No. 23-15361

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN DOE,
Petitioner-Appellee,
v.
MERRICK B. GARLAND, Attorney General, et al.,
Respondents-Appellants.

On Appeal from the United States District Court
for the Northern District of California
No. 3:22-cv-03759-JD
Hon. James Donato

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA, ASIAN LAW CAUCUS, CALIFORNIA COLLABORATIVE FOR IMMIGRANT JUSTICE, FLORENCE IMMIGRANT & REFUGEE RIGHTS PROJECT, IMMIGRANT LEGAL DEFENSE, AND PANGEA LEGAL SERVICES IN SUPPORT OF PETITIONER-APPELLEE JOHN DOE'S PETITION FOR PANEL REHEARING OR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 26.1, 29(a)(4), and 29(b)(4) of the Federal Rules of Appellate Procedure, amici curiae state that they do not have a parent corporation and that no publicly held corporation owns 10 percent or more the stock of amici, as they do not issue any stock.

Date: December 20, 2024 */s/ Michelle (Minju) Y. Cho*

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INTEREST OF *AMICI CURIAE*

ACLU of Northern California and **ACLU of Southern California** are nonprofit organizations that use litigation and advocacy to advance the constitutional and civil rights of noncitizens. They have significant experience representing people in ICE custody to vindicate their constitutional rights in court.

Asian Law Caucus is a nonprofit organization based in San Francisco, California that regularly represents individuals facing deportation and litigates habeas petitions for noncitizens challenging their confinement in immigration detention.

California Collaborative for Immigrant Justice is a nonprofit organization based in Oakland, California that utilizes coordination, advocacy, and legal services to fight for the liberation of detained immigrants in California.

Florence Immigrant & Refugee Rights Project is a nonprofit organization based in Arizona that provides free legal and social services to adults and children detained in immigration custody. The Florence Project seeks to ensure all people facing removal have access to counsel, understand their rights, and are treated humanely.

Immigrant Legal Defense (ILD) is a nonprofit organization based in Oakland, California that serves marginalized immigrant communities, including detained noncitizens, through legal representation and advocacy. ILD seeks robust

due process protections for immigrants and governmental transparency, including by filing habeas corpus petitions.

Pangea Legal Services is a nonprofit organization based in San Francisco and San Jose, California that provides low-cost and free legal services to immigrants facing removal and advocates for the immigrant community through policy advocacy, education, and legal empowerment.

All *amici curiae* represent noncitizens in habeas petitions challenging ICE detention. *Amici* thus share an interest in ensuring the fair administration of laws governing detention and access to habeas corpus relief as a swift and accessible remedy for detained noncitizens.

This brief is filed under Fed. R. App. P. 29(b) and Circuit Rule 29-2 with the consent of all parties. No party's counsel authored the brief in whole or in part. No party, party's counsel, or person other than *amici*, their members, or their counsel contributed money intended to fund preparing or submitting the brief.

INTRODUCTION & BACKGROUND

Twenty years ago, the Supreme Court explained whether a habeas court has jurisdiction over a federal prisoner's challenge to imprisonment "breaks down into two related subquestions. First, who is the proper respondent to that petition? And second, does the [court] have jurisdiction over him or her?" *Rumsfeld v. Padilla*, 542 U.S. 426, 434 (2004). The same day, the Supreme Court issued *Rasul v. Bush*, where it likewise held the habeas statute "requires nothing more" than that a prisoner file their habeas petition in the judicial district with jurisdiction over "'the person who holds him in what is alleged to be unlawful custody.'" 542 U.S. 466, 478, 483 (2004) (quoting *Braden v. 30th Jud. Cir. Ct. of Ky.*, 410 U.S. 484, 494-95 (1973)).[1]

Petitioner-Appellee ("Petitioner") filed a habeas petition while confined by U.S. Immigration and Customs Enforcement ("ICE") at Golden State Annex ("GSA"), a facility owned and operated by private company The Geo Group, Inc. ("GEO"). He named the San Francisco ICE Field Office Director as a respondent and, as *Padilla* and *Rasul* instruct, filed the petition in the court with jurisdiction over that official: the Northern District of California. ER-27-106.

