Practice Advisory[1]

HABEAS CORPUS PETITIONS

January 15, 2025

This practice advisory addresses petitions for writs of habeas corpus in immigration cases. Traditionally, district courts have jurisdiction to entertain habeas petitions seeking release, seeking a bond hearing before an immigration judge, and/or challenging certain detention conditions. In the wake of enforcement actions under Trump 2.0, it is possible that noncitizens may need to resort to habeas as a mechanism to challenge immigration enforcement actions where the noncitizen is unable to access the existing statutory judicial review scheme available under § 242 of the Immigration and Nationality Act (INA), 8 U.S.C. § 1252, or a new enforcement action is not covered by it.

The advisory focuses on the procedural aspects of litigating habeas petitions, not the substance of possible arguments underlying them. It is accompanied by a Template Habeas Petition and Template Application for an Order to Show Cause.

Advisory Contents

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I. Overview and Sources of Habeas Authority

The writ of habeas corpus—which literally means to "produce the body"—is a type of court order, stemming from English common law and long enshrined in the U.S. Constitution and statutes. The right to file a petition for a writ of habeas corpus is intended to, at a minimum, provide "a means of reviewing the legality of Executive detention." *Rasul v. Bush*, 542 U.S. 466, 474 (2004) (quoting *INS v. St. Cyr*, 533 U.S. 289, 301 (2001)).

There are two main sources of authority for immigration habeas petitions. First, and most relevant, is the civil habeas statute, 28 U.S.C. § 2241. It provides that:

> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.
> . . .

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

. . .

(3) He is in custody in violation of the Constitution or laws or treaties of the United States . . . .

Second, and a more challenging basis of jurisdiction, is the Suspension Clause of the U.S. Constitution, also known as the Great Writ. *See* U.S. Const. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

A third source of habeas authority is specific to expedited removal orders. *See* Section III.D.

II. Habeas Challenges in the Immigration Context

Federal courts have addressed habeas petitions in a variety of immigration actions, including challenges to immigration detention, the detention of unaccompanied children, conditions of confinement, expedited removal orders, and sometimes in connection with removal proceedings. The following is a *non-exhaustive* listing of types of habeas-related litigation in these areas.

A. Release-Related

1. Detention

- Post-removal order detention in violation of the U.S. Constitution or immigration statutes where removal is not reasonably foreseeable.[2]

- Whether an agency erred in making a dangerousness determination.[3]

- Failure to consider conditional parole as a condition for release under 8 U.S.C. § 1226(a), instead of monetary bond.[4]

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[2] *See Zadvydas v. Davis*, 533 U.S. 678 (2001); *Clark v. Martinez*, 543 U.S. 371 (2005).

[3] *See, e.g.*, *Martinez v. Clark*, 144 S. Ct. 1339 (2024) (vacating and remanding Ninth Circuit decision finding no jurisdiction to review dangerousness determination in denying bond), and *Martinez v. Clark*, No. 21-35023, __ F.4th__, 2024 WL 5231197, *7 (9th Cir. Dec. 27, 2024) (following remand, holding that court has jurisdiction to review danger determination under abuse of discretion standard).

[4] *See, e.g.*, *Rivera v. Holder*, 307 F.R.D. 539 (W.D. Wash. 2015).

- Immigration detention without the opportunity for parole in violation of the immigration statute, regulations, and ICE's parole directive.[5]

- Failure to consider ability to pay and/or alternatives to detention in custody determinations.[6]

- Use of the Intensive Supervision Appearance Program (ISAP) (electronic monitoring).[7]

- Whether an individual is properly subject to mandatory detention.

- Conditions of confinement in violation of the U.S. Constitution due to risk of contracting COVID-19.[8]

2. Notable Decisions and Limitations

- Individuals detained pursuant to 8 U.S.C. § 1226(a) do not have a *statutory* right to bond hearings every 6 months. *Jennings v. Rodriguez*, 583 U.S. 281 (2018).

- 8 U.S.C. § 1226(c), providing for the detention of individuals with certain criminal convictions without bond hearings during removal proceedings, is facially constitutional. *Demore v. Kim*, 538 U.S. 510 (2003).

- Individuals detained pursuant to 8 U.S.C. § 1226(c) do not have a *statutory* right to a bond hearing regardless of when U.S Immigration and Customs Enforcement (ICE) takes them into custody. *Nielsen v. Preap*, 586 U.S. 392 (2019).

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[5] *See, e.g.*, *Abdi v. Duke*, 280 F. Supp. 3d 373 (W.D.N.Y. 2017), *vacated in part on other grounds by Abdi v. McAleenan*, 405 F. Supp. 3d 467 (W.D.N.Y. 2019); *Damus v. Nielsen*, 313 F. Supp. 3d 317, 323 (D.D.C. 2018).

[6] *See, e.g.*, *Hernandez v. Sessions*, 872 F.3d 976 (9th Cir. 2017) (challenge to agency's failure to consider financial circumstances or alternative release conditions prior to custody determinations where petitioners were determined not to be dangerous or flight risks). *But see Martinez v. Clark*, No. 21-35023, __ F.4th__, 2024 WL 5231197 (9th Cir. Dec. 27, 2024) (rejecting argument that due process requires agency to consider alternatives to detention where petitioner was found to be a danger).

[7] *See, e.g.*, *Gozo v. Mayorkas*, No. 1:23-CV-159, 2024 WL 2027510 (S.D. Tex. Mar. 4, 2024); *Ahmed v. Tate*, No. 4:19-CV-4889, 2020 WL 3402856 (S.D. Tex. June 19, 2020); *Xiaoyuan Ma v. Holder*, 860 F. Supp. 2d 1048 (N.D. Cal. 2012); *Nken v. Napolitano*, 607 F. Supp. 2d 149 (D.D.C. 2009); *Nguyen v. B.I. Inc.*, 435 F. Supp. 2d 1109 (D. Or. 2006); *Urbina v. Godfrey*, No. CV 06-538-ST, 2006 WL 2474881 (D. Or. Aug. 22, 2006).

