No. 25-1560

In the United States Court of Appeals for the Fourth Circuit

BADAR KHAN SURI,

Petitioner–Appellee,

v.

DONALD J. TRUMP, et al.,

Respondents-Appellants.

On Appeal from the United States District Court
for the Eastern District of Virginia, No. 1:25-cv-480

Brief Amici Curiae of Habeas Scholars Marc D. Falkoff, Eric M. Freedman, Paul Halliday, Randy A. Hertz, Aziz Z. Huq, Lee Kovarsky, Nancy Morawetz, Jessica Rofé, Stephen I. Vladeck, and Larry Yackle in Support of Petitioner-Appellee

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes and Rules

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

Amici curiae (individually listed following this brief) are professors of law and related disciplines who have expertise in the history and law of habeas corpus. *Amici* have a professional interest in ensuring the fair and lawful application of the Great Writ consistent with historical practice and constitutional mandate. They write to share with the Court their understanding that—unless lawfully suspended by Congress—habeas is always available to challenge assertedly unlawful executive detention such as that alleged by Petitioner-Appellee Dr. Badar Khan Suri.

The Eastern District of Virginia therefore has jurisdiction over Suri's habeas petition. And the district court did not abuse its discretion in retaining jurisdiction over the petition rather than transferring it to districts in Texas or Louisiana. The government's arguments otherwise, if accepted, would effectively suspend the writ during the period the executive branch keeps secret a detainee's immediate custodian as it transfers him to its preferred forum.

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[1] Counsel for *amici* certify that no person other than *amici* and their counsel helped draft this brief or contributed funds to its preparation or submission. All parties have consented to its filing.

The government contends that it can preclude habeas jurisdiction over a petition filed by an immigrant (or, for that matter, a United States citizen) by keeping his immediate custodian secret while it transports him to the government's favored forum—or out of the country. Under the government's theories, if there is no immediate custodian or no immediate custodian known to petitioner's counsel when the petition is filed: (1) habeas jurisdiction is barred in *any* district until the government reveals the eventual immediate custodian in its favored forum, and in the alternative (2) once it discloses that information, jurisdiction is limited to the government's favored forum, and even if a district had habeas jurisdiction when the petition was filed, that district *must* transfer the petition to the favored forum (rather than deciding whether to transfer by applying the discretionary, equitable factors mandated by the federal transfer statutes). *See* Respondent-Appellants' Opening Brief ("Gov. Br.") at 13, 24. That is not and has never been the law of habeas corpus.

INTRODUCTION

As detailed in Points I-III, below, the United States District Court for the Eastern District of Virginia has habeas jurisdiction over Suri's petition. The history of the Great Writ demonstrates that the executive branch is not empowered to suspend the writ's availability by keeping secret the petitioner's immediate custodian while it shops for a favorable forum. History shows that the writ was applied flexibly and equitably and without notable concern for the particular custodian who is named. *See* Point I.

Moreover, as a matter of precedent and statutory construction, Suri was not obligated to comply with the "traditional requirement[]" of *statutory* habeas jurisdiction that he name his "immediate custodian" when filing his petition because at that time he had no known or knowable immediate custodian. *Öztürk v. Hyde*, 136 F.4th 382, 390, 392 (2d Cir. 2025) (citing *Rumsfeld v. Padilla*, 542 U.S. 426, 438, 447, 450 n.18 (2004)).[2]

[2] Though the district of confinement and immediate custodian rules are often described as "jurisdictional," that word is "not [used] in the sense of subject-matter jurisdiction." *Padilla*, 542 U.S. at 434 n.7. Instead, it is a matter of venue or personal jurisdiction. *Kanai v. McHugh*, 638 F.3d 251, 258 (4th Cir. 2011).

Padilla explains the "default rule" applicable to statutory habeas jurisdiction in the ordinary circumstance in which a petitioner is confined in a detention facility overseen by a warden who is his immediate custodian because the warden has day-to-day control and the power to produce the petitioner's body to the habeas court: "Whenever a § 2241 habeas petitioner seeks to challenge his present physical custody within the United States, he should name his warden as respondent and file the petition in the district of confinement." *Padilla*, 542 U.S. at 435, 447. This default "rule [is] derived from the terms of the habeas statute," *id.*, which requires in relevant part that the petitioner "allege . . . the name of the person who has custody over him . . . *if known*," 28 U.S.C. § 2242 (emphasis added).