ICE and GEO have a contract under which ICE detains people at GSA while

[1] *Amici* address only the correct application of *Padilla* and *Rasul* to this case. *Amici* do not address the threshold question of whether *Padilla*'s "immediate custodian" rule applies to habeas petitions filed by detained immigrants, which the Supreme Court explicitly left open. *See* 542 U.S. at 435 n.8.

they await immigration processes. The contract[2] describes ICE's extensive expectations for operations at GSA; concentrates authority over daily life at GSA within the local ICE Field Office Director; and prohibits GEO from performing the essential functions of a habeas respondent (either completely or without ICE's authorization), including producing the petitioner to the habeas court, explaining the basis of the detention, and giving effect to resulting court orders. Under such circumstances, neither ICE nor GEO evidently believes GEO can litigate a habeas petition filed by someone like Petitioner: in all the immigration detention habeas cases naming a GEO employee as a respondent currently pending in E.D. Cal., no counsel for GEO has entered an appearance. Only government counsel has appeared.

Without considering how the contract subordinates GEO to ICE, the panel assumed (without analysis) that the highest-ranked GEO employee at GSA, the Facility Administrator, is equivalent to a warden at a traditional prison facility. The panel misunderstood how ICE, through its Field Office Director in San Francisco, maintains control over detainees at GSA, leading directly to the panel's legal errors.

Applying *Padilla* and *Rasul* to this case is straightforward: the proper respondent to Petitioner's habeas petition is the San Francisco ICE Field Office

[2] *Ahn v. GEO Group, Inc.*, Case 1:22-cv-00586-CDB (E.D. Cal. filed May 17, 2022), Contract Between ICE and GEO For Detention Services at Mesa Verde Detention Facility, Golden State Modified Community Correctional Facility, and Central Valley Modified Community Correctional Facility ("ICE-GEO Contract"), ECF 64-1.

Director because that official is the closest equivalent to a traditional warden at GSA. The Northern District of California, where Petitioner filed his petition, has jurisdiction over the Field Office Director. Accordingly, the district court did not err in exercising jurisdiction over the petition.

ARGUMENT

I. The Panel Decision's Failure To Understand The Extent Of ICE's Control At Golden State Annex Led To Its Profound Legal Errors.

By design, ICE, not GEO, exercises day-to-day control over people detained in Golden State Annex. This critical fact is why, under *Padilla* and *Rasul*, the correct respondent to Petitioner's habeas petition is the ICE Field Office Director. The panel decision incorrectly assumed the "Facility Administrator" of Golden State Annex, a GEO employee, is equivalent to a "warden" as that word is used in other habeas cases. *See* Op. 5, 21. But the panel never acknowledges that ICE specifically prevents the Facility Administrator from fulfilling the important responsibilities of a habeas respondent described in *Padilla*, which are instead reserved for ICE's Field Office Director. *See* 542 U.S. at 435.

A. ICE prohibits GEO from taking the actions that would be necessary to fulfill the responsibilities of a habeas respondent.

A habeas respondent must "make a return certifying the true cause of the detention," 28 U.S.C. § 2243,[3] and have "'the power to produce the body of such

[3] All statutory sections refer to Title 28 of the U.S. Code unless otherwise noted.

party before the court or judge, that he may be liberated if no sufficient reason is shown to the contrary,'" *Padilla*, 542 U.S. at 435 (quoting *Wales v. Whitney*, 114 U.S. 564, 574 (1885)). *Padilla* thus defines a proper habeas respondent as an "immediate custodian" capable of fulfilling specific responsibilities articulated in *Wales*. *Id.* The panel decision, though purporting to rely on *Padilla*'s "immediate custodian" concept, neither cites *Wales* nor acknowledges that, without ICE's acquiescence, GEO employees are prohibited from performing the duties *Padilla* expressly requires of a respondent: producing a petitioner to the court, certifying the true cause of detention, and effecting any court-ordered relief.

