No. 09-581

IN THE
Supreme Court of the United States

JAMAL KIYEMBA, et al.,
Petitioners,

v.

BARACK H. OBAMA, President of the United States, et al.,
Respondents.

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

BRIEF OF LEGAL HISTORIANS AND HABEAS CORPUS EXPERTS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae listed in the Appendix are professors of legal history or experts in habeas corpus with particular expertise in English legal history prior to 1789 and/or early American legal history. As in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), *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. *See, e.g.*, *id.* at 2244 ("[T]o the extent there were settled precedents or legal commentaries in 1789 regarding the extraterritorial scope of the writ or its application to enemy aliens, those authorities can be instructive for the present cases.").

Amici are impelled to support certiorari in this case in light of the Court of Appeals' conclusion that the petitioners are not entitled to use habeas corpus as a means of objecting to their transfer beyond the jurisdiction of the habeas court. *See* Pet. App. A. As the brief that follows suggests—and as the dissenting judge in the Court of Appeals concluded, *see id.* at 27a (Griffith, J., concurring in the judgment in part and dissenting in part) ("Since at least the

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1. The parties have consented to the filing of this brief. Counsel of record for both parties received notice at least 10 days prior to the due date of *amici curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel for a party (nor a party itself) made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

seventeenth century, the Great Writ has prohibited the transfer of prisoners to places beyond its reach where they would be subject to continued detention on behalf of the government.")—the pre-revolutionary English experience was decidedly to the contrary.

SUMMARY OF ARGUMENT

This Court has repeatedly suggested that, "at the absolute minimum," the Constitution's Suspension Clause, U.S. Const. art. I, § 9, cl. 2, protects the writ of habeas corpus "as it existed in 1789." *INS v. St. Cyr*, 533 U.S. 289, 301 (2001) (quoting *Felker v. Turpin*, 518 U.S. 651, 663–64 (1996)). Thus, the scope of habeas corpus in English courts at the time of the Founding necessarily informs the scope of the writ protected by the Constitution, and, in light of *Boumediene*, 128 S. Ct. 2229, the scope of relief available to non-citizens detained at Guantánamo Bay.

A review of historical sources reveals that the writ of habeas corpus "as it existed in 1789" was available to individuals who sought to challenge their transfer beyond the jurisdiction of the habeas court. Because the writ of habeas corpus derived from the royal prerogative, King's Bench often issued writs that were not based upon established precedent. Analytically, this means that the justices were empowered to examine detention in all forms, including cases concerning transfer. And empirically, the King's Bench in fact exercised this expansive jurisdiction in cases where the petitioner sought to challenge his transfer beyond the court's process.

Moreover, these common law powers both predated and survived the Habeas Corpus Act of 1679. As is now familiar, the Act was itself titled "An Act for the better securing the Liberty of the Subject, and for the Prevention of Imprisonment beyond the Seas," and expressly forbade "the shipment of prisoners to places where the writ did not run or where its execution would be difficult," *Boumediene*, 128 S. Ct. at 2304 (Scalia, J., dissenting). While the Act thereby reinforced the conclusion that a fundamental concern of habeas corpus was the prevention of unlawful extrajudicial transfer, the common law practice of King's Bench both before and subsequent to the Act's codification independently provided authority at least as broad as—if not far broader than—the statute. Such authority unquestionably included the use of habeas corpus to prevent a prisoner's transfer outside the jurisdiction of King's Bench.

This distinction is significant because it highlights the extent to which the English experience that necessarily informed the Founders' understanding of the scope of habeas corpus was hardly limited to cases under the Habeas Corpus Act of 1679. To the contrary, that experience included a robust common law writ of habeas corpus to which King's Bench routinely resorted when the statutory writ proved either unavailable or ineffective. As such, it is of little moment that the Habeas Corpus Act of 1679 only protected prisoners from transfer beyond the jurisdiction by prohibiting the transfer itself; the common law writ continued to furnish King's Bench—as it always had—with an

opportunity to inquire into the transfer before it took place, an authority that was repeatedly exercised. Both statutory and common law practice conclusively establish that "[t]he bar against transfer beyond the reach of habeas protections is a venerable element of the Great Writ and undoubtedly part of constitutional habeas," Pet. App. 28a (Griffith, J., concurring in the judgment in part and dissenting in part). The Court of Appeals' conclusion to the contrary misunderstands the writ protected by the Suspension Clause in these key respects, and must not be left intact.

