *2–3 (E.D. Cal. Sept. 29, 2020) (collecting conflicting authority). Disagreement surfaced in the Fifth Circuit as well. *Compare* Rice v. Gonzalez, 985 F.3d 1069, 1070 (5th Cir. 2021) ("[T]he Great Writ does not, in this circuit, afford release for prisoners held in state custody due to adverse conditions of confinement."), *with* Cheek v. Warden of Fed. Med. Ctr., 835 F. App'x 737, 739–41 (5th Cir. 2020) (finding a request to release to home confinement during pandemic was properly brought under § 2241, dicta). *See also* Betancourt Barco v. Price, 478 F. Supp. 3d 1153, 1156 (D.N.M. 2020) ("[A] conditions of confinement claim such as this is not appropriate in a § 2241 habeas action . . . ."); Savage v. Warden of FCI Pekin, No. 1:20-CV-1181, 2020 WL 4060768, at *3 (C.D. Ill. July 20, 2020) (dismissing petition under § 2241 as barred by circuit precedent); Kovarsky, *supra* note 9, at 81 & n.57 (collecting additional orders from 2020 that "have simply dismissed habeas challenges as impermissible shortcuts through Section 1983 litigation that the PLRA restricts").

13. Ziglar v. Abbasi, 137 S. Ct. 1843, 1862–63 (2017) ("[W]e have left open the question whether [detainees] might be able to challenge their confinement conditions via a petition for a writ of habeas corpus."); Boumediene v. Bush, 553 U.S. 723, 792 2008) (declining to determine the "reach of the writ with respect to claims of unlawful conditions of treatment or confinement").

14. 411 U.S. 475, 476–77, 487, 498 (1973) (deprivation of good-time credits cognizable under § 2241 and fell within the traditional ambit of habeas: challenging the fact or duration of confinement, stating that release from confinement—the remedy petitioners seek here—is "the heart of habeas corpus").

15. *Id.* at 489; *see* 18 U.S.C. § 3626(g)(2) (2019) (excluding habeas corpus proceedings challenging the fact or duration of confinement in prison).

immediate release, not improved conditions, and alleging that for them, *any* confinement was unconstitutional.[16]

Yet even in courts that acknowledged habeas jurisdiction over these claims, petitioners faced dismissal for failure to exhaust other remedial avenues first.[17] Finally, when courts did reach the merits, the

16. *See, e.g.*, Wilson v. Williams, 961 F.3d 829, 837–39 (6th Cir. 2020); Harp v. Nagy, No. 20-CV-11866, 2021 WL 1978580, at *3 (E.D. Mich. May 18, 2021) (following *Williams*); Busby v. Bonner, 466 F. Supp. 3d 821, 826 (W.D. Tenn. 2020); Lichtenwalter v. Warden, Belmont Corr. Inst., No. 2:20-CV-1559, 2021 WL 2677791, at *2 (S.D. Ohio June 30, 2021); Blackburn v. Noble, 479 F. Supp. 3d 531, 538 (E.D. Ky. 2020); Malam v. Adducci, 452 F. Supp. 3d 643, 649–50 (E.D. Mich.), *as amended* (Apr. 6, 2020); Cameron v. Bouchard, 462 F. Supp. 3d 746, 781–82 (E.D. Mich. 2020), *vacated on other grounds by* 815 Fed. App'x 978 (6th Cir. 2020); Baez v. Moniz, 460 F. Supp. 3d 78, 82 (D. Mass. 2020); Tripathy v. Schneider, 473 F. Supp. 3d 220, 228 (W.D.N.Y. 2020); Fernandez-Rodriguez v. Licon-Vitale, 470 F. Supp. 3d 323, 328 (S.D.N.Y. 2020); Torres v. Milusnic, 472 F. Supp. 3d 713, 724–26 (C.D. Cal. 2020); Sekerke v. Gore, No. 20-CV-1998 JLS (MSB), 2021 WL 3604169, at *5–7 (S.D. Cal. Aug. 13, 2021); Gutierrez-Lopez v. Figueroa, 462 F. Supp. 3d 973, 983 (D. Ariz. 2020); Martinez-Brooks v. Easter, 459 F. Supp. 3d 411, 433–34 (D. Conn. 2020) (FCI-Danbury).

