

No. \_\_\_\_\_

---

IN THE  
**Supreme Court of the United States**

---

NOU XIONG next friend of V.L., *et al.*,

*Petitioners,*

v.

COLONEL ALAN P. BORJA, *et al.*,

*Respondents.*

---

**On Petition for a Writ of Certiorari to  
the United States Court of Appeals  
for the Ninth Circuit**

---

**PETITION FOR WRIT OF CERTIORARI**

---

JOSHUA J. SCHROEDER  
*Counsel of Record (pro bono)*  
SCHROEDERLAW: LAW OFFICES OF JOSHUA J.  
SCHROEDER  
PO Box 82, Los Angeles, CA 90078  
(510) 542-9698, josh@jschroederlaw.com

## QUESTIONS PRESENTED

- 1) Does the District of Guam have subject matter jurisdiction to review Suspension Clause claims pursuant to *Boumediene v. Bush* when a petitioner requests common law release?
- 2) After a petition for habeas corpus is filed in a certain District Court and the Government physically moved the petition's intended beneficiary into the immediate custodianship of a party not in the habeas corpus jurisdiction of the first District Court, did the Government have an independent duty to move the original District Court to transfer venue to the appropriate District Court the Government moved the writ's intended beneficiary into?

**LIST OF PARTIES**

Nou Xiong, next friend of V.L., and V.L. on their own behalf and on behalf of others similarly situated are the Petitioners in this case. Colonel Alan P. Borja, in his official capacity as Warden of the Guam Department of Corrections, Hagatna Detention Facility, and Sergio Albarran, in his official capacity as director of Immigration & Customs Enforcement, are Respondents.

**RELATED DECISIONS**

The Order of the Court of Appeals denying the request for rehearing and *en banc* review is unpublished at *Xiong v. Borja*, No. 25-3656, Dkt. Entry 33.1 (9th Cir. 2026). The Memorandum of the Court of Appeals is unpublished at *Xiong v. Borja*, No. 25-3656, Dkt. Entry 31.1 (9th Cir. 2026). The District of Guam dismissal is available at *Xiong v. Borja*, No. 1:25-cv-00026, ECF No. 25. The preceding Orders of the Northern District of Texas dismissal and denial of Petitioner's motion to transfer venue and temporary order not to move Petitioner out of the country are available at *Xiong v. Trump*, No. 4:25-cv-00558-O, ECF Nos. 2, 26.

## TABLE OF CONTENTS

|                                                                                                    | Page |
|----------------------------------------------------------------------------------------------------|------|
| QUESTIONS PRESENTED.....                                                                           | i    |
| LIST OF PARTIES.....                                                                               | ii   |
| RELATED DECISIONS.....                                                                             | iii  |
| TABLE OF AUTHORITIES.....                                                                          | vi   |
| OPINION BELOW.....                                                                                 | 2    |
| JURISDICTION.....                                                                                  | 2    |
| CONSTITUTIONAL PROVISIONS, STATUTES,<br>AND STATUTES INVOLVED.....                                 | 2    |
| STATEMENT OF CASE.....                                                                             | 4    |
| REASONS FOR GRANTING THE<br>PETITION.....                                                          | 8    |
| CONCLUSION.....                                                                                    | 19   |
| APPENDICES:                                                                                        |      |
| Appendix A – Memorandum of the Ninth Circuit<br>Court of Appeal Affirming the District Court ..... | 1a   |

|                                                                                               |    |
|-----------------------------------------------------------------------------------------------|----|
| Appendix B – Order of the Ninth Circuit Court of<br>Appeal Denying Motion for Rehearing ..... | 4a |
| Appendix C – Order of the District of Guam .....                                              | 6a |