First, ICE prohibits contractors from accessing a detained person's A-file, which contains all official documents relating to a noncitizen's immigration history, including the alleged legal basis for detention.[4] Because GEO employees cannot access the A-file, they cannot explain why a habeas petitioner is confined, as § 2243 and Supreme Court precedent requires. CoreCivic, a private detention company like GEO that also contracts with ICE nationwide, plainly states it "do[es] not know the circumstances of people when they are placed in a facility or have any say whatsoever in their deportation or release."[5] There is no reason to

[4] Immigr. and Customs Enf't, Performance Based Nat'l Det. Standards (2011, rev. 2016) ("PBNDS") § 2.1.V.D. ("Under no circumstances may non-ICE/ERO personnel have access to the detainee's A-file.").
[5] CoreCivic, *10 Facts About CoreCivic*, https://www.corecivic.com/private-detention.

believe this does not apply equally to GEO. Petitioner never alleged any GEO employee "played any role in the decisions or proceedings that led to [his] detention," and "it is telling that the declarations submitted in support of the government's return to [his] petition are exclusively from federal officials." *Doe v. Becerra*, 704 F. Supp. 3d 1006, 1012 (N.D. Cal. 2023); *see* ER-9-26. Having deliberately screened its contractors from knowing why someone is in custody, ICE cannot now claim those contractors can explain to a court why a habeas petitioner's continued detention may be justified.

Second, ICE forbids GEO employees from transporting people in custody to court without ICE's say-so, ensuring the Facility Administrator lacks "the power to produce the body of [a habeas petitioner] before the court or judge." *Wales*, 114 U.S. at 574. The panel decision claims there is "no support in the record" for that fact, Op. 20, but ICE's own documents belie this. The ICE-GEO contract expressly requires GEO to adhere to the PBNDS,[6] which plainly prohibit GEO from transporting people out of GSA without ICE's authorization: "No detainee may be transported to/from any facility" unless ICE "authoriz[es] the removal;" and "The Field Office Director is the approving official for non-medical emergency escorted trips," including to court.[7] *See also Doe*, 704 F. Supp. 3d at 1012 (observing GSA

[6] ICE-GEO Contract at 2.
[7] PBNDS §§ 1.3.V.G.1; 5.2.V.A.

Facility Administrator cannot transport habeas petitioner to court without, "at the very least," "permission and cooperation from ICE"). The panel decision cites one out-of-circuit criminal habeas case to suggest a private contract warden is an appropriate respondent. *See* Op. 19 (citing *Stokes v. U.S. Parole Comm'n*, 374 F.3d 1235, 1239 (D.C. Cir. 2004)). But *Stokes* does not help address the question before this Court: whether, in light of its contract with ICE, *this* contractor can act competently as a habeas respondent.

Third, if continued detention is unjustified, habeas courts routinely order the government to schedule a bond hearing in immigration court. *See* ER-6. A bond hearing, while short of release, is critical relief that fits easily within the scope of § 2241. *See* § 2243 (habeas courts "shall" fashion remedies "as law and justice require"); *Boumediene v. Bush*, 553 U.S. 723, 779 (2008) ("[R]elease need not be the exclusive remedy and is not the appropriate one in every case in which the writ is granted," for habeas is, "above all, an adaptable remedy."); *Peyton v. Rowe*, 391 U.S. 54, 66 (1968) ("[T]he statute does not deny the federal courts power to fashion appropriate relief other than immediate release.").[8] GEO, which unlike the federal government does not appear in immigration court, cannot give effect to such orders. *See Doe*, 704 F. Supp. 3d at 1013 (explaining it would be "impossible"

[8] Amici join Petitioner's concerns that the panel decision may erroneously abort access to habeas remedies this Court and the Supreme Court have long recognized. *See* Petition at 15-17.

for the GSA Facility Administrator to comply with court-ordered habeas relief on her own).

