20-6838

ORIG

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JASON SINAGWANA NSINANO
— PETITIONER

vs.

JEFFRY A. ROSEN,
ACTING U.S. ATTORNEY GENERAL,
— RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF APPEALS FOR THE NINTH
CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

A) Whether a lower federal court loses its jurisdiction over a petition for writ of *habeas corpus* upon release of the civil detention petitioner, albeit *with* conditions and restrictions, or if and how the mootness question applies to confinement in the civil arena.

B) What level of precision of pleading suffices for *pro se* litigants, for the lower court to be bound under this Court's *Castro v. United States*, (2001) and its progeny, and for petitioner's filing to survive a district court's potential use of a dismissal *without leave to amend*: when filing for a Writ of *habeas corpus*.

PARTIES TO THE PROCEEDINGS

All parties to the proceedings are named in the caption.

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....IV
PETITION FOR A WRIT OF CERTIORARI.....1
OPINIONS BELOW.....1
JURISDICTION.....1
INTRODUCTION.....2
STATEMENT OF THE CASE.....5
I. THE DISTRICT COURT'S DISMISSAL OF PETITIONER'S *HABEAS* PETITION WAS PATENTLY UNPROCEDURAL.....9
II. THE COURT OF APPEALS' RULING CONSTITUTES LEGAL ERROR FOR ITS ASSESSMENT OF MOOTNESS IN RELATION TO THIS CASE IGNORES SETTLED LAW AND GUIDANCE PROVIDED BY THIS COURT.....13
A. Petitioner Continues to Have A Personal Stake in His *Habeas* Filing And An Elimination of a 'Case or Controversy' Has Not Occured.....13
B. The 'In Custody' Requisite Under The Operative Federal *Habeas Corpus* Statute Is Currently Met.....15
REASONS FOR GRANTING THE WRIT.....19
CONCLUSION.....21

APPENDIX
Order of the Court of Appeals for the Ninth Circuit.....1a-4a

TABLE OF CONTENTS-Continued

Order of the Court of Appeals for the Ninth Circuit on Petition For Rehearing.....5a
Order of the District Court for the Central District of California.....6a-9a
Article III, Section 2, Clause 1 of the U.S. Constitution is reproduced at.....10a
The Due Process Clause of the Fifth Amendment to the U.S. Constitution is reproduced at.....11a
The Equal Protection Clause of the Fourteenth Amendment to the U.S Constitution is reproduced at.....12a
28 U.S.C. § 2241 is reproduced at.....13a-15a

TABLE OF AUTHORITIES

Cases

SUPREME COURT

Bell v. Wolfish, 411 U.S. 520 (1979).....17
Boumediene v. Bush, 553 U.S. 723 (2008).....5, 6, 18, 21
Calderon v. Moore, 518 U.S. 149 (1996).....13, 14, 15, 20
Castro v. United States, 540 U.S. 375 (2003).....8, 10, 11
Day v. McDonough, 547 U.S. 198 (2006).....11
Erickson v. Pardus, 551 U.S. 89 (2007).....7
Haines v. Kerner, 404 U.S. 519 (1972).....8

TABLE OF CONTENTS-Continued

Harris v. Nelson, 394 U.S. 286 (1969).....6, 7
Hensley v. Municipal Court, 411 U.S. 345 (1973).....6, 19
Hughes v. Rowe, 449 U.S. 5 (1980).....7
Jennings v. Rodriguez, 583 U.S. __ (2018).....20
Johnson v. Avery, 393 U.S. 483 (1969).....17
Jones v. Cunningham, 371 U.S. 236 (1963).....15, 16, 18, 19, 20
Lewis v. Continental Bank Corp., 494 U.S. 472 (1990).....13
Maleng v. Cook, 490 U.S. 488 (1989).....16
McFarland v. Scott, 512 U.S. __ (1994).....8
Preiser v. Rodriguez, 411 U.S. 475 (1973).....17
United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1980).....15
Ziglar v. Abbasi, 582 U.S. __ , No. 15-1358 (2017).....17

