Nos. 06-1195, 06-1196

IN THE
Supreme Court of the United States

LAKHDAR BOUMEDIENE, ET AL., *Petitioners,*
v.
GEORGE W. BUSH, ET AL., *Respondents.*

KHALED A.F. AL ODAH, ET AL., *Petitioners,*
v.
UNITED STATES OF AMERICA, ET AL., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia

BRIEF *AMICUS CURIAE* OF THE FEDERAL PUBLIC DEFENDER FOR THE SOUTHERN DISTRICT OF FLORIDA IN SUPPORT OF PETITIONERS

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STATEMENT OF AMICUS CURIAE[1]

This case addresses whether Congress' limitation on federal habeas corpus jurisdiction for "enemy combatant" detainees at Guantanamo Bay violates the Suspension Clause of the United States Constitution. The Federal Public Defender for the Southern District of Florida has represented many habeas petitioners by appointment of the federal courts, including two petitioners recently before this Court in *Gonzalez v. Florida*, 545 U.S. 524 (2005), and *Dodd v. United States*, 545 U.S. 523 (2005). *Amicus* has also represented detainees at Guantanamo Bay, one of whom remains detained there.

This brief attempts to supplement with an alternative analytical framework the arguments developed by the parties regarding the scope of the Constitution's protection of the writ.

SUMMARY OF ARGUMENT

The D.C. Circuit resolved whether Section 7(a) of the Military Commissions Act of 2006 violates the Suspension Clause by focusing its analysis exclusively on habeas protections *as of 1789*. In their briefs to this Court,

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[1] Pursuant to Rule 37.6, *amicus curiae* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus curiae* and their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been lodged with the Clerk.

Petitioners and other *amici* conclusively demonstrate that the D.C. Circuit misapprehended the pre-1789 caselaw. But the D.C. Circuit erred for a separate reason: its exclusive focus on pre-1789 caselaw was incomplete, because pre-1789 law only encompasses the writ's constitutional protection at its "absolute minimum." The evolving body of habeas principles *after* 1789 further delineates the scope of the writ's constitutional protection, and further confirms that federal habeas jurisdiction over Petitioners' claims is constitutionally protected.

The Suspension Clause does not merely protect the writ "known to the Framers." The Framers must have been aware that the writ had evolved for centuries before, and would not have conceived of a writ frozen at a particular point in time, incapable of evolving to meet new circumstances. Further, by providing for suspension of the writ only in times of extreme crisis, *e.g.*, "Rebellion," or "Invasion," the Suspension Clause plainly implies that the writ must not be suspended in unexceptional times, and must, in fact, function in the creation of the "more perfect Union" contemplated by the Constitution.

Suspension Clause protection extends to the historical core of the writ, as it has evolved since 1789. Because this Court's decision in *Rasul v. Bush* held that habeas jurisdiction extends to persons identically-situated to Petitioners, the Suspension Clause inquiry for the instant case turns on a simple inquiry: does *Rasul* fall within the compass of the writ's evolving historical core? It does.

Rasul expressly grounded its reasoning in the historic core purpose of habeas corpus. The opinion correctly noted that, by challenging Executive detention, the petitioners invoked habeas at its "historical core," in a context where habeas protections were at their "strongest." The detainees, moreover, challenged "military custody"; *Rasul* correctly noted that the habeas remedy has long been invoked to challenge restraints in the context of military affairs. The *Rasul* petitioners were aliens; as *Rasul* noted, the writ has been available to aliens from the early days of the Republic. The *Rasul* petitioners were detained overseas; again, *Rasul* correctly observed that the writ has long reached beyond this Nation's territorial boundaries. Indeed, the claim that the territorial boundaries of the United States might limit the writ's application runs counter to the very purpose of the Suspension Clause, which is to achieve the full realization of the Constitution's guarantees of liberty – a goal that countenances no artificial territorial limits.

Some have argued that the constitutional protections of the writ cannot extend beyond 1789 developments, because no limiting principle would prevent the protections from "ratcheting up" automatically, and without limits, each time Congress amended the writ to apply in new circumstances. But the writ as it was first written by Congress in 1789 was extremely flexible, and susceptible to use in a wide variety of contexts. It is this original writ that is at stake today.

In fact, because the writ's evolution since 1789 has largely resulted not from Congress' amendment of laws,

but from judicial interpretation of the laws to meet new circumstances, the Suspension Clause inquiry turns on whether *a court's* application of the writ in a new context is tethered to the historical core of habeas corpus, and is therefore constitutionally-protected. Courts are accustomed to this type of inquiry, and can discern whether the existence of habeas jurisdiction in new circumstances falls within the compass of the evolution of habeas principles.