## TABLE OF AUTHORITIES

### ***Cases***

|                                                                           |                     |
|---------------------------------------------------------------------------|---------------------|
| <i>Ahrens v. Clark</i> , 335 U.S. 188 (1948) .....                        | 8, 9                |
| <i>Boumediene v. Bush</i> , 553 U.S. 723 (2008) .                         | 4, 7, 10, 11, 13–18 |
| <i>Braden v. 30th Judicial Cir. Ct. of Ky.</i> , 410 U.S. 484 (1973)..... | 8–12                |
| <i>Delgadillo v. Carmichael</i> , 332 U.S. 388 (1947) .....               | 17                  |
| <i>DHS v. Thuraissigiam</i> , 591 U.S. 103 (2020) .....                   | 11, 13, 14, 16, 17  |
| <i>Hamdi v. Rumsfeld</i> , 542 U.S. 507 (2004) .....                      | 18                  |
| <i>Johnson v. Eisentrager</i> , 339 U.S. 763 (1950) .....                 | 9, 10               |
| <i>Jones v. Cunningham</i> , 371 U.S. 236 (1963) .....                    | 9                   |
| <i>Marbury v. Madison</i> , 5 U.S. 137 (1803) .....                       | 18                  |
| <i>Moore v. Harper</i> , 600 U.S. 1 (2022) .....                          | 18                  |
| <i>Padilla v. Kentucky</i> , 559 U.S. 356 (2010) .....                    | 17                  |
| <i>Rasul v. Bush</i> , 542 U.S. 466 (2004) .....                          | 4, 9, 10, 14, 15    |
| <i>Rumsfeld v. Padilla</i> , 542 U.S. 426 (2004) .....                    | 8–13                |
| <i>SEC v. Jarkesy</i> , 603 U.S. 109 (2024) .....                         | 4, 5                |
| <i>Trump v. J.G.G.</i> , 604 U.S. 670 (2025) .....                        | 9                   |

|                                                              |   |
|--------------------------------------------------------------|---|
| <i>Xiong v. Borja</i> , No. 25-3656 (9th Cir. 2026) .....    | 2 |
| <i>Xiong v. Trump</i> , 4:25-cv-00558-O (N.D. Tex. 2025) ... | 7 |

### ***Statutes***

|                                                                                                                                           |               |
|-------------------------------------------------------------------------------------------------------------------------------------------|---------------|
| 5 U.S.C. § 702 .....                                                                                                                      | 4             |
| 8 U.S.C. § 1101 .....                                                                                                                     | 4             |
| FARRA, Pub. L. No. 105-277, div. G, Title XXII, §<br>2242, 112 Stat. 2681, 2681-822 (1998) (codified as<br>Note to 8 U.S.C. § 1231) ..... | 4             |
| 8 U.S.C. § 1252(g) .....                                                                                                                  | 3, 11, 17, 18 |
| 28 U.S.C. § 1254 .....                                                                                                                    | 2             |
| 28 U.S.C. § 1346 .....                                                                                                                    | 4             |
| 28 U.S.C. § 1361 .....                                                                                                                    | 3, 4          |
| 28 U.S.C. § 1367 .....                                                                                                                    | 4             |
| 28 U.S.C. § 1404(a) .....                                                                                                                 | 11            |
| 28 U.S.C. § 1651 .....                                                                                                                    | 3, 4          |
| 28 U.S.C. § 2241 .....                                                                                                                    | 3, 4, 8, 16   |
| 50 U.S.C. §§ 21–24 .....                                                                                                                  | 4             |
| Cal. Pen. Code § 1473.7 .....                                                                                                             | 17            |

***Treaties***

- Article 3 of the Geneva Convention (III) Relative to  
the Treatment of Prisoners of War, Aug. 12, 1949,  
[1955] 6 U.S.T. 3316, 3318, T.I.A.S. No. 3364 .....4