CIRCUIT COURTS

Second Circuit

Simon v. United States, 359 F.3d 139 (CA2 2004).....10,11

Ninth Circuit

Boyd v. Thompson, 147 F.3d 1124 (CA9 1998).....11

TABLE OF CONTENTS-Continued

Guerrero v. RJM Acquisitions LLC, 499 F.3d 926 (CA9 2007).....18
Henderson v. Johnson, 710 F.3d 872 (CA9 2013).....12
Herbst v. Cook, 260 F.3d 1039 (CA9 2001).....11, 12
Hernandez v. Sessions, 872 F.3d 976 (CA9 2017).....6
McCullough v. Graber, 726 F.3d 1057 (CA9 2013).....13
Miller v. Laird, 464 F.2d 533 (CA9 1972).....18

Tenth Circuit

Nasious v. Two Unknown B.I.C.E. Agents, 492 F.3d 1158 (CA10 2007).....10, 12

Court Rules

FEDERAL RULES OF CIVIL PROCEDURE

Federal Rule of Civil Procedure (Fed. R. Civ. P.) 72(b)(1).....3

U.S. DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA LOCAL RULES

Central District of California Local Rules (C.D. Cal. L.R.) 72-3.1.....3

TABLE OF CONTENTS-Continued

Constitutional Provisions

Article III of the U.S. Constitution.....13, 14, 15, 20

Fifth Amendment to the U.S. Constitution's Due Process Clause.....2, 5

Equal Protection Component of the Fifth Amendment to the U.S. Constitution's Due Process Clause.....2

Statues

28 U.S.C. § 2241.....2, 15, 17, 18, 20, 21

PETITION FOR A WRIT OF CERTIORARI

Jason S. Nsinano respectfully petitions for a writ of certiorari to review the judgment of the United States court of appeals for the Ninth Circuit on an appeal of a *habeas corpus* petition.

OPINIONS BELOW

The decision of the court of appeals on judicial review, is reprinted in the Appendix (App.) at 1a-4a. The court of appeals' decision on rehearing, is reproduced at App. 5a. The district court's opinion, reported at *Nsinano v. Sessions*, 236 F. Supp. 3d 1133, 1137 (C.D. Cal. 2017), is reprinted at App. 6a-9a.

JURISDICTION

The court of appeals entered its judgment on June 10, 2020, and denied a petition for rehearing on August 6, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

All Constitutional and Statutory provisions involved are reproduced at App. 10a-15a.

INTRODUCTION

A federal immigration detainee filed a *pro se* petition for the writ of *habeas corpus*, in the district court for the central district of California, challenging his lengthy, prolonged detention and circumstances around the detention as, *inter alia*, constitutionally doubtful or outright unconstitutional.

The district court referred the petition to a magistrate judge for the preliminary stage, however, just a few days in, a *dispositive* ruling came in from the district judge herself. The district judge dismissed the *pro se* writ of *habeas corpus* petition *with prejudice*, concluding that it did not have subject matter jurisdiction over *one* of the claims listed in the habeas (apparently perceived to be the only claim), reasoning the entire habeas failed as a result.

The *habeas corpus* petition, in actuality, alleged constitutional wronging stemming from the excessive length of the physical civil confinement by federal agencies: violations of the Fifth Amendment to the United States Constitution's Due Process and Equal Protection Clauses.[1] The *habeas corpus* filing was made pursuant to the Federal *habeas corpus* statute, 28 U.S.C. § 2241.

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[1] The civil detention would last up to approximately 3 years and 5 months.

The petition [2] for *habeas corpus* included about a handful of *pro se* pleadings on various grounds of which the Applicant thought and argued were a basis for ending the detention. These included statutes and regulations, and the aforesaid constitutional provisions.

The district court dismissed the entire habeas and - as above said - *with prejudice* or without leave to amend based on a failure of one of the claims from securing subject matter jurisdiction in that court (as per the district court).

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[2] Upon receipt of the *self represented* petition for the writ of *habeas corpus*, on January 19, 2017, the district court immediately assigned it to a magistrate judge, in accordance with Federal Rules of Civil Procedure, mandating, "A magistrate judge *must* promptly conduct the required proceedings *when assigned*, without the parties' consent, to hear a pretrial matter dispositive of a claim or defense or a prisoner petition challenging the conditions of confinement." Fed. R. Civ. P. 72(b)(1) (emphases added).