ARGUMENT

I. A Complete Suspension Clause Analysis Focuses On More Than "Absolute Minimum" Protections.

This Court has stated:

> [R]egardless of whether the protection of the Suspension Clause encompasses all cases encompassed by the 1867 Amendment extending the protection of the writ to state prisoners, or by subsequent legal developments, *at the absolute minimum*, the Suspension Clause protects the writ 'as it existed in 1789.'

I.N.S. v. St. Cyr, 533 U.S. 289, 300-01 (2001) (emphasis added; citations omitted) (quoting *Felker v. Turpin*, 518 U.S. 651, 663-64 (1996)). This statement that *pre*-1789 law reflected the *absolute minimum* of Suspension Clause protections suggested that *post*-1789 law delineated protections beyond this bare minimum. *See* Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 Harv. L. Rev. 2029, 2063 (2007) ("*St. Cyr*'s statement that the Suspension Clause protects 'at the absolute minimum' the scope of habeas corpus in 1789 leaves open the possibility that the clause today guarantees jurisdiction over an expanded set of claims based on expanded understandings of substantive constitutional rights.").

Indeed, in *Felker*, the precedent cited in *St. Cyr*, this Court "assume[d] . . . that the Suspension Clause refers to the writ *as it exists today*, rather than as it existed in 1789." 518 U.S. at 663-64 (emphasis added) (citing *Swain v. Pressley*, 430 U.S. 372, 384 (1977) (Burger, C.J., concurring)).

Despite *St. Cyr* and *Felker*, the D.C. Circuit resolved whether Section 7(a) of the Military Commissions Act of 2006 violates the Suspension Clause by focusing its analysis exclusively on habeas protections *as of 1789*. *Boumediene v. Bush*, 476 F.3d 981, 990-91 (D.C. Cir.) ("We are aware of no case *prior to 1789* going detainees' way, and we are convinced that the writ in 1789 would not have been available to aliens held at an overseas military based leased from a foreign government.") (emphasis added), *cert. granted*, 127 S.Ct. 3078 (2007).

In their briefs to this Court, Petitioners and other *amici* show how the D.C. Circuit misapprehended the pre-1789 habeas corpus caselaw. They demonstrate that the court erred in concluding that this caselaw turned on the status of the petitioner, or on the location of the petitioner within sovereign bounds. Their briefs show that throughout its history, the Great Writ protected against the illegal conduct of any agent acting under the Crown's authority, *wherever the jailer operated, and regardless of the detainee's alienage*, arguments that should suffice to resolve the instant case in Petitioners' favor.

Alternatively, the D.C. Circuit's analysis was flawed for a separate reason: It focused exclusively on pre-1789

law. This left its analysis incomplete, and possibly misleading, because this Court's precedents indicate that pre-1789 law only encompasses the writ's constitutional protection at its "absolute minimum." The evolving body of habeas principles *after* 1789 further delienates the scope of the writ's constitutional protection.

In *Felker*, this Court rejected a Suspension Clause challenge to restrictions on the writ of habeas corpus imposed by the AEDPA of 1996. 518 U.S. 651. This Court explained that the restrictions at issue were consistent with the "evolving body of equitable principles informed and controlled by historical usage, statutory development, and judicial decisions." *Id*. at 664 (quoting *McCleskey v. Zant*, 499 U.S. 467, 489 (1991)). The "evolving body of equitable principles" to which *Felker* referred was habeas practice as it had developed in the United States *after 1789*. *See Felker*, 518 U.S. at 664-65 (noting that AEDPA "codifies" pre-existing holdings of the federal courts); *McCleskey*, 499 U.S. at 479-89 (analyzing 19th and 20th century legal developments). *Felker* held that the AEDPA restrictions were valid because they were "well within the compass of [the post-1789] evolutionary process [of habeas corpus practice]." 518 U.S. at 664. *Felker*'s reasoning implies that, just as the "evolving body of equitable principles [of habeas corpus]" in the United States after 1789 shed light on the restrictions to the writ which did not run afoul of the Suspension Clause, this evolution likewise delineated areas of habeas jurisdiction for which restrictions *would* run afoul of the Suspension Clause.

