No. 19-161

IN THE
# Supreme Court of the United States

DEPARTMENT OF HOMELAND SECURITY, ET AL.,
*Petitioners*,

v.

VIJAYAKUMAR THURAISSIGIAM,
*Respondent*.

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

## BRIEF OF LEGAL HISTORIANS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT


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## INTEREST OF *AMICI*[1]

This case raises the question whether the federal courts have jurisdiction to review habeas corpus petitions filed by noncitizens apprehended in the United States and subject to expedited removal orders. *Amici curiae* are among the nation's foremost scholars of legal history with expertise in English legal history prior to 1789 and/or early American history. *Amici* have a professional interest in ensuring that the Court is fully and accurately informed regarding the historical scope of the common law writ of habeas corpus that, under this Court's precedents, is properly considered in evaluating issues raised under the Suspension Clause. U.S. Const. art. I, § 9, cl. 2.

## SUMMARY OF ARGUMENT

*Amici* wish to clarify two points bearing on this Court's analysis of the constitutionality of the statutory bar[2] to habeas review of expedited removal orders: the availability and the nature of habeas corpus review at common law. Historical evidence has long

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[1] Counsel for *amici* state that no counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel made any monetary contribution intended to fund the preparation or submission of this brief. Sup. Ct. R. 37.6. All parties have consented to the filing of this brief. Sup. Ct. R. 37.3(a).

[2] Section 1252(e) prohibits judicial review of expedited removal orders in habeas proceedings except to assess: (i) whether the petitioner (a) "is an alien" (b) subject to an expedited removal order; and/or (ii) "whether the petitioner . . . is an alien lawfully admitted for permanent residence [or was previously granted refugee or asylee status]." 8 U.S.C. § 1252(e). Respondent's claims are not encompassed by these narrow exceptions.

been considered by the Court as important in interpreting the Great Writ's availability and scope as guaranteed by the Suspension Clause and federal habeas statute. *See*, *e.g.*, *INS v. St. Cyr*, 533 U.S. 289, 301 (2001) ("[A]t the absolute minimum, the Suspension Clause protects the writ as it existed in 1789."); *see also Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 93-94 (1807) (Marshall, C.J.) ("[F]or the meaning of the term habeas corpus, resort may unquestionably be had to the common law").

In this case, common law history from England and the United States shows that the Ninth Circuit was correct to conclude that habeas corpus is available to Respondent, a noncitizen, to test the lawfulness of his expedited removal order and detention shortly after physically entering the United States. The writ "as it existed in 1789" was available in such circumstances and ensured searching review to prevent illegal restraints on liberty.

Disregarding this history, the government primarily contends that there is no evidence of the use of the writ to obtain anything other than "relief" from "detention as such," and Respondent's petition thus "falls well outside the historical core of habeas corpus" protected by the Suspension Clause. Pet'rs' Br. 18. This argument, however, rests on a fundamentally flawed reading of the historical record.

The judges who created the common law writ understood that its historic function was to ensure that those acting in the King's name did not abuse their power. Put differently, the writ concerned the actions of the detainer rather than the status of the detainee.

Consistent with this purpose, seventeenth and eighteenth century judges used the writ to review the actions of an evolving array of public and private actors who imposed various restraints on liberty. Indeed, *amici* know of no case before 1789 declining to review a petition on the ground that an alleged restraint on liberty was beyond the scope of habeas review. In light of this history, the request of an asylum seeker, such as Respondent, for review of an official order sending him to a country where he faces a credible fear of physical injury is well within the "core of habeas."

No other aspect of Respondent's petition or the expedited removal process calls into question this conclusion. For instance, while the government and its *amici* emphasize that Respondent has limited ties to the United States, Pet'rs' Br. 23-27; Brief for Criminal Justice Legal Foundation as *Amicus Curiae* ("CJLF Br.") 17, the historical record demonstrates that the availability of the writ did not hinge on the strength of a petitioner's connection to England. In fact, in the one case we know of in which a lawyer argued that habeas should be limited for foreigners, the argument was rejected. *See DuCastro's Case*, 92 Eng. Rep. 816 (1697); Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 Va. L. Rev. 575, 606 n. 76 (2008). Historic examples likewise refute the government's suggestion that Respondent's petition is outside the historic core of the common law writ because petitioner would be "free" if he agreed to return

to Sri Lanka or because the relief he seeks is "additional procedures" to determine his status. Pet'rs' Br. 30; *see infra* Section I.

The government also asserts that because permitting further judicial review of expedited removal orders would impede important policy objectives, this Court should find that the existing expedited removal process is an adequate habeas substitute even if it does not provide substantially the same review as habeas does. Pet'rs' Br. 46-48. Prior to 1789, however, the common law writ remained available, even when it would have been expedient to curtail it. Perhaps more importantly, the government's argument cannot be squared with the logic underlying the Suspension Clause itself. The Framers did not consider the possibility that the writ could be limited absent truly exigent circumstance. Instead, they debated only whether habeas could *ever* be suspended. None subscribed to the government's apparent position that, absent a formal suspension, judicial review of restraints on liberty can be curtailed for expediency.