Under these circumstances, where GEO cannot certify the cause of detention, transport a petitioner to court, or effectuate any relief, no GEO employee, including the Facility Administrator, can serve as an "immediate custodian" as understood in *Padilla*, 542 U.S. at 435, and *Wales*, 114 U.S. at 574.

B. The San Francisco ICE Field Office Director governs the minutiae of life at Golden State Annex, underscoring their role as Petitioner's "immediate custodian."

The panel decision suggests the San Francisco ICE Field Office Director is a "'remote supervisory official'" akin to "'the Attorney General,'" too removed to serve as an "immediate custodian" for habeas purposes. Op. 16 (quoting *Padilla*, 542 U.S. at 435). But it does not explain what makes the Field Office Director "remote" and not "immediate," nor does it acknowledge overwhelming evidence that, by ICE's design, it is the Field Office Director, and not the Facility Administrator, who governs the minutiae of daily life at contract facilities like GSA.

GSA's detention contract requires GEO to adhere to ICE's Performance-Based National Detention Standards ("PBNDS"), a 475-page document detailing ICE's policies and procedures around topics as wide-ranging as custody, release, transportation, food, hygiene, medical treatment, solitary confinement, mail,

telephone access, safety, religious practices, visitation, law library, marriage requests, grievance procedures, and recreation.[9]

The PBNDS repeatedly concentrates authority over daily life at a detention center in the Field Office Director, distinguishing that official's authority over detainees from other officials in the chain of command. For example, a detained person seeking an independent medical or mental health exam must obtain the Field Office Director's approval;[10] the Field Office Director has final authority over a detained person's request to marry;[11] all legal presentations by outside organizations must be reviewed and approved by the Field Office Director;[12] and the Field Office Director decides whether to transfer a detained person elsewhere.[13]

When ICE and GEO jointly oversee certain aspects of detainees' lives at GSA, the PBNDS subordinate the Facility Administrator's authority to the Field Office Director's. For instance, a Facility Administrator cannot transport a detained person outside the facility for a non-medical emergency without approval from the Field Office Director;[14] a Facility Administrator cannot resolve a request to marry

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[9] *See* ICE-GEO Contract at 2 ("All services shall be furnished in compliance with the following regulations/policies/standards: 2011 Performance Based National Detention Standards (PBNDS 2011)as [*sic*] revised in DEC [*sic*] 2016….").
[10] PBNDS § 4.3.V.FF.
[11] *Id.* § 5.3.V.D.
[12] *Id.* §§ 6.4.V.A., 6.4.V.L.
[13] *Id.* § 7.4.V.A.
[14] *Id.* § 5.2.V.A.

without review by the Field Office Director, who may reverse the Facility Administrator's decision;[15] and a Facility Administrator may not deny a request to participate in a religious diet without first consulting the Field Office Director, nor remove someone from that diet without documented concurrence from the Field Office Director.[16] In contrast, not one provision of the PBNDS allows the Facility Administrator to overrule a decision by the Field Office Director.

These facts demonstrate how ICE maintains control over people at GSA, while GEO is "a mere functionary, no different than an individual jailor posted outside Petitioner's cell block" whose "involvement here is merely to provide a service to ICE." *Doe v. Barr*, 20-cv-02263-RMI, 2020 WL 1984266, at *5 (N.D. Cal. Apr. 27, 2020). Because ICE's Field Office Director exercises day-to-day control over detained people, that official is the relevant "immediate custodian" for habeas purposes, as eighteen judges of the Northern District of California concluded prior to the panel decision.[17]