The same inference is implicit in Justice O'Connor's concurrence in *Demore v. Kim*, in which she concluded that habeas suits brought by aliens temporarily detained pending removal were not protected by the Suspension Clause. 538 U.S. 510, 538-40 (2003) (O'Connor, J., concurring). After canvassing *post*-1789 caselaw, she reasoned: "All in all, it appears that in 1789, *and thereafter until very recently*, the writ was not generally available [to persons in petitioners' circumtances]." *Id*. at 539 (emphasis added). Justice O'Connor's reasoning implies that, had history informed her that in 1789 "and thereafter until very recently," the writ *had* issued to aliens temporarily detained pending removal, this would have led her to a *contrary* holding, namely, that the Suspension Clause's protections extended to the petitioners. *Cf.* Fallon & Meltzer, *Habeas Corpus Jurisdiction*, 120 Harv. L. Rev. at 2039 ("the reach of the constitutional guarantee of habeas jurisdiction may simply be a function of historical practice").

A. The Suspension Clause Protects More than the Writ "Known to the Framers": It Encompasses The Historical Core of the Writ's Evolution Since 1789.

It has been said that "the writ protected by the suspension clause is the writ as *known to the framers*, not as Congress may have chosen to expand it or, more pertinently, as the Supreme Court has interpreted what Congress did." Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 170 (1970) (emphasis added). But

this view that the Suspension Clause only protects the writ "known to the Framers" is not, on balance, persuasive.

First, the Framers must have been aware that the writ as it stood when they drafted the Constitution had itself been the product of considerable development over time. *See Rasul v. Bush*, 542 U.S. 466, 473 (2004) (habeas corpus is "a writ antecedent to statute . . . throwing its root deep into the genius of our common law") (citation omitted); Muhammad Usman Faridi, *Streamlining Habeas Corpus While Undermining Judicial Review: How 28 U.S.C. § 2254(D)(1) Violates the Constitution*, 19 St. Thomas U. L. Rev. 361, 366-67 (2006) ("By the time habeas corpus appeared in the Suspension Clause, it had already existed as a common law right for four centuries and as a statutory right for 130 years.").

It is therefore unlikely that the Framers conceived of a writ frozen at a precise point in time -- *e.g.*, 1789 -- and incapable of evolving to meet new circumstances. *See* Henry Paul Monaghan, *Doing Originalism*, 104 Colum. L. Rev. 32, 37 (2004) (noting the writ's "organic" history prior to 1789, and concluding: "because the whole history of habeas corpus shows that the courts in England were capable of developing the writ, [the Framers] did not adopt an institution frozen as of [the date of the Constitution]"). Rather, the Framers envisaged a common law writ which would be "moldable to the exigencies of the times." *Commonwealth ex. rel. Stevens v. Myers*, 419 Pa. 1, 18, 213 A.2d 613, 623 (Pa. 1965) (discussing common law habeas in Pennsylvania).

Second, the Suspension Clause is a unique provision of the Constitution in that it steps back, and pictures our Nation not enjoying "life, liberty and the pursuit of happiness," but, instead, in a different season, enduring the bitter scourges of "Rebellion," or "Invasion." U.S. Const. art. I § 9 cl. 2. The Framers, understandably, did not dwell long on these grim scenarios. *See* Bruce Ackerman, *The Emergency Constitution*, 113 Yale L. J. 1029, 1041 (2004) (characterizing the Suspension Clause as "a *rudimentary* emergency provision") (emphasis added); *see also* Youngstown *Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 649-650 (1952) ("Aside from suspension of the privilege of the writ of habeas corpus, [the Framers] made no express provision for exercise of extraordinary authority because of a crisis.").

To the limited extent the Framers contemplated a Nation in times of extreme crisis, they viewed the suspension of the writ of habeas corpus as a necessity for such times. *But this recognition of the need for suspension in exceptional times implies the necessity of non-suspension in unexceptional times*. By prohibiting suspension in unexceptional times, the Framers implied that the writ functions in the creation of the "more perfect Union" contemplated by the Constitution – indeed, that it performs an essential purpose. *See*, *e.g.*, *Daniels v. Allen*, 344 U.S. 443, 448-49 (1953) (Frankfurter, J., concurring) ("It is not the boasting of empty rhetoric that has treated the writ of habeas corpus as the basic safeguard of freedom in the Anglo-American world."); Fallon & Meltzer, *Habeas Corpus Jurisdiction*, 120 Harv. L. Rev. at 2039 (the "necessary availability of habeas corpus

review" is implicit in the Constitution's "structure," because it requires courts to determine "whether the Constitution and laws create substantive rights to judicial relief from executive detention") (citing Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic,* 66 Harv. L. Rev. 1362, 1372 (1953)); David L. Shapiro, *Habeas Corpus, Suspension and Detention: Another View*, 82 Notre Dame L. R. 59, 64 (2006) (concluding that the Suspension Clause contains an "affirmative guarantee" of habeas, in order to achieve the "full realization" of other constitutional guarantees); Gerald L. Neuman, *The Habeas Corpus Suspension Clause After* I.N.S. v. St. Cyr, 33 Colum. Hum. Rts. L. Rev. 555, 591 (2002) ("the Suspension Clause should be construed in the context of the Constitution of which it forms a part, and not solely by reference to the legal system that preceded the Constitution.").

