No. 24-7351

IN THE

Supreme Court of the United States

TERRY PITCHFORD,

Petitioner,

v.

BURL CAIN, COMMISSIONER,
MISSISSIPPI DEPARTMENT OF CORRECTIONS, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF HABEAS CORPUS SCHOLARS AS AMICI CURIAE IN SUPPORT OF PETITIONER

Elizabeth R. Moulton
ORRICK, HERRINGTON & SUTCLIFFE LLP
405 Howard Street
San Francisco, CA 94105

Tor Tarantola
ORRICK, HERRINGTON & SUTCLIFFE LLP
2100 Pennsylvania Avenue, NW
Washington, DC 20037

Geoffrey C. Shaw
Counsel of Record
ORRICK, HERRINGTON & SUTCLIFFE LLP
355 S. Grand Avenue
Suite 2700
Los Angeles, CA 90071
(213) 629-2020
geoffreyshaw@orrick.com

Counsel for Amici Curiae

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INTEREST OF AMICI CURIAE[1]

Amici are scholars of law and legal history with expertise in habeas corpus and the ancient and modern history of the writ.

Paul D. Halliday is Julian Bishko Professor of History and Professor of Law at the University of Virginia. He is a leading expert in English legal history and the author of *Habeas Corpus: From England to Empire* (2010).

Lee Kovarsky is the Bryant Smith Chair in Law at the University of Texas at Austin. He is a leading scholar of the death penalty and habeas corpus and is the author of *The New Negative Habeas Equity*, 137 Harv. L. Rev. 2222 (2024).

Amici share an interest in ensuring that a sophisticated understanding of the history of the writ and of the use of equity at common law informs the development of habeas corpus law in this Court and in lower federal courts.

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[1] No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than amici curiae and their counsel made a monetary contribution intended to fund the preparation or submission of the brief. Amicus Lee Kovarsky has an affiliation with Phillips Black, Inc., the law firm of counsel for Petitioner. Mr. Kovarsky receives no salary from Phillips Black, Inc. He has had no involvement in Phillips Black's representation of Mr. Pitchford and has not nor will ever receive anything of value in conjunction with that representation.

INTRODUCTION AND SUMMARY OF ARGUMENT

In several recent opinions, the Court has suggested that 28 U.S.C. §§ 2241 and 2243 may give federal habeas courts discretion to deny habeas relief when an applicant has otherwise established eligibility for the writ. *See Brown v. Davenport*, 596 U.S. 118, 132 (2022) (suggesting, in dicta, "that Congress invested federal courts with discretion when it comes to supplying habeas relief—providing that they 'may' (not must) grant writs of habeas corpus, and that they should do so only as 'law and justice require'" (citing 28 U.S.C. §§ 2241, 2243)); *Shinn v. Ramirez*, 596 U.S. 366, 377 (2022) (suggesting, in dicta, that a habeas applicant "is never entitled to habeas relief" and "must still 'persuade a federal habeas court that law and justice require [it]'" (quoting *Davenport*, 596 U.S. at 132) (alteration in original)); *Edwards v. Vannoy*, 593 U.S. 255, 289 (2021) (Gorsuch, J., concurring) ("The law … invests federal courts with equitable discretion to decide whether to issue the writ or to provide a remedy.").

As scholars of the history of habeas corpus and the role of equity in common law adjudication, we respectfully urge the Court against developing this idea further in this case. As an initial matter, it is beyond the scope of the question presented. *Infra* Part I. But we also advise that fuller consideration in a better posture—with adversarial presentation and vigorous amicus participation—will yield conclusions contrary to those expressed in *Davenport* and the other cases cited above. Specifically, the idea that federal courts possess equitable discretion to deny habeas relief to

otherwise eligible prisoners belies the writ's common law and statutory histories and well as the history of equity and its role in common law courts.

Historically, equity was an instrument of mercy. Equity permeated common law habeas corpus practice and operated in aid of prisoners. To the extent English common law judges exercised equitable discretion in habeas cases, they did so to *set aside* formal obstacles that would typically preclude relief; equity was not a source of power to impose new obstacles or exercise discretion to a prisoner's disadvantage. *Infra* Part II. Congress did not break from this history when enacting today's habeas statutes. Congress has consistently required courts to discharge prisoners held in violation of federal law. It has never invested Article III courts with equitable discretion to deny habeas relief to a prisoner who has established that his conviction was illegal. And Article III courts have traditionally respected that mandate. *Infra* Part III.

Because the equitable authority suggested in *Davenport* is foreign to the writ's history, the Court should not address it further in *Pitchford*. At a minimum, the issue deserves a squarely presented question and full briefing. We therefore urge that any decision in this case say nothing about the issues discussed in this amicus brief.

ARGUMENT

I. The Court Should Not Venture Beyond § 2254(d) In This Case.

The Court granted certiorari to decide whether the Mississippi Supreme Court's waiver determination was unreasonable under "the standards set forth in AEDPA, 28 U.S.C. § 2254(d)." *Pitchford v. Cain*, No. 24-7351, 2025 WL 3620434, at *1 (U.S. Dec. 15, 2025). Section 2254(d) is not a provision about "the merits" of the underlying claim; it is a relitigation bar. It broadly precludes merits consideration of claims that state courts adjudicate on the merits, with two exceptions: when "the adjudication of the claim - (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