    See also Mays v. Dart, 453 F. Supp. 3d 1074 (N.D. Ill. 2020) (declining to decide, but noting if it did, "it would not consider it to be an absolute bar to plaintiffs' motion for a temporary restraining order," as plaintiffs "contend . . . that they cannot be held in the Jail consistent with the Constitution's requirements[, which are] . . . not the sort of claims that are, or can be, appropriately addressed via a claim for damages," and citing precedent from the Seventh Circuit); Frohlich v. United States, No. 20-CV-2692 (PJS/HB), 2021 WL 2531188, at *2 (D. Minn. June 21, 2021) (agreeing "that a § 2241 petition can be used to pursue a claim that the United States government cannot constitutionally confine the petitioner *at all*—that is, in any facility, under any conditions," but concluding petitioner did not make such a claim).

17. *See, e.g.*, Medina v. Williams, 823 F. App'x 674, 676 (10th Cir. 2020) (finding, even assuming habeas jurisdiction under § 2241 was appropriate, the petitioner failed to exhaust state judicial remedies); Parkhurst v. Pacheco, 809 F. App'x 556, 556 (10th Cir. 2020) (affirming dismissal of a state prisoner's 28 U.S.C. 2241 habeas petition, in which he alleged his continued confinement was hazardous to his health in light of the COVID-19 pandemic, for failure to exhaust); Denbow v. Me. Dep't of Corr., No. 1:20-CV-00175-JAW, 2020 WL 4736462, at *10, 13 (D. Me. Aug. 14, 2020) (finding petitioner failed to exhaust § 2241 claim by seeking release through state remedies); *Mays*, 453 F. Supp. 3d at 1089 (Habeas claim "barred due to their failure to exhaust available state court remedies"); *see also* Garrett & Kovarsky, *supra* note 9, at 28–29, & n.175 (noting authority and how exhaustion complicates class treatment). Other decisions provided review under § 2241 for federal prisoners without mandating the petitioner meet the exhaustion requirement in the compassionate release statute. *See, e.g.*, *Martinez Brooks*, 459 F. Supp. at 436–37.

demanding and unsettled[18] standards for proving a violation of the Eighth Amendment often barred relief.[19]

Despite these obstacles, a number of habeas class actions did succeed in leveraging relief through court orders or settlement agreements. These include—so far—cases filed by prisoners serving criminal sentences in at least[20] six different districts: in California, where the court is currently overseeing a preliminary injunction for prisoners at FCI Lompoc and USP Lompoc;[21] in Connecticut, where prisoners at

18. For example, see the petition for certiorari pending in *Cope v. Cogdill*, where the petition presents the question: "Whether the objective standard this Court announced in *Kingsley v. Hendrickson* applies to inadequate-care claims brought by pretrial detainees—as the Second, Sixth, Seventh, and Ninth Circuits have held—or whether the subjective standard that applies to convicted prisoners also applies to pretrial detainees—as the Eighth, Tenth, and Eleventh Circuits have held and as the Fifth Circuit held below." Petition for a Writ of Certiorari, Cope v. Cogdill, No. 21-783 (U.S. Nov. 24, 2021) (citation omitted). Multiple amici have weighed in already. *See* Documents filed in *Cope v. Cogdill*, SUP. CT. U.S., https://www.supremecourt.gov/docket/docketfiles/html/public/21-783.html [https://perma.cc/MJ6B-BKUH] (last visited Mar. 31, 2022).

19. *See, e.g.*, Barbosa v. Barr, 502 F. Supp. 3d 1115, 1120–21 (N.D. Tex. 2020) (finding no § 2241 jurisdiction, and in the alternative rejecting claim on the merits); Livas v. Myers, 455 F. Supp. 3d 272, 281–82 (W.D. La. 2020) (same); *see also* Chunn v. Edge, 465 F. Supp. 3d 168, 202 (E.D.N.Y. 2020) (rejecting preliminary injunction); Garrett & Kovarsky, *supra* note 9, at 28 n.175.

20. Not included in the list is a class action filed against the Sheriff of Cook County, Illinois, alleging both claims under § 1983 and § 2241, in which a preliminary injunction on the § 1983 claims was partially upheld by the Seventh Circuit and extended through February 22, 2022, both the § 2241 and § 1983 claims remain pending, and the parties are "working to explore the possibility of resolution." *See* Joint Status Report at 2, Mays v. Dart, No. 20 C 2134 (N.D. Ill. Dec. 9, 2021). Also not included is *Banks v. Booth*, a case filed by those confined by the District of Columbia, in which the parties have apparently reached a settlement agreement on the § 2241 and §1983 claims. *See* Minute Order, Banks v. Booth, No. 1:20-cv-00849 (D.D.C. Dec. 7, 2021) (noting parties' report that they have reached a settlement in principle, granting stay the case to allow them additional time to "work toward a final agreement, subject to the Court's approval under Rule 23").