## ARGUMENT

### I. THE COMMON LAW WRIT TESTED THE LEGALITY OF A WIDE RANGE OF RESTRAINTS ON LIBERTY

The government contends that the decision below is wrong because common-law judges *only* used the writ to grant "relief" from "detention as such." Pet'rs' Br. 18. That argument, however, misunderstands the relevant history.

To start, judges in eighteenth century England did not consider themselves constrained by existing precedent when reviewing habeas petitions; instead they acted consistent with what they viewed as the writ's core function—ensuring that officials acting in the King's name did not abuse their power. To that end, judges in both England and post-colonial America reviewed new restraints on liberty on habeas, and would have done so here as well. In any event, Respondent's claim falls well within the "core" of common-law habeas cases, which involved individuals with limited connections to the realm, detention for transfer beyond the realm, and relief other than release from detention.

### A. The Common Law Writ Was Defined By its Function: Ensuring That Officials Acting in the King's Name Did Not Abuse Their Power

The government's position that Respondent's petition must fall beyond the historical core of habeas corpus unless he can identify precisely analogous precedent is ahistorical. In eighteenth century practice, the authority of English judges to review habeas petitions was not constrained by past decisions.

Rather than "analogiz[ing] among cases" and "follow[ing] precedents," the judges who created the Great Writ understood that it should be used to ensure that officials responsible for discharging the crown's power did not abuse that authority. *See* Paul D. Halliday, HABEAS CORPUS: FROM ENGLAND TO EMPIRE 160 (2010) ("HABEAS CORPUS"); *id.* at 78 ("The broad need to do justice for the subject while protecting the honor of king and court provides the key to

habeas corpus . . . and all the prerogative writs."). "King's Bench issued the writ by reasoning not from precedents, but from the writ's central premise: that it exists to empower the justices to examine detention in all forms." *Id.* at 176. Thus, "[i]n any matter involving the liberty of the subject the action of the Crown or its ministers or officials [wa]s subject to the supervision and control of . . . judges on habeas corpus." 11 HALSBURY'S LAWS OF ENGLAND 25 (3d ed. 1955).

As Sir Edward Coke explained, King's Bench had:

> not only jurisdiction to correct errors in judicial proceeding[s], but other errors and misdemeanors extrajudicial tending to the breach of the peace, or oppression of the subjects, or raising of faction . . . or any other manner of misgovernment, so that no wrong or injury, either public or private, can be done, but that this shall be reformed or punished.

Sir Edward Coke, THE FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 71 (1644); *see also* HABEAS CORPUS 87 ("[T]he point of the prerogative writs" was to "ensur[e] that errors were corrected and 'justice should be done' . . . even where law had not previously provided the means to do so."); *Bourn's Case*, Cro. Jac. 543, 79 Eng. Rep. 465, 466 (K.B. 1619) (Chief Justice Montagu: "[T]o dispute [the writ] is not to dispute the jurisdiction, but the power of the king and his court, which is not to be disputed."); *Bourn's* Case, Palmer 55, 81 Eng. Rep. 996 (K.B. 1619) (Justice Dodderidge: "[T]his writ is not at the suit of any subject, but of the king, and [it] is a point of distributive justice to defend the persons of subjects from

wrong and restraint, and no liberty is exempt of the prerogative of the king.").[3]

### B. Judges Used The Writ to Ensure that New Restraints on Liberty Conformed to Law

Consistent with this jurisprudential mindset, English and American courts in the seventeenth and eighteenth centuries did not hesitate to deploy the Great Writ to address new threats to law and liberty. HABEAS CORPUS 160 ("The court's work . . . covered novelties as soon as they appeared, restraining new practices or jurisdictions that posed greater threats to law and liberty than did older ones."); *see also* Eric M. Freedman, MAKING HABEAS WORK 128 n.6 (2018) ("From the late seventeenth century onward, King's Bench in England combined the existing forms of the writ in creative ways to deal with issues raised by private restraints in [various] contexts . . . . As the case[] of the alleged slave Peter Johnson . . . illustrate[s], colonial courts followed the same practice. So did early national ones."). Indeed, *amici* are unaware of

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[3] Subjecthood in the seventeenth and eighteenth centuries did not correspond to present-day American citizenship: mere physical presence within territory under *de facto* English control could subject a person to the King's authority. SIR MATTHEW HALE'S THE PREROGATIVE OF THE KING 56 (The Publications of the Selden Society, vol. 92) (Yale, D.E.C., ed., London: Bernard Quaritch, 1975); *see also, e.g*, *Law Report*, Times (London), July 2, 1791 at 3 ("[T]he writ of *Habeas Corpus* was given for the liberty of the subject . . . ."); 1 William Blackstone, 1 COMMENTARIES ON THE LAWS OF ENGLAND 358 (1765) (discussing Coke and Hale for proposition that "[l]ocal allegiance is such as is due from an alien, or stranger born, for so long time as he continues within the king's dominion and protection").

any case before 1789 holding that courts lacked jurisdiction to assess the legality of a category of restraint on individual liberty.