The Eastern District of Virginia has jurisdiction over Suri's petition: Under this Court's construction of the unknown-custodian exception in *United States v. Moussaoui*, 382 F.3d 453 (4th Cir. 2004), because Suri had no *immediate* custodian (or any such custodian was unknown and unknowable) when he filed his petition, he properly named his *ultimate* custodian as respondent, Secretary Noem, and the Eastern District of Virginia had habeas jurisdiction because she was subject to

process therein. *See* Point II.A. In the alternative, jurisdiction was proper in the Eastern District of Virginia under the principles of Justice Kennedy's concurrence in *Padilla* given the district court's unchallenged factual finding that the government here engaged in forum shopping and its not-clearly-erroneous finding that the government engaged in willful secrecy. *See* Point II.B. Finally, the district court did not abuse its discretion in retaining jurisdiction over the petition and deciding that the interest of justice did not warrant transferring the petition to districts in Texas or Louisiana. *See* Point III.

LEGAL ARGUMENT

I. THE HISTORY OF HABEAS CORPUS DEMONSTRATES THAT THE WRIT CANNOT BE MADE UNAVAILABLE BY AN EXECUTIVE BRANCH DECISION TO KEEP SECRET A DETAINEE'S IMMEDIATE CUSTODIAN WHILE TRANSPORTING HIM TO ITS FAVORED FORUM.

The government's position would mean that habeas jurisdiction is unavailable in *any* district while it keeps secret the detainee's immediate custodian or when no immediate custodian exists or is knowable; the government can secure jurisdiction in its preferred forum by revealing an immediate custodian only after the detainee has arrived in that forum, and can remove the detainee from the country without any district having the power to engage in habeas review. This proposition not only

conflicts with precedent, *see* Point II, below, but is fundamentally at odds with the writ's common law history and development prohibiting such suspension of the Great Writ.

Over the course of centuries in England and the colonies, habeas corpus crystallized into a fundamental guarantee that detention must be lawful, ensuring both the legality of the government's conduct and the liberty of the individual. *See Boumediene v. Bush*, 553 U.S. 723, 739 (2008) ("The Framers viewed 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."). The common law writ's baseline protections are enshrined in the Constitution's Suspension Clause, *id.* at 746 ("'at the absolute minimum' the Clause protects the writ as it existed when the Constitution was drafted and ratified") (citation omitted), and that history informs the writ's meaning and usage under statute, *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 93 (1807). Habeas is "a writ antecedent to statute, . . . throwing its root deep into the genius of our common law." *Rasul v. Bush*, 542 U.S. 466, 473 (2004) (quoting *Williams v. Kaiser*, 323 U.S. 471, 484 n.2 (1945) (Frankfurter, J., dissenting)).

Time and again, courts have underscored that the writ must be exercised with the equity and flexibility necessary to achieve its underlying purpose of preventing unlawful confinement. *See, e.g.*, *Jones v. Cunningham*, 371 U.S. 236, 243 (1963) (habeas is not "a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose"); Paul D. Halliday, *Habeas Corpus: From England to Empire* 102 (2010) ("Habeas corpus was an equitable device in all but name, enabling action in response to the particulars of a given circumstance rather than imposing obedience to a set of rules inscribed in precedents."); *id.* at 59-60 (describing "the equitable flexibility" that common law judges employed in habeas cases). "[C]ommon-law habeas corpus was, above all, an adaptable remedy. Its precise application and scope changed depending upon the circumstances." *Boumediene*, 553 U.S. at 779-80.

The writ's protections are at their zenith where, as here, a petition challenges executive detention rather than incarceration following criminal conviction. "[A]t its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest." *Rasul*, 542 U.S. at 474 (2004) (cleaned up).

The writ is available—unless properly suspended by Congress—whenever a petition has been filed and detention challenged as unlawful. The default immediate custodian and district of confinement rules must be satisfied or excused, but those rules provide no basis for the writ to be made unavailable, even if that gap is not for a "protracted time," as the government argues is permissible. Gov. Br. 32-33. The right of a detained individual to file a petition at all times, and the power of the court to consider that petition, has never been questioned.

Delay in availability of the writ was historically impermissible. Habeas "is perhaps the most important writ known to the constitutional law of England, affording as it does a *swift* and imperative remedy in *all cases* of illegal restraint or confinement." *Williams*, 323 U.S. at 484 n.2 (citation omitted) (emphasis added); 3 W. Blackstone, Commentaries *131 ("[T]he sovereign is *at all times* entitled to have an account, why the liberty of any of her subjects is restrained," "not only in term-time, but also during the vacation") (emphasis added); *id.* at *135 (describing the English habeas statute, 16 Car. I, c.10, § 8, "whereby it is enacted, that if any person be committed by the king [or privy council] he shall have granted unto him, *without any delay upon any pretence whatsoever*, a writ

of *habeas corpus*") (emphasis added); *id.* at *137 (explaining that "even upon writs at the common law it is now expected by the court, agreeable to ancient precedents and the spirit of the act of parliament, that the writ should be *immediately obeyed, without waiting*") (emphasis added).

