No. 17-2171

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

USAMA JAMIL HAMAMA, et al.,
Petitioners-Appellees,
v.

THOMAS HOMAN, Deputy Director and Senior Official Performing the Duties of the Director, U.S. Immigration and Customs Enforcement, et al.,
Respondents-Appellants.

On Appeal from the United States District Court
for the Eastern District of Michigan No. 2:17-cv-11910
Before the Honorable Mark A. Goldsmith

BRIEF FOR AMICI CURIAE SCHOLARS OF HABEAS CORPUS LAW IN SUPPORT OF PETITIONERS-APPELLEES

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to Sixth Cir. R. 26.1, amici curiae make the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

NONE.

Dated: February 12, 2018

/s/ Noah A. Levine
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STATEMENT OF INTEREST[1]

Amici curiae are scholars at universities across the United States with expertise in the law of habeas corpus. An addendum to this brief provides a full list of amici submitting this brief. Amici, having collectively spent decades on research, study, and writing about the writ of habeas corpus and the Suspension Clause of Article I, Section 9 of the Constitution, have a professional interest in ensuring that this Court is accurately informed regarding the history and application of the habeas writ and the Suspension Clause. Amici take no position respecting other issues raised in the case. Amici's institutional affiliations are provided for identification purposes only.

SUMMARY OF ARGUMENT

This case presents this Court with two primary issues—the first concerning the jurisdiction of the district court to consider Petitioners' habeas corpus petition and the second concerning the merits of the claims made in those petitions. Amici submit this brief with regard to only the former, the jurisdictional issue, in order to address the subject of the Suspension Clause and to demonstrate that it compels judicial scrutiny of a petitioner's timely claim for relief *before* removal occurs.

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[1] 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 toward the preparation or submission of this brief. All parties have consented to the filing of this brief.

After reading 8 U.S.C. § 1252(g)[2] to divest it of jurisdiction to consider Petitioners' habeas corpus petition, the district court held that the Suspension Clause required judicial review of Petitioners' habeas petition. In so finding, the district court relied on two important and long-established principles of the law of habeas corpus. The first is that the Suspension Clause is implicated by prohibitions on judicial review of the enforcement of immigration removal orders. The second principle is that the Suspension Clause is violated if no substitute process allows for judicial review at a time and in a form that permits a court to grant effective relief. Amici submit this brief to explain why both principles are correct and firmly rooted in the history of the writ of habeas corpus and governing Suspension Clause jurisprudence.

Three district court findings provided the backdrop for that court's application of and adherence to the two principles described above. First, the court found that the grounds for relief from removal that Petitioners sought to present—that removal to Iraq would violate their rights under the Immigration and Nationality Act and Convention Against Torture due to changed country conditions in Iraq—arose *after* Petitioners' removal proceedings had ended. Op. &

[2] Amici take no position in this brief regarding the district court's construction of 8 U.S.C. § 1252(g), nor concerning whether the statute could be construed to allow federal court jurisdiction in a manner that avoids the Suspension Clause issues addressed by the district court and this brief.

Order re Jurisdiction, RE 64, PageID# 1227, 1229, 1243. Second, the court found that absent the stay that it had entered, the government's enforcement of Petitioners' removal orders would begin immediately, without sufficient time for Petitioners to file motions to reopen their removal proceedings to present their claims for relief based on changed country conditions or for them to seek judicial review of any decisions on such motions. *Id.* at PageID# 1226, 1231-1232, 1245-1246. Finally, the district court found that Petitioners had demonstrated a likelihood that, if they were returned to Iraq, they would be subjected to a heightened risk of persecution, torture, or murder. *Id.* at PageID# 1229-1231.

Amici take no position on the factual findings of the district court. Amici describe the findings, however, because they provide the context for the district court's application of the habeas corpus and Suspension Clause principles addressed in this brief. Given the district court's findings, this case presents the critically important legal question whether, when facts arise *after* the entry of an order of removal showing that enforcement of the order presents a substantial risk of the petitioner's persecution, torture, or murder upon being returned to his or her home country, the Suspension Clause requires some level of judicial scrutiny of the petitioner's claims before the removal order is enforced.