[8] *See, e.g.*, *Hope v. Warden York Cty. Prison*, 972 F.3d 310 (3d Cir. 2020); *Zepeda Rivas v. Jennings*, 465 F. Supp. 3d 1028 (N.D. Cal. 2020); *Yanes v. Martin*, 464 F. Supp. 3d 467, 468 n.1 (D.R.I. 2020) (collecting cases). *But see Pinson v. Carvajal*, 69 F.4th 1059, 1068-69 (9th Cir. 2023). For additional resources related to litigating immigration detention conditions, contact Eunice Cho at echo@aclu.org.

- Individuals detained pursuant to 8 U.S.C. §§ 1226(c) or 1225(b) do not have a *statutory* right to a bond hearing following prolonged detention. *Jennings v. Rodriguez*, 83 U.S. 281 (2018). But note that there is a circuit split on whether due process requires a bond hearing about prolonged mandatory detention. *Compare German Santos v. Warden Pike Cnty. Corr. Facility,* 965 F.3d 203, 206 (3d Cir. 2020) ("Because his detention has become unreasonable, he has a due process right to a bond hearing, at which the Government must justify his continued detention by clear and convincing evidence.") *with Banyee v. Garland*, 115 F.4th 928 (8th Cir. 2024), *and Rodriguez Diaz v. Garland*, 53 F.4th 1189 (9th Cir. 2022).

- Individuals in withholding-only proceedings following reinstatement orders or § 1228(b) orders are subject to post-removal order detention under 8 U.S.C. § 1231(a) and are not statutorily entitled to bond hearings while seeking withholding of removal. *See Johnson v. Guzman Chavez*, 594 U.S. 523 (2021); *Johnson v. Arteaga-Martinez*, 596 U.S. 573 (2022).

B. Detention of Unaccompanied Children

- Detention of unaccompanied children in the custody of the Office of Refugee Resettlement (ORR) in violation of the U.S. Constitution, immigration statutes, or the *Flores* settlement agreement.[9]

- Determinations allegedly justifying transfer of individuals to an adult detention facility, including to the use of radiographs and other age determination tools.[10]

C. Expedited Removal under 8 U.S.C. § 1225(b)

The INA expressly provides for limited habeas review of certain determinations made in expedited removal proceedings. *See* 8 U.S.C. § 1252(e)(2). These determinations include whether the petitioner:

- is a noncitizen,
- was ordered removed under 8 U.S.C. § 1225(b)(1), and
- can prove by a preponderance of the evidence that they are a lawful permanent resident, refugee, or asylee and that such status has not been terminated.

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[9] *See, e.g.*, *D.B. v. Cardall*, 826 F.3d 721 (4th Cir. 2016); *Santos v. Smith*, 260 F. Supp. 3d 598 (W.D. Va. 2017); *Saravia v. Sessions*, 280 F. Supp. 3d 1168 (N.D. Cal. 2017); *J.S.G. v. Stirrup*, No. SAG-20-1026, 2020 WL 1985041 (D. Mary. Apr. 26, 2020); *Maldonado v. Lloyd*, No. 18 Civ. 3089 (JFK), 2018 WL 2089348 (S.D.N.Y. May 4, 2018).

[10] *R.R. v. Orozco*, No. 20-564 KG/GBW (D.N.M. Jun. 30, 2020); *N.B. v. Barr*, No. 19-CV-1536 JLS (LL), 2019 WL 4849175, at *13 (S.D. Cal. Oct. 1, 2019); *B.I.C. v. Asher*, No. C16-132-MJP-JPD, 2016 WL 8672760 (W.D. Wash. Feb. 19, 2016).

See 8 U.S.C. § 1252(e)(2)(A)-(C). If person is improperly issued an expedited removal order, for example, because they have been in the country for a greater amount of time than expedited removal covers, a habeas petition alleging that the person was not "ordered removed under 8 U.S.C. § 1225(b)(1)" may be a viable option.[11] However, the statute specifically provides that such review must be limited to "whether such an order in fact was issued and whether it relates to the petitioner" and may not include review of whether a noncitizen "is actually inadmissible or entitled to any relief from removal." 8 U.S.C. § 1252(e)(5).

Habeas review is *not* available for systemic challenges to implementation of the expedited removal statute. 8 U.S.C. § 1252(e)(3).

The Supreme Court largely has foreclosed habeas actions raising procedural challenges to expedited removal orders or aspects of the expedited removal process. *See DHS v. Thuraissigiam*, 591 U.S. 103 (2020). In *Thuraissigiam*, the petitioner—who was apprehended immediately after physically entering the United States—filed a habeas petition to challenge alleged flaws in his credible fear proceeding, seeking as a remedy a "new opportunity to apply for asylum." 591 U.S. at 115. Notably, the petitioner in *Thuraissigiam* did not challenge "unlawful executive detention," but rather sought "the opportunity to remain lawfully in the United States," *id*. at 119 (citation omitted).[12]

The Court held that neither the Suspension Clause nor the Due Process Clause afforded the petitioner a right to judicial review. *Id*. In reaching its conclusion as to due process, the Court held that a noncitizen "in respondent's position"—in other words, a noncitizen who is apprehended shortly after having entered unlawfully—"has only those rights regarding admission that Congress has provided by statute." *Id*. at 140.

D. Removal Proceedings Related

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[11] *Cf. Dugdale v. U.S. CBP*, 88 F. Supp. 3d 1, 6 (D.D.C. 2015) (holding "that a determination of whether a removal order 'in fact was issued' fairly encompasses a claim that the order was not lawfully issued due to some procedural defect") (quoting *Am-Arab Anti-Discrimination Comm. v. Ashcroft*, 272 F. Supp. 2d 650, 663 (E.D. Mich. 2003)); *Am-Arab Anti-Discrimination Comm.*, 272 F. Supp. 2d at 663 (recognizing "jurisdiction on habeas review to determine whether the expedited removal statute was *lawfully applied* to petitioners in the first place"); *Smith v. CBP*, 741 F.3d 1016, 1022 (9th Cir. 2014) (rejecting a claim that an individual was not "ordered removed under 8 U.S.C. § 1225(b)(1)" on the merits); *Agarwhal v. Lynch*, 610 F. Supp. 3d 990 (E.D. Mich. 2022) (denying motion to dismiss a habeas petition challenging whether the individual was ordered removed under 8 U.S.C. § 1225(b)(1) on the basis that the expedited removal order had not been reviewed, approved, and issued according to the relevant statute and regulations).