***Other Authorities***

- Aala Abdullahi & Geoff Hing, *ICE Detained Them,  
and Then They Vanished*, THE MARSHALL PROJECT  
(June 1, 2026, 6:00 AM EDT) .....11
- Mattathias Schwartz & Seamus Hughes, *Justice  
Dept. Lawyer Is Found in Contempt by Federal  
Judge*, N.Y. TIMES (Feb. 18, 2026) .....12
- Scott Friedman et al., *ICE Transfer Flights Bring  
More Detainees to Texas Where Attorneys Warn of  
Longer Waits*, NBC5 (May 11, 2026, 10:08 AM  
CST).....12
- White House Memorandum From William Scharf,  
Assistant to the President and Staff Secretary, to  
Susie Wiles, Chief of Staff (Apr. 29, 2025),  
*available at Read Will Scharf's Confidential  
Habeas Corpus Memo*, N.Y. TIMES (June 15, 2026)  
[https://www.nytimes.com/interactive/2026/06/15/us/  
politics/trump-miller-habeas-  
corpus.html?eafs\\_enabled=false](https://www.nytimes.com/interactive/2026/06/15/us/politics/trump-miller-habeas-corpus.html?eafs_enabled=false),.....13

***Rules***

FRCP Rule 12(b)(1) .....17

FRCP Rule 12(h)(3).....3–4

***Constitutional Provisions***

U.S. CONST. art. I, § 9, cl. 2 .....4, 15

No. \_\_\_\_\_

---

IN THE  
**Supreme Court of the United States**

---

NOU XIONG next friend for V.L., *et al.*,

*Petitioners,*

v.

COLONEL ALAN P. BORJA, *et al.*,

*Respondents.*

---

**On Petition for a Writ of Certiorari to  
the United States Court of Appeals  
for the Ninth Circuit**

---

**PETITION FOR WRIT OF CERTIORARI**

---

Petitioners, Nou Xiong, next friend of V.L., and V.L., respectfully asks that a writ of certiorari issue to review the Memorandum Disposition of the United States Court of Appeals for the Ninth Circuit, filed on February 17, 2026 and subsequent rejection of

Petitioner's timely motion for rehearing and request for *en banc* review filed on March 31, 2026.

### **OPINION BELOW**

The opinion of the United States Court of Appeals for the Ninth Circuit, which was unpublished, was filed on February 17, 2026, is attached as Appendix A, and the Order denying Petitioner's timely motion for rehearing and *en banc* review filed on March 31, 2026, is attached as Appendix B, and may both be found at *Xiong v. Borja*, No. 25-3656, Dkt. Entries 31.1, 33.1 (9th Cir. 2026).

### **JURISDICTION**

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254. The decisions of the United States for which petitioner seeks review were issued on February 17, 2026, and on March 31, 2026 deciding Petitioners' timely motion for rehearing and *en banc* review. This petition is filed within 90 days of the United States Court of Appeals for the Ninth Circuit final decision, under Rules 13 and 29 of this Court.

### **CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED**

*The United States Constitution, Article I, Section 9, Clause 2* provides, in relevant part:

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.

*Section 242(g) of the Immigration and Nationality Act, enacted by 306(a)(2) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”), and codified at 8 U.S.C. § 1252(g), provides, in relevant part:*

Except as provided in this section and notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

*Rule 12(h)(3) of the Federal Rules of Civil Procedure provides in relevant part:*

If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.

## STATEMENT OF CASE

In the court of first instance, the District of Guam, subject matter jurisdiction was asserted under 28 U.S.C. §§ 1346, 1361, 1651, 2241, the Suspension Clause at U.S. CONST. art. I, § 9, cl. 2, and pursuant to the principles of supplemental jurisdiction under 28 U.S.C. § 1367. First Amended Petition for Writ of Habeas Corpus and Class Action Complaint for Declaratory and Injunctive Relief, 1:25-cv-00026, ECF No. 5, at 8 (“Am. Pet.”). Federal question or “arising under” jurisdiction was asserted under The Alien Enemies Act, 50 U.S.C. §§ 21–24, the All Writs Act, 28 U.S.C. § 1651, Administrative Procedures Act, 5 U.S.C. § 702, the codification of the United Nations Convention Against Torture in FARRA, Pub. L. No. 105-277, div. G, Title XXII, § 2242, 112 Stat. 2681, 2681-822 (1998) (codified as Note to 8 U.S.C. § 1231), Article 3 of the Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955] 6 U.S.T. 3316, 3318, T.I.A.S. No. 3364, the Immigration & Nationality Act, 8 U.S.C. § 1101, and other treaties, and several provisions of the U.S. Constitution and The Declaration of Independence. Am. Pet. at 7–8. Personal jurisdiction was maintained under *Rasul v. Bush*, 542 U.S. 466 (2004) and *Boumediene v. Bush*, 553 U.S. 723 (2008), and jurisdiction generally was maintained according to these cases’ holdings at common law, and this Court’s recent finding in *SEC v. Jarkesy* that: “When a matter ‘from its nature, is the subject of a suit at the common law,’ Congress may not ‘withdraw [it] from judicial cognizance.’”