1. Between 1688 and 1815, for instance, the Royal Navy impressed, that is, forcibly enlisted, approximately 250,000 sailors into naval service. Denver Brunsman, THE EVIL NECESSITY: BRITISH NAVAL IMPRESSMENT IN THE EIGHTEENTH-CENTURY ATLANTIC WORLD 6 (2013). Impressed sailors routinely employed the common law writ to challenge the legality of their compelled service, becoming by the late eighteenth century the largest constituency petitioning for the writ, often filing their applications for the writ while on shore leave. HABEAS CORPUS 32-33, 115; *see also* Brunsman, *supra*, at 194.

English judges also used habeas to review the detention of enslaved people. In a widely celebrated case, *Somerset v. Stewart*, 20 Howell's State Trials 1, 79-82 (K.B. 1772), an African slave purchased in Virginia and detained on English soil pending voyage to Jamaica was discharged on habeas after issuance of the writ. For present purposes, the most important aspect of *Somerset*'s case was "the fact of the writ's issuance." HABEAS CORPUS 176. "King's Bench issued the writ by reasoning not from precedents, but from the writ's central premise: that it exists to empower the justices to examine detention in all forms." *Id.* While the specific circumstances of *Somerset* were unusual, the way the writ worked was not—it "comported with the ways in which habeas decisions had been made and explained for centuries." *Id.* at 174; *see* James Oldham, *New Light on Mansfield and Slavery*, 27 J. British Studies 45, 46 (1988);

*see also R. v. Stapylton* (K.B. 1771) (habeas used to retrieve a slave before he set sail for Jamaica); James Oldham, THE MANSFIELD MANUSCRIPTS AND THE GROWTH OF ENGLISH LAW IN THE EIGHTEENTH CENTURY, 1225-28, 1242-43 (1992); *Case of the Hottentot Venus* 104 Eng. Rep. 344, 344-45 (K.B. 1810) (court examined whether a "native of South Africa," Saartje Baartman, was confined against her will).

Moreover, courts used habeas to review the actions of a wide range of different authorities. For example, the Great Writ was used to review actions by inferior courts of record, as well as commissions and tribunals which affected the liberty of the subject. Thus, actions by the London Court of Sessions, bankruptcy commissioners, the College of Physicians in malpractice jurisdiction over doctors, the decisions of justices of the peace, and of the Sewers Commission sitting as a court of record were all subject to habeas review.[4] Throughout the English Civil War, Parliament also created a number of new authorities—from a national

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[4] *See Bushell's Cas*e, 124 Eng. Rep. 1006, 1016 (C.P. 1670) (habeas corpus granted to discharge a juror who had been committed for contempt by London Court of Sessions for voting to acquit); *Hollingshead's Case*, 91 Eng. Rep. 307 (K.B. 1702) (prisoner discharged; bankruptcy commission failed to adhere to statute); *Dr. Groenvelt's Case*, 91 Eng. Rep. 1038 (K.B. 1702) (holding that statute empowering College of Physicians to fine did not abrogate royal pardon power); *Gardener's Case*, Cro. Eliz. 821, 78 Eng. Rep. 1438 (K.B. 1600) (review of question of whether justice of the peace properly interpreted firearms statute); *Hetley v. Boyer and Mildmay*, 79 Eng. Rep. 287 (K.B. 1613) (discharging individual imprisoned after challenging taxations system used by the Commission to finance project; holding such taxation system invalid).

Presbyterian church to a "bewildering array of committees created to manage the war by building militias, procuring supplies, and collecting funds." HABEAS CORPUS 163. Habeas corpus was readily available to test the legality of their actions as well. *Id.*

Finally, English judges extended habeas to resolve domestic disputes. In *R. v. Delaval*, 97 Eng. Rep. 913 (K.B. 1763), a habeas writ supported by affidavits from parents prompted judicial inquiry into the status of their daughter, who had been apprenticed at age fifteen to a music master before being handed-over to the respondent to serve as his mistress. Lord Mansfield approved the use of the writ in these circumstances and mentioned three other cases "of writs of habeas corpus directed to private persons, 'To bring up infants.'" *Id.* at 914.

To give another example: In *R. v. Turlington*, 97 Eng. Rep. 741 (K.B. 1761), the writ was issued to the keeper of a private "mad-house" to bring into court a woman who had been placed in the asylum by her husband. *See also R. v. Lee*, 83 Eng. Rep. 482 (K.B. 1676) (reviewing husband's treatment of wife, but refusing relief); *Lister's Case*, 88 Eng. Rep. 17, 17 (K.B. 1721) (ordering release of wife whose husband "[took] her violently into his custody"); *Law Report*, Times (London), Jan. 30, 1786, at 3 (Lord Mansfield observing that a father was entitled to habeas corpus to recover his children when improperly withheld).

2. Like their English counterparts, early American courts employed the writ to review a broad range of restraints on liberty. For instance, in 1748, Peter Johnson of Portsmouth, New Hampshire sought a writ of habeas corpus on the ground that he was

wrongfully "imprisoned for refusing to serve as a slave." E. Freedman, MAKING HABEAS WORK, *supra*, at 14 (citing Provincial Case File No. 22344, New Hampshire State Archives[5]). Johnson was imprisoned when his alleged master complained to a local Justice of the Peace that Johnson "refuseth to labour and is stubborn and rebellious." *Id.* at 124 n.11. The Justice of the Peace subsequently issued an order directing the sheriff to confine Johnson "until [he] shall behave himself." *Id.* In response to Johnson's petition, the Superior Court ordered his alleged owner to appear, and the issue of Johnson's status was put to a jury. *Id.* at 14. Ultimately, Johnson was freed, and the court ordered him released from both the physical custody of the sheriff and the legal custody of his alleged owner. *See id.* at 124 n.13.