Third, since 1789, this Court has recognized the availability of habeas jurisdiction in circumstances that the 1789 Congress likely could not even have contemplated. For example, in 1789, no American extradition treaties existed. The first such treaty, the Jay Treaty with Great Britain, took force in 1795, lapsed in 1807; the United States negotiated no new extradition treaty until 1842. Michael Abell & Bruno A. Ristau, *International Legal Assistance* 4 (1995).[2] Yet *In re Kaine*, 55 U.S. 103 (1852)

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[2] Extradition treaties were largely a late nineteenth century development. Ann Powers, *Justice Denied? The Adjudication of Extradition Applications*, 37 Tex. Int' L. J. 277, 281 (2002). Congress enacted the first legislation implementing extradition treaties in 1848. *Id*. at 282 n. 27.

inferred from the 1789 Act a jurisdiction to entertain habeas petitions filed by persons detained for extradition. *See Ex Parte Yerger*, 75 U.S. 85, 100 (1868) ("In *Kaine*'s case, all the judges, except one, asserted, directly or indirectly, the jurisdiction of the court to give [habeas] relief"); *see also Collins v. Loisel*, 262 U.S. 426 (1923).

Likewise in immigration cases, this Court has consistently found that alien detainees fall within the compass of habeas jurisdiction. *See*, *e.g.*, *Ekiu v. United States*, 142 U.S. 651 (1892) (denying writ); *Chin Yow v. United States*, 208 U.S. 8 (1908) (granting writ); *Kwock Jan Fat v. United States*, 253 U.S. 454 (1920) (granting writ). Yet Congress did not pass the first law regulating immigration until 1875, and, consequently, habeas challenges to deportation or exclusion did not begin until the late nineteenth century. *Demore*, 538 U.S. at 538 (O'Connor, J., concurring) ("Because federal immigration laws from 1891 to 1952 made no express provision for judicial review, these challenges took the form of petitions for writs of habeas corpus."). *See* Jonathan L. Hafetz, *Note*, *The Untold Story of Noncriminal Habeas Corpus and the 1996 Immigration Acts*, 107 Yale L.J. 2509, 2536 (1998) (noting the absence of a direct link between the writ's use at common law prior to 1789 and the contemporary deportation cases). Even so, the existence of habeas jurisdiction in immigration cases is now well-established.

The extension of habeas jurisdiction to extradition and immigration contexts exemplifies the writ's capacity to evolve. The cases involved Executive detention, a context

in which habeas protections are at their strongest. *See Rasul* 542 U.S. at 474. They involved aliens, persons protected by the writ since the early days of the Republic. *Id*. at 481 n. 11. The writ achieved its core historic purpose even as it evolved to meet new circumstances.

If, as some claim, the writ "known to the Framers" marks the outer boundaries of Suspension Clause protection, one would expect courts to have made some reference to this constitutional boundary as they extended the writ to new legal contexts, like extradition, or immigration -- contexts unknown to the Framers. *Cf. National Archives and Records Admin. v. Favish*, 541 U.S. 157, 170 (2004) (noting that a statute's privacy protection "goes beyond the common law and the Constitution") (citations omitted). The absence of any passing reference to the writ "known to the framers" in habeas contexts like extradition, or immigration, involving no direct link to the pre-1789 model, strongly suggests that the writ "known to the Framers" has not marked the outer boundaries of constitutional protection in the past, and should not do so now.

In sum, the writ that the Suspension Clause contemplates is better described as one grounded in the historical, core purpose of habeas corpus, yet "moldable to the exigencies of the times." *Myers*, 419 Pa. at 18, 213 A.2d at 623. This writ operates in tandem with the evolution of the Constitution, and the Nation. *See* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L. J. 1425, 1509-10 (1987) ("The [Suspension] Clause illustrates yet again the interplay of common law and

constitutional protections of liberty. The common law writ would furnish the cause of action that assured judicial review; the Constitution would furnish the test on the legal merits of confinement."); *Heikkila v. Barber*, 345 U.S. 229, 608 (1953) (recognizing habeas' historical function in "the enforcement of due process").

B. Petitioners Invoke Habeas Principles At Their Historical Core, and the Suspension Clause Therefore Protects the Federal Courts' Jurisdiction to Hear Their Claims.