Am. Pet. at 8 (quoting *SEC v. Jarkesy*, 603 U.S. 109, 140 (2024)).

Petitioners are a common law husband and wife Nou Xiong, a U.S. citizen and next friend of V.L., and V.L., who was a Hmong green card holder who entered the country legally and resided in the United States from his early childhood until he was apparently “removed.” Am. Pet. at 3. He and his family were granted green cards upon immigration into the United States for being allies or alien friends of the United States during the Vietnam War and related military conflicts in Southeast Asia. *Id.* However, before V.L. was practically able to seek his own naturalization as an adult he was convicted of a crime at the age of 18 in California for which he was duly sentenced, and paid his time. Appendices C & D. V.L. had since led a reformed life in the United States, never reoffending, but was nevertheless eventually ordered removable by the Executive Office for Immigration Review. *Id.*

Despite being ordered removable, V.L. entered a potentially lifelong legal status of effectively not removable along with virtually all other Hmong individuals in the United States. *See* Am. Pet. at 3, 34. Hmong Americans generally held a special status as alien friends who were not accepted by Laos as legitimate deportees and/or because the United States was not willing to remove Hmong individuals even if they were ordered removable according to mutual loyalty principles between allies and for humanitarian reasons. *See id.* It appears that in early 2025, U.S. policy changed and V.L. was

put on what is believed to be the first full flight of Hmong individuals removed in a generation, at least, if not the first in U.S. history. *Id.* at 6.

Several links in the chain of due process leading up to V.L.'s apparent "removal" were not apparently followed, including: (1) notice and an opportunity to be heard regarding V.L.'s revocation of release; and (2) notice and an opportunity to be heard regarding whether V.L.'s ultimate "removal" was pursuant to his order of removal or whether it was carried out as some other form of banishment or worse. At the time of V.L.'s alleged removal, the Executive department was developing several ulterior bases aligned with the "unitary executive" theory of Presidential power promulgated by this Court for "removing" immigrants from the Bluebonnet Detention Facility where V.L. was housed. *See Id.* at 2. Due to this case's dismissal prior to any motion made by the Government to dismiss the case in which the Government would have been required to take a position, it remains unclear whether V.L.'s order of removal was actually the basis of authority the Government claimed to remove V.L. and others similarly situated.

Ordinary communication between Government counsel and the counsel of record here was never observed during the litigation of this case. *Id.* at 6. All the information undersigned counsel received regarding V.L.'s status was either filed into the habeas case itself or provided through V.L., Ms. Xiong, or third party activists or legal observers by which counsel gleaned information about the

Government's notice of when, where, why, and how V.L. was being allegedly removed. *Id.* No paperwork was directly provided to counsel from Government counsel, V.L., or Ms. Xiong outside of the paperwork filed in response to V.L.'s habeas corpus petition. *Id.*

Other critical facts include: (1) that V.L.'s First Amended Petition requested common law habeas corpus release pending legitimate government action or simple release; (2) in his previous filing before the Northern District of Texas V.L. also requested common law habeas corpus release; (3) that at all times V.L. was careful not to request more immigration court process through habeas corpus; (4) that V.L. was physically removed from the direct custodianship of named parties in his Northern District of Texas petition while his petition was pending before the Northern District of Texas; (5) that V.L. was put under the direct custodianship of individuals who could not have been named in the petition pending before the Northern District of Texas according to this Court's controlling precedent; and (6) the Government is presently pursuing undersigned counsel through motions for sanctions that appear to presume that the functional test from *Boumediene v. Bush* has already been invalidated, abrogated, or overruled by this Court before this Court has had a chance to invalidate, abrogate, or overrule *Boumediene* and other similar precedents in a case or controversy like this case. Appendices A–C; *Xiong v. Trump*, 4:25-cv-00558-O, ECF No. 26 (N.D. Tex. 2025); Am. Pet. at 3 (“Petitioner asserts the common law remedy of release pending legitimate government action.”).