ARGUMENT

I. THE COMMON LAW POWERS OF ENGLISH COURTS TO ISSUE WRITS OF HABEAS CORPUS INCLUDED THE USE OF THE WRIT TO PREVENT TRANSFER TO UNLAWFUL OVERSEAS DETENTION.

As Justice Kennedy correctly summarized in *Boumediene*, the writ of habeas corpus *ad subjiciendum et recipiendum*[2] "was in its earliest use a mechanism for securing compliance with the King's laws." 128 S. Ct. at 2244; *see also* William F. Duker, A Constitutional History of Habeas Corpus 12–23 (1980) (describing habeas's "humble origins"). Subsequently, however, in the period leading up to the end of the sixteenth century (and the beginning

2. On the different forms of the writ available at common law, see Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 Va. L. Rev. 575, 598 n.50 (2008).

of the seventeenth), "it became clear that by issuing the writ of habeas corpus common-law courts sought to enforce the King's prerogative to inquire into the authority of a jailer to hold a prisoner." *Boumediene*, 128 S. Ct. at 2245.

Indeed, "[t]he single most important feature of habeas corpus jurisprudence, as it emerged in the seventeenth century, did not concern *how* King's Bench justices decided the fate of prisoners." Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575, 600 (2008). Rather, "[i]t concerned the fact *that* the justices decided their fate, regardless of who locked them up. Thus the great importance of habeas corpus lay in its extension to all institutions and courts by an insistent King's Bench, whose justices made use of all the powers available to them in doing so." *Id.* Analytically, the breadth of the habeas corpus jurisdiction exercised by King's Bench during this period necessarily encompassed the authority to prevent transfer of a prisoner beyond the court's process. And empirically, the justices exercised such power.

a. The Power of King's Bench To Issue Writs of Habeas Corpus Derived from the Royal Prerogative.

That the writ traced its roots and owed its power to the royal prerogative is critical in understanding the functional—indeed, the effectively *equitable*—nature of the authority exercised by King's Bench in the decades leading up to the

Habeas Corpus Act of 1679. As Professors Halliday and White have explained, "Although habeas corpus was a common law writ, subjects' pleas to use it were often based less on common law norms than on appeals to what we might call the equity of the writ." Halliday & White, *supra*, at 608. Moreover, "The key to the prerogative writs lay in the court's omnipotence when using them, and that omnipotence primarily stemmed from their equitable character: their embodiment of the King's mercy." *Id.*; *see also Bourn's Case*, 79 ENG. REP. 465, 467 (K.B. 1619) ("[T]his writ is a prerogative writ, which concerns the King's justice to be administered to his subjects; for the King ought to have an account why any of his subjects are imprisoned . . . and to dispute it is not to dispute the jurisdiction, but the power of the King and his Court, which is not to be disputed . . . .").[3]

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3. The conclusion that habeas implicated the *equitable* powers of King's Bench is bolstered by two different sets of historical evidence: that "the justices regularly rendered judgments that did more than answer the question about the propriety of the arrest warrant, ostensibly the only matter raised by the writ," and that "King's Bench often ignored its own ostensible rules controlling process," especially the principle that the return to a writ of habeas corpus had to be taken as accurate on its face. *See* Halliday & White, *supra*, at 610.

b. As a Result, King's Bench Often Issued Writs that Were Not Based Upon Established Precedent, but that Nevertheless Empowered the Justices To Examine Detention in All Forms.

More than just affecting how this period is accurately described historically, the increasing "omnipotence" of King's Bench when it came to habeas corpus had contemporaneous consequences as well, for it left the justices in a better position to adapt the writ to accommodate novel jurisdictional issues as they arose (and proliferated) throughout the mid-seventeenth century, especially in the period leading up to the English Civil War, the Interregnum, and the Restoration. Thus, as the court encountered imprisonment orders issued by new governmental officers or agencies, or from individuals imprisoned in places testing the geographic reach of its process, King's Bench showed no reluctance to continue issuing writs of habeas corpus. *See, e.g.*, Halliday & White, *supra.* at 611–12, 621 n.130.