In another example, George Bigby applied for habeas on behalf of his eighteen-year-old son Zedebee, who had enlisted in the army without his consent. *United States v. Anderson*, 24 F. Cas. 813, 813 (C.C.D. Tenn. 1812). The court rejected the army's argument that judges could not interfere with war department enlistment procedures and held that enlistment of an underage soldier absent parental consent was a form of illegal confinement. *Id.* at 14. In support of its holding, the court cited its "power to issue writs of habeas corpus in all cases where citizens are illegally confined" and explained that "Congress could not pass a law vesting the war department with a power which would in effect suspend the writ of habeas corpus." *Id.*

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[5] https://tinyurl.com/t52p7fr.

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Together, these cases demonstrate that the writ of habeas corpus was historically available to examine restraints on liberty in a wide variety of forms. No restraints, even novel ones, were beyond the oversight of English and early American judges.

### C. The Common Law Writ Would Have Extended to Persons Such as Respondent

In light of the function of the Great Writ prior to 1789 and the principles that guided its application, it is clear that habeas would have reached the restraint on liberty at issue in this case. To the extent that analogies to historical cases are relevant, they show that Respondent's claims and the relief he seeks lie within the bounds of the common law writ. The writ applied even when, as here, a petitioner was foreign and had limited ties to the Crown or was detained for transfer beyond the realm. The historical record also demonstrates that the relief available on habeas was not limited to release from detention.

#### 1. The Common Law Writ Extended to Foreigners With Limited Ties to the Crown

Respondent's challenge to his removal order is not beyond the core of the historic common law writ merely because he has limited ties to the United States. As this Court has recognized, the purpose of the common law writ was to vindicate the rights of "the King and his courts" rather than individuals. *Boumediene v. Bush*, 553 U.S. 723, 740 (2008). In other words, the historical core of habeas corpus was chiefly concerned with the status of the detainer or

jailor, rather than the status of the detainee. HABEAS CORPUS 41-45; 184-87. Given its purpose, it is unsurprising that the common law of England prior to 1789 did not condition the availability of the writ on whether a petitioner was a subject or the length of time he had been in the realm. *Id.* at 207-08. Indeed, because the status of the detainee was generally irrelevant, "in the many cases of foreigners using habeas corpus" prior to 1789, "the issue of their foreignness [was] almost never discussed, much less used to bar review of detention." Halliday & White, *supra*, at 604-05.

In fact, status as a foreign national was often the *very reason* for which a petitioner sought the writ in impressment cases. In one example from 1769, the Admiralty solicitor described dispatching agents to King's Bench Chief Justice Mansfield's chambers to discover the grounds upon which a writ of habeas corpus had been issued for the production of two impressed sailors. Having ascertained from the affidavits that the men were claiming to be Swedish nationals, and thus exempt from service in the Royal Navy, the solicitor recommended that they be discharged without contesting the application. K. Costello, *Habeas Corpus and Military and Naval Impressment, 1756-1816*, 29 J. Legal Hist. 215, 239 n. 145 (2008) (citing S. Seddon to J. Clevland, 14 Dec. 1759, PRO ADM 1/3677).[6]

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[6] *See also Hans Anderson, et al.,* The National Archives, London (Kew) [PRO] ADM1/3680, folio 478 (K.B. 1778) (ordering two Danes impressed into the Royal Navy released on habeas corpus); *Jacob Lilliquest, et al.'s Case,* PRO, ADM1/3678, folios

Although one *amicus* brief contends that "aliens with weak[] connections were turned away by the courts," CJLF Br. 11 (citing *R. v. Schiever*, 97 Eng. Rep. 551 (K.B. 1759) and *The Case of Three Spanish Sailors,* 96 Eng. Rep. 775 (C.P. 1779)), nothing in the case reports it cites supports that assertion.

In *Schiever*, a Swedish national challenged his detention as a prisoner of war after he was captured aboard a French privateer during a war between England and France. 97 Eng. Rep. at 551. Significantly, in an affidavit supporting his petition, Schiever conceded that he was a prisoner of war. King's Bench denied the writ on that basis, because, at that time, prisoners of war could be released only through prisoner exchanges. HABEAS CORPUS 169. The case report says nothing about the petitioner's "connections" (or lack of connection) to England.

Similarly, in *The Case of Three Spanish Sailors*, three sailors were seized from a Spanish privateer and induced to work on a merchant vessel based on a promise of wages and release upon arrival in England. Once in England, however, the ship's captain turned the sailors over to an English warship as prisoners of war. On habeas, the court found that the captain had engaged in misconduct but nevertheless denied the petitioners' relief based on a concession in their own affidavits that they were "prisoners of war." 96 Eng. Rep. at 776.