## REASONS FOR GRANTING THE PETITION

In the habeas corpus context, the writ runs to the custodian. *Braden v. 30th Judicial Cir. Ct. of Ky.*, 410 U.S. 484, 495 (1973) (“Read literally, the language of § 2241(a) requires nothing more than that the court issuing the writ have jurisdiction over the custodian.”). In *Braden*, when the territorial rule from *Ahrens v. Clark* was cited in an attempt to affirm dismissal of the habeas corpus writ of a man detained in Alabama from filing in Kentucky, this Court stressed that *Ahrens* “can no longer” be viewed as “establishing an inflexible jurisdictional rule, dictating the choice of an inconvenient forum.” *Id.* at 499–500 (abrogating *Ahrens v. Clark*, 335 U.S. 188 (1948)); *id.* at 502 (Rehnquist, J., dissenting) (characterizing *Ahrens* as “overrule[d]” by the majority). However, in *Rumsfeld v. Padilla* this Court reawakened a limited form of the territorial rule in *Ahrens* through *Braden* by emphasizing the jurisdictional basis is the custodian whom the petitioner is seeking relief from. *Rumsfeld v. Padilla*, 542 U.S. 426, 444 (2004) (emphasizing that the holding from *Braden* eliminated *Ahrens*’ previous requirement that “both the petitioner and his custodian” needed to be “within the territorial confines of the district court” to maintain jurisdiction).

As a result, *Padilla* admitted that the term “custodian” did not need to be the custodian directly exercising control over a detainee. *Id.* By the time of *Padilla*’s ruling, this Court had long maintained that custodians challenged by the writ of habeas corpus

need not have direct custody of an individual. See *Jones v. Cunningham*, 371 U.S. 236, 238 (1963) (“[T]he chief use of habeas corpus has been to seek the release of persons held in actual, physical custody in prison or jail. Yet English courts have long recognized the writ as a proper remedy even though the restraint is something less than close physical confinement.”). Nevertheless, this Court pushed back in *Padilla* by holding: “The plain language of the habeas statute thus confirms the general rule that for core habeas petitions challenging present physical confinement, jurisdiction lies in only one district: the district of confinement.” *Padilla*, 542 U.S. at 443, *extended by Trump v. J.G.G.*, 604 U.S. 670, 672 (2025) (per curiam).

The narrowest reading of *Padilla* would revert habeas petitions challenging traditional detention to *Braden’s* observation of *Ahrens*: “On the facts of *Ahrens* itself, for example, petitioners could have challenged their detention by bringing an action in the Eastern District of New York against the federal officials who confined them in that district.” *Braden*, 410 U.S. at 500. Thus, the Court held that filing a petition in the right District is jurisdictional, but not fatal to review as that Court “remand[ed] the case for entry of an order of dismissal *without* prejudice.” *Padilla*, 542 U.S. at 451 (emphasis added). Around the time *Padilla* was decided, this Court also issued *Rasul v. Bush*, which applied constitutional avoidance doctrine and extended *Johnson v. Eisentrager’s* critical factor test to decide federal jurisdiction notwithstanding statutory language that

might have been read in a way that precluded subject matter jurisdiction. *Rasul v. Bush*, 542 U.S. 466, 475–76 (2004) (extending the “six critical facts” from *Johnson v. Eisentrager*, 339 U.S. 763, 777 (1950) as dispositive of habeas jurisdiction). The first critical factor, which must apparently be established prior to dismissing a habeas corpus writ for lack of subject matter jurisdiction is whether the beneficiary “is an enemy alien.” *Id.* V.L. is undoubtedly an alien friend. Am. Pet. at 50.