The answer to that question is yes: the Suspension Clause does require some measure of judicial scrutiny. First, the removal of an alien entails executive

detention and physical restraint that is squarely within the reach of the Great Writ. The proposition that habeas corpus is available to challenge such detention has been settled since the first years of federal immigration enforcement. Prohibitions on judicial review of the enforcement of removal orders thus plainly implicate the Suspension Clause, as the Supreme Court recognized in *INS v. St. Cyr*, 533 U.S. 289 (2001). Second, a statutory substitute for habeas corpus review violates the Suspension Clause if it renders judicial relief practically ineffective. The history of the writ of habeas corpus, dating back to the common law in England, demonstrates that a central element of habeas review was the court's control of the petitioner, so as to ensure the court's ability to render effective relief, such as release or conditional release of the prisoner. The removal of aliens from the control of United States authorities and to a country where they will face persecution, torture, or murder before their grounds for opposing removal can be heard, and reviewed in court, would be a textbook example of judicial relief having been rendered ineffective. As a result, any statutory prohibition on consideration of habeas corpus petitions in such a context would violate the Suspension Clause, permitting a federal court to exercise its habeas jurisdiction under 28 U.S.C § 2241.

ARGUMENT

I. THE SUSPENSION CLAUSE GUARANTEES JUDICIAL REVIEW OF REMOVAL ORDERS

The district court relied first on an elementary and well-settled principle of habeas corpus law and Suspension Clause jurisprudence: the Suspension Clause applies to judicial review of government actions to remove aliens from the United States. *See INS v. St. Cyr*, 533 U.S. 289, 300 (2001) ("Because of [the Suspension] Clause, some 'judicial intervention in deportation cases' is unquestionably 'required by the Constitution.'" (quoting *Heikkila v. Barber*, 345 U.S. 229, 235 (1953))); *see also Muka v. Baker*, 559 F.3d 480, 483 (6th Cir. 2009) (same).

The writ of habeas corpus is, "[a]t its historical core," fundamentally a tool to "review[] the legality of Executive detention." *St. Cyr*, 533 U.S. at 301; *see also Boumediene v. Bush*, 553 U.S. 723, 783 (2008) (noting that "the need for habeas corpus is more urgent" "[w]here a person is detained by executive order"). Removal of an alien from the United States by the Executive Branch implicates detention in at least two respects. Not only does the government physically detain persons in contemplation of future removal, as is the case here with the arrest of Petitioners by United States Immigration and Customs Enforcement, but also, as the federal courts have long recognized, the act of removal itself inherently involves confinement and restraint of the person's physical liberty. *See Chin Yow v. United States*, 208 U.S. 8, 12 (1908) ("It would be difficult to say that [an alien]

was not imprisoned, theoretically as well as practically, when to turn him back meant that he must get into a vessel against his wish and be carried to China."); *In re Jung Ah Lung*, 25 F. 141, 142 (D. Cal. 1885) ("If the denial, therefore, to the petitioner of the right to land, thus converting the ship into his prison-house, to be followed by his deportation across the sea to a foreign country, be not a restraint of his liberty within the meaning of the habeas corpus act, it is not easy to conceive any case that would fall within its provisions."), *aff'd*, 124 U.S. 621 (1888).[3]

For this reason, removal orders historically have been reviewed by habeas corpus. *See St. Cyr*, 533 U.S. at 305-308 (setting forth history of habeas review of immigration decisions). Indeed, during the "finality" era of 1891 to 1952, a petition for habeas corpus provided the only avenue for an alien to test the legality of a removal order. In those years, Congress had attempted to make administrative removal decisions final and non-reviewable in federal court. And yet, as the Supreme Court observed in *Heikkila*, habeas corpus persisted precisely because "it was required by the Constitution." 345 U.S. at 235.

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[3] At the same time, from its earliest appearance in the Colonies, the writ of habeas corpus has been available to citizens and noncitizens alike. *See INS v. St. Cyr*, 533 U.S. 289, 301-302 (2001) ("In England prior to 1789, in the Colonies, and in this Nation during the formative years of our Government, the writ of habeas corpus was available to nonenemy aliens as well as to citizens."); *see also, e.g.*, *Ex parte D'Olivera*, 7 F. Cas. 853 (C.C.D. Mass. 1813) (No. 3,967) (entertaining habeas petition of Portuguese sailors detained in Boston).