    An unknown number of petitions were dismissed as moot when petitioners were released or transferred. *See, e.g.*, Letter, Chunn v. Edge, No. 20-cv-1590 (E.D.N.Y. Jul. 28, 2020) (noting all petitioners had been released); Sekerke v. Gore, No. 20-CV-1998 JLS (MSB), 2021 WL 5299851, at *2 (S.D. Cal. Oct. 8, 2021) (petitioner's "transfer to Wasco State Prison renders his request for habeas relief moot.").

21. Torres v. Milusnic, No. CV-20-4450 CBM (PVCx), 2021 WL 3829699, at *1–2 (C.D. Cal. Aug. 27, 2021) (remedial order). For other orders in this case, see Torres v. Milusnic, No. CV-20-4450-CBM-PVC(x), 2020 WL 8611035, at *2–3 (C.D. Cal. Sept. 18, 2020); Torres v. Milusnic, 472 F. Supp. 3d 713, 718 (C.D. Cal. 2020) (granting preliminary injunction).

FCI Danbury secured a preliminary injunction to accelerate the process for evaluating inmates for home confinement and compassionate release, leading to settlement in July 2020;[22] in New York, where after more than a year of court oversight, the case ended in ended in settlement in July of 2021 and MCC New York closed in October 2021;[23] in Ohio, where despite the Sixth Circuit's decision vacating a preliminary injunction,[24] discovery continued until the case involving FCI Elkton ended in settlement in May 2021;[25] in Michigan, where parties in a case involving the Oakland County Jail reached a settlement agreement in summer 2021;[26] and in Maryland, where a case involving the Prince George's County Correctional Center settled in June of 2021 after the court granted a preliminary injunction;[27] and where another case filed

22. The agreement is described in Whitted v. Easter, No. 3:20-cv-00569 (MPS), 2021 WL 2562398, at *3 (D. Conn. June 23, 2021). *See also Martinez-Brooks*, 459 F. Supp. 3d at 434 (denying motion to dismiss and finding the petition states a claim under § 2241 alleging "that the fact of their confinement in prison itself amounts to an Eighth Amendment violation under [the] circumstances, and nothing short of an order ending their confinement at FCI Danbury will alleviate that violation"). For a decision granting compassionate release of a prisoner following the settlement in *Easter*, see, for example, United States v. Hilow, No. 15-cr-170-JD, 2020 WL 2851086, at *5 (D. N.H. June 2, 2020).

23. Fernandez-Rodriguez v. Licon-Vitale, 470 F. Supp. 3d 323, 366 (S.D.N.Y. 2020); Memo Endorsement at 1–2, Fernandez-Rodriguez v. Licon-Vitale, 20 Civ. 3315 (ER) (S.D.N.Y. Dec. 24, 2021).

24. Wilson v. Williams, 961 F.3d 829, 833 (6th Cir. 2020).

25. After the court of appeals rejected the preliminary injunction in the habeas class action by prisoners in FCI Elkton, the district court granted a motion for expedited discovery, concluding that the finding regarding the inability to demonstrate deliberate indifference on appeal was only dispositive as to the evidence before the Court as of the issuance of the preliminary injunction rather than being dispositive of Petitioners' entire case, under a different standard. Order at 2, 4–5, Wilson v. Williams, 20-cv-00794 (N.D. Ohio Aug. 6, 2020). The case eventually settled in May of 2021 (stipulated dismissal) after a long series of stays for settlement talks. Notice of Stipulated Dismissal of All Claims, Wilson v. Williams, 20-cv-00794 (N.D. Ohio May 10, 2021).

26. Opinion and Order Overruling Objections and Granting Final Approval of the Proposed Class Action Settlement at 1, Cameron v. Bouchard, No. 20-10949 (E.D. Mich. July 22, 2021).