Federal courts have been authorized to issue writs of habeas corpus since the Judiciary Act of 1789. And the executive branch has no power, under the habeas statutes or the Constitution, to circumvent the right of a district court judge to consider the writ filed by a petitioner who either satisfies the default statutory rules or who meets an exception excusing noncompliance.

Indeed, the writ's history is directly at odds with the government's position that it can make the writ unavailable by not disclosing the petitioner's immediate custodian until he has been transferred to the government's preferred forum. The writ's history instead demonstrates a deeply rooted commitment to preventing loopholes, inconveniences, and other obstacles that could frustrate or delay the writ's *immediate* availability to enable judicial determination whether detention complies with law. For example, English judges employed devices to issue habeas writs during vacation time (when the King's Bench was not in session) to

avoid gaps in coverage. *See* Halliday, *Habeas Corpus: From England to Empire* at 239-40. Judges also increasingly demanded "'sufficiency' and 'certainty' in the statement of wrongs" in a jailer's return responding to a habeas petition so the court could resist vague returns and thus determine whether the prisoner's detention was lawful. *Id.* at 102-03.

Throughout the writ's history, courts focused on the substantive lawfulness of detention without placing determinative or even meaningful weight on the technical issue of the petition's naming the proper custodian: "Including or omitting the name of the jailing authority [in a return] seemed to matter very little . . . . The absence of information identifying the officer ordering imprisonment was largely irrelevant to decision-making." *Id.* History shows that courts, when enforcing habeas petitions, were deeply concerned with both the alleged wrongful detention and with any vagueness in the substance of the jailer's return concerning the basis for detention. Accordingly, courts remained flexible and equitable in preventing unlawful detention—and this flexibility included not requiring precision as to the petitioner's custodian.

Protections against gaps in the availability and efficacy of the common law writ were strengthened in the celebrated Habeas Corpus Act

of 1679. *See* 31 Cha. 2. c. 2 (Eng.) (1679 Act); Lee Kovarsky, *Citizenship, National Security Detention and the Habeas Remedy*, 107 Calif. L. Rev. 867, 878 (2019). Fundamental to the history of the common law writ, and to its statutory counterparts, was the understanding that—unless properly suspended—the writ was always available to the detainee, and always addressable by the court, whether convenient to the respondent or otherwise.

Judges thus sent the common law writ to jailers even if a prisoner was detained in a location that was not only distant, but possessed special territorial status, such as Berwick and the palatinates, Marches of Wales, and Channel Isles. *See* Halliday, *Habeas Corpus: From England to Empire* at 240-41. As a high prerogative writ, habeas was a writ a jailer "must return," and one he resisted at his peril. *Id.* at 260; *see also id.* at 240 (judges "used the contempt process vigorously to enforce returns"). There were at times delays in *enforcing* the common law writ given the practical obstacles in travel and communication of centuries ago, delays the 1679 Act helped protect against by prohibiting the transfer of any prisoner "beyond the Seas" and strengthening sanctions on custodians for noncompliance with or evasion of the writ. 1679 Act, 31

Cha. 2, c. 2, § 12.[3] But those *enforcement* delays did not result in any period in which a detainee could not immediately *file* a habeas petition.

Indeed, *amici* are unaware of any instance in which a common law court accepted the proposition that there could be any period, even if not for a "protracted time," Gov. Br. at 32-33, in which a prisoner was unable to file a petition absent a proper suspension of the writ. In the United States, the Suspension Clause reserves that power to Congress, and only "when in Cases of Rebellion or Invasion the public Safety may require it," U.S. Const. art. I, § 9, cl. 2. The government's suggestion that it may make the writ unavailable by secretly moving the prisoner between undisclosed locations, under the custody of undisclosed immediate custodians, is thus fundamentally at odds with the writ's common law history.

If a detainee, in the course of being transported to the government's favored forum, has no known or knowable immediate custodian, and instead only an ultimate custodian, the petitioner's naming as

[3] The 1679 Act made such unlawful transfers not only a criminal offense but also a virtually unpardonable one. *See* Gerald L. Neuman, *The Habeas Corpus Suspension Clause after* Boumediene v. Bush, 110 Colum. L. Rev. 537, 568 (2010).

respondent his ultimate custodian cannot justify denying the writ's availability. That is particularly true when, as here, the government has been found to have engaged in willful secrecy and forum shopping to evade habeas jurisdiction outside its preferred forum.