In explaining this historical record, *Heikkila* began with *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892), in which the Supreme Court had examined the Immigration Act of 1891 and determined that Congress "manifestly intended" the Act to shield exclusion decisions from judicial review. *Id*. at 663-664. Even so, the *Nishimura Ekiu* Court continued, an alien immigrant was "doubtless entitled to a writ of *habeas corpus*" to test the legality of his restraint. *Id*. at 660. *Heikkila* also cited *Fong Yue Ting v. United States*, 149 U.S. 698 (1893), in which the Supreme Court considered habeas petitions brought by noncitizens alleged to be illegally present in the United States. *Id*. at 711. The Court noted that while a treaty or statute might authorize judicial review of the executive decision to exclude or expel an alien, the "paramount law of the constitution" also may require the court to intervene. *Id.* at 713.

In 2001, in *St. Cyr*, the Supreme Court confirmed the import of *Heikkila* and the many habeas challenges heard by federal courts during the "finality" era: the Suspension Clause requires some measure of judicial review of deportation orders. *St. Cyr*, 533 U.S. at 300. As a result, the Court reasoned, "even assuming that the Suspension Clause protects only the writ as it existed in 1789, … [i]t necessarily follows that a serious Suspension Clause issue would be presented" by Congress's withdrawal of habeas review from federal courts without the provision of an "adequate substitute for its exercise." *Id.* at 304-305.

II. THE JUDICIAL REVIEW GUARANTEED BY THE SUSPENSION CLAUSE MUST INCLUDE THE POWER TO PROVIDE AN EFFECTIVE REMEDY

Both Supreme Court jurisprudence and the history of the writ of habeas corpus demonstrate that an essential attribute of the Great Writ is the power of the habeas court to grant effective relief. The Suspension Clause thus requires that any statutory substitute for habeas corpus ensures the same remedial power. In this case, that means that a statutory substitute is inadequate if it delays, until *after* a petitioner's removal from the United States, judicial review of that petitioner's timely claim for relief from removal based on likely persecution, torture, or murder arising from that very act of removal.

The Supreme Court's decision in *Boumediene v. Bush*, 553 U.S. 723 (2008) confirms that the privilege of habeas corpus, and thus the minimum attribute of any adequate substitute, entails the power of the court to grant effective relief to the habeas petitioner. The Court held both that the petitioner is entitled "to a meaningful opportunity to demonstrate that he is being held" unlawfully and that "the habeas court must have the power to order the conditional release of an individual unlawfully detained," calling these "the easily identified attributes of any constitutionally adequate habeas corpus proceeding." *Id.* at 779. Ultimately, what is essential is that "the judicial officer must have adequate authority to make a determination in light of the relevant law and facts and to formulate and issue

appropriate orders for relief, including, if necessary, an order directing the prisoner's release." *Id.* at 787.

The history of the writ of habeas corpus both before and after the Framing confirms the *Boumediene* holding. Historically, the scope of the writ reached not just the court's jurisdiction to rule upon the lawfulness of the petitioner's restraint, but also the court's power to ensure effective relief by, as especially important in this case, controlling the location of the petitioner. Making that power more effective was one of the reforms pursued by the Habeas Corpus Act of 1679, which Parliament passed to remedy a series of abuses that had impaired the effectiveness of the writ.[4] Those abuses included the Crown's efforts to evade the writ by removing prisoners to areas where the writ did not reach. In response, the Act strengthened the courts' power to control the custody of petitioners. Specifically, Section 9 of the Act regulated the transfer of prisoners and, subject to certain exceptions, placed it under control of the courts. Sections 2 and 3 of the Act also limited the time for a custodian to produce a prisoner in response to the writ, while Section 12, also with certain exceptions, outlawed the removal of prisoners from England and attached steep penalties to noncompliance. *See* 3 *Blackstone's Commentaries* *135-137 (Univ. of Chi. Press 1979) (praising the Act as "another

[4] *See generally*, Nutting, *The Most Wholesome Law—The Habeas Corpus Act of 1679*, 65 Am. Hist. Rev. 527 (1960).

magna carta"); 9 Holdsworth, *A History of English Law* 116-118 (1926); Sharpe, *The Law of Habeas Corpus* 18-20 (2d ed. 1989); Oaks, *Habeas Corpus in the States—1776-1865*, 32 U. Chi. L. Rev. 243, 252-253 (1965).