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[15] *Id.* § 5.3.V.D.
[16] *Id.* § 4.1.V.G.11.
[17] *See De La Rosa v. Murray,* No. 23-cv-06461-VC, 2024 WL 2646470 (N.D. Cal. Apr. 8, 2024); *Doe v. Becerra*, 704 F. Supp. 3d 1006 (N.D. Cal. 2023); *Doe v. Becerra*, 697 F. Supp. 3d 937 (N.D. Cal. 2023); *Rosas v. Becerra*, No. 23-cv-04058-LB, 2023 WL 6541855 (N.D. Cal. Oct. 6, 2023); *Grewal v. Becerra*, No. 23-cv-03621-JCS, 2023 WL 6519272 (N.D. Cal. Oct. 4, 2023); *I.E.S. v. Becerra*, No. 23-cv-03783-BLF, 2023 WL 6317617 (N.D. Cal. Sept. 27, 2023); *Pham v. Becerra*, No. 23-cv-01288-CRB, 2023 WL 2744397 (N.D. Cal. Mar. 31, 2023); *Salesh P. v. Kaiser*, No. 22-cv-03018-DMR, 2022 WL 17082375 (N.D. Cal. Nov. 18, 2022); *Henriquez v. Garland*, No. 5:22-cv-00869-EJD, 2022 WL 2132919

C. The panel decision leads to absurd consequences.

Since the panel decision was issued in July 2024, habeas petitioners have been required to name a private GEO employee, and no government official, as the respondent to their petitions. Predictably, absurd consequences have ensued.

First, amici are aware of at least ten pending or dismissed habeas petitions which were either filed in, or transferred to, E.D. Cal. after the panel decision; name a GEO employee as a respondent; and were brought by individuals detained at GSA or Mesa Verde ICE Processing Center (a GEO-owned-and-operated ICE detention center in Bakersfield, California, approximately 26 miles from GSA).[18]

(N.D. Cal. June 14, 2022); *Ameen v. Jennings*, No. 22-cv-00140-WHO, 2022 WL 1157900 (N.D. Cal. Apr. 19, 2022); *Meneses v. Jennings*, No. 21-cv-07193-JD, 2021 WL 4804293 (N.D. Cal. Oct. 14, 2021); *Romero Romero v. Wolf*, No. 20-cv-08031-TSH, 2021 WL 254435 (N.D. Cal. Jan. 26, 2021); *Domingo v. Barr*, No. 20-cv-06089-YGR, 2020 WL 5798238 (N.D. Cal. Sept. 29, 2020); *Hilario Pankim v. Barr*, No. 20-cv-02941-JSC, 2020 WL 2542022 (N.D. Cal. May 19, 2020); *Ortuño v. Jennings*, No. 20-cv-02064-MMC, 2020 WL 2218965 (N.D. Cal. May 7, 2020); *Doe v. Barr*, No. 20-cv-02263-RMI, 2020 WL 1984266 (N.D. Cal. Apr. 27, 2020); *Ramirez v. Sessions*, No. 18-cv-05188-SVK, 2019 WL 11005487 (N.D. Cal. Jan. 30, 2019); *Zabadi v. Chertoff*, No. 05-cv-01796-WHA, 2005 WL 1514122 (N.D. Cal. June 17, 2005). *But see Rivera-Trigueros v. Becerra*, No. 23-cv-05781-RFL, 2024 WL 1129880 (N.D. Cal. Mar. 14, 2024) (holding that GSA Facility Administrator is correct respondent, but failing to account for how the ICE-GEO contract prohibits GEO from performing essential functions of a habeas respondent); *Byron H.E. v. Becerra*, No. 24-cv-00564-VKD, 2024 WL 1596675 (N.D. Cal. Apr. 11, 2024) (same).

[18] *See Le v. Field Office Director*, No. 1:24-cv-01272-EPG (E.D. Cal. filed Oct. 18, 2024); *Diep v. Andrews*, 1:24-cv-01238-SKO (E.D. Cal. filed Oct. 11, 2024); *Riego v. Current or Acting Field Office Director*, 1:24-cv-01162-SKO (E.D. Cal. filed Oct. 1, 2024); *Cabrera Espinoza v. Becerra*, No. 1:24-cv-01118-SAB (E.D. Cal. filed Sept. 20, 2024); *Singh v. Warden*, 1:24-cv-01080-HBK (E.D. Cal. filed Sept.

Yet in *none* of the cases has counsel for GEO ever entered an appearance: only government counsel has appeared.[19] This reflects ICE and GEO's implicit acknowledgment that ICE—not GEO—is legally responsible for habeas petitioners' imprisonment, and only ICE—not GEO—can competently litigate the petitions.