[12] *See also id*. at 107 (describing petitioner's goal as obtaining "additional administrative review of his asylum claim and ultimately to obtain authorization to stay in this country").

Previously, in the early 2000s, district courts reviewed certain final removal orders, but that practice was short-lived.[13] Nevertheless, some attorneys continue to list the civil habeas statute and the Suspension Clause in the jurisdictional section of complaints that do not involve challenges to immigration detention. Where there is a viable non-habeas basis for jurisdiction, courts generally do not address the propriety of habeas jurisdiction.

In contrast, where habeas is the main or only jurisdictional basis provided, courts determine whether they have habeas jurisdiction. For example, courts have dismissed habeas actions seeking to halt the execution of removal orders to await some discretionary agency action pursuant to 8 U.S.C. § 1252(g).[14] On the other hand, courts have exercised jurisdiction over habeas petitions filed by non-detained petitioners who challenged a sudden policy change to the terms of the Orders of Supervision governing their post-final order release to "ensure that there are adequate and effective alternatives to habeas corpus relief in the circumstances of [that] case."[15]

The Second Circuit previously found that the Suspension Clause permitted review of a habeas petition alleging that ICE sought to deport the petitioner as a result of speech protected by the First Amendment. *Ragbir v. Homan*, 923 F.3d 53, 78-79 (2d Cir. 2019) *vacated by Pham v. Ragbir*, 141 S. Ct. 227 (2020) (remanding for further consideration in light of *DHS v. Thuraissigiam*, 591 U.S. 103 (2020)).

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[13] Specifically, the Supreme Court addressed amendments to the INA, enacted in 1996 and 1997, that curtailed judicial review over certain final removal orders in the courts of appeals. *See Calcano-Martinez v. INS*, 533 U.S. 348 (2001); *INS v. St. Cyr*, 533 U.S. 289 (2001). The Court held that construing the amendments to preclude federal court review of pure questions of law would raise substantial constitutional questions. *Calcano-Martinez*, 533 U.S. at 351; *St. Cyr*, 533 U.S. at 301. To avoid this constitutional issue, the Court held that the Suspension Clause required review of legal questions. Subsequently, judicial review over removal orders was bifurcated; some removal orders were reviewable in the circuit courts on petition for review and others were reviewable in district court via habeas. To rectify this bifurcation, through the REAL ID Act of 2005, Congress revised the INA to restore judicial review in the courts of appeals over removal orders raising constitutional claims or questions of law. *See generally Guerrero-Lasprilla v. Barr*, 589 U.S. 221, 232-34 (2020) (addressing history of the REAL ID Act and 8 U.S.C. § 1252(a)(2)(D)).

[14] *See, e.g.*, *Tazu v. Att'y Gen. U.S.*, 975 F.3d 292, 297, 300 (3d Cir. 2020) (affirming dismissal of habeas petition challenging deportation before the agency's adjudication of a motion to reopen); *E.F.L. v. Prim*, 986 F.3d 959, 964-65 (7th Cir. 2021) (affirming dismissal of habeas petition seeking to enjoin removal to await adjudication of petitioner's self-petition under the Violence Against Women Act (VAWA)); *Rauda v. Jennings*, 55 F.4th 773, 775 (9th Cir. 2022) (affirming dismissal of habeas action seeking to prevent deportation to await the Board of Immigration Appeals' (BIA) adjudication of petitioner's then-pending motion to reopen); *Camarena v. Dir., ICE*, 988 F.3d 1268, 1270 (11th Cir. 2021) (affirming dismissal of habeas petition seeking to halt execution of petitioners' removal orders to await adjudication of their pending applications for provisional unlawful presence waivers).

[15] *See, e.g.*, *Devitri v. Cronen*, 290 F. Supp. 3d 86, 93 (D. Mass. 2017).

III. Pre-Filing Considerations

A. Place of Filing / Venue

1. Detained Petitioners

The civil habeas statute applies to individuals who are "in custody." 28 U.S.C. § 2241(c), Whether an individual is "in custody" is determined at the time the habeas petition is filed. *Spencer v. Kemna*, 523 U.S. 1, 7 (1998) (addressing identical language in 28 U.S.C. § 2254).

Habeas petitions generally are filed in the district court with jurisdiction over the filer's place of custody, also known as the district of confinement. *See Rumsfeld v. Padilla*, 542 U.S. 426, 443 (2004) ("The plain language of the habeas statute . . . confirms the general rule that for core habeas petitions challenging present physical confinement, jurisdiction lies in only one district: the district of confinement."); 28 U.S.C. § 2241(a) (providing for habeas petitions "within [courts'] respective jurisdictions").

Not all habeas petitions follow this rule. In *Padilla*, the Supreme Court stated the district of confinement rule applies to "core habeas petitions challenging present physical confinement." 542 U.S. at 443. The Court expressly declined to decide whether habeas petitions filed by noncitizens "detained pending deportation" are this type of "core challenge[]." *Id*. at 435 & n.8.

Some courts have expressly held that a habeas petition challenging immigration detention must be filed in the district of confinement.[16]

Note that if venue is proper at the time of filing, the district court ordinarily will retain jurisdiction even if DHS subsequently transfers the petitioner to another district.[17]

2. Non-Detained Petitioners

Although the statute applies to individuals who are "in custody," 28 U.S.C. § 2241(c), individuals need not be physically detained to file a habeas petition. Rather, they may be subject

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[16] *See Doe v. Garland*, 109 F.4th 1188, 1192 (9th Cir. 2024) (petition for rehearing pending); *cf. Anariba v. Dir. Hudson Cnty. Corr. Ctr*., 17 F.4th 434, 444-45 (3d Cir. 2021) (applying the district of confinement rule to a habeas petition challenging immigration detention).