Because the Suspension Clause protects the historical core of habeas principles as they evolve to meet new circumstances, the constitutional inquiry here turns on whether Petitioners' circumstances fall within this evolving history. Parsing habeas precedents to identify a historical core might, in some contexts, present "thorny question[s]." *See Demore*, 538 U.S. at 540 (O'Connor, J., concurring). But in the instant case, this inquiry is greatly simplified, because this Court recently held in *Rasul* that habeas jurisdiction extended to alien detainees at Guantanamo -- that is, to persons identically-situated to Petitioners. 542 U.S. 466. The constitutional inquiry can therefore focus on *Rasul*, and turn on whether its jurisdictional holding falls within the historical core of habeas corpus. It does: *Rasul*'s reasoning is firmly grounded in core habeas corpus principles.

Rasul involved a challenge to Executive detention. As the opinion recognized, this implicated habeas "at its historical core," in a context where the writ's protections

were "strongest." 542 U.S. at 474 ("At 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*.") (emphasis added) (citing *St. Cyr*, 533 U.S. at 301).

Rasul, moreover, involved the legality of Executive custody in a context in which military affairs were implicated: the government attempted to justify the detention of persons based on their designation by the military as "enemy combatants." *Rasul*, 542 U.S. at 485. *Rasul* relied on well-established precedent in re-affirming that habeas jurisdiction is available to such persons: "Consistent with the historic purpose of the writ, this Court recognized the federal courts' power to review applications for habeas relief in a wide variety of cases involving executive detention, in wartime as in times of peace." *Rasul*, 542 U.S. at 475-76 (citing *Ex Parte Milligan*, 4 Wall. 2 (1866), *Ex Parte Quirin*, 317 U.S. 1 (1942) and *In re Yamashita*, 327 U.S. 1 (1946)); *id*. at 487 (Kennedy, J., concurring) ("there are circumstances in which the courts maintain the power and the responsibility to protect persons from unlawful detention where military affairs are implicated"); *accord Ex Parte Endo*, 323 U.S. 283 (1944) (Japanese internment).

Further, *Rasul* relied on the precedents of this Court that have long recognized that habeas jurisdiction extends to persons "confined overseas." *Rasul*, 542 U.S. at 479 (citing *Burns v. Wilson*, 346 U.S. 137 (1953); *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955); *Hirota v. MacArthur*, 338 U.S. 197, 199 (1948) (Douglas, J.,

concurring)). *Rasul* correctly observed that "[n]othing" in "any" of this Court's precedents "categorically excludes aliens detained in military custody outside the United States from [the] privilege." 542 U.S. at 484. *Rasul* therefore remained well within the compass of habeas principles when it held that the writ reaches persons detained at the U.S. Naval Base at Guantanamo Bay.

In addition, as *Rasul* noted, aliens have been eligible for the writ from the "early years of the Republic." 542 U.S. at 481 n. 11 (collecting cases). Hence, *Rasul*'s conclusion that alien petitioners were eligible for the writ was, again, tethered to the writ's core history.

Finally, *Rasul* pointed out that the detainees' custodian was within the jurisdiction of the court. 542 U.S. at 483-84. This well-established jurisdictional prerequisite of habeas law, *see Rumsfeld v. Padilla*, 542 U.S. 426 (2004), was therefore also satisfied.

The *Rasul* dissent did not attach significance to the many ways, noted above, in which the decision was grounded in well-established habeas principles; instead it sought to erect a "presumption against extraterritorial application" of habeas jurisdiction. 542 U.S. at 488-89 (Scalia, J., dissenting). But this approach incorrectly presumed that strict territorial limits confine habeas jurisdiction, when, in fact, the Constitution commands an expansive protection of the writ.

When it adopted the 1789 Judiciary Act, Congress was "[a]cting under the immediate influence of [the Suspension

Clause's] injunction [and] must have felt, with peculiar force, the obligation of providing efficient means by which this great *constitutional* privilege should receive life and activity." *Ex Parte Bollman*, 4 Cranch 75, 95 (1807) (Marshall, C.J.) (emphasis added). The "peculiar force" Congress "felt" would have been a constitutional obligation to create a writ that would be sufficient to achieve the *full* realization of constitutional guarantees, and to sustain the Republic as it developed. *See* Shapiro, *Habeas Corpus, Suspension and Detention*, 82 Notre Dame L. R. at 64; Fallon & Metzler, *Habeas Corpus Jurisdiction*, 120 Harv. L. Rev. at 2038 (the "necessary availability" of habeas corpus review is "implicit in the Constitution's structure").