Following that, the magistrate judge assigned had *no* participation in the *habeas corpus* proceeding as the district judge without warning appeared and with a *dispositive* ruling at that. It was in total surprise to the Petitioner because he was expecting to hear from the magistrate judge. The Central District of California Local Rules aren't much different, and are in fact tied to Fed. R. Civ. P. 72, similarly commanding, "*Upon assignment* of a case covered by Fed. R. Civ. P. 72, the Magistrate Judge *shall* conduct all necessary proceedings." C.D. Cal. L.R. 72-3.1 (emphasis added).

And so the district court, purportedly, never heard the *pro se* applicant argue that the constitutionality of his prolonged detention was questionable.

The Petitioner tried to fix this on motions for reconsideration, telling the court that the petition should not be dismissed *completely* based on just one claim, that constitutional claims should preserve the request for the writ of *habeas corpus* for which the court had jurisdiction under the federal habeas statute.

What then transpired in that 'reconsideration' stage was what amounted to the proverbial *wildgoose chase* or even a 'runaround': asking the *pro se* litigant (and the Respondent) to identify and discuss what federal and local district court rules the motion to reconsider fell under, and then about 12 months later the district court *literally* concluded that *this* effort would not save the petition and the *pro se* applicant had invoked those rules "belatedly." To be clear, the lower court required not that he just *satisfy* those rules - which he had - but that the *pro se* Petitioner had to *mention* them in the motion for reconsideration.

And so the district court *never* found itself to have jurisdiction over the petition. Upon appeal to the court of appeals for the Ninth Circuit, whilst not answering if the district court *did* have jurisdiction,

the court of appeals opined that it did not have jurisdiction for a new reason: mootness.

STATEMENT OF THE CASE

The district court's treatment of the *habeas* petition, filed *pro se* by the Petitioner, was not consistent with this Judicial Body's notable reverence and regard of the Constitutionally enshrined Writ. The lower court would rather treat the petition as another run-of-the-mill petition, missing the point that Petitioner had been contesting a particularly lengthy civil confinement. He did so questioning its conformity with Constitutional Due Process and other notions found in the Fifth Amendment to the U.S. Constitution.

The right to habeas remedies in the American legal system is fundamental. *Boumediene v. Bush*, 553 U.S. 723, 739 (2008) (Writers of the Constitution understood that "freedom from unlawful restraint as a *fundamental* precept of liberty, and they understood the writ of habeas corpus as a *vital* instrument to secure that freedom." (emphases added)). Indeed, "protection for the privilege of habeas corpus was one of the few safeguards of liberty specified in a Constitution that, at the outset, had no Bill of Rights." *Boumediene*, 553 U.S. at 739 (2008).

And thus the *habeas corpus* is a necessity in order to mitigate the "significant risk that" an "individual will be needlessly deprived of the fundamental right to liberty." *Hernandez v. Sessions*, 872 F.3d ---, No. 16-56829, slip op. at 32 (CA9 2017) (emphasis added); *Boumediene v. Bush*, 553 U.S. 723, 742 (2008) (America's British ancestors had "condemned executive 'imprison[ment] without any cause' shown, and declared that 'no freeman in any such manner as is before mencioned [shall] be imprisoned or deteined.'" (citations omitted)).

It is well outside of historical practice and tradition for administration of the Writ to be so narrowed and tied to formalities, infact Congress and this Court have never sought to do so. "The very nature of the writ demands that it be administered with the *initiative* and *flexibility* essential to insure that miscarriages of justice within its reach are surfaced and corrected." *Harris v. Nelson*, 394 U.S. 286, 291 (1969) (emphasis added).

The Court has warned and reminded that It has "consistently rejected interpretations of the habeas corpus statute that would suffocate the writ in stifling formalisms or hobble its effectiveness with the manacles of arcane and scholastic procedural requirements." *Hensley v. Municipal Court, San Jose-Milpitas Judicial Dist., Santa Clara Cty.*, 411 U.S. 345, 350 (1973). And in doing this, the Court has "emphasized and jealously guarded" the Great

Writ's "ability to cut through barriers of form and procedural mazes," *Harris*, 394 U.S., at 291.

The district court was plainly divorced from the historical use, importance, and weight precedent of the writ of *habeas corpus* in America's legal heritage.