[17] *See Ex Parte Endo*, 323 U.S 283, 304-05 (1944) (rejecting mootness after transfer because "there is no suggestion that there is no one within the jurisdiction of the District Court who is responsible for the detention of appellant and who would be an appropriate respondent"); *Anariba v. Dir. Hudson Cnty. Corr. Ctr.*, 17 F.4th 434, 446 (3d Cir. 2021) ("[T]he District Court retained jurisdiction following Argueta's transfer out of New Jersey because it already had acquired jurisdiction over Argueta's properly filed habeas petition that named his then-immediate custodian.").

to some other type of restriction on their liberty.[18]

For example, courts have found individuals subject to an order of supervision may be in custody for purposes of 28 U.S.C. § 2241 where they challenge the conditions of their release.[19]

Courts also have found individuals subject to final removal orders are "in custody" for purposes of 28 U.S.C. § 2241,[20] but are not "in custody" after being physically removed from the United States.[21]

In non-detention situations, courts apply "traditional venue considerations" to assess venue for a habeas petition. *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 493 (1973). Accordingly, some district courts have followed *Braden*, where the Court considered factors such as convenience to the parties, where "material events took place," and where "records and witnesses pertinent to petitioner's claim are likely to be found," to guide the venue analysis. *Id*. at 493-94.[22] Notably, such decisions generally arise in districts where the court recognizes that an individual other than the warden can be the proper respondent. *See infra* Section III.B.

B. Proper Respondent

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[18] *See Rumsfeld v. Padilla*, 542 U.S. 426, 437 ("[O]ur understanding of custody has broadened to include restraints short of physical confinement . . . ."); *Jones v. Cunningham*, 371 U.S. 236, 240 (1963) (individuals not physically confined are still in custody where there are "other restraints on [their] liberty, restraints not shared by the public generally," including individuals on parole from criminal custody).

[19] *See, e.g.*, *Doe v. Barr*, 479 F. Supp. 3d 20, 26 (S.D.N.Y. 2020); *Devitri v. Cronen*, 290 F. Supp. 3d 86, 90 (D. Mass. 2017); *Xiao Biao Li v. Barr*, 839 F. App'x 589, 591 (2d Cir. 2020); *Alvarez v. Holder*, 454 F. App'x 769, 772-73 (11th Cir. 2011) (*citing Dawson v. Scott*, 50 F.3d 884, 886 n 2 (11th Cir. 1995)); *Gozo v. Mayorkas*, No. 1:23-cv-159, 2024 WL 2027510, at *1 (S.D. Tex. Mar. 4, 2024). *But see, e.g.*, *Berrezueta v. Decker*, No. 1:20-cv-10688-MKV, 2021 WL 601649, at *1-2 (S.D.N.Y. Jan. 11, 2021) (habeas petition filed while individual in custody, who was then released subject to order of supervision, could be dismissed as moot absent proof of collateral consequences from prior detention).

[20] *See, e.g.*, *Rosales v. Bureau of Immigr. and Customs Enf't*, 426 F.3d 733, 735 (5th Cir. 2005) (agreeing with pre-REAL ID Act decisions that "a final deportation order subjects [a noncitizen] to a restraint on liberty sufficient to place the [noncitizen] 'in custody'").

[21] *See, e.g.*, *I.M. v. CBP*, 67 F.4th 436, 444 (D.C. Cir. 2023); *Kumasrasamy v. Att'y Gen.*., 453 F.3d 169, 173 (3d Cir. 2006) (citing Ninth and Eleventh Circuit cases); *Samirah v. O'Connell*, 335 F.3d 545, 549-51 (7th Cir. 2003). *Compare Ortiz-Mondragon v. Symdon,* No. 15-CV-1412, 2019 WL 330528 (E.D. Wis. Jan. 25, 2019) (holding "custody" to apply because "absence from the United States does not alone prevent the terms of a probation from continuing to apply. . . . Similarly, several cases have held that a person detained abroad may nevertheless be 'in custody' of the United States for purposes of the habeas statute.").

[22] *See, e.g.*, *Farez-Espinoza v. Chertoff*, 600 F. Supp. 2d 488, 495-96 (S.D.N.Y. 2009) (applying "traditional principles of venue" and the federal venue statute, 28 U.S.C. § 1391(e), in case where U.S. Attorney General is proper respondent). *Cf. Chen v. Holder*, No. 6:14-2530, 2015 WL 13236635, at *3-4 (W.D. La. Nov. 20, 2015) (applying both traditional venue principles and the district of confinement rule and reaching the same result).

In *Rumsfeld v. Padilla*, the Supreme Court addressed the identity of the proper respondent to a § 2241 habeas petition filed by a U.S. citizen challenging his detention as an enemy combatant. 542 U.S. 426 (2004). The Court held that the only proper respondent to a traditional habeas corpus petition involving a "core challenge[]" to "present physical confinement" is the actual or "immediate custodian" of the facility where the individual is detained. *Id*. at 435. In that case, the immediate custodian was the commanding officer in charge of the naval brig where the petitioner was physically held. *Id*. at 442.

The Supreme Court expressly left open the question of the identity of the proper respondent(s) to a petition filed by a noncitizen "detained pending deportation." *Id*. at 435 n.8 (recognizing circuit split on "the question whether the Attorney General is a proper respondent to a habeas petition filed by [a noncitizen] detained pending deportation" and stating "[b]ecause the issue is not before us today, we again decline to resolve it").

However, several circuits and district courts have applied the immediate custodian rule to immigration habeas actions challenging detention.[23] In circuits with such binding precedent, habeas petitions must name the warden of the detention facility where the noncitizen is held. In circuits without binding precedent, it is nevertheless worth considering naming the warden to avoid the possible necessity of briefing this issue.