It was not legislative grace that caused Congress in 1789 to enact a writ that was flexible and susceptible to use in wide variety of future challenges to unlawful executive detention. Congress in 1789 was not free to enact a narrow habeas statute. The "peculiar force" of the Constitution compelled Congress to design – and thereafter, to preserve – a statute that was consistent with the commands and goals of the Constitution. *See Ex Parte Lange*, 85 U.S. 163, 166 (1873) (noting that the Court's own authority to issue a writ arose under the 1789 Act and "under the Constitution of the United States"); *see also Rasul*, 542 U.S. at 485-86 (Kennedy, J., concurring) (observing that the scope of habeas jurisdiction should be measured "against the backdrop of the constitutional *command* of the separation of powers") (emphasis added); James S. Liebman, *Apocalypse Next Time? The Anachronistic Attack on Habeas Corpus/Direct Review*

Parity, 92 Colum. L. Rev. 1997, 2062 (1992) (reviewing 19th century habeas precedents and concluding that the 1789 habeas statute gave federal prisoners "a remedy of habeas corpus review of [a variety of] fundamental (typically constitutional) legal claims").

This would explain why, in 1867, when Congress revised the habeas statute in view of implementing the commands of the Fourteenth Amendment, *see* Brennan, *Federal Habeas Corpus*, 7 Utah L. Rev. at 426, it wrote legislation "of the most comprehensive character [that] brought within the habeas corpus jurisdiction of every court and of every judge every possible case of privation of liberty contrary to the National Constitution, treaties, or laws" – creating jurisdiction that would be "impossible to widen." *Ex Parte McCardle*, 73 U.S. 318, 325-26 (1867).

The *Rasul* dissent was mistaken, therefore, when it sought to erect a presumption against the extraterritorial limitation of habeas jurisdiction. If the Constitution mandates a habeas remedy fully capable of protecting fundamental guarantees of liberty, the territorial reach of habeas jurisdiction should extend as far as necessary around the globe to keep pace with potentially illegal Executive detentions. *Compare United States v. Youssef*, 327 F.3d 56, 111 & n. 45 (2d Cir. 2003) (no cases invalidate a federal prosecution on the ground that it exceeded the Constitution's extra-territorial limits) (citing Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 Harv. L. Rev. 1217, 1263 n. 12 (1992)); *id*. at 86 ("[i]f it chooses to do so, [Congress] may legislate with respect to

conduct outside the United States, in excess of the limits posed by international law.") (citation omitted), *with* Stephen I. Vladeck, *Deconstructing Hirota: Habeas Corpus, Citizenship, and Article III*, 95 Geo. L. J. 1497, 1551 (2007) (analyzing recent cases involving assertions of the writ by United States citizens overseas, and concluding that extraterritorial limitations on habeas jurisdiction are increasingly called into doubt, or deemed inapposite). A presumption against extraterritorial application of the writ, moreover, is manifestly ill-suited to the exigencies of a world in the midst of rapid globalization. *Cf.* Jane Mayer, *Outsourcing Torture: The Secret History of America's "Extraordinary Rendition" Program*, The New Yorker, Feb. 14, 2005 (chronicling human rights violations committed overseas by the United States government, with the complicity of foreign governments).

C. The "Ratcheting Up" Critique Of Suspension Clause Protection Is Misplaced.

Some object that the Suspension Clause could not possibly expand to encompass post-1789 developments, because this would mean that habeas protection expands each time Congress adopts a new legal context for the writ, thereby creating a limitless constitutional protection, a "one-way ratchet that enshrines in the Constitution every grant of habeas jurisdiction." *St. Cyr*, 533 U.S. 289, 341-42 (Scalia, J. dissenting); *accord Lindh v. Murphy*, 96 F.3d 856, 868 (7th Cir. 1996) ("Any suggestion that the Suspension Clause forbids every contraction of the powers bestowed [by Congress subsequent to 1789) is untenable.

The Suspension Clause is not a ratchet."), *rev'd on other grounds*, 521 U.S. 320 (1997). Tellingly, however, this "ratcheting up" contention is not based on the actual text of the Clause, or on an explanation of the Framers' intent, but is simply a result-oriented critique of a constitutional protection that seems limitless.