The panel decision claims such cases show the government is capable of "stepp[ing] in to defend its interest" in a habeas petition that names only a private contract warden as respondent. Op. 19. Even setting aside how government attorneys will know to enter appearances in cases where no government official has been named a respondent, the panel overlooks the obvious: when government attorneys appear in such habeas petitions, they do so because the interests at stake are those of *the government*. Moreover, it is improper for government attorneys to make appearances purportedly to represent GEO employees, but in reality to defend the interests of the government. Indeed, ICE's interests will not always be identical to its contractors. *See, e.g.*, *Villalta v. Sessions*, 17-cv-05390-LHK, 2017

13, 2024); *Montes Regalado v. Garland*, 1:24-cv-00998-EPG (E.D. Cal. filed Aug. 22, 2024); *Romero Romero v. Wofford*, 1:24-cv-00944-SKO (filed Aug. 14, 2024); *Doe v. Wofford*, 1:24-cv-00943-EPG (filed Aug. 14, 2024); *Keo v. Warden*, 1:24-cv-00919-HBK (E.D. Cal. filed Aug. 8, 2024); *Kapila v. Garland*, 1:24-cv-00914-SAB (filed Aug. 7, 2024).

[19] Each of these cases originally named various ICE officials as respondents (in addition to or instead of the Facility Administrator). It is almost certainly because the petitioners included ICE officials as respondents that government attorneys became aware of these habeas petitions and knew to enter their appearances.

WL 4355182, at *1 n.1 (N.D. Cal. Oct. 2, 2017) (in response to habeas petition naming ICE officials and contractor-sheriff as respondents, ICE officials opposed motion for temporary restraining order, while contractor-sheriff separately filed a "Non-Opposition" and stated he "t[ook] no position" on its merits).

Second, the decision will stifle detainees' ability to access habeas relief if ICE—as it frequently does—transfers a person with a pending habeas petition to another facility. Typically, if a prisoner is transferred out-of-district after filing a habeas petition, the original habeas court "acquired jurisdiction" when the petition was filed and "the removal of [the petitioner] did not cause it to lose jurisdiction where a person in whose custody [the petitioner] is remains within the district." *Ex parte Endo*, 323 U.S. 283, 306 (1944). Thus, a habeas court may issue relief "if a respondent who has custody of the prisoner is within reach of the court's process even though the prisoner has been removed from the district since the suit was begun." *Id.* at 307. This scheme works when an ICE official is the habeas respondent, because even if a petitioner is transferred to an ICE facility elsewhere, the original respondent and the petitioner's post-transfer custodian are in a single chain of command. If the habeas court orders the habeas petitioner to appear or grants them relief, the ICE respondents involved will be able to comply. But *Endo*'s logic leads to absurdities when applied to the GSA Facility Administrator.

Imagine Petitioner filed a habeas action naming the Facility Administrator as

the sole respondent, and ICE subsequently transferred him from GSA to Stewart Detention Center in Georgia, where ICE contracts with CoreCivic, another private detention company. Under *Endo*, the Facility Administrator ought to remain the proper respondent. But assuming she had any interest in continuing to litigate a habeas petition filed by someone no longer in her custody, and could discern where Petitioner had been transferred, she would have no power to order a CoreCivic employee to transport Petitioner to a habeas court in California, nor compel CoreCivic to effect any resulting relief, because GEO and CoreCivic employees do not share a chain of command. Only an ICE respondent could, post-transfer, continue to litigate a habeas petition as *Endo* contemplates. This makes practical sense and comports with Article III's case-or-controversy requirement: Petitioner alleged no injury traceable to the Facility Administrator, who, moreover, was not competent to effectuate the court's ordered relief, a bond hearing.

As this scenario suggests, the panel decision will likely allow ICE to moot a habeas petition filed by a person detained in a contract facility (which most ICE detention centers are) by transferring the prisoner elsewhere—even for legitimate reasons—and evaporating any case or controversy the habeas petitioner had with the first contract "warden." Such maneuvers will make it unjustifiably difficult for people enduring unconstitutional detention to have their claims heard.