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123, 137 (K.B. 1759) (holding an English ship captain in contempt for ignoring previous court order to release a foreigner impressed upon his ship); *Booy Booysen and John Jurgenson Brandt*, PRO, ADM1/3677, folio 262 (K.B. 1758) (granting habeas release to two Danes impressed on the Princess Royal).

CJLF's argument that "the petitioner[s]" in these cases were "not . . . entitled to habeas corpus is at best ambiguous and at worst misleading." E. Freedman, MAKING HABEAS WORK, *supra*, at 10. Though denied habeas relief on the merits, the petitioners in these cases obtained judicial review of the facts and law underlying their detention despite their limited connection to the Crown.[7] In fact, we are aware of only one report in which counsel explicitly argued that foreigners might not have the same access to habeas corpus as other subjects—and King's Bench rejected that view. *DuCastro's Case*, 92 Eng. Rep. 816 (1697); Halliday & White, *supra*, at 606 n. 76.

### 2. The Writ Applied to Foreign Nationals Detained For Transfer

We are aware of no historical cases that support the government's view that the common law writ would not have extended to aliens detained for deportation. To the extent that the historical record directly addresses this anachronistic question, it confirms that habeas would have reached the actions of

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[7] CJLF also points to *Somerset* and *In Case of the Hottentot Venus* as examples of aliens who were "part of the population" and therefore entitled to greater privileges. *See* CJLF Br. 10 (citing *Yamataya v. Fisher*, 189 U. S. 86 (1903)). The case reports, however, contain absolutely no evidence that the status of the detained person was a prelude to the use of habeas corpus in either of these cases. *See Somerset*, 20 Howell's State Trials at 79-82; *Hottentot Venus*, 104 Eng. Rep. at 344-45; Oldham, *New Light on Mansfield and Slavery*, *supra*, at 56-58 (examining multiple reports of the *Somerset* case). CJLF also contends that King's Bench "regarded [Baartman] as a resident." CJLF Br. 10. Again, the report shows nothing of the kind. *See Hottentot Venus,* 104 Eng. Rep. at 344-45.

government officials responsible for this restraint on liberty. *See, e.g., Somerset*, 20 Howell's State Trials at 79 (considering whether "the owner had a right to detain the slave, *for the sending of him over to be sold in Jamaica*") (emphasis added); *Murray's Case*, TNA ("The National Archives, London"), KB 145/17/29 (4 July 1677) (writ issued for Murray, a Scot, after he was imprisoned in order to be sent to Scotland and tried there for several crimes). In addition to the general principles discussed above, two examples are illustrative.

1. In 1792 "the flow of French emigrants" fleeing the French Revolution "reached its climax" and precipitated a conversation in England regarding "what measures could be taken to control the influx of foreigners." *See* J.R. Dinwiddy, *The Use of the Crown's Power of Deportation Under the Aliens Acts, 1793-1826,* 41 Hist. Res. 193, 193 (1968). Ultimately, Parliament responded by enacting the Aliens Act of 1793, which "imposed new burdens on aliens." HABEAS CORPUS 255. Among its many innovations, the Aliens Act suspended habeas for those who violated its provisions, in some cases for deportation.[8]

This aspect of the Act was controversial. Proponents maintained that suspension of the writ was "necessary" for "the safety of the state." *Id.* at 256. Others condemned the Act precisely because it would interfere with habeas. *Id.* Leaders on both side of

[8] To suspend habeas, the Act uses the same language that appears in other suspension statutes from this period: Rather than expressly suspending the writ, the Act expands specific officials' authority to detain "without bail or mainprise." HABEAS CORPUS 248, 259.

this debate, however, appear to have shared the common assumption that *absent suspension*, the writ would have been available to foreign nationals detained pursuant to its provisions, even if they ultimately would have been deported.

2. In another instructive episode, English forces sought to reduce resistance to their control in Nova Scotia by relocating upwards of 5,000 Acadians to other English colonies. Governor James Glen of South Carolina considered expelling Acadians who arrived there, but conferred with the colony's Attorney General and Chief Justice who expressed concern that should he execute this unlawful plan he would be "subject . . . to all the Pains & Penalties in the Habeas corpus Act." *See* James Oldham & Michael Wishnie, *The Historical Scope of Habeas Corpus and INS v. St. Cyr*, 16 Geo. Immigr. L.J. 485, 498 (2002).

### 3. Relief Was Not Limited to Release from Detention

Finally, the historical record reveals that relief under the common law writ was not limited to release from detention; rather, the writ empowered judges to provide equitable relief and do justice, even in the absence of existing rules or remedies. Indeed, the text of the common law writ did not instruct the recipient to produce a "body" so that he could be released but instead so that he could "undergo and receive whatever [the] court should then and there happen to order concerning him in this behalf." HABEAS CORPUS 39. This language reflected the historic understanding that the relief available on habeas was "equitable in character" if not in name. HABEAS CORPUS 87. Thus, though the writ "grew up in the chief common law

court," judges understood it could be used to "do justice even in the absence of previously existing rules or remedies." *Id.* Consistent with the writ's equitable nature, common law courts displayed creativity in crafting remedies appropriate to the facts of each case.