Notably, however, some courts have recognized national-level policy making officials, such as the U.S. Attorney General, as proper respondents.[24] Still others recognize as the proper respondent the federal official with responsibility over the detention facility or the federal contract governing the detention facility, usually the ICE Field Office Director, or the person with legal authority over the claim.[25]

Significantly, in order to exercise personal jurisdiction over a habeas petition, a district court need only find that one named respondent is proper.[26]

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[23] *See*, *e.g.*, *Vasquez v. Reno*, 233 F.3d 688, 693-96 (1st Cir. 2000) (pre-*Padilla*); *Kholyavskiy v. Achim*, 443 F.3d 946, 949-53 (7th Cir. 2006) (post-*Padilla*); *Anariba v. Dir. Hudson Cnty. Corr. Ctr.*, 17 F.4th 434, 444–45 (3d Cir. 2021) (post-*Padilla*); *Doe v. Garland*, 109 F.4th 1188, 1194-96 (9th Cir. 2024) (post-*Padilla*) (petition for rehearing pending); *see also Concepcion v. Barr*, 514 F. Supp. 3d 555, 561 (W.D.N.Y. 2021).

[24] *See, e.g.*, *Santos v. Smith*, 260 F. Supp. 3d 598, 607-08 (W.D. Va. 2017); *Jarpa v. Mumford*, 211 F. Supp. 3d 706, 723-25 (D. Md. 2016); *Somir v. United States*, 354 F. Supp. 2d 215, 217-18 (E.D.N.Y. 2005); *S.N.C. v. Sessions*, 325 F. Supp. 3d 401, 407 (S.D.N.Y. 2018); *but see Roman v. Ashcroft*, 340 F.3d 314, 327 (6th Cir. 2003) (pre-*Padilla*, holding that the U.S. Attorney General was not the proper respondent in a non-core habeas challenge).

[25] *See, e.g.*, *Campbell v. Ganter*, 353 F. Supp. 2d 332, 336 (E.D.N.Y. 2004); *Masingene v. Martin*, 424 F. Supp. 3d 1298, 1301-02 (S.D. Fla. 2020).

[26] *Dunn v. U.S. Parole Commission*, 818 F.2d 742, 744 (10th Cir. 1987) ("So long as the petitioner names as respondent a person or entity with power to release him, there is no reason to avoid reaching the merits of his petition.") (quoting *Lee v. United States*, 501 F.2d 494, 502-03 (8th Cir. 1974) (Webster, J. concurring)).

A NILA survey of attorneys who regularly file habeas petitions challenging detention reveals that most name the warden or superintendent of the detention facility, the ICE Field Office Director, the DHS Secretary, and the U.S. Attorney General. In cases involving unaccompanied children detained in the custody of the Office of Refugee Resettlement (ORR), the relevant officers and agencies would be national-level officials or officials with responsibility over the detention facility from ORR or the U.S. Department of Health and Human Services.[27]

C. Exhaustion

There is no statutory exhaustion requirement in 28 U.S.C § 2241. However, exhaustion may be judicially required. This type of exhaustion is known as prudential exhaustion. Courts may waive the prudential exhaustion requirement if "administrative remedies are inadequate or not efficacious, pursuit of administrative remedies would be a futile gesture, irreparable injury will result, or the administrative proceedings would be void." *Laing v. Ashcroft*, 370 F.3d 994, 1000 (9th Cir. 2004) (quoting *S.E.C. v. G.C. George Sec., Inc.*, 637 F.2d 685, 688 (9th Cir. 1981).[28]

In detention cases, appeals to the Board of Immigration Appeals (BIA) can take months or years. Thus, requiring habeas petitioners to appeal to the BIA to prudentially exhaust is not efficient, would cause irreparable harm by continuing to deprive a person of their liberty, and/or would be futile where the agency has a precedent decision on the relevant issue. *But see Leonardo v. Crawford*, 646 F.3d 1157, 1160-61 (9th Cir. 2011) (a detainee challenging an immigration judge's adverse bond determination typically should first appeal to the BIA).[29]

IV. Components of a Habeas Filing

Under the civil habeas statute, "[a]n application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf." 28 U.S.C. § 2242. "It shall allege the facts concerning the applicant's commitment or detention, the name of the person who has custody over him and by virtue of what claim or authority, if known" and "may be amended or supplemented." *Id*.

A. **Habeas Petition** (Required)

1. Petition Elements

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[27] *See, e.g.*, *Santos*, 260 F. Supp. 3d at 607-08 (finding director of ORR and director of juvenile detention center proper respondents).

[28] *See also McCarthy v. Madigan*, 503 U.S. 140, 146-49 (1992), *superseded by statute on other grounds as stated in Booth v. Churner*, 532 U.S. 731 (2001) (noting that traditional exceptions include where exhaustion would cause "undue prejudice to subsequent assertion of a court action" or "irreparable harm" to the petitioner, where there is "some doubt as to whether the agency was empowered to grant effective relief," or where it would be futile because "the administrative body is shown to be biased or has otherwise predetermined the issue before it") (internal quotation marks omitted).

[29] These arguments may be more challenging if the petitioner already filed and is awaiting the adjudication of a BIA appeal.

In counseled cases, a habeas petition will have many of the same elements as a federal district court complaint. Federal Rule of Civil Procedure 3 governs the commencement of district court actions. Courts have local rules that implement the federal rule and address the format for pleadings that commence an action, including whether pleading paper is required, font size, and caption formatting. Like all complaints, habeas petitions should have numbered paragraphs.

The following is an overview of the basic elements to include in a habeas petition:

Caption – The caption should include the name of the document, e.g., Petition for Writ of Habeas Corpus. If any of the respondents are people, the caption should note that the respondent(s) are sued "in his/her/their official capacity."

Introduction – Introductions are optional, but helpful. They should provide a brief overview of the most compelling facts, the basis of the claim(s), and the relief sought.