The "ratcheting up" critique raises the concern that every Congressional expansion of the writ might be automatically constitutionalized. But this concern largely falls away once one recognizes that the federal writ of habeas corpus was flexible *as it was first written in 1789*, and has not required much in the way of amendment by Congress. In reality, the evolution of habeas law has been more the work of the courts, not of Congress. *See* Friendly, *Is Innocence Irrelevant?*, 38 U. Chi. L. Rev.at 170 (emphasis added) (judicial interpretations of statutes, rather than Congressional amendments of these statutes, "more pertinently" explain the writ's expansion). Indeed, the habeas remedy was so broadly written into the first United States Code that, if anything, it has required more judicial containment than expansion. *See Reed v. Farley*, 512 U.S. 339, 356 (1994)(Scalia, J., concurring) ("This Court has long applied equitable limitations to narrow the broad sweep of federal habeas jurisdiction.").[3]

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[3] To be sure, the 1867 extension of the writ to state prisoners, subject to commitment by state courts, is regarded as a significant expansion of the writ. *See Felker*, 518 U.S. at 659 ("Congress greatly expanded the scope of federal habeas corpus in 1867"). But the true extent of the 1867 expansion remains a matter of controversy. *See* Fallon & Meltzer, *Habeas Corpus Jurisdiction*, 120 Harv. L. Rev. at 2096 n. 262 (noting controversy on this point); Gerald L. Neuman,

The instant case involves the application of the writ "at its historical core," *Rasul*, 542 U.S. at 474, to persons detained under *federal* authority, by the *Executive* Branch – a matter plainly encompassed by the 1789 statute, which

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Habeas Corpus, Executive Detention, and the Removal of Aliens, 98 Colum. L. Rev. 961, 987 (1998) (noting habeas inquiries into "jurisdictional facts" which predated the 1867 Act); Marc M. Arkin, *Rethinking the Constitutional Right to a Criminal Appeal*, 39 UCLA L. Rev. 503, 562-63 (1992) (objecting that the "growth of habeas corpus caused by resistance to the Fugitive Slave Act in the antebellum period" undermines the view that "the issues cognizable in habeas corpus began to expand only after Congress passed the 1867 Act"). Moreover, since state prisoners, from the inception of the Republic, had access to the Supreme Court's appellate jurisdiction, the 1867 Act only hastened their access to relief through habeas corpus, without necessarily expanding their standing to vindicate their rights. *Cf*. James S. Liebman, *Apocalypse Next Time? The Anachronistic Attack on Habeas Corpus/Direct Review Parity*, 92 Colum. L. Rev. 1997, 2062 (1992) (noting state prisoners' access to the Supreme Court via a writ of error under the 1789 Act).

The 1867 amendments can be viewed as part of the natural interplay between the writ and the Constitution, in this instance the Civil War Amendments. *See* Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* § 7.2d, at 378 (5th ed. 2005) (arguing that state prisoners enjoy the habeas right based on the Suspension Clause and the Fourteenth Amendment); Jordan Steiker, *Incorporating the Suspension Clause: Is There a Constitutional Right to Federal Habeas Corpus for State Prisoners*?, 92 Mich. L. Rev. 862, 868 (1994) (arguing the same); William J. Brennan, Jr., *Federal Habeas Corpus and State Prisoners: An Exercise in Federalism*, 7 Utah L. Rev. 423, 426 (1961) (Congress broadened habeas corpus in 1867 to broaden understandings of the 14th Amendment). In any event, the 1867 amendments are not directly at issue here.

broadly authorized courts to inquire into the "cause of commitment" of federal prisoners. Act of September 24, 1789, c. 20, s. 14, 1 Stat. 81-82. This mandate proved broad enough to encompass a "wide variety" of inquiries into the legality of confinement, *Rasul v. Bush*, 542 U.S. 466, 475-76 (2004) (citing, *inter alia*, cases involving wartime detention), based on the widest spectrum of sources of law. *See Felker*, 518 U.S. at 659 n.1 (noting that Section 14 of the 1789 Judiciary Act was a "direct ancestor" of the text of a current habeas statute, 28 U.S.C. § 2241, which authorizes inquiry into whether the prisoner "is in custody in violation of the Constitution or laws or treaties of the United States").

The flexibility and continuity of the 1789 statute is evident in *Ex Parte Yerger*, a habeas case in which Congress had deliberately eliminated this Court's jurisdiction, by repealing habeas jurisdiction it had recently conferred. 75 U.S. at 108. Nevertheless, this Court's jurisdiction over the case remained unaffected -- because the repeal did not affect the broad habeas jurisdiction originally conferred in 1789. *See Felker*, 518 U.S. at 659 (explaining *Yerger*); Ira Mickenberg, *Abusing the Exceptions and Regulations Clause: Legislative Attempts to Divest the Supreme Court of Appellate Jurisdiction*, 32 Am. U. L. Rev. 497, 526 (1983) (noting that Congress' 1868 repeal of a portion to the 1867 Habeas Corpus Act "[did] no more than return[] the Court's jurisdiction to its earlier status under the Judiciary Act. No new area or subject matter was removed from the scope of the Court's review, and the Court's jurisdiction over the subject matter of habeas corpus remained intact.").