Current federal statutory requirements for habeas jurisdiction—that a petition ordinarily name the immediate custodian, if known, and be filed in the district where that immediate custodian is confining the petitioner—did not exist during the writ's long history. The writ ran to the jailer, but England did not require precision as to the custodian or have multiple districts in which habeas petitions could be adjudicated, thus did not impose anything comparable to the immediate custodian or district of confinement rules.

The Supreme Court's interpretation of the language of the habeas statutes to superimpose such general default rules on statutory habeas jurisdiction, for the purpose of furthering the orderly administration of justice and preventing forum shopping, does not arise from the history of habeas. Nor do those rules inherently contradict that history or the core principles underlying the writ. But given that history, and the constitutional prohibition on construing habeas more narrowly than it

existed in 1789, *Boumediene*, 553 U.S. at 747, the default requirements must never be applied inflexibly to strip judges of their equitable power to issue the habeas writ.

History compels, then, that judges always retain the power to prevent gaps in the writ's immediate availability. Moreover, restrictions later imposed by statute, such as the obligation to name a proper custodian, if known, to avoid improper forum shopping, must be construed equitably and applied neutrally to the prisoner and jailer alike to ensure that the Great Writ remains unimpaired as the preeminent safeguard against unlawful executive detention

II. THE EASTERN DISTRICT OF VIRGINIA HAS JURISDICTION OVER SURI'S HABEAS PETITION.

A. Under this Court's *Moussaoui* Decision, Because Suri Had No Known Immediate Custodian in Louisiana When His Petition Was Filed, He Properly Named as Respondent Secretary Noem, an Ultimate Custodian Subject to Process in the Eastern District of Virginia.

The United States District Court for the Eastern District of Virginia has the power to issue the habeas writ in Suri's case under the unknown custodian exception recognized by this Court's decision in *United States v. Moussaoui*, 382 F.3d 453 (4th Cir. 2004). Under *Moussaoui*, when Suri filed his petition, his *immediate* custodian was unknown and

unknowable—indeed, insofar as the record shows, he had no immediate custodian—thus Suri properly named as respondent his *ultimate* custodian, a supervisor subject to process in the Eastern District of Virginia. *See id.* at 464-65.

Moussaoui held that "[o]rdinarily, a habeas writ must be served on a prisoner's immediate custodian—'the individual with day-to-day control over' the prisoner. Here, however, the immediate custodian is unknown. Under such circumstances, the writ is properly served on the prisoner's ultimate custodian." *Id.* (citing *Demjanjuk v. Meese*, 784 F.2d 1114, 1116 (D.C. Cir. 1986) (applying the unknown custodian exception)) (internal citations omitted). Because the habeas petitioners in *Moussaoui* were "in military custody," "[t]herefore Secretary of Defense Donald Rumsfeld [was] their ultimate custodian"; because the Secretary was "indisputably within the process power of the district court," that court therefore had power to issue the habeas writ. *Id.*

So, too, here. As the district court found, when Suri's petition was filed, his airplane had landed in Louisiana but he had not been booked into or confined in a detention facility. He therefore had no known *immediate* custodian—in Louisiana or otherwise—including the pilot of

the airplane from which he may well have deboarded, or the warden of the facility he had not yet entered. *Suri v. Trump*, 785 F. Supp. 3d 128, 141 (E.D. Va. 2025) ("At the time the habeas petition was filed, Petitioner's immediate custodian was unknown."); *id.* at 142 ("Not only was Petitioner's immediate custodian unknown to his counsel at the time of filing his petition, it appears that his immediate custodian at [that time] remains unknowable to all, including the Government.")

The government did not identify any purported immediate custodian to the district court. *Id.* at 142. For the first time on appeal, in its Reply Brief opposing the stay, the government suggested as immediate custodian *at the time of filing* the warden of the Louisiana facility in which Suri would *later* be detained, nearly an hour *after* the petition was filed. ECF 23-1 at 7. The government cites no evidence supporting either the suggestion that the Louisiana warden had custody over Suri before he was detained in that warden's facility, *id.*, or its primary suggestion that the Texas warden had custody because the NTA stated that Suri's immigration hearing was scheduled to occur in his facility 49 days later. *Id.* at 7-8. Neither was Suri's immediate custodian when the petition was filed, before he had entered either facility.