*Boumediene v. Bush* both extended and modulated *Rasul* and *Padilla* in a majority opinion that exhaustively reviewed habeas corpus jurisdiction. *Boumediene*, 553 U.S. at 736, 766, 796. Notwithstanding *Padilla*, *Boumediene* cited footnote 15 of *Braden*, which concluded that sometimes the most convenient forum is not in the location of detention. *Id.*, citing *Braden*, 410 U.S. at 499, n.15 (“Where a prisoner brings an action in the district of confinement attacking a detainer lodged by another State, the court can, of course, transfer the suit to a more convenient forum.”). *Boumediene* modified *Padilla* with *Braden*’s practicality in this passage:

If, in a future case, a detainee files a habeas petition in another judicial district in which a proper respondent can be served, see *Rumsfeld v. Padilla*, 542 U. S. 426, 435–436 (2004), **the Government can move for change of venue to the court that will hear these petitioners’ cases**, the United States District Court for the District of

Columbia. See 28 U. S. C. §1404(a); *Braden v. 30<sup>th</sup> Judicial Circuit Court of Ky.*, 410 U. S. 484, 499, n. 15 (1973). *Boumediene*, 553 U.S. at 796 (emphasis added).

This gives rise to the second question presented regarding the legal consequence of moving V.L. to Guam. Here, the District Court did not appear to apply a *Boumediene* analysis to determine whether there is Suspension Clause jurisdiction. Appendix C, at 13a. It appears that the Court relied upon the application of a 8 U.S.C. § 1252(g)'s apparent preclusion of subject matter jurisdiction, without determining whether *Boumediene* applies according to the standard later set in *DHS v. Thuraissigiam* by this Court (discussed below) to review the constitutionality of 8 U.S.C. § 1252(g)'s apparent preclusion. *Id.*

This Court's clear precedents that maintained Suspension Clause jurisdiction need to be clarified and reaffirmed post haste, because the President is experimenting on immigrant detainees by, apparently, using *Padilla* to play a shell game with immigrants. Aala Abdullahi & Geoff Hing, *ICE Detained Them, and Then They Vanished*, THE MARSHALL PROJECT (June 1, 2026, 6:00 AM), <https://www.themarshallproject.org/2026/06/01/ice-transparency-immigrants-disappear-transfers>. Detained immigrants are often flown all over America and can spend time detained in several different locations, apparently to make filing habeas corpus more difficult. *Id.* ("If someone is moved

before a lawyer files, the petition has to be filed in the new location, setting up a cycle where lawyers may struggle to file before their clients are moved again.”). The Government also appears to make use of *Padilla* to forum shop by gathering the subjects of the Government’s most experimental acts of “removal” into the Northern District of Texas, which included the removal at issue here of what is believed to be several Hmong alien friends including V.L. without proper assurances that they are not being sent to South Sudan, CECOT in El Salvador, or into the ocean to die. *Id.*; Am. Pet. at 50; Scott Friedman et al., *ICE Transfer Flights Bring More Detainees to Texas Where Attorneys Warn of Longer Waits*, NBC5 (May 11, 2026, 10:08 AM CST), <https://www.nbcdfw.com/investigations/ice-transfer-flights-bring-more-detainees-texas-where-attorneys-warn-longer-waits/4021218/> (tracking more than 2,500 ICE transfer flights bound for Texas).

*Padilla* narrowed *Braden*, explicitly because it perceived that allowing Petitioners to file potentially anywhere would result in “rampant forum shopping.” *Padilla*, 542 U.S. at 447. In the time *Padilla* was decided, a very different Executive Branch existed and the Court did not appear to suspect the President would forum shop for judges that are more likely to look the other way while he carries out, what appears to be, clear violations of this Court’s precedents. *See, e.g.*, Mattathias Schwartz & Seamus Hughes, *Justice Dept. Lawyer Is Found in Contempt by Federal Judge*, N.Y. TIMES (Feb. 18, 2026), <https://www.nytimes.com/2026/02/18/us/politics/justice-department-minnesota->