Moreover, the means by which King's Bench adapted the writ is telling: rather than articulate circumstance-specific jurisdictional rules, King's Bench issued the writ throughout this period on demonstration of a prima facie cause for issuance, requiring the production of the prisoner (and putting the disposition of the prisoner's claim under its authority) even in cases without clear precedent. The jurisdictional consistency in the face of factually varied circumstances reflected the increasingly

prevalent assumption that the merits of a habeas claim were to be evaluated by the King's Bench itself, and only once it had seized itself of both legal and physical custody of the prisoner, who was then committed to the custody of the King's Bench's marshal.[4]

Thus, habeas corpus became centered upon a general principle rather than a set of common law rules. That principle, derived from the royal prerogative, was that King's Bench could review imprisonment orders without respect to either the specific source of the authority to imprison or the factual circumstances under which the imprisonment took place. And while the result in a majority of cases was that the petitioner was bailed *pendente lite* or discharged, the critical point is the expansive *jurisdiction* of King's Bench to reach the merits. *See, e.g.*, Duker, *supra*, at 62 ("From the fourteenth to the seventeenth century, habeas corpus was a convenient weapon wielded by the courts of England in their maneuvers to increase and to safeguard their jurisdictions.").[5] Thus, the court's power to issue the

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4. On the significance of having the prisoner committed to the custody of King's Bench through its marshal, see Paul D. Halliday, Habeas Corpus: England to Empire 59 & 357 n.92 (forthcoming Mar. 2010).

5. To enforce its (expanding) jurisdiction, King's Bench during the same period began inserting subpoena clauses into successive writs of habeas corpus—or imposing fines or using attachments for contempt—thereby raising the stakes should the recipient of the writ decline to comply. And although the Habeas Corpus Act of 1679 would provide statutory authority for such measures, the practice was widespread by the early years of the seventeenth century through the common law

writ depended little if at all upon the merits of the petitioner's claim; it was only once the petitioner was properly before King's Bench that the justices could—and would—reach the merits. As Professor Halliday has explained,

> The most significant aspect of Somerset's Case,[6] as in POW cases, was not the result, but that it was a case at all. In Schiever's case,[7] the court had maintained its jurisdiction over POWs by deciding whether that Swede truly counted as a POW. Similarly, for James Somerset, the fact of the writ's issuance was of the first importance. 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. . . . There were no real precedents, but there was nothing any more surprising about using the writ for a slave trapped on a ship in the Downs than there was for a sailor trapped on a ship in the same waters.

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habeas process. On subpoena clauses and process by attachment for contempt, see Halliday, *supra*, at 11-14, 60–63, 83-84, 92-93 & 350-51 n.39 (forthcoming Mar. 2010).

6. 20 How. St. Tr. 1 (K.B. 1772).

7. 97 Eng. Rep. 551 (K.B.. 1759).

Paul D. Halliday, Habeas Corpus: From England to Empire 176 (forthcoming Mar. 2010).

That the power of King's Bench had so expanded during this period is perhaps most clearly apparent from the use of habeas corpus during the English Civil War, which "proved to be one of the glory periods for habeas corpus," during which "[t]he court stood up to the imprisonment orders made by many of the new officers or agencies created by Parliament to fight a war against their king." Halliday & White, *supra*, at 621 n.130. As Halliday elaborates,

> Early in the war, [King's Bench] bailed prisoners committed on the warrant of the Earl of Essex, commander of Parliament's armies, when the returns to their writs made no mention of why he imprisoned them. Shortly before the Restoration, the justices of the Upper Bench bailed Francis Lord Willoughby, former governor of Barbados and royal conspirator, from military custody at Hull.

Halliday, *supra*, at 165 (footnotes omitted); *see also id.* at 402 nn.114–15 (providing citations to the dispositions).

But specific examples of the expansion of the writ aside, the reality by the time of the Restoration was that habeas corpus had become a powerful tool through which English subjects enlisted the power of King's Bench, even in cases presenting unprecedented circumstances of imprisonment.

Insofar as the jurisdiction of King's Bench was concerned, such novelty, in the end, was entirely beside the point.

c. Exercising This Authority, King's Bench Issued the Writ on a Number of Occasions To Prevent the Transfer of an Individual Beyond the Reach of Its Process.

One important manifestation of the increasingly vast jurisdictional reach of King's Bench's habeas powers was its response to those in custody who sought to use habeas to prevent their transfer beyond the practical—if not legal—reach of the court's process. Indeed, although Justice Scalia was entirely correct in *Boumediene* that the Habeas Corpus Act of 1679 sought to eliminate such a "possibility of evading judicial review" by the "spiriting-away" of British prisoners, 128 S. Ct. at 2304 (Scalia, J., dissenting), "[m]any of the technical provisions enacted in 1679 were in actual operation by the middle 1670's as a result of reforms within the court itself," Helen A. Nutting, *The Most Wholesome Law—The Habeas Corpus Act of 1679*, 65 Am. Hist. Rev. 527, 539 (1960), including the use of the writ to allow King's Bench to decide the legality of such transfers.