Jurisdiction – The district court has subject matter jurisdiction under 28 U.S.C. § 2241. To cover all possible bases, the petition may also provide that the court has jurisdiction under 28 U.S.C. § 1331 (federal question) and, where applicable, Article I § 9, cl. 2 of the U.S. Constitution (Suspension Clause). The section should also state that the court may grant relief pursuant to the habeas statute, 28 U.S.C. § 2241; the Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq*.; and the All Writs Act, 28 U.S.C. § 1651. The jurisdictional statement generally also includes a statement that the action arises under the Constitution and the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq*.

Venue – In habeas cases, due to the custody requirement, venue generally is proper in the judicial district where the person is detained at the time of filing. See Section III.A. for further discussion of the custody requirement and exceptions. If the petition is not filed in the district of confinement, the venue section should explain why venue is proper under 28 U.S.C. § 1391(e). That statute provides that, in cases where the respondent is a U.S. officer, employee or agency, venue lies in any judicial district where respondent resides, where a substantial part of the relevant events/omissions occurred, or where the petitioner resides if no real property is involved in the action.

Parties – This section should set forth the name of each petitioner and respondent. With respect to petitioners challenging detention, include the length and place of detention and an allegation that they are under the direct control of the respondent(s). With respect to individual respondents, indicate that the respondent is a legal custodian of the petitioner and state that they are sued in their official capacity.

Legal Background/Framework – Although optional, this section is usually advisable to address the basics of the law governing the basis for detention and/or the challenge.

Statement of Facts – This section sets forth the factual allegations that form the basis of the unlawful detention and/or conduct challenged.

Claims for Relief – This section generally consists of numbered counts with each count alleging a separate statutory or constitutional violation. Regulatory violations can form the basis of either a statutory count or a separate independent count.

Prayer for Relief – This section generally requests that the court: (a) assume jurisdiction over the matter; (b) declare that the actions of respondent(s) violate the statutory/constitutional/regulatory provisions that form the basis for the claims for relief; (c) issue a writ of habeas corpus (e.g., order release, order a bond hearing); (d) award attorneys' fees and costs; and (e) grant any other relief that the court deems just and proper.

2. Form AO 242

The U.S. Courts' website has a standard form (Form Number AO 242) for a petition for writ of habeas corpus under 28 U.S.C. § 2241. The form is available at https://www.uscourts.gov/sites/default/files/AO_242_0.pdf. This form is for use by pro se habeas petitioners, but it is a good option for attorneys who need to file an emergency habeas action.

B. $5 Filing Fee or Waiver (Required)

There is a $5.00 filing fee set by statute. *See* 28 U.S.C. § 1914(a). A petitioner who is unable to pay the filing fee may seek a waiver by filing an application to proceed in forma pauperis.[30]

C. Civil Cover Sheet (Required)

Federal court filings require a civil cover sheet.[31] The form is fairly self-explanatory and contains detailed instructions about how to complete it. For immigration detention habeas petitions, the category under Nature of Suit is "Alien Detainee" (located under "Prisoner Petitions").

D. Summons(es) (Possibly Required)

A summons may also need to be completed and filed for each respondent to the petition. *See* Federal Rule of Civil Procedure 4(b).[32] Note that some courts will not require a habeas petitioner to file summonses but instead will issue them on its own after the petition is filed.

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[30] Fee waiver forms are available on the U.S. Courts' website, https://www.uscourts.gov/forms/fee-waiver-application-forms. However, some district courts use customized application forms, which can be found on the specific court's website.

[31] The standard civil cover sheet (Form Number JS 44) is available on U.S. Courts' website, https://www.uscourts.gov/forms/civil-forms/civil-cover-sheet. However, some district courts use customized civil cover sheets, which can be found on the specific court's website.

[32] Summons forms generally are available on website of each district court. The standard summons form (Form Number AO 440) also is available on the U.S. Courts' website, https://www.uscourts.gov/forms/notice-lawsuit-summons-subpoena/summons-civil-action.

E. **Application for an Order to Show Cause** (Optional)

An application for an order to show cause (OSC) asks the district court to issue an order directing the respondent(s) to show cause why it should not grant a writ of habeas corpus. Essentially, it asks the court to order respondents to respond to the petition within 3 to 20 days. The statutory authority for an OSC is 28 U.S.C. § 2243, which requires that, where a petition for writ of habeas corpus has been filed, the court must grant the petition or issue an OSC to the respondents "forthwith," unless the petitioner is not entitled to relief.

Once a court issues an OSC, it "shall be returned within three days" absent good cause. *Id.* Where good cause has been established, the respondent(s) can be given "additional time, not exceeding" twenty days to file the return. *Id.* The statute thereafter provides that once a return has been submitted, a hearing shall be set within five days of the return, absent a showing of good cause by the respondent(s) for additional time. *Id.*

An application for an OSC is filed either as a separate filing or as part of the habeas complaint, in the introduction, body, and/or prayer for relief. A template application for an order to show cause and template text for a habeas petition accompany this practice advisory.

Attorneys who report not requesting OSCs have indicated that they do not do so because: (1) the local district judges generally issue an order directing a response soon after the habeas petition is filed so the request is not necessary; (2) the local U.S. Attorney's Office generally agrees to a reasonable briefing schedule as a matter of course; (3) local judges ignore them; and/or (4) filing a motion for a temporary restraining order prompts a faster response.

Attorneys who report routinely requesting OSCs do because: (1) courts that do not have a standard procedure for directing a response to the petitioner or that give the government longer response periods may be more inclined to adopt the timeline suggested by petitioner; (2) OSC requests, whether part of the habeas petition or as a separate filing, are less work to prepare than a motion for a temporary restraining order and/or are easier to docket when filing; and/or (3) OSC requests remind the court that Congress intended to expeditiously resolve habeas petitions.

Although 28 U.S.C. § 2243 permits district courts to decline to issue an order to show cause and dismiss frivolous habeas petitions if the petitioner does not appear entitled to relief, most counseled habeas petitions are non-frivolous, and the government must be held to respond.