27. *See* Seth v. McDonough, 461 F. Supp. 3d 242, 247 (D. Md. 2020); Settlement Order at 1, Seth v. McDonough, No. PX-20-1028 (D. Md. June 29, 2021); *see also* Garrett & Kovarsky, *supra* note 9, at 39 (noting that "the judge entered a narrow injunction designed only to protect high-risk prisoners").

by petitioners in the Chesapeake Detention Facility settled in April 2021.[28] Other successful cases involved immigration detainees as well.[29]

Granted, this use of § 2241 as a remedy for imperiled prisoners during the pandemic is limited in scope, a small part of what Garrett and Kovarsky have condemned as a "flimsy judicial response."[30] Yet for the petitioners in these cases, whose claims did not fit neatly under § 2254 or § 2255, and who were able to meet the stringent showings required for the merits of their Eighth Amendment claims, the traditional habeas remedy under § 2241 showed its worth as an indispensable gap-filler for safeguarding constitutional rights.

II. RESIDUAL EQUITABLE POWERS IN § 2254 AND § 2255 CASES

The equitable power that AEDPA left to the judiciary also made a difference for petitioners challenging the validity of their criminal judgments under §§ 2254 and 2255 during the pandemic. One of the most consequential provisions in AEDPA was the new one-year filing period for both state and federal prisoners.[31] By 2010, the Court, invoking the equitable discretion of habeas courts, had approved "equitable tolling" of this deadline for a petitioner who could show that, despite due diligence, an extraordinary circumstance beyond the petitioner's control prevented timely filing.[32] The Court later explained, "[E]quitable principles have traditionally governed the substantive law of habeas corpus," and "we will not construe a statute to displace courts' traditional equitable authority absent the clearest command."[33]

28. Order at 1, Catchings v. Wilson, No. 1:21-cv-00428-TSE (D. Md. Apr. 23, 2021), ECF No. 88.

29. In addition to the cases collected in Garrett & Kovarsky, *supra* note 9, at 35–37, see *Arias v. Decker*, 459 F. Supp. 3d 561, 580 (S.D.N.Y. 2020) (granting motion for temporary restraining order and preliminary injunction), and Malam v. Adducci, No. 20-10829, 2020 WL 4818894, at *1 (E.D. Mich. Aug. 19, 2020) (involving petitioners in ICE custody in the Calhoun County Correctional Facility). *See also* Gayle v. Meade, No. 20-21553-CIV, 2021 WL 6072820, at *1 (S.D. Fla. Dec. 23, 2021) (granting final approval of the Settlement Agreement).

30. Garrett & Kovarsky, *supra* note 9, at 64.

31. 28 U.S.C. 2244(d) (2019); *see* KING & HOFFMANN, *supra* note 6, at 79 tbl.4.1 (estimated 21.7% of the non-capital petitions between 2004 and 2005 by state prisoners included claims dismissed as time barred).

32. Holland v. Florida, 560 U.S. 631, 649 (2010).

33. McQuiggin v. Perkins, 569 U.S. 383, 397 (2013) (alteration in original) (quoting Holland, 560 U.S. at 646).

Not surprisingly,[34] in the early months of the pandemic, federal courts granted requests for equitable tolling when prisoners alleged COVID-19 conditions impaired their ability to prepare and file a petition on time. Courts excused late filing when COVID-19 restrictions: barred access to the law library, copy machine, or other personal property needed to draft a pleading;[35] resulted in the closing of the courthouse;[36] precluded an in-person competency evaluation of the petitioner;[37] or prevented meetings with counsel[38] or the collection of records, expert evaluations, or witness interviews.[39]

* * * * *

34. Courts turned to equitable tolling in previous natural disasters. *E.g.*, Johnson v. Cain, 68 F. Supp. 3d 593, 608 (E.D. La. 2014) (granting the writ after finding that filing was delayed by the lack of an adequate state court record after Hurricane Katrina).

35. United States v. Maddox, No. 18-cr-0014 (WMW/BRT), 2021 WL 1550492, at *1 (D. Minn. Apr. 19, 2021). *But see* Massena v. United States, No. 16-cr-80071-MARRA, 2020 WL 5127632, at *4 (S.D. Fla. July 31, 2020) ("The law is clear, however, that transfers between prison facilities, solitary confinement, lockdowns, restricted access to the law library, and an inability to secure court documents do not qualify as extraordinary circumstances warranting equitable tolling.").