Thus, under *Moussaoui*'s unknown custodian exception, Suri's petition properly named Secretary Noem as his *ultimate* custodian at the time of filing—a higher-up in the chain of custody, and thus the proper custodian absent a known immediate custodian, because she had the "ability to produce the prisoner's body before the habeas court," *Padilla*, 542 U.S. at 435. And because jurisdiction attaches to the custodian, and the Eastern District of Virginia had personal jurisdiction over Suri's ultimate custodian, the district court had jurisdiction over Suri's petition.

Habeas jurisdiction attaches to the custodian, not the petitioner: Suri's *geographical* location in Louisiana at the time of filing does not control which district or districts had the power to issue the writ; what matters, instead, is whether the district had power over Suri's custodian. "In determining whether a district court possesses the power to serve a writ of habeas corpus, the critical principle is that the writ is served not upon the prisoner, but upon the custodian." *Moussaoui*, 382 F.3d at 464; *see also Ex Parte Endo,* 323 U.S. 283, 306 (1944) ("[T]he mode of procedure upon this writ is, that it is directed to, and served upon, not the person confined, but his jailer.") (cleaned up).

As *Padilla* explained, "whether the [district court] has jurisdiction over [the] habeas petition breaks down into two related subquestions. First, who is the proper respondent to that petition? And second, does the [district court] have jurisdiction over him or her?" *Padilla,* 542 U.S. at 434; *see also id.* at 450 n.18 (recognizing that when "a prisoner is held in an undisclosed location by an unknown custodian, it is impossible to apply the immediate custodian and district of confinement rules."). Thus, because the proper respondent was Noem as ultimate custodian (rather than any immediate custodian in Louisiana), and because the district court had jurisdiction over Noem,[4] habeas jurisdiction was proper in the Eastern District of Virginia.[5]

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[4] Noem was subject to personal jurisdiction because she "regularly transacts business in" the Eastern District of Virginia, *Suri*, 785 F. Supp. 3d at 141 n.7, and in any event "[her] objection to personal jurisdiction was waived," *id.*

[5] To the extent that *Moussaoui*'s authorizing jurisdiction over ultimate custodians in multiple districts might be thought in some other case to be in tension with *Padilla*'s forum shopping concerns, Suri here filed in the last district his counsel knew Suri was detained, where no such concerns apply. *Cf. Padilla*, 542 U.S. at 453-54 (Kennedy, J., concurring) (suggesting that, under exceptions to the immediate custodian, jurisdiction would ordinarily be proper in the last-known district of confinement).

If jurisdiction were not proper in the Eastern District of Virginia, an impermissible gap would exist in the Great Writ when, as here, there was no immediate custodian at the time of filing, or no known immediate custodian because the government kept that information secret until it had transported the detainee to its favored forum. In such circumstances, habeas jurisdiction would be unavailable in *any* district to prevent governmental forum shopping, or indeed to prevent the petitioner's removal from the country. Such a reading of the habeas statutes would have the effect of suspending habeas, in direct conflict with its history and with the Suspension Clause of the Constitution. *See* Point I, above. The executive branch does not "have the power to switch the Constitution on or off at will . . . ." *Boumediene*, 553 U.S. at 765.

The government's central argument is that "the knowledge of habeas petitioner's counsel [about the immediate custodian at the time the petition was filed] is not relevant to determining jurisdiction." Gov. Br. at 24. But this contention is directly belied both by the language of the habeas statute, which requires that the petition name the custodian only "if known," 28 U.S.C. § 2242, and by this Court's decision in *Moussaoui*, which expressly holds otherwise. In sum, the district court

has habeas jurisdiction over Suri's petition because Suri had no known immediate custodian, his petition thus properly named Noem as his ultimate custodian, and Noem was subject to jurisdiction in the Eastern District of Virginia.

B. The Eastern District of Virginia Has Habeas Jurisdiction Under the Principles of Justice Kennedy's *Padilla* Concurrence, Given the District Court's Factual Findings of Governmental Secrecy and Forum Shopping.

The Eastern District of Virginia also has habeas jurisdiction under the principles of Justice Kennedy's *Padilla* concurrence, given the district court's unchallenged and not clearly erroneous factual findings. In *Padilla*, Justice Kennedy (joined by Justice O'Connor, representing two members of the five-justice majority) set forth particular circumstances that would justify exceptions to the immediate custodian rule and vest habeas jurisdiction in the district from which the petitioner was removed. The district court found those circumstances to be present here: the government engaged in secrecy and forum shopping, thereby vesting habeas jurisdiction in the Eastern District of Virginia.