F. **Exhibits** (Optional)

Most district courts allow a petitioner to attach exhibits to the habeas petition as contemplated by Federal Rule of Civil Procedure 10(c) which provides that "an exhibit to a pleading is part of the pleading for all purposes." Attaching exhibits may be helpful because the government generally will not produce an underlying record. However, some district courts prohibit attaching exhibits in support of a complaint, so it is important to check local rules.

If exhibits are permitted in a detention habeas petition, they may include: immigration judge (IJ) and/or BIA decisions related to detention; evidence before the IJ or BIA; evidence used by DHS

in assessing the petitioner's custody status; a declaration/affidavit by petitioner or counsel regarding various substantive or procedural case facts, and/or a transcript of relevant underlying bond proceedings before the IJ.

G. Memorandum of Points and Authorities (Optional)

A memorandum of points and authorities (P&A) is not required but may be beneficial. A P&A is like a brief in that it contains a thorough legal analysis in support of the claims stated in the habeas petition. If the habeas petition must be filed quickly, a P&A can be filed afterwards.

H. Motions for Injunctive Relief (Optional)

A motion for temporary restraining order (TRO) or motion for a preliminary injunction (PI) is also optional. *See* Federal Rule of Civil Procedure 65. These types of motions are considered extraordinary remedies and require strict compliance with FRCP 65 as well as all relevant local rules. A PI is an injunction that applies pending full adjudication of the merits of the habeas petition. A TRO is an injunction that is temporary in duration, usually 14 days. Among other factors, the moving party must establish that the petitioner will suffer irreparable injury to obtain injunctive relief.[33] Although beyond the scope of this advisory, it is worth noting that a PI motion requires advance notice to opposing counsel (i.e., the local U.S. Attorney's Office) but a TRO motion may be filed without such notice.

I. Motion to Proceed Under a Pseudonym (Optional)

To prevent public viewing, a petitioner can employ initials or pseudonyms in place of the petitioner's name.[34] However, counsel must simultaneously (or very soon thereafter) file a motion seeking the court's permission to proceed under a pseudonym. Such a motion should make clear that the petitioner will reveal their identity to both the court and opposing counsel.

Proceeding under a pseudonym will shield from public view only the names of the petitioner. To shield other sensitive information, it may be necessary to move for permission to file pleadings under seal, either in whole or in part. This too will require a motion.

V. Post- Filing

A. Service

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[33] *Winter v. Nat. Res. Def. Council, Inc*., 555 U.S. 7, 20 (2008); *see also* Fed. R. Civ. P. 65(b)(A)(1) (permitting courts to issue a TRO "without written or oral notice to the adverse party or its attorney" where, inter alia, "immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition").

[34] *See* Fed. R. Civ. P. 5.2(a) (requiring that, "unless the court orders otherwise, in an electronic or paper filing with the court that contains . . . the name of an individual known to be a minor . . . a party or nonparty making the filing may include only: . . . the minor's initials").

District courts do not handle service of habeas petitions uniformly. Attorneys who litigate habeas cases report an array of experiences, including judges who order the clerk's office to serve the petition on the local U.S. Attorney's Office, judges who issue an order for a specific type of service on the local U.S. Attorney's Office, and judges who simply order the U.S. Attorney's Office to respond within a certain time. Other attorneys report that the district court will issue a summons(es) and expect counsel to complete service and then file an Affidavit of Service/Proof of Service before the case moves forward. For this reason, it is prudent to consult with colleagues and/or call the clerk's office to ask about local practice.

Federal Rule of Civil Procedure 4(e) governs service on the warden, but it also advisable to serve the local U.S. Attorney's Office because they regularly defend immigration habeas cases and may be willing to consent to accept service on the warden's behalf.[35]

Federal Rule of Civil Procedure 4(i)(2) sets forth the required manner of service of the complaint and summons in suits against an agency, officer, or employee sued in an official capacity.[36] Note that service is made by certified mail *or* registered mail *or* in-person delivery. Fed. R. Civ. P. 4(i)(2). Use of private delivery services (i.e., FedEx, DHL) is not permitted. Emailing service to the agency or a person only assists with prompt handling. It does not constitute service.

If counsel handles service, counsel then must inform the district court that the summons and habeas petition were served. This is usually accomplished by filing an affidavit of service listing the names, positions, and addresses of the parties served, the method of service, and the date the documents were received. Fed. R. Civ. P. 4(l)(1).

The rules allow for reasonable time to cure deficiencies in service if the U.S. Attorney's Office or the U.S. Attorney General has been served. Fed. R. Civ. P. 4(i)(4); *see also* Fed. R. Civ. P. 4(l)(3) (permitting amendment of proof of service).

Attorneys from the local U.S. Attorney's Office or Office of Immigration Litigation (a division within the Civil Division of the U.S. Department of Justice) typically represent the government in immigration habeas actions. Once counsel enters an appearance, pleadings must be served on counsel "unless the court orders service on the party." Fed. R. Civ. P. 5(b)(1).

B. Judge Assignment, Standing Orders, and Deadlines

Within hours or days after the petition is filed, the court will assign a district court judge and/or a magistrate judge. For a magistrate judge to conduct all proceedings and order the entry of a final

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[35] Under Rule 4(e), counsel must serve an individual within a judicial district either by: following the state law of the location of the district court or where service is made; or personal delivery, leaving a copy at the person's dwelling or usual place of abode with someone of suitable age and discretion who resides there, or delivering a copy to an agent authorized by appointment or law to receive service.

[36] In general, Rule 4(i)(2) requires serving the local U.S. Attorney's Office, the U.S. Attorney General in Washington, DC, and the agency, officer, or employee.

judgment, all parties must consent. *See generally* 28 U.S.C. § 636(c); Fed. R. Civ. P. 73. Thus, attorneys may need to decide whether to consent to proceed before a magistrate.[37] If either party does not consent, however, the case will proceed before the district court judge. It may be worthwhile to research the judge assigned to the case and/or connect with local practitioners who have appeared before the judge.

Most judges have standing orders with specific instructions for litigation and case management. Read any applicable standing orders and strictly comply with everything in them.