contempt.html?eafs\_enabled=false. The *Padilla* Court likely did not imagine a President would push to suspend habeas corpus by executive papers only to apparently be delayed by a memo citing this Court's decision in *Boumediene*. White House Memorandum From William Scharf, Assistant to the President and Staff Secretary, to Susie Wiles, Chief of Staff (Apr. 29, 2025), *available at Read Will Scharf's Confidential Habeas Corpus Memo*, N.Y. TIMES (June 15, 2026) [https://www.nytimes.com/interactive/2026/06/15/us/politics/trump-miller-habeas-corpus.html?eafs\\_enabled=false](https://www.nytimes.com/interactive/2026/06/15/us/politics/trump-miller-habeas-corpus.html?eafs_enabled=false).

Will Scharf's confidential memo, now published by the New York Times, relied upon *Boumediene's* functional approach that might allow a military tribunal to continue functioning as long as it maintains a functional equivalent to habeas corpus review. *Id.* The "upshot," according to Scharf, was that "all persons held in de facto U.S. territory habeas corpus rights apply, or in the limited circumstance of military detainees an adequate alternative to habeas must be provided." *Id.* at 98a. In the weeks preceding this case's initial filings, one of the President's top lawyers did not perceive an exception for immigrant detainees. *Id.* (dated Apr. 29, 2025); Am. Pet. at 1 (dated June 2, 2025).

Here, it seems that the District Court must have relied upon *DHS v. Thuraissigiam's* distinguishing of *Boumediene* from mainline immigration cases to dismiss for lack of subject matter jurisdiction. *DHS v. Thuraissigiam*, 591 U.S.

103, 136 (2020), *distinguishing Boumediene*, 553 U.S. at 734. For *Thuraissigiam* to apply, the Petitioners must have failed to seek “simple release.” *Thuraissigiam*, 591 U.S. at 127 (holding that *Boumediene* “relate[s] to the question whether the statutory procedures for Guantanamo detainees *seeking release from custody* provided an adequate substitute for a habeas petition *seeking release*”). Yet, here, the Petitioner sought simple release according to the terms set out in *Thuraissigiam*. Am. Pet. at 3 (requesting “the common law remedy of release”).

Further expounding *Boumediene*, the *Thuraissigiam* Court observed: “Holding that an Act of Congress unconstitutionally suspends the writ of habeas corpus is momentous.” *Id.* at 132. In no place did *Thuraissigiam* appear to overrule or abrogate *Boumediene* jurisdiction to adjudicate whether there is “an adequate substitute for habeas petition[s] *seeking release*.” *Id.* Instead, this Court distinguished *Boumediene* by saying it “is not about immigration at all.” *Id.* at 136.

Again, the litmus test that *Thuraissigiam* described for deciding whether *Boumediene* should apply is whether a habeas petitioner requested “simple release.” *Id.* at 119. Not putting a request for basic, common law release, as existed in 1789 in an immigrant habeas petition was apparently fatal. *Id.* at 116. But, again, the Petitioners satisfied this requirement, which should have led to an application of *Boumediene*’s extension of *Rasul*’s six factor test. *Boumediene*, 553 U.S. at 766, *extending Rasul*, 542

U.S. at 476 (quoting *Eisentrager*, 339 U.S. at 777). The six factors required that a prisoner:

(a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; (f) and is at all times imprisoned outside the United States. *Eisentrager*, 339 U.S. at 777.

To this, *Boumediene* added “three factors”:

(1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner’s entitlement to the writ. *Boumediene*, 553 U.S. at 766.