The relationship between *pro se* petitioners and the courts is particularly vital and has indeed been defended by this Court. *Pro se* litigants are to be accorded greater caution when they petition the courts, and this includes liberal construction of such filings for they are neither lawyers nor represented.

The Court's *Erickson v. Pardus* counsels that where a petitioner is proceeding without representation, his pleadings should be held to less stringent standards. 551 U.S. 89, 93-94 (2007) (per curiam). The district court had not done so, to much regret, and looked outside of or around the pleadings to arrive at its conclusion.

A district court is charged with liberally construing a petition filed by a pro se litigant to allow the development of a potentially meritorious case. *Hughes v. Rowe*, 449 U.S. 5, 9 (1980). Given the nature of the claim, a substantial amount of time confined unconstitutionally, it could well be a meritorious case. The gravamen of the petition was that the length of the detention was unnecessarily

perpetuated; this, apparently, the district court failed to hear.

Petitioner followed a pleading method known as fact-pleading.

McFarland v. Scott held that a *habeas corpus* petition "must meet heightened pleading requirements," referring to Rule 2 (c)'s fact pleading mandate: But, "heightened" in that a pleading needs to go beyond mere notice pleading, and support an allegation with the "factual underpinnings of the petitioner's claims." *McFarland v. Scott*, 512 U.S. 849, __ (1994) (plurality) (slip op., at 856); *Id.* (O'Connor, J., concurring in part and dissenting in part) (slip op., at 860) (citing Habeas Rule 2 (c) of Rules Governing Section 2254 Cases).

In *Castro v. United States*, 540 U.S.375 (2003), in a concurrence, Justice Scalia describes this in another way, saying, "'Liberal construction' of pro se pleadings is merely *an embellishment of the notice-pleading standard* set forth in the Federal Rules of Civil Procedure[.]" *Castro*, 540 U.S.at 386 (2003) (Scalia, J., concurring) (citing *Haines v. Kerner*, 404 U.S. 519, 520 (1972) (per curiam)) (emphasis added).

Petitioner had done this alleging that he believed the prolonged detention was constitutionally infirm. He puts forth the constitutional provision claimed

violated and attaches the circumstantial facts thereto: this is fact-pleading.

That the district court would not even hear the claim, was woefully and exceedingly improper: as a matter of law.

I. THE DISTRICT COURT'S DISMISSAL OF PETITIONER'S *HABEAS* PETITION WAS PATENTLY UNPROCEDURAL

The district court in this case did not even remotely meet the standard, set by this Court, of the valid dismissal of a *pro se* litigant's court filing. It did so in not adhering to the procedural steps to be followed before dismissing a *pro se* applicant and shutting the judicial doors on the petitioner.

When a federal court decides that a *pro se* petition is critically flawed or defective in some aspect or another, the appropriate approach is to give the petitioner notice and an opportunity to respond. This is required by norms and by constitutional Due Process. *Infra*. For this should cure the fault identified by the court and - under a logical and reasonable presumption that the petitioner intends to have his petition *not* thrown out - the unrepresented litigant may have a chance to present his claims.

This has been the long held view, in this Court, and even in the Ninth Circuit, where this petition hails from, and its sister courts generally.

This Court has long addressed this procedural wronging over the decades, a notable case being *Castro v. United States*, 540 U.S. 375 (2003). Therein, it was made resoundingly clear that "*unless* the court informs the litigant of its intent to" take a specified *sua sponte* action, "warns the litigant" the consequences of that *sua sponte* action, and "provide the litigant with an opportunity to," *inter alia*, "amend" the petition or otherwise, a dismissal *with prejudice* will not be valid nor be upheld. *Id.* Emphasis in original.

This had not happened here.

The court of appeals for the Tenth Circuit has described this dismissal with prejudice as being extreme and that lower courts should consider a reasonable approach. *Nasious v. Two Unknown B.I.C.E. Agents*, 492 F.3d 1158, 1162 (CA10 2007) (GORSUCH, Cir. Judge) ("Dismissing a case with prejudice, ... is a significantly harsher remedy - *the death penalty of pleading punishments*[.]" (citations omitted) (emphasis added)).