36. Cowan v. Davis, 1:19-CV-00745-DAD, 2020 WL 4698968, at *3 (E.D. Cal. Aug. 13, 2020) (granting tolling in ongoing capital habeas case); Brown v. Davis, 482 F. Supp. 3d 1049, 1058–60 (E.D. Cal. 2020); *see also* Dunn v. Baca, No. 3:19-cv-00702-MMD-WGC, 2020 WL 2525772, at *2 (D. Nev. May 18, 2020) ("If travel restrictions were not in place, if counsel for Dunn and counsel for Respondents did not need to work from home under less than optimal conditions, if the courthouse was open, then the Court likely would hold that *Smith* implicitly eliminated prospective equitable tolling.").

37. Dale v. Williams, No. 3:20-cv-00031-MMD-CLB, 2020 WL 4904624, at *3 (D. Nev. Aug. 20, 2020), *appeal dismissed*, No. 20-16839, 2020 WL 8922186 (9th Cir. Oct. 19, 2020).

38. Zuniga v. Bean, No. 2:20-cv-00619-GMN-BNW, 2021 WL 1565783, at *1–2 (D. Nev. Apr. 21, 2021) (finding that COVID-19 is an extraordinary circumstance that prevented Zuniga from meeting the statutory deadline, when counsel could not obtain juvenile-court records, meet with Zuniga in person or by videoconference "to determine which claims to raise and to determine whether a neuropsychological evaluation of Zuniga is necessary," or "to interview people in-person on potentially sensitive issues.").

39. Brown v. Davis, No. 1:19-CV-01796-DAD, 2021 WL 1839411, at *2 (E.D. Cal. May 7, 2021). *See also* Meghan Downey, *Extraordinary Circumstances and Extraordinary Writs: Equitable Tolling During the COVID-19 Pandemic and Beyond*, 27 BERKELEY J. CRIM. L. (forthcoming 2022) (manuscript at 20–24), https://ssrn.com/abstract=3892830 [https://perma.cc/U27B-5UNL] (collecting cases).

My modest observation about habeas litigation after AEDPA during the pandemic can be stated this way: When reflecting on what AEDPA did do—substantially limit federal habeas relief—we should not overlook what it didn't do. By its terms, AEDPA did not eliminate the equitable authority of federal courts in reviewing petitions filed under § 2241, nor did it extinguish entirely that authority for courts reviewing § 2254 and § 2255 cases. The litigation collected here illustrates how courts may need that residual power in a crisis such as our current pandemic to enforce the Constitution's commands. COVID-19 may be the most recent emergency in which judicial review of the constitutionality of detention requires the backstop that § 2241 provides, but it won't be the last.

The equitable authority to shape review under the habeas statutes should not be taken for granted.[40] To address unanticipated challenges to confinement, access to federal habeas review under § 2241 in particular must remain flexible. Ongoing divisions in the lower courts about the availability and scope of § 2241 deserve resolution. Without clarification, a prisoner's access to judicial review will continue to depend on the circuit in which he happens to be confined.

Of course, flexibility to define the scope of the writ is not a one-way ratchet favoring only petitioners. Some invocations of equitable power by habeas courts will allow access to the writ, others will deny it. Well-known examples include the Court's decisions to bar review of Fourth Amendment claims, recognize the defense of procedural default, and define retroactivity.[41] Debate about the appropriate *exercise* of the judiciary's equitable power to administer the writ will surely continue. I only hope that the Court and Congress will safeguard that power so

40. *See, e.g.*, McQuiggin v. Perkins, 569 U.S. 383, 404, 409–10 (2013) (Scalia, J., dissenting) (stating that the Court has "no 'equitable' power to discard statutory barriers to habeas relief," to recognize an equitable exception for innocence, and "cannot simply extend judge-made exceptions to judge-made barriers into the statutory realm," distinguishing equitable tolling, which "can be seen as a reasonable assumption of genuine legislative intent").

41. See, e.g., *Danforth v. Minnesota*:

> This Court has interpreted that congressional silence—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. See, *e.g.*, *Brecht v. Abrahamson,* 507 U.S. 619 (1993) (harmless-error standard); *McCleskey v. Zant,* 499 U.S. 467 (1991) (abuse-of-the-writ bar to relief); *Wainwright v. Sykes,* 433 U.S. 72 (1977) (procedural default); *Stone v. Powell,* 428 U.S. 465 (1976) (cognizability of Fourth Amendment claims). *Teague* is plainly grounded in this authority . . . .

552 U.S. 264, 278 (2008) (discussing why "general rule of retroactivity" established by *Teague v. Lane*, 489 U.S. 288 (1989), fits within the Court's power to interpret the federal habeas statute).

there is at least an opportunity to use it when needed for the next unanticipated crisis in confinement.