A particularly instructive case in this regard is that of Robert Murray, a Scot imprisoned on two separate occasions in 1677—first for "defamation of his majesty and his government," and later "in order to his being sent into Scotland to be tried there according to law for several crimes." *See* Halliday,

supra, at 236. Both times, King's Bench issued the writ to allow an inquiry into Murray's deportation, and ended up bailing him rather than permit his deportation. *See id.* at 425 n.87 (citing the disposition).

Of course, as Paul Freund warned, one must be careful "to look to history for the essentials of the Great Writ, but not to one point in that history for its accidents." Brief for Respondent at 33, *United States v. Hayman*, 342 U.S. 205 (1952) (No. 23), *quoted in* Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 Colum. L. Rev. 961, 970 & n.42 (1998). But Murray's case was no accident. Indeed, in the context of slavery, there are a number of reported instances of writs issuing to prevent the removal from England of individuals allegedly bound to slavery, the most famous of which is *Somerset's Case,* 20 How. St. Tr. 1 (K.B. 1772), in which Lord Mansfield issued the writ on the ground that slavery was unknown to English common law. *See generally* George Van Cleve, Somerset's Case *and Its Antecedents in Imperial Perspective*, 24 L. & HIST. REV. 601 (2006). To similar effect, the common law writ routinely issued in cases brought by impressed seamen to inquire into the propriety of their military induction—before they were removed to the high seas. *See, e.g.*, Halliday & White, *supra*, at 605 & n.72.

The upshot of these cases is the conclusion that habeas corpus could be—and routinely *was*—used to ensure the *ex ante* legality of an individual's transfer beyond the process of King's Bench. And while concerns over the prisoner's fate once

transferred may well have motivated the justices' disposition toward individual cases, the only means of allaying such concerns was to assert jurisdiction *ab initio*, in order to allow King's Bench to conduct an inquiry into whether such fears might be justified. Thus, while jurisdiction never turned on the particular claims the prisoner made on the merits in objecting to transfer, the assertion of jurisdiction in every case empowered King's Bench to provide remedies in those cases in which English law might prohibit the fate that would befall the petitioner if transferred.

II. THE SCOPE OF COMMON LAW HABEAS PRE-DATED AND WAS BROADER THAN THE AUTHORITY PROVIDED BY THE HABEAS CORPUS ACT OF 1679, AND CONTINUED TO EVOLVE AND EXPAND AFTER THE ACT.

a. The Habeas Corpus Act of 1679 Did Not Establish Limits on the Scope of Habeas Authority But Rather Reflected the Existing Common Law Practice, Which Continued to Evolve.

Like generations of scholars, both Justices Kennedy and Scalia in *Boumediene* emphasized the historical significance of the Habeas Corpus Act of 1679, 31 Car. 2, c. 2, which Blackstone hyperbolically labeled "the second *magna carta*," William Blackstone, 1 Commentaries *137, and the "stable bulwark of our liberties," *id.*; *see also* The Federalist

No. 84, at 512 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (citing Blackstone's discussion of the Habeas Corpus Act).

To be sure, the Act was at least partially directed to the problem of transfer beyond the reach of judicial process. After all, its full name was "An Act for the better securing the Liberty of the Subject, and for the Prevention of Imprisonment beyond the Seas," and, as Justice Scalia noted, Article XII expressly forbid "the shipment of prisoners to places where the writ did not run or where its execution would be difficult." *Boumediene*, 128 S. Ct. at 2304 (Scalia, J., dissenting). But the focus on the language and scope of the Habeas Corpus Act of 1679 obscures the larger and more important points about the common law practice of King's Bench both before and subsequent to the Act's codification. Indeed, as Halliday and White have concluded,

> the celebrated Habeas Corpus Act merely codified practices generated by King's Bench justices. In whig histories, the statutory writ of the 1679 Habeas Corpus Act provides a moment for parliamentary self-congratulation that all but erased the significance of the role judges had played in developing the equitable dimensions of habeas corpus jurisprudence.

Halliday & White, *supra*, at 611; *cf.* Eric M. Freedman, *Milestones in Habeas Corpus: Part I Just Because John Marshall Said it, Doesn't Make it So: Ex parte* Bollman *and the Illusory Prohibition on*

the Federal Writ of Habeas Corpus for State Prisoners in the Judiciary Act of 1789, 51 Ala. L. Rev. 531, 579 n.160 (2000) (noting comparable misconceptions about habeas in American jurisprudence).