Exceptions to the immediate custodian rule would apply, Justice Kennedy explained, in circumstances that he (and the other members of the majority) found did not exist in *Padilla*. Those exceptions would

apply: "if there is an indication that the Government's purpose in removing a prisoner were to make it difficult for his lawyer to know where the habeas petition should be filed"; "where the Government was not forthcoming with respect to the identity of the custodian and the place of detention"; or where the government's conduct was "designed to play games with forums." *Padilla*, 542 U.S. at 454-55 (Kennedy, J., concurring). In such circumstances, "habeas jurisdiction would lie in the district or districts from which [the petitioner] had been removed," *id.*—here, the Eastern District of Virginia.

In this case, the district court made unchallenged and not clearly erroneous factual findings, detailed below, that: the government moved Suri more rapidly than other immigration detainees in the Eastern District of Virginia so as to make it difficult for his counsel to know where to file the petition; concealed from Suri's counsel his custodian and place of detention; and intentionally moved Suri in secret to the government's preferred forum. *Suri*, 785 F. Supp. 3d at 135-36, 144-48. These findings plainly satisfy Justice Kennedy's concurrence.

In response, the government first suggests that applying Justice Kennedy's concurrence here would "override the *Padilla* majority

opinion." Gov. Br. at 35. Not so. While the concurrence is not binding, it reflects the views of at least six justices, the two concurring and four dissenting justices. And the three remaining justices in the majority took no position, going out of their way to explain that they believed the *factual* scenarios discussed by the concurrence to be inapplicable, not only because Padilla's immediate custodian was known to his counsel, *Padilla*, 542 U.S. at 449 n.17, 450 n.18, but because in *Padilla* the government had not engaged in any secrecy, forum shopping, or other misconduct, *id.* at 441, 449 n.17. The majority thus concluded there was no reason to consider the *legal* implications if the *factual* circumstances addressed in Justice Kennedy's concurrence were to arise. *Id.* at 442.

And those circumstances did arise here. The government does not challenge the district court's factual finding of forum shopping, and it does not challenge as clearly erroneous the finding of intentional secrecy to make it difficult for Suri's counsel to know where to file. Instead, it contends that its actions do not meet the criteria established by Justice Kennedy's concurrence.

But the facts found by the district court plainly and directly satisfy those criteria: "Petitioner's transfer to Texas was not about bedspace,"

contrary to the government's assertions otherwise, which were "either non-responsive or riddled with inconsistencies." *Suri*, 785 F. Supp. 3d at 145. The government did not "satisfactorily explain[] why [Suri] would be transferred from a place with [bedspace] to a facility that did not have bedspace," where Suri had to sleep on the floor. *Id.*

Instead, the district court found, "Respondents' goal in moving Petitioner was to make it difficult for Petitioner's counsel to file the petition and to transfer him to the Government's chosen forum." *Id.* at 146. The government's "assertions with respect to the NTA's listed address [falsely stating that Suri's current residence was in Texas] also appear to be post hoc rationalizations," "suggest[ing] that Respondents' design was to forum shop and spirit Petitioner away from this District before his counsel could file a petition." *Id.* Moreover, "the fashion in which Petitioner was transferred appears exceptional for immigration detainees who are arrested in Virginia, if not in general. This atypical movement would make it difficult for any diligent lawyer's filings to 'catch up' to their client's location." *Id.* at 147.

The government told Suri, after his arrest, that he would be moved to another location in Virginia, "where he believed he would be held for a

longer term and was permitted to tell his wife this information," and she shared that information with Suri's counsel. *Id.* at 134-35. After Suri was taken to an airport in Richmond to be flown out of Virginia, he was not "permitted to further communicate his whereabouts to his wife or to his counsel." *Id.* at 136. And the government both "failed to notify Dr. Khan Suri's counsel of his transfer [from Virginia] despite ICE's policy suggesting that notice to counsel in the event of transfer is standard practice," *id.* at 146 n.12, and failed to update "the ICE Online Detainee Locator [to] provide information about Petitioner's whereabouts until after the petition was filed," *id.* at 144.