The Second Circuit, too, has explained that this harsh dismissal without leave to amend *does* raise "due process concerns," *Simon v. United States*, 359

F.3d 139, 144 (CA2 2004), and that "'the very point of the warning is to help the *pro se* litigant understand'" *Id.* at 145 (quoting *Castro v. United States*, 124 S. Ct. 786, 793 (2003)); *c.f. Day v. McDonough*, 547 U.S. 198, 210 (2006) ("*Of course*, before acting on its own initiative, a court must accord the parties *fair notice* and an opportunity to present their positions." (emphasis added)).

The Ninth Circuit position is not too or at all different (there *is* actually a harmony among the circuits on this). *Infra.*

Herbst v. Cook, 260 F.3d 1039 (CA9 2001), a leading case in that circuit, has cautioned lower courts on using their authority for unwarranted dismissals saying, "'A district court's use of this summary dismissal power is not without limits. A habeas court must give a petitioner notice of the procedural default and an opportunity to respond to the argument for dismissal.'" *Herbst v. Cook*, 260 F.3d 1039, 1043 (CA9 2001) (quoting *Boyd v. Thompson*, 147 F.3d 1124, 1128 (CA9 1998)).

Herbst is almost on all fours with the current case: Petitioner in this *habeas corpus*, after surprise from the district judge's sudden and unannounced assumption over the petition, tried to save his petition via motions for reconsideration - which were ultimately futile, *supra.* The court of appeals addressed this similarly circumstanced predicament

saying that "a motion for reconsideration is inadequate as an opportunity to respond" because, among others, "the bar that must be cleared in order to succeed upon reconsideration is higher than pre-dismissal." *Herbst*, 260 F.3d at 1044 (CA9 2001) (citation omitted).

The *habeas* petition spent about a year on that reconsideration. The district court was put on notice once more that there had been Constitutional questions presented, other than the claim it found didn't give it subject matter jurisdiction.

It maintained its *with prejudice* dismissal, ignoring its own circuit law.

The district court had *clearly* not even considered the severability of the claim it thought it lacked jurisdiction and go forward, then, with the Petitioner's Due Process claims. *Nasious v. Two Unknown B.I.C.E. Agents*, 492 F.3d at 1163 (CA10 2007) (GORSUCH, Cir. Judge) ("no indication that the district court considered the *practicability* of alternatives" "such as dismissal without prejudice or perhaps partial dismissal, *leaving intact any claims that are adequately stated* (if any exist)." (emphases added)); *c.f. Henderson v. Johnson*, 710 F.3d 872, 873 (CA9 2013) (*per curiam*) ("we have explained that a petitioner who files a mixed petition must, *at a minimum*, be offered leave to amend the petition to

delete any unexhausted claims and to proceed on the exhausted claims." (emphasis added)).

II. THE COURT OF APPEALS' RULING CONSTITUTES LEGAL ERROR FOR ITS ASSESSMENT OF MOOTNESS IN RELATION TO THIS CASE IGNORES SETTLED LAW AND GUIDANCE PROVIDED BY THIS COURT

A. Petitioner Continues to Have A Personal Stake in His *Habeas* Filing And An Elimination of a 'Case or Controversy' Has Not Occured.

The court of appeals itself has recognized the factors and particular circumstances where, in a giving proceeding, the 'case or controversy' has ceased. "A federal court lacks jurisdiction unless there is a 'case or controversy' under Article III of the Constitution. This controversy must exist at all stages of the proceedings, including appellate review, 'and not simply at the date the action is initiated.' If a court is unable to render 'effective relief,' it lacks jurisdiction and must dismiss the appeal." *McCullough v. Graber*, 726 F.3d 1057, 1059 (CA9 2013) (citing *Calderon v. Moore*, 518 U.S. 149, 150 (1996); other citations omitted); *see also Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477–78 (1990).

As the court of appeals agrees, it turns on "effective relief," and a triumphant *habeas* here would see

those conditions and remaining restrictions on liberty looked at and possibly adjusted. To be sure, not all in the general public share these encumbrances on personal freedom, and not even similar circumstanced aliens. This is the "case or controversy" under Article III of the United States Constitution.

This Court has declared elsewhere that "even the availability of a partial remedy, is sufficient to prevent a case from being moot." *Calderon v. Moore*, 518 U.S. 149, 150 (1996) (*per curiam*) (citation and quotation marks omitted).