A closer look at historical practice tells a different story, revealing that "[m]any of the technical provisions enacted in 1679 were in actual operation by the middle 1670's as a result of reforms within the court itself," Nutting, *supra*, at 539, and that "in the century after the passage of the Habeas Corpus Act of 1679, all the important innovations in habeas corpus jurisprudence occurred through judicial use of the common law writ rather than the statutory one." Halliday & White, *supra*, at 612. To take just one example from many, despite the failure of Parliament in 1758 to agree to legislation that would have remedied the perceived failure of the statutory writ to encompass challenges to impressment orders, King's Bench, under the direction of Chief Justice Lord Mansfield, routinely entertained such cases by issuing common law writs of habeas corpus. *See, e.g.*, *id.* at 612 & nn.96–97, 632 & n.163. *See generally* James Oldham & Michael J. Wishnie, *The Historical Scope of Habeas Corpus and* INS *v.* St. Cyr, 16 Geo. Immigr. L.J. 485, 488–95 (2002).

b. Cases In Which the Writ Issued To Prevent Transfers Beyond the Process of King's Bench Predate the Habeas Corpus Act of 1679.

As discussed above, King's Bench had already used writs of habeas corpus to inquire into transfer beyond its process several years before the Habeas Corpus Act of 1679 expressly prohibited such transfers—as typified, for example, in *Murray's Case*. And since "the statutory writ was never understood . . . as *superseding* the common law habeas jurisprudence," Halliday & White, *supra*, at 631, this authority survived enactment of the Habeas Corpus Act of 1679 intact, even though the Act itself provided no comparable power.

Instead, the Act's purported innovations were targeted toward solidifying the power of the justices to issue the writ during vacation, ensuring a speedy return of the writ, and enhancing the penalties for disobedience of (or wrongful refusal to issue) the writ. *See generally* Nutting, *supra*, at 540–43. Tellingly, though, all of these authorities had routinely been exercised by King's Bench when issuing common law writs of habeas corpus long before Parliament saw fit to codify them.

While there may be debate as to the necessity of these reforms, archival evidence suggests that, after the Act, courts continued to resort to their common law powers to issue the writ in cases in which the statute may not have specifically authorized it. *See, e.g.*, Halliday & White, *supra*, at 634 n.168 ("[B]etween 1679 and 1789, the writ of

habeas corpus was treated in Anglo-American jurisprudence as sounding in common law as well as in the 1679 Act."); *see also id* at 612 n.97 ("The Act concerned the use of habeas corpus only in cases of alleged felony or treason. These wrongs dwindled as a share of habeas litigation in the eighteenth century as ever-larger numbers of writs tested detentions in which there was no allegation of wrong, such as those involving abused wives and impressed sailors.").[8]

* * *

This Court is already familiar with much of the history summarized above, especially given its more expansive presentation in *amici*'s brief on the merits in *Boumediene*. Its invocation here, though, is to emphasize a point largely neglected by this Court in *Boumediene*—and misunderstood by the authors of the majority and concurring opinions in the Court of Appeals in this case: the English experience that necessarily informed the Founders' understanding of the nature of the "privilege of the writ of habeas corpus" that Article I's Suspension Clause was designed to protect was hardly limited to cases under the Habeas Corpus Act of 1679. To the contrary, that experience included a robust common law writ of habeas corpus to which King's Bench

8. As Halliday and White explain, "That the writ in its common law form developed new uses is evident not only from the non-felony matters to which it was put, but also from the note written on the back of each writ . . . saying whether it had issued according to the terms of the 1679 statute—a relatively rare occurrence—or by rule of the court." Halliday & White, *supra*, at 612 n.97.

routinely resorted when the statutory writ proved either unavailable or ineffective. As such, while it is significant that the Habeas Corpus Act of 1679 protected prisoners from transfer beyond the jurisdiction by prohibiting the transfer itself, *see Boumediene*, 128 S. Ct. at 2304 (Scalia, J., dissenting), the common law writ continued to furnish King's Bench—as it always had—with an opportunity to inquire into the transfer before it took place, and that authority was repeatedly exercised. Thus, and contrary to the conclusion of the Court of Appeals in this case, "[t]he bar against transfer beyond the reach of habeas protections is a venerable element of the Great Writ and undoubtedly part of constitutional habeas." Pet. App. 28a (Griffith, J., concurring in the judgment in part and dissenting in part). The Court of Appeals' decision to the contrary should accordingly be reversed.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully submit that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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