These facts suggested to the district court that the government's actions operated to lull Suri's counsel into believing that the petition did not need to be filed in the short term, in the district where Suri and counsel resided, to ensure that he would not be taken out of the jurisdiction or deported forthwith; instead, the government intended to "spirit Petitioner away from this District before his counsel could file a petition," *id.* at 146.[6]

[6] Indeed, the district court's exercising its habeas jurisdiction appears to be what prevented Suri's removal from the country. Shortly after Suri

Rather than challenge the district court's factual findings or their legal consequences, the government argues that following Justice Kennedy's concurrence to find jurisdiction in the Eastern District of Virginia would violate *Padilla*'s admonition that a district court not exercise jurisdiction "premised on 'punishing' alleged Government misconduct." 542 U.S. at 448. But what *Padilla* rejected as improper punishment was manufacturing jurisdiction that would not otherwise exist on facts that did not exist: Unlike here, the immediate custodian in *Padilla* was known, *id.* at 449 n.17, and the majority rejected "any hint of Government misconduct or bad faith," thus rendering irrelevant "a series of events that did not occur," *id.* at 448. In contrast, the government misconduct here was not alleged and rejected, as in *Padilla*; it was specifically found by the district court to exist. And the facts found directly meet the criteria of Justice Kennedy's concurrence.

The government also ignores the district court's factual finding that it engaged in forum shopping, despite *Padilla*'s admonition against

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arrived in Louisiana, he was told "he would be leaving Louisiana to be transferred to New York to be deported," and apparently only the district court's "Order directing that Petitioner not be removed from the United States," entered that same day, operated to prevent Suri's deportation. *Id.* at 147, 136.

interpreting the habeas statutes to permit forum shopping by petitioners, *id.* at 447, and Justice Kennedy's conclusion that an exception to the immediate custodian rule would be warranted if the government's conduct was "designed to play games with forums," *id.* at 455. This Court should join Justice Kennedy and the Third Circuit in holding that habeas forum shopping concerns are not limited to petitioners, and should also recognize "forum-shopping concerns, not on the part of the petitioner but instead the Government." *Anariba v. Dir. Hudson Cnty. Corr. Ctr.*, 17 F.4th 434, 447 (3d Cir. 2021).

Indeed, "[t]hese forum-shopping concerns intensify when the [petitioner] is an ICE detainee" because "the Government has the machinery already in place to permit extensive forum shopping" by moving detainees "to a jurisdiction that is more amenable to the Government's position." *Id.* at 447-48. Open beds materialize, as in this case, with statistically surprising regularity within the Fifth Circuit. *See Vasquez v. Reno*, 233 F.3d 688, 694 (1st Cir. 2000) ("The petitioner's decision to seek habeas relief in Massachusetts likely was motivated by the fact that the law of the Fifth Circuit is markedly less favorable to alien habeas petitioners than the law of the First Circuit."); *see also Eisel*

v. Sec'y of Army, 477 F.2d 1251, 1254, 1257-58 (D.C. Cir. 1973) (expressing concern that "the Government might engage in a form of inverse forum shopping" to shape habeas jurisdiction); Jessica Rofé, *Peripheral Detention, Transfer, and Access to the Courts*, 122 Mich. L. Rev. 867, 923 (2024) (supporting the "principle that neither the petitioner nor the government should be able to forum shop or manipulate the availability of habeas relief") (citation omitted).

The district court's factual findings in this case carefully and precisely documented the government's secrecy and forum shopping. This conduct vests habeas jurisdiction in the Eastern District of Virginia under the principles of Justice Kennedy's concurrence.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY DECIDING NOT TO TRANSFER THE PETITION TO DISTRICTS IN TEXAS OR LOUISIANA.

The government argues in the alternative that, even if the Eastern District of Virginia "initially" had jurisdiction, "it should have transferred the case once it became aware that Suri had been removed from the district before the filing of the habeas petition." Gov. Br. at 30-31. The government thus suggests that habeas jurisdiction turns on what the district court eventually learned about Suri's geographical location at the time of filing; instead, the facts that actually control go to what Suri's

counsel knew at the time of filing about Suri's then-immediate custodian, if any, and whether those facts are knowable.

The government's argument fundamentally misunderstands both the nature of habeas jurisdiction and the equitable statutory criteria for transferring a habeas action to another district. Habeas "jurisdiction" is "not [used] in the sense of subject matter jurisdiction," *Padilla*, 542 U.S. at 463 n.7, but is instead informed by equitable, venue-like principles. *Id.* at 451 (Kennedy, J., concurring); *id.* at 436 n.6 (Stevens, J., dissenting). This Court so recognized in *Kanai,* 638 F.3d at 258. The district court exercised its discretion by construing traditional venue considerations here to weigh against transfer. *Suri*, 785 F. Supp. 3d at 148-49.