This makes it plain that the court of appeals floundered in its application of the mootness doctrine to these facts. Potential relief for the *habeas corpus* Petitioner in this case would be certainly effective and meaningful.

Calderon is illustrative of the crucial need for scrupulous assessment of a given petition to not only see whether mootness applies, but also where it does *and where it does not*. To put it in another manner, in petitions with multiple pleadings, claims which are no longer viable should stop there and those with ongoing justiciability may go forward.

This is the "partial" remedy which *Calderon* so gracefully instructs and is very applicable to the case at hand and is at the heart of its central argument.

The lower courts are "not prevented from granting 'any effectual relief.'" *Calderon*, 518 U.S. at 150 (1996) (*per curiam*) (citation omitted).

There still is a 'personal stake' for the *habeas* Petitioner, and one - at that - which has not ceased. The lower federal courts *are* presented with *dispute*; and they are capable of resolving. "'The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).'" *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980) (quoting Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 Yale L. J. 1363, 1384 (1973)).

The district court, therefore, has jurisdiction, under Article III of the United States Constitution, over the *habeas corpus* petition.

B. The 'In Custody' Requisite Under The Operative Federal *Habeas Corpus* Statute Is Currently Met

This Court has squarely settled that restrictions on liberty that fall outside the physical confinement realm will still be targetable by a *habeas corpus*. *See infra.*

The court of appeals' holding would seem to put it at odds with *Jones v. Cunningham*, 371 U.S. 236 (1963).

In *Jones*, this Court had found that the "in custody" requirement had been met *even* where the petitioner was released on parole with restrictions in place. *Jones v. Cunningham*, 371 U.S. 236 (1963); *see also Maleng v. Cook*, 490 U.S. 488, 490-91 (1989) ("not required that a prisoner be physically confined in order to challenge his sentence on habeas corpus.")

The Federal *Habeas* Statute, explained the Court, "does not attempt to mark the boundaries of 'custody,'" "nor in any way other than by use of that word attempt to limit the situations in which the writ can be used." *Jones*, 371 U.S. 236, 238 (1963).

A mere substitution has occurred, with regards to the Petitioner, in the instant case, replacing the physical with a *less* physical restriction - albeit with potential to be arbitrary or exceed necessity. Thus,it is clear that these are circumstances where the writ of *habeas corpus* has jurisdiction and may be invoked.

To be sure, "the use of habeas corpus has not been restricted to situations in which the applicant is in actual, physical custody." *Jones*, 371 U.S. at 239 (1963).

In a string of cases, this Court gradually dealt with the question of *even* how unlawful environmental conditions of a lawful confinement would factor into the propriety of a petition for *habeas corpus* as the

appropriate vehicle to challenge those conditions. *Infra.* This culminated in *Ziglar v. Abbasi*, 582 U.S. __ , No. 15-1358 (2017), and the Court answered in the affirmative.

Custody in violation of the laws may also include *the settings* of a lawful custody if they are violative of enshrined individual rights. For this, if so alleged, certainly is custody *in violations of the laws* of the United States, as contemplated by the federal *habeas corpus* statute. *See e.g.* 28 U.S.C. § 2241

"Indeed, the habeas remedy, if necessity required its use, would have provided a faster and more direct route to relief" and "would have required officials" use "less-restrictive conditions immediately"under those circumstances. *Ziglar*, 582 U.S. __ , No. 15-1358 (2017) (slip op., at 22); *accord Preiser v. Rodriguez*, 411 U.S. 475, 499 (1973) ("When a prisoner is put under additional and unconstitutional restraints during his lawful custody, it is arguable that habeas corpus will lie to remove the restraints making custody illegal"); *see also Bell v. Wolfish*, 411 U.S. 520, 526 (1979); *Johnson v. Avery*, 393 U.S. 483 (1969).

The breadth and scope of *habeas corpus* inquiry into matters on personal liberty can be broad, but this need not be interpreted as unlimited, the writ seeks only to address those instances where an individual's freedom is deprived "*in violation*" of the laws. 28

U.S.C. 2241(c)(3) (italics added); *see also Boumediene*, 553 U.S. at 740 (2008) (citing that the *Magna Carta* "decreed that no man would be imprisoned *contrary to the law* of the land." (emphasis added)).