John Harper, who had a "great reputation" as a large man who danced well was put in Westminster's house of corrections in 1733 as "a common player of interludes." HABEAS CORPUS 116-17. The return did not make clear whether the justice of the peace who jailed Harper had followed the statute that defined actors as "vagabonds." *Id.* at 117. The court therefore discharged Harper on condition that he return for further debate regarding whether he was a "vagabond" under the act. *Id.* at 117, n. 92. Other examples of court orders that did more than direct the release of a petitioner abound. *See, e.g., R. v. Lee*, 83 Eng. Rep. 482 (K.B. 1676) (refusing to discharge wife who filed habeas petition claiming mistreatment by her husband but offering to "bind him with sureties" to not mistreat her); HABEAS CORPUS 117 n. 95 (Henry Brearley, a local leader, was released by Queen's Bench in 1600 on the condition that he apologize); HABEAS CORPUS 119 n.113 (Richard Alborough used habeas corpus to escape hanging but only on condition of transportation); *Edwards's Case*, TNA, KB29/251/67d and KB21/4/13 (K.B. 1609) (King's Bench ordered bail of Hugh Edwards, on condition that he treat his wife well and support her).

## II. HABEAS REVIEW ENCOMPASSED THE APPLICATION OF LAW TO FACTS

The government also suggests that the relief Respondent seeks falls outside the historical core of habeas because he seeks review of more than purely legal questions. Pet'rs' Br. 45. That is incorrect. The historical record refutes the idea that only pure legal questions—or only the narrow questions over which the statute at issue here permits review—would be reviewable.

For instance, in *Thomas Miller's Case*, 96 Eng. Rep. 518, 2 Black. W. 881 (C.P. 1773), a prisoner, detained pursuant to a law that required him to answer the questions of a bankruptcy commissioner, argued that he should be discharged because he had no memory of the events at issue and was unable to answer the commissioner's questions. The Court of Common Pleas did not limit its analysis to the legal rule at issue, however, but applied the law to the facts of that case and discharged the prisoner, reasoning that where a prisoner "really has no recollection, tis impossible to make any other answer, and we must not compel men to impossibilities." *Id.* at 520.

Similarly, in many impressment cases, judges acting on habeas made decisions based on sworn affidavits, considering the specific factual contours of the cases before them. For example, in *Good's Case*, 96 Eng. Rep. 137, 1 Black. W. 251 (K.B. 1760), King's Bench reviewed an affidavit and held that the relevant law was inapplicable to a ship-carpenter who "never used to go to sea." In the case of John Millachip, a liveryman in the city of London, Lord Mansfield remarked that he "often sent a message to the

Admiralty where a person has appeared to me from the Affidavits to be entitled to his discharge on the writ" and once, upon review of an affidavit, "thought there was such a possible probable cause" that he granted the writ "to put the question in a way of litigation." James Oldham, *Some Effects of War on the Law in Late Eighteenth- and Early Nineteenth Century England*, *in* CHALLENGES TO AUTHORITY AND THE RECOGNITION OF RIGHTS: FROM MAGNA CARTA TO MODERNITY 142, 162 (Catharine MacMillan & Charlotte Smith, eds. 2018); *see also id.* (Mansfield observing that "it would be extremely hard if there were no summary way for the party to obtain his discharge.");[9] *Law Report*, Times (London), May 26, 1808, at 4 (in case of Nathaniel Young, citing Millachip case and reviewing affidavit to determine whether to grant writ).

Another example is the grant of habeas relief to John Golding in 1692. Detained from a vessel flying French colors as a prisoner of war, the native of Dublin was released based on the court's determination that the legal term "prisoner of war" did not apply to him as an English subject. *See* HABEAS CORPUS 170.

Courts also looked behind affidavits in habeas judgments. *See, e.g., Case of the Hottentot Venu*s, 104

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[9] These quoted remarks from Lord Mansfield in *Rex v. Kirke* were transcribed from a manuscript found in notebook 6A, Crown Cases 1794–1797, compiled by and for Sir Soulden Lawrence, puisne justice of the Court of King's Bench, MS 20, Middle Temple Library, London, pp. 39-48. *Rex v. Kirke* was also reported in the Morning Chronicle on 18 June 1777. *See* Oldham, *Some Effects of War on the Law in Late Eighteenth- and Early Nineteenth Century England*, *supra*, at 169 n.101.

Eng. Rep. at 344, discussed *supra* Sections I.B, I.C.1; *R. v. Turlington*, 97 Eng. Rep. 741 (K.B. 1761) (ordering inquiry into the sanity of the petitioner committed to a "private madhouse" and discharging her based on finding her "free from the least appearance of insanity").

Following independence and adoption of the Constitution, federal courts in the United States embraced the English tradition of reviewing the application of law to facts on habeas. For instance, Chief Justice John Marshall, riding circuit, ordered the release of one prisoner detained under a statute concerning enforcement of debts to the Treasury. Marshall examined the facts of that case and held that the prisoner was "not one of those persons on whom the law was designed to operate" because he was serving only in an acting capacity as a Navy ship's purser. *Ex Parte Randolph*, 20 F. Cas. 242, 254-55 (C.C. Va. 1833) (No. 11,558).