In the passage following these factors, *Boumediene* applied this framework and reached one of its central holdings: “We hold that Art. I, § 9, cl. 2, of the Constitution has full effect at Guantanamo Bay.” *Id.* at 771. By rejecting geographic limitations to the Suspension Clause, and rather basing jurisdiction on the Court’s jurisdiction over the custodians in

Guantanamo Bay, it upheld this Court's jurisdiction to review laws under the Suspension Clause. *Id.*

Then, the Court reviewed whether a law that appeared to preclude habeas corpus review was a "suspension" of habeas corpus, and *Boumediene* decided that it was a suspension according to a functional test. *Id.* at 792 ("Although we do not hold that an adequate substitute must duplicate § 2241 in all respects, it suffices that the Government has not established that the detainees' access to the statutory review provisions at issue is an adequate substitute for the writ of habeas corpus.") As the statute at issue did not provide a functional equivalent of habeas corpus review, it "effect[ed] an unconstitutional suspension of the writ." *Id.*

*Thuraissigiam* generally conceded that seeking common law release pending legitimate government action was still available to immigrants. *Thuraissigiam*, 591 U.S. at 137 ("The writ of habeas corpus as it existed at common law provided a vehicle to challenge all manner of detention by government officials, and the Court had held long before that the writ could be invoked by aliens already in the country who were held in custody pending deportation."). Furthermore, *Thuraissigiam* admitted: "Ordering an individual's release from custody may have the side effect of enabling that person to pursue all sorts of opportunities that the law allows." *Id.* at 124. In this case a grant of common law release may have given V.L. the opportunity to seek to vacate his criminal conviction pursuant to a California law enacted pursuant to

this Court’s ruling in *Padilla v. Kentucky*, but this potential side-effect is not relevant to the jurisdiction of the District of Guam to issue simple release pending legitimate Government action. Cal. Pen. Code § 1473.7; *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010) (noting that “[t]he severity of deportation [was] ‘the equivalent of banishment or exile’” (quoting *Delgadillo v. Carmichael*, 332 U.S. 388, 390–91 (1947))).

*Thuraissigiam* ensured that all persons, including immigrants, have the privilege of habeas corpus or a functional equivalent as long as they asserted simple release. Here, Petitioners requested simple release. Am. Pet. at 3. Therefore, as long as the critical factor test of *Boumediene* is decided in Petitioners’ favor, they should have been afforded the opportunity to argue that there is no functional equivalent for habeas corpus afforded to immigrants through the Executive Office for Immigration Review (“EOIR” or “Immigration Court”) or any other tribunal.

The result of such litigation could be that 8 U.S.C. § 1252(g) must be struck down as effecting an unconstitutional suspension of the writ, but it would be presumptuous at this time to assume that is what the Government will argue justifies lack of subject matter jurisdiction. See, e.g., *Boumediene*, 553 U.S. at 766. Therefore, this Court should find in the affirmative in response to both questions presented to afford the Government the opportunity to file a Rule 12(b)(1) motion to dismiss wherein the Government can explain what basis it thinks the law

precludes subject matter jurisdiction without violating the Suspension Clause. Here, Petitioners reserve the argument that the IIRIRA's § 1252(g) amendment to the INA is an unconstitutional suspension of the writ, but at this early stage Petitioners perceive that it would be unripe to argue *Boumediene's* functional test.

Ensuring that the United States remains a free society where people can trust that no person will be arbitrarily held in detention must always begin with an assertion of this Court's subject matter jurisdiction to "say what the law is." *Moore v. Harper*, 600 U.S. 1, 19 (2022) (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803)). In the new, fraught context America finds itself in, where alien enemy suits have been resurrected and are currently pending before the federal courts, this suit involving an undoubted alien friend could be an important vehicle to issue a reaffirmation of this Court's previous openness to hearing the petitions of more controversial figures. *See Boumediene*, 553 U.S. at 790. The Petitioners urge this Court to reaffirm Justice O'Connor's bold response to a President and Congress that united in an attempt to silence this Court: "Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake." *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (plurality opinion).

**CONCLUSION**

For the foregoing reasons, petitioner requests that this Court grant the petition for certiorari.

Dated: June 29, 2026

Respectfully Submitted,

/s/ Joshua J. Schroeder

JOSHUA J. SCHROEDER  
*Counsel of Record (pro bono)*  
SCHROEDERLAW: LAW OFFICES OF  
JOSHUA J. SCHROEDER  
PO Box 82  
Los Angeles, CA 90078  
(510) 542-9698  
josh@jschroederlaw.com