Calculate and calendar all relevant deadlines. Although practices vary by court and judge, counsel may receive court-issued documents specifically related to deadlines for case management reports and conferences, additional briefing, responses, or even oral argument. Most habeas petitions are resolved without discovery.

C. Government Response

Although 28 U.S.C. § 2243 allows for a response to a habeas petition "within three days unless for good cause additional time, not exceeding twenty days is allowed," some district courts take the position that they are not bound by that reply period, reasoning that they have discretion pursuant to the superseding Rules Governing Section 2254 Cases in the United States District Courts and Rules Governing Section 2255 Cases for the United States District Courts[38] to set a deadline beyond twenty days for habeas petitions under 28 U.S.C. § 2241.[39]

In no circumstance, however, should the court set the response time beyond sixty days, which is the amount of time the government has to file either an answer or a defensive motion in cases against the United States, a federal agency, or a federal officer or employee in an official capacity. *See* Fed. R. Civ. P. 12(a)(3).

Depending on the facts and nature of the case, the government may file a motion to dismiss the petition for lack of jurisdiction, a return (response on the merits), or move for summary judgment. If the government files a return, the petitioner can file a traverse (reply).

If DHS releases the petitioner from immigration custody after the habeas petition is filed, opposing counsel generally will argue that the case is moot. However, that a petitioner is no longer in custody does not automatically moot a petition if the petitioner was in custody at the

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[37] Consent forms generally are available on website of each district court. The standard consent form (Form Number AO 85) also is available on the U.S. Courts' website, https://www.uscourts.gov/sites/default/files/ao085.pdf.

[38] *See* https://www.uscourts.gov/sites/default/files/rules_governing_section_2254_and_2255_cases_in_the_u.s._district_courts_-_dec_1_2019.pdf.

[39] *See, e.g., Bleitner v. Welborn,* 15 F.3d 652, 653-54 (7th Cir. 1994); *Clutchette v. Rushen,* 770 F.2d 1469, 1473-75 (9th Cir. 1985); *Castillo v. Pratt*, 162 F. Supp. 2d 575, 576-77 (N.D. Tex. 2001); *Romero v. Cole*, No. 1:16-CV-00148, 2016 WL 2893709, at *2 (W.D. La. Apr. 13, 2016); *Y.V.S. v. Wolf*, No. EP-20-CV-00228-DCG, 2020 WL 4926545, at *1 (W.D. Tex. Aug. 21, 2020) (collecting cases).

time of filing.[40] Although it is beyond the scope of this advisory, there are some exceptions to mootness, including if the claim is capable of repetition, yet evading review.[41]

D. Pro Se Petitioners and Appointed Counsel

Although unrepresented individuals are not automatically provided with legal representation in habeas proceedings if they cannot afford an attorney, they may request representation pursuant to the Criminal Justice Act, which provides that district courts "may" provide representation "for any financially eligible person" including those "seeking relief under [28 U.S.C. § 2241]," "[w]henever the United States magistrate judge or the [district] court determines that the interests of justice so require." 18 U.S.C. § 3006A(a)(2)(B). Some courts have invoked this statute to appoint counsel for pro se individuals seeking immigration-related habeas relief.[42]

E. Attorneys' Fees and Costs

Under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d) & 5 U.S.C. § 504 *et seq*., individuals can recover attorneys' fees and costs for successful federal court litigation against the U.S. government. The EAJA statute applies to "any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action." 28 U.S.C. § 2412(d)(1)(A). Thus, courts have traditionally recognized that EAJA fees are available in the immigration context, including following successful immigration-related habeas petitions.[43]

However, to date, two circuits have held that a habeas petition seeking release from immigration detention was not a "civil action," characterizing it instead as a "hybrid" proceeding, and thus was ineligible for fee recovery under EAJA. *See Obando-Segura v. Garland*, 999 F.3d 190, 193-95 (4th Cir. 2021); *Barco v. Witte*, 65 F.4th 782, 785 (5th Cir. 2023).

Contrary to those decisions, after analyzing the same issue, the Second and Ninth Circuits have found that immigration habeas petitions *do* constitute civil actions for the purposes of EAJA and thus allow for fee recovery. *See Vacchio v. Ashcroft*, 404 F.3d 663, 667-72 (2d Cir. 2005); *In re Hill*, 775 F.2d 1037, 1040-41 (9th Cir. 1985) (same).

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40 *See Spencer v. Kemna*, 523 U.S. 1, 7 (1998).

41 *See, e.g.*, *Hubbart v. Knapp,* 379 F.3d 773, 777-78 (9th Cir. 2004); *Rosales-Garcia v. Holland*, 322 F.3d 386, 397 (6th Cir. 2003); *Leonard v. Hammond*, 804 F.2d 838, 842-43 (4th Cir. 1986).

42 *See, e.g.*, *Thomas v. Searls,* 515 F. Supp. 3d 34, 38-39 (W.D.N.Y. 2021); *Dela Cruz v. Napolitano*, 764 F. Supp. 2d 1197, 1199 (S.D. Cal. 2011); *Haynes v. Lowe*, No. 3:13-CV-00188, 2013 WL 1856663, at *1 (M.D. Penn. Apr. 5, 2013); *Van Truong v. Holder*, No. 2:10-cv-797 CW, 2012 WL 845399, at *3-5 (D. Utah Mar. 12, 2012); *Fuentes v. Terry*, No. CIV 10-526 WJ/LFG, 2010 WL 11619142, at *3 (D.N.M. Aug. 17, 2010).

43 *See, e.g.*, *Nadarajah v. Holder,* 569 F.3d 906 (9th Cir. 2009); *Sotelo-Aquije v. Slattery*, 62 F.3d 54, 58-59 (2d Cir. 1995); *see also Saysana v. Gillen*, 614 F.3d 1 (1st Cir. 2010) (considering EAJA claim but finding government's position substantially justified); *Kiareldeen v. Ashcroft*, 273 F.3d 542 (3d Cir. 2001) (same).