Because the panel did not properly consider ICE and GEO's contract

relationship, its legal reasoning was based on incomplete or incorrect facts. Rehearing or rehearing en banc is required to align the panel decision with governing law and reality.

II. Applying Governing Law Would Have Led The Panel To The Correct Result: The San Francisco ICE Field Office Director Is The Proper Habeas Respondent.

The panel decision does not apply certain authoritative precedents, incorrectly distinguishing them on irrelevant grounds. Most seriously, the panel improperly distinguishes *Rasul v. Bush*, 542 U.S. at 466, because it involved habeas petitioners detained "at Guantanamo Naval Base, for which there is no judicial district." Op. 24. But *Rasul*'s reasoning is not limited to petitioners detained in Guantanamo, and courts have relied on it for cases that do not involve Guantanamo detainees. *See, e.g.*, *Noriega v. Pastrana*, 130 S.Ct. 1002, 1006 (2010) (Mem.) (Thomas, J., dissenting from denial of certiorari) (relying on *Rasul* in context of noncitizen habeas petitioner detained in Florida).

Rasul affirmed that because under § 2241 the habeas writ acts upon the custodian, not the petitioner seeking relief, the proper habeas court is the one with jurisdiction over the custodian. *See Rasul*, 542 U.S. at 478-79. Thus, habeas petitions must be filed in the district where the custodian can be reached by service of process, even if that is not where the petitioner is imprisoned. A petitioner may *not* file a habeas petition where they, but not their custodian, is located. Yet that is

what the panel incorrectly held. *See* Op. 21-25 (holding habeas petition must be filed in the "district of confinement").

Contrary to the panel decision's reasoning, *Rasul* is consistent with *Padilla*. Because, in *Padilla*, the on-site warden was the proper custodian, that case had no reason to consider the correct judicial district when the proper custodian is outside the petitioner's district of confinement, as *Rasul* did. *Padilla* held the correct respondent is not "the Attorney General" or other cabinet-level "remote supervisory official," but nothing in *Padilla* requires a habeas petitioner to name as respondent a warden-in-name-only—much less one who, by contract, is prohibited from completing the responsibilities of a respondent as *Padilla* defined them. Nor does *Padilla* require that a habeas petitioner and respondent reside in the same judicial district. Taken together, *Padilla* and *Rasul* mean that where a competent "immediate custodian" and prisoner are in different judicial districts, the prisoner must file their habeas petition in the district with jurisdiction over the custodian. That is precisely what Petitioner did.

After *Rasul*, Congress passed two rounds of amendments to the habeas statute. *See Hamad v. Gates*, 732 F.3d 990, 996-99 (9th Cir. 2013) (describing congressional amendments to § 2241). Congress thus had the opportunity to—but did not—abrogate the rule tethering jurisdiction to the custodian, rather than the petitioner's district of confinement. *See also, e.g.*, *In re Jackson*, 15 Mich. 417,

440-41 (1867) ("The place of confinement is, therefore, not important…. The important question is, where is the power of control exercised?…[F]or the wrong is done wherever the power of control is exercised.").

Because the panel distinguished *Rasul* on irrelevant grounds, it failed to apply it as precedent. But *Rasul* accords with *Padilla*, and controls: the proper venue for a habeas petition is the district where the custodian is located, even if the petitioner is confined elsewhere. Petitioner thus did not err in filing his habeas petition in the Northern District of California, where his immediate custodian—the ICE Field Office Director—was located.

CONCLUSION

For the forgoing reasons, the Court should grant rehearing or rehearing en banc.

Date: December 20, 2024 */s/ Michelle (Minju) Y. Cho*

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CERTIFICATE OF COMPLIANCE

I certify that this brief contains 4,181 words, excluding the items exempted by Fed. R. App. P. 32(f). I certify this brief is an amicus brief and complies with the word limit set forth in Circuit Rule 29-2(c)(2). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

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