The case of *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807) also itself features the application of law to facts. There, Marshall analyzed whether there was sufficient evidence from the affidavits to justify the charge of treason, looking into the "particular words" used by one petitioner and what "has been said" by the other. *Id.* at 135. Finding no evidence to match the elements for treason, Marshall granted the writ. *Id.* at 136.

These and many other historical examples confirm that at common law in England and in post-colonial America, courts regularly and routinely applied law to facts when reviewing habeas petitions.

## III. THE COMMON LAW WRIT REMAINED AVAILABLE IN TIMES OF CRISIS

The government contends that the expedited-removal process is an adequate substitute for habeas in light of the "current crisis at the southwest border." Pet'rs' Br. 48. But that position is inconsistent with both the history of the writ in England and the Framers' understandings. It was well recognized in England and in the Founding era that the writ remained available even when it would have been more convenient or expedient to dispense with it. The policy concerns the government identifies cannot, consistent with history, justify restrictions on the availability of the writ in the expedited-removal statute.

### A. The Common Law Writ Was Available Even When Judicial Review Might Interfere with Important Policy Objectives

The government's position finds no support in the historical use of the writ. At common law, unless Parliament expressly suspended the writ, it remained available, even in times of crisis or when judicial review might undermine the Crown's policy objectives.

For instance, following the "Glorious Revolution" of 1688-89, William III, who with his wife and consort Mary, James II's daughter, had replaced his father-in-law on the English throne, faced crises on two fronts as he fought for his throne in Ireland and attempted to forestall an imminent invasion by France. HABEAS CORPUS 134-35. Nevertheless, except when Parliament suspended the writ by statute, habeas remained available. Indeed, between the start of Michaelmas term 1689 and the end of 1690, King's Bench

reviewed the fate of 251 prisoners: more than in any other period of equal length. *Id.* Most (147) had been jailed for wrongs against the state such as treason, seditious libel, or treasonable practices. *Id*. Despite the severity of their charges, King's Bench bailed or discharged 80 percent of those prisoners. *Id.*[10]

Similarly, during the Seven Years' War between France and England, Admiralty solicitor Samuel Seddon warned Lord Mansfield that allowing impressed sailors to seek habeas relief would create serious difficulties in manning the king's ships. HABEAS CORPUS 115 (discussing letter from Seddon). That risk, however, did not justify the writ's restriction. The writ remained available, and in the last four decades of the eighteenth century, sailors were involved in more than a thousand habeas cases. HABEAS CORPUS 84-85; *see also* Brunsman, *supra*, at 192-93.[11]

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[10] *Darnel's Case*, 3 How. St. Tr. 1 (K.B. 1627), is a further example of the writ's vitality even in times of crisis. There, five knights were imprisoned for failing to pay loans Charles I imposed to raise funds for the Thirty Years' War. Charles "regarded the situation he and his allies faced as an emergency," and yet King's Bench still permitted the knights to use writs of habeas corpus. Mark Kishlansky, *Tyranny Denied: Charles I, Attorney General Heath, and the Five Knights' Case*, 42 Hist. J. 53, 59-60 (1999). When King's Bench delayed judgment on the return, it provoked widespread outrage, leading Charles to release the knights and Parliament to enact the Petition of Right, which specifically forbade the practice of detaining prisoners by his Majesty's special command without a specific cause of legal detention. *See* Eric M. Freedman, *Hamdi and the Case of the Five Knights*, Legal Times (Feb. 3, 2003).

[11] The sheer number of habeas petitions from impressed sailors held all over the Empire led an officer for the Impress Service of Ireland, Archibald Hamilton, to compile the case law

In another example, Lord Ellenborough sanctioned a "fast-sailing cutter to bring back" a man who sought a writ to challenge his impressment aboard a warship that had already sailed to Cadiz, Spain "on service of importance." *Law Report,* Times (London), Jan. 26, 1811 at 3. The Times explained that Lord Ellenborough was hesitant to "impede his Majesty's service," but he nonetheless issued the writ and endorsed dispatching the ship to track down the petitioner because the Lordship was "very strongly obnoxious to sending abroad impressed men pending an application by them to the Court . . . ." *Id*

The numerous habeas cases involving prisoners of war further demonstrate that the Justices of King's Bench did not believe that the Crown's policy concerns—even those implicating national security—curtailed their authority.

For example, in 1690, Abraham Fuller sought the writ when he was detained after landing in Chester, the usual point of entry from Ireland, where many had taken up arms against the King. The writ returned with no charge, stating only that Fuller was being held "as a prisoner of war." King's Bench discharged Fuller, even though (and perhaps because) the warrant for his arrest alleged "treasonable practices," which was inconsistent with the "prisoner of war" label in the return. HABEAS CORPUS 169-71 (citing *Fuller's Case*, TNA, KB11/14 (K.B. 23 Jan. 1690);

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into a "Treatise on Impressing" in 1806. Reproduced in 8 Irish Jurist (N.S.) 117 (1973). One common ground identified in the Treatise for challenging an impressment was that a sailor was not the "*proper subject for that practice*." *Id*. at 131 (emphasis in the original).

*see also id.* (citing *Cumberford's Case*, TNA, KB16/1/6 (K.B. 23 Jan. 1697) (discussing case of Garret Cumberford, where no charge on return resulted in bailment)).