Moreover, as history demonstrates, courts traditionally have been flexible and equitable in preventing unlawful detention through the writ, setting aside technical or formalistic barriers, including specificity in naming the custodian, that could undercut the writ's availability or application. *See* Point I, above. Consistent with these flexible and equitable principles, the statutory criteria for transferring a habeas petition to change venue to a different district permit such transfer as a discretionary matter "[f]or the convenience of parties and witnesses, in

the interest of justice," from the filing district "to any other district . . . where [the action] might have been brought." 28 U.S.C. § 1404(a); *see also* 28 U.S.C. § 1406(a) (similarly authorizing transfer "in the interest of justice" in the absence of venue in the filing district); 28 U.S.C. § 1631 (similarly authorizing transfer "in the interest of justice" in the absence of jurisdiction in the filing district); *see generally Nichols v. G.D. Searle & Co.*, 991 F.2d 1195, 1201-02 (4th Cir. 1993). And the district court's decision to retain jurisdiction over Suri's petition, rather than to transfer it to districts in Texas or Louisiana, is reviewed on appeal for abuse of discretion. *Nichols*, 991 F.2d at 1200.

Given the district court's factual findings addressing the statutory criteria of the convenience of parties and the interest of justice, no abuse of discretion occurred here. Specifically, the government argues on appeal that the petition should have been transferred to districts in Texas or Louisiana. Both arguments fail.

First, the district court correctly held that there was no plausible basis for jurisdiction in Texas under a "straightforward application of the default rules," *Suri*, 785 F. Supp. 3d at 139. The government's intent to confine Suri in Texas as his "ultimate destination," Gov. Br. at 23, did

not make it proper for Suri's petition to be filed in Texas three days before he ever entered Texas. That is because transfer under § 1404 (and the other transfer statutes) is only permissible to a district where the case "could have been brought." 28 U.S.C. § 1404(a).

Second, as to Louisiana, the government has forfeited any argument that the petition should have been transferred there because the government did not raise that argument to the district court. The district court repeatedly observed that "Respondents argue that Petitioner's claims can only be heard in the Northern District of Texas—despite the fact that Dr. Khan Suri was not in Texas at the time the petition was filed." *Suri*, 785 F. Supp. 3d at 137; *id.* at 139 ("Respondents contend that . . . jurisdiction is only proper in the Northern District of Texas."); *id.* at 140 (same).[7]

Any argument for jurisdiction in or transfer to Louisiana is thus forfeited given the government's failure to raise it before the district

[7] The government noted the possible argument for jurisdiction in Louisiana, but specifically rejected "establish[ing] habeas in a district that [Suri] was merely passing through on the way to the permanent place of confinement [in Texas]. That cannot possibly be correct, nor is it under [Fourth Circuit precedent.]" ECF 49 at 17-18. Noting and rejecting a possible argument does not raise or preserve that argument.

court—indeed, its affirmative waiver of that argument. As this Court held in *Kanai,* 638 F.3d at 258, "any challenge to habeas proceedings based on [the petition proceeding in the wrong district] is waived if not timely asserted" to the district court; *see also Berg v. Kingdom of the Neth.,* 24 F.4th 987, 998 (4th Cir. 2022) (holding that the plaintiff "never asked the district court to transfer venue to the District of Columbia under § 1406(a)," thus the argument "is forfeited" absent a "miscarriage of justice").

Even if the argument had not been forfeited, the district court's decision not to *sua sponte* transfer to Louisiana was not an abuse of discretion. In considering transfer, the district court looked to "traditional venue considerations," observing that Suri "has strong connections to this District," where Suri's "exceptionally diligent counsel" was located, *Suri*, 785 F. Supp. 3d at 148, and "the Eastern District of Virginia is where Petitioner resides with his wife and children [and] is where Petitioner was arrested," *id.* at 149.

The district court also relied, in assessing the interest of justice, on its factual findings that the government had engaged in secrecy and forum-shopping: "The Court declines to transfer Dr. Khan Suri's petition

to the Western District of Louisiana for the additional reason that doing so would ratify [the government's] attempt at forum shopping." *Id.* at 148. The district court carefully considered the factors relevant under the transfer statutes, exercising its discretion by deciding to retain jurisdiction. *Id.* at 148-49. This Court should not disturb the district court's sound reasoning.

CONCLUSION

For the foregoing reasons, this Court should recognize that the Eastern District of Virginia has jurisdiction over Suri's habeas petition.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations stated in Fed. R. App. P. 32(a)(7)(B). Using the word count feature of Microsoft Word, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and L.A.R. 29.1(b), this brief contains 6,442 words. The brief complies with the typeface and type-style requirements of Fed. R. App. P. 32(a) because it has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Century Schoolbook typeface.

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CERTIFICATE OF SERVICE

I hereby certify that on October 3, 2025, I electronically filed the foregoing document by using the CM/ECF system, thereby serving all counsel of record.

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