While the reforms of the 1679 Act applied only to "criminal or supposed criminal matters," the English courts adopted analogous reforms of the common law writ over the course of the eighteenth century. Oaks, 32 U. Chi. L. Rev. at 252; *see* Sharpe, *supra* p. 10, at 20. Those reforms, in turn, produced rules that carried over to courts in the United States. Justice Nelson described these rules for controlling custody in his separate opinion in *In re Kaine*, an extradition case:

> [P]ending the examination or hearing, the prisoner, in all cases, on the return of the writ, is detained, not on the original warrant, but under the authority of the writ of *habeas corpus*. He may be bailed on the return *de die in diem*, or be remanded to the same jail whence he came, or to any other place of safe keeping under the control of the court, or officer issuing the writ, and by its order brought up from time to time, till the court or officer determines whether it is proper to discharge or remand him absolutely. … The efficacy of the original commitment is superseded by this writ while the proceedings under it are pending, and the safe keeping of the prisoner is entirely under the authority and direction of the court issuing it, or to which the return is made.

55 U.S. (14 How.) 103, 133-134, (1853) (Nelson, J., concurring in part and dissenting part) (citing Bacon, *A New Abridgement of the Law* (originally published in 1732), and earlier English cases); *see also Barth v. Clise*, 79 U.S. (12 Wall.) 400, 402 (1871) (citing *Kaine* for the proposition that the court to which the return of the writ is made must keep safe the prisoner); *Johnston v. Marsh*, 227

F.2d 528, 530, n.4 (3d Cir. 1955) ("When the prisoner came before the court, the Judge, under common law doctrine, gained custody of him, the authority of the writ superseding that of the original commitment."); Hurd, *A Treatise on the Right of Personal Liberty and on the Writ of Habeas Corpus and the Practice Connected with It* 324 (1858).

To preserve their remedial power over pending habeas petitions, United States courts issued orders to respondent custodians and held in contempt those who attempted to transfer petitioners outside the realm of the writ. *See, e.g.*, *United States v. Davis*, 25 F. Cas. 775 (C.C.D.C. 1840) (No. 14,926) (ordering imprisonment of a custodian until he produced enslaved persons he had allegedly removed from the District of Columbia to avoid writ for their freedom); *Ex parte Young*, 50 F. 526 (C.C.E.D. Tenn. 1892) (confirming lawfulness of holding father in contempt for transferring his child out of state to avoid habeas); *United States v. Green*, 26 F. Cas. 30 (C.C.D.R.I. 1824) (No. 15,256) (bypassing attachment where custodian was in court and could be compelled to testify); Hurd, *supra* p. 11, at 240-242.

Nineteenth-century state statutes provided for punishment of the same types of acts, making it a crime to conceal or transfer custody of a prisoner with the intent to evade a writ of habeas corpus. For example, in 1825, Missouri law made it a punishable offense for a custodian to transfer a prisoner to the custody of

another or to conceal him, "with intent to avoid the operation of [the] writ." 1825 Mo. Laws 426 (1825). And in 1845, the Illinois legislature likewise provided for punishment—through fines and imprisonment—for the transfer or concealment of a prisoner with "the intent to avoid the operation of [the habeas corpus] writ." 48 Ill. Rev. Stat. § 14 (1845). An 1858 treatise on the writ of habeas corpus catalogued similar statutes in several states: "In Maine, Massachusetts and Delaware, the concealing of the prisoner or changing his custody, with the intent to elude the service of the writ of habeas corpus, is prohibited under severe penalties … . In Indiana, Arkansas and Alabama, the act is declared a misdemeanor, and the offender subject to fine and imprisonment." Hurd, *supra* p. 11, at 237. The federal decisions and state statutes reflect a common, fundamental objective of the law of habeas corpus: controlling the location of the prisoner to ensure the ability of the habeas court to render effective relief.