But relevant to the case at hand, "the writ as a proper remedy even though the restraint is something less than close physical confinement." *Jones*, 371 U.S. at 238 (1963).

In the Ninth Circuit, where this case hails from, the jurisprudence there holds that a court may even maintain jurisdiction over a habeas petition amended *after the petitioner is released*, where the petition was filed while in custody and the amended petition merely "relates back" to the initial petition. *Guerrero v. RJM Acquisitions LLC*, 499 F.3d 926, 933 (CA9 2007); *see also Miller v. Laird*, 464 F.2d 533, 534 (CA9 1972).

A potential remand of this *habeas corpus* appeal could allow for a possible amendment, in a *habeas corpus* proceeding that, practically, *never was*. In the least of circumstances, the ability to inquire into, by a federal court, should not be foreclosed to the Petitioner. A hand-off approach would be impermissible given the extensive physical detention that preceded.

This Court overruled, previously, the court of appeals for the Ninth Circuit previously in *Hensley v. Municipal Court*, 411 U.S. 345 (1973), a substantially similar case, although outside of the civil detention category that this case falls in. There, this Court clarified that, consistent with the Supreme Court's "construction of the statute's custody requirement," the lower courts maintained jurisdiction for petitioners under conditions of release. *Hensley*, 411 U.S. at 350 (1973) (referring to the federal *habeas corpus* statute).

Here, Petitioner has continued cause for *habeas corpus*, and the court of appeals would conclude that the petition is now moot? That just isn't so. The district court does not lose its jurisdiction in these circumstances. "Such restraints are enough to invoke the help of the Great Writ." *Jones v. Cunningham*, 371 U.S. at 243 (1963).

REASONS FOR GRANTING THE WRIT

The questions presented here are whether a federal court retains its jurisdiction, that is non-mootness, over a *habeas corpus* petition where the petitioner obtains his physical liberty with restrictions and conditions of that release. This Court (as well as the lower courts) answered this issue in the criminal justice context, but as far as the civil (immigration) context, it is not that clear or *perhaps* just not explicit.

It would appear that the same rationale applies equally, and there is no reason to believe it would be otherwise here. In cases involving the "in custody" language of the federal *habeas corpus* statute, or involving standing under Article III, both hit the mark perfectly on the issue. *Supra.* But none involved civil detention. *See e.g.*, *Calderon*, 518 U.S. 149 (1996); *Jones*, 371 U.S. 236 (1963); *supra.*This grey area is compounded by a lack of noteworthy case law specifically targeting the issue. But, suffice it to say that the distinction between criminal and civil would simply be untenable. It *could even* raise equal protection concerns for various petitioners. *Infra.*

It is undisputed that, "the law treats like cases alike." *Jennings v. Rodriguez*, 583 U.S. __ , __ (2018) (BREYER, J., dissenting) (slip op., at 12). There is *no doubt* that this would be the result be the same here, *but* the court of appeals here concluded otherwise. This lack of *clear* direction has the potential to create an impermissible anomaly between *habeas corpus* in civil and criminal contexts, and possibly further among lower courts.

The operative restraint in conditioned liberty, will be no different in a civil scenario. They are "are in *every relevant sense* identical." *Jennings*, 583 U.S. __ , __ (2018) (BREYER, J., dissenting) (slip op., at 12) (emphasis added).

The Court should grant certiorari therefore.The Constitutional and statutory (*habeas corpus*) question presented is of great import.

The alternate question the Petitioner wishes this Court to grant certiorari on the presented is that the district court in this case had completely prevented a *habeas corpus* proceeding from occurring at all.

There is no clear indication that the lower court considered preserving the petition for claims that were clearly meritorious and colorable constitutional claims. An inspection of the petition - the facts, the short constitutional pleadings, the invocation of 28 U.S.C. § 2241 - one might be left dumbfounded wondering what more the district court required from a *pro se* petitioner who had *long sought* to "enforce separation-of-powers principles," *Boumediene*, 553 U.S. at 743.

CONCLUSION

For all the above considerations, the Court should grant the petition.

Respectfully submitted,

/s/ Nsinano J. 1/1/2021

JASON S. NSINANO, *pro se* DATE