The same year, Peter Depremont and three other French merchants were trapped in England when war began with the French. They were captured and sought writs of habeas corpus. The return to their writs explained that Depremont and the other merchants were Frenchmen, to be held "*durante bello*," and that a dozen English merchants were being held in similar circumstances in France. Based on this information, the petitioners were remanded to await exchange for their English counterparts. While King's Bench disagreed with the merits of Depremont's petition, the court did not refrain from exercising jurisdiction to confirm his status—despite the ongoing military conflict. HABEAS CORPUS 171 (citing *Depremont's Case*, TNA, KB11/14 (K.B. 7 Feb. 1690)).

The government's suggestion that habeas corpus can be restricted based solely on the executive's policy concerns, even in times of crisis, is inconsistent with the writ's common-law history. As Blackstone noted, "the parliament *only* … can authorize the crown, by suspending the habeas corpus act for a short and limited time, to imprison suspected persons without giving any reason for so doing." 1 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 136 (21st ed. 1844) (emphasis added). Absent a suspension, the writ known to the Founders was far more durable than the government contends.

### B. The Framers Understood that Habeas Would Remain Available Regardless of Expediency

The government's position is similarly incompatible with the Framers' understanding of the writ and the logic underlying the Suspension Clause. In drafting the Suspension Clause, the Framers made clear that only the most exigent circumstances—not convenience or expediency—could justify formal suspension. And importantly, there is no historical evidence suggesting that the Framers envisioned *any* restrictions on the availability of the writ—let alone ones based on convenience and expediency—*absent* such a formal suspension

In drafting the Suspension Clause, the Framers rejected the idea of a writ that could be suspended based only on policy concerns related to expediency or convenience. During the Revolutionary War, Parliament had offered one such convenience-based rationale in support of the Suspension Act of 1777, which formally suspended the writ as applied to Americans. Until that point, formal suspensions had been justified principally by "necessity"—a rationale that "operated when, in Parliament's estimation, the subjects' liberties could only be protected by temporary, carefully contained limits on a writ that had come to be associated with those liberties." Halliday & White, *supra*, at 624. The 1777 Act "marked a significant retreat" from that traditional principle, justifying the suspension on the ground that "it may be inconvenient in many such cases [of accused American traitors] to proceed forthwith to the trial of such

criminals, and at the same time of evil example to suffer them to go at large." *Id.* at 645 (alteration in original) (quoting 1777 Act, 17 Geo. 3, c. 9 (Feb. 20, 1777 to Jan. 1, 1778)).

The Framers never even considered adopting the notion, embodied in the Suspension Act of 1777, that the writ could be suspended based solely on concerns for convenience or expediency. Instead, to the extent there was any debate at the Constitutional Convention concerning the Suspension Clause, it was over whether the writ could *ever* be suspended.[12] Of course, the Framers ultimately agreed that the writ could be suspended only "when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. art. I, § 9, cl. 2. We are aware of, and the government has cited, no historical evidence suggesting that the Framers envisioned *any* restrictions on the availability of the writ—let alone ones based on convenience or expediency—in the absence of a formal suspension.

That same understanding is reflected in early judicial opinions. For instance, in *Lockington's Case*,

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[12] A sizable minority of the Framers believed that the writ should never be suspended. Eric M. Freedman, HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY 12-13 (2001); *see also* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed. rev. ed. 1966) 438 (John Rutledge of South Carolina argued that the writ was inviolable and could never be suspended); Luther Martin, Genuine Information VIII (Jan. 22, 1788), *reprinted in* 15 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 434 (John P. Kaminski & Gaspare J. Saldino eds., 1984) (Luther Martin worried that if the federal government could suspend the writ, it might become an "engine of oppression" during times of supposed "act[s] of rebellion.").

Bright. (N.P.) 269 (Pa. 1813), the petitioner, an alien who had resided in the United States prior to the War of 1812, was taken into custody after the war began. When he sought a writ of habeas corpus from the Pennsylvania Supreme Court, the district attorney challenged the judges' authority to issue the writ.[13] The judges rejected that challenge, explaining that to destroy their jurisdiction in cases of habeas corpus, "it is necessary to show, not that the United States have given them jurisdiction; but that congress possess, and have exercised, the power of taking away that jurisdiction"—*i.e.*, that Congress formally suspended the writ. *Id.* at 273; *see also Ex parte D'Olivera*, 7 F. Cas. 853, 854 (C. C. D. Mass. 1813) (Story, J., on circuit) (granting writ for Portuguese sailors arrested as alleged deserters during War of 1812, finding that their confinement was not authorized by federal statute because the sailors were engaged by a foreign vessel).

In short, the history of the Suspension Clause and of early post-colonial habeas practice demonstrates a strong continuity with the tradition established at common law in England: that, contrary to the government's position here, the availability of habeas could not be restricted based solely on expedience, convenience, or other policy concerns of the executive.

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[13] Although the petition was brought under state law, it nonetheless demonstrates "the court's general understanding of *habeas corpus* law." *See* Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 Colum. L. Rev. 961, 993 (1998).

## CONCLUSION

The Court should uphold the Ninth Circuit's decision.

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†This brief does not purport to state the view of Yale Law School, if any.

# APPENDIX

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