Once one recognizes that it is the Judiciary, not Congress, that has accounted for much of the evolution of habeas law (whether by expansion or contraction), the "ratcheting up" critique falls away, because the Suspension Clause inquiry focuses on whether a *court's* application of habeas jurisdiction in a new context is sufficiently tethered to the "historical core" of habeas precedent to merit constitutional protection. This inquiry into the connection between a given new case and past evolving caselaw is the type of inquiry to which courts are accustomed – as it happens, especially in the habeas context. *See*, *e.g.*, *Panetti v. Quarterman*, __U.S.__, 127 S.Ct. 2842, 2855 (2007) (habeas petitioner was entitled to relief because the state court's ruling "constituted an unreasonable application of . . . clearly established law as determined by this Court"); *Whorton v. Bockting*, __U.S.__, 127 S.Ct. 1173, 1180 (2007) (to determine whether a habeas petitioner may benefit from the retroactive application of a rule of law under *Teague v. Lane*, 489 U.S. 288 (1989), courts must distinguish between an "old rule" and a "new rule").

The constitutional protection of the Suspension Clause does not expand *ipso facto*, and without limits, each time a federal court finds statutory habeas jurisdiction to exist in a new legal context. Constitutional protection exists only if this new legal context is tethered to habeas' historical core, as reflected in the "evolving body of equitable principles informed and controlled by historical usage, statutory development, and judicial decisions." *Felker*, 518 U.S. at 664. *See also Griswold v. Connecticut*, 381 U.S. 479, 501 (1965) (Harlan, J., concurring) (noting

the need, in constitutional areas, for "continual insistence upon respect for the teachings of history [and] solid recognition of the basic values that underlie our society.").

Thus, when, in the past, new limitations on habeas rights took effect, *see, e.g.*, *Stone v. Powell*, 428 U.S. at 518-19 (Brennan, J., dissenting) (arguing that the majority's holding "overruled" prior decisions which had recognized "the unrestricted scope of habeas jurisdiction"); *Williams v. Taylor*, 529 U.S. 362, 387 n. 14 (2000) (opinion of Stevens, J.) (noting that AEDPA "wrought substantial [procedural] changes in habeas law"), these new limitations did not automatically "ratchet down" the scope of constitutionally-protected habeas jurisdiction. The limitations merely signaled that habeas law had changed direction, while remaining within the constitutional compass.

Admittedly, it may sometimes prove difficult to establish whether a habeas principle is deeply-rooted and therefore well-integrated within the fabric of the law. A bright line may not always delineate with exactitude the scope of constitutional protection. *See Demore*, 538 U.S. at 538-40 (2003) (O'Connor, J., concurring) (observing that the degree to which the Constitution protects the writ as it has evolved in immigration caselaw after 1789 presented a "thorny question"); *cf. O'Dell v. Netherland*, 521 U.S. 151, 173 (1997) ("Distinguishing new rules from those that are not under our post-*Teague* jurisprudence is not an easy task.").

But, even if it yielded few bright lines, a test focused on evolving habeas principles is well-suited to the Suspension Clause. First, though the test may be untidy, in actual practice there ought to be few occasions to apply it. *Cf. Hamdi v. Rumsfeld*, 542 U.S. 507, 525 (2004) (plurality opinion) ("Only in the rarest circumstances has Congress seen fit to suspend the writ."). Second, it might be desirable for the test to be unclear at its margins. The Framers certainly did not intend to encourage Congress to encroach on the liberties protected by the writ of habeas corpus. A test that left Congress wary of coming close to invading Suspension Clause boundaries would be consistent with the structure of the Constitution. *Cf.* Charles L. Black, Jr., *Law As An Art* in *The Humane Imagination* 17, 33 (1986) (pointing out that "exact definition" is not always desirable in the law, because "exact definition would simply point out ways of immunity, and, to the birds of prey, make the law 'their perch and not their terror.'") (quoting William Shakespeare, *Measure for Measure*, Act 2, Scene 1). Finally, of course, the inquiry remains focused where it should be: on the core values that have animated the writ from the early days of the Republic.

II. CONCLUSION.

For the foregoing reasons, *amicus curiae* Federal Public Defender for the Southern District of Florida request that the Court expand its analytical framework for its Suspension Clause analysis, and reverse the decision below.

Respectfully submitted,

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