Far from an ancillary feature, control over the custody of a petitioner was thought essential to the courts' remedial power under the Great Writ. After all, a court could not very well "direct[] the prisoner's release" or issue other "appropriate orders for relief," *Boumediene*, 553 U.S. at 787, if the prisoner was beyond the reach of the writ and the court's jurisdiction. The Supreme Court has routinely acknowledged this intuitive point. For example, in *United States v. Shipp*, 203 U.S. 563 (1906), the Supreme Court considered a contempt proceeding

against a sheriff who had permitted a lynch mob to murder a habeas petitioner whose execution had been stayed pending appeal. Dismissing the sheriff's argument that the circuit court was without power to issue a stay unless the court had first decided that the petitioner was held in violation of the Constitution, the Court ruled:

> Until its judgment declining jurisdiction should be announced, [the Court] had authority, from the necessity of the case, to make orders to preserve the existing conditions and the subject of the petition, just as the state court was bound to refrain from further proceedings until the same time. The fact that the petitioner was entitled to argue his case shows what needs no proof, that the law contemplates the possibility of a decision either way, and therefore must provide for it.

Id. at 573 (citations omitted). Similarly, in *Lonchar v. Thomas*, 517 U.S. 314 (1996), the Supreme Court recognized that denying a stay necessary to prevent a petitioner's execution would effectively amount to a dismissal of his petition and thus a denial of "the protection of the Great Writ entirely, risking injury to an important interest in human liberty." *Id.* at 319, 324.

Just as denying a stay necessary to prevent a petitioner's execution vitiates "the protection of the Great Writ," so too would removal of a petitioner in the context presented by the district court's findings of fact here—*i.e.*, a petitioner presenting claims for relief from removal based on the likelihood of persecution, torture, or murder upon removal to his or her home country. As articulated by Judge Easterbrook, "[t]he ability to come back to the United States would not be

worth much if the alien has been maimed or murdered in the interim." *Hor v. Gonzales*, 400 F.3d 482, 485 (7th Cir. 2005). In such a case, the court's eventual order in a petitioner's favor would be a dead letter, coming too late to effect the relief requested, precisely because the government changed the petitioner's location during the pendency of the petitioner's claim for relief.

At a constitutional minimum, the Suspension Clause protects the habeas court's power to render effective relief on a petitioner's claim. Accordingly, any statutory substitute for habeas corpus that purports to defer, until *after* the petitioner's removal from the United States, judicial review of that petitioner's timely claim for relief from removal based on likely persecution, torture, or murder cannot satisfy the Suspension Clause.[5]

[5] This Court's decision in *Muka v. Baker*, 559 F.3d 480 (6th Cir. 2009), is not to the contrary. That decision concerned circumstances in which the petitioners' claims for relief from removal (adjustment of status) were available at the time of their removal proceedings. *See id.* at 485-486. As framed by the district court's findings of fact in this case, the changed country conditions giving rise to Petitioners' claims here arose *after* their removal proceedings had ended, and there would have been no reason to file motions to reopen before the government's 2017 agreement with Iraq. RE 64, PageID# 1229, 1246. This case thus presents critically different circumstances, in which, absent the district court's intervention by means of the habeas writ, a petitioner's timely claim for relief on grounds of likely persecution, torture, or murder would not be examined until after the petitioner's removal.

CONCLUSION

Amici curiae respectfully submit that the two principles of habeas corpus law underlying the district court's jurisdictional decision—that (a) the Suspension Clause is implicated by prohibitions on judicial review of the enforcement of immigration removal orders, and (b) the Suspension Clause is violated if no substitute process allows for judicial review at a time and in a form that permits a court to grant effective relief—are correct, firmly rooted in the history of the writ of habeas corpus and governing Suspension Clause jurisprudence, and should be affirmed.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 32(a)(7)(B)(i).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(f) and Sixth Circuit Rule 32(b)(1), the brief contains 3,701 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word 2016 in 14 point Times New Roman font. As permitted by Fed. R. App. P. 32(g)(1), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

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February 12, 2018

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of February, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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