The question whether § 2254(d) bars relitigation is distinct from the question whether the underlying constitutional claim has merit. *See Lockyer v. Andrade*, 538 U.S. 63, 71 (2003) (declining to "reach the question whether the state court erred and instead focus solely on whether § 2254(d) forecloses habeas relief"). As the Court recently recognized, there are many cases in which a petitioner can establish constitutional error without clearing § 2254(d)'s hurdles. *See Klein v. Martin*, No. 25-51, 2026 WL 189976, at *1 (U.S. Jan. 26, 2026) (per curiam) ("Faithful application of [AEDPA's] standards sometimes puts federal

district courts and courts of appeals in the disagreeable position of having to deny relief in cases they would have analyzed differently if they had been in the shoes of the relevant state court."). And other doctrines might bar relief on meritorious claims that are unrestricted by the relitigation bar, including procedural default, harmless error, and retroactivity. *See, e.g.*, *Dretke v. Haley*, 541 U.S. 386, 388 (2004) (procedural default); *Davenport*, 596 U.S. at 135 (harmless error); *Danforth v. Minnesota*, 552 U.S. 264, 274-75 (2008) (retroactivity).

The Court's recent statements suggesting that lower courts "may" deny relief or should only grant relief as "law and justice require" rely on statutory language not found in § 2254(d), but in two other sections that address different aspects of habeas practice. Questions about whether a claimant shows "custody in violation of" federal law within the meaning of § 2241(c)(3) arise only if the relitigation bar is satisfied, and a claimant's entitlement to remedies under § 2243 arise later still. For that reason, remedial questions associated with §§ 2241 and 2243 are not subsumed by the question presented, which is about whether Mr. Pitchford has satisfied an exception to relitigation in § 2254(d).

Nor were questions about equitable discretion to deny relief litigated below. *See* Br. for Resp'ts-Appellants, *Pitchford v. Cain*, No. 23-70009 (5th Cir. Feb. 26, 2024), ECF No. 33; Br. for Pet'r-Appellee, *Pitchford*, No. 23-70009 (5th Cir. Apr. 26, 2024), ECF No. 42; Reply Br. for Resp'ts-Appellants, *Pitchford*, No. 23-70009 (5th Cir. May 31, 2024), ECF No. 50. Because further discussion of the issue would take place

in the absence of percolation and adversarial presentation, the Court should avoid addressing it here.

Caution is especially warranted because discretion to deny habeas relief lacks support in the writ's English common law history, its American statutory history, or federal judicial practice.

II. Common Law Habeas Corpus Incorporated Equitable Principles To The Advantage Of Prisoners.

We first discuss the history of habeas corpus, which sits at an unusual intersection of common law and equity. Understanding the provenance of equity in American habeas law, and the proper limits on its exercise, requires appreciating how equity was originally conceived and used in English courts and how it affected common law habeas practice.

At common law, the writ of habeas corpus was, literally, a summons issued by a court of law to a jailer demanding information about a prisoner's detention. That is why, today, a habeas case in federal court typically names the prison warden as the respondent. The common law writ issued because the court had been informed of facts that suggested the possibility that a wrong had been committed by a detention order. And the only way to adjudicate the allegations was to obtain and scrutinize the facts of the detention. *See* Paul D. Halliday, *Habeas Corpus* 45-48 (2010).

The writ was formally an instrument of common law courts, not courts of equity. But habeas practice incorporated equitable principles. The common law

courts' simulation of equity was so apparent by the early 1600s that Lord Chancellor Ellesmere declared that practice in habeas corpus and related writs "confound[ed] the distinct jurisdictions of common law and of equity." Louis A. Knafla, *Law and Politics in Jacobean England* 281 (1977) (spelling modernized). This Court continues to recognize the equitable flavor of habeas practice. It has explained that "habeas corpus is, at its core, an equitable remedy." *Schlup v. Delo*, 513 U.S. 298, 319 (1995). This equitable dimension of modern American habeas law derives from how the writ developed in the sixteenth through eighteenth centuries.

Equity operated in pursuit of mercy. And it was especially important in habeas proceedings, because, as articulated by Justice Dodderidge in 1624, "the law is tender in restraint of liberty." Halliday, *Habeas Corpus* at 188 (quoting Justice Dodderidge, Cambridge University Library, MS Gg.2.30, fol. 37v). Habeas corpus practice often involved an exercise in equity working to the advantage of prisoners when they encountered harsh, inflexible rules. Equitable principles grounded judicial authority to give the facts behind dubious detentions a full hearing, even where the formal rules of common law courts might prevent doing so. Orders by the common law Court of King's Bench to release Protestant or Catholic dissenters, and others detained by overzealous justices of the peace, illustrate how this operation of equity often worked around the relevant law. *See* Halliday, *Habeas Corpus* at 31, 99-101, 149-53, 344-45 nn.62-64.

To the extent common law judges exercised "equitable discretion" in habeas corpus cases, it was in aid of prisoners and to displace otherwise operable legal rules that stood as obstacles to mercy. The notion that a court might invoke equitable principles to withhold relief from a prisoner who is formally entitled to it represents a sharp departure from the common law history of the writ.

A. Equity pursued the "sweetness of mercy."

From its earliest formulations, equity was conceived as an exercise of mercy. The sixteenth-century legal scholar Christopher St. German, adopting the third-century definition from St. Cyprian, wrote that "[e]quity is a righteousness that considereth all the particular circumstances of the deed, the which also is tempered with the sweetness of mercy." Halliday, *Habeas Corpus* at 88 (quoting 91 *St. German's Doctor and Student* 95 (T.F.T. Plucknett & J.L. Barton eds., 1974)); *see also* Dennis R. Klinck, *Conscience, Equity, and the Court of Chancery in Early Modern England* 46-51 (2010).

This stock phrase—"the sweetness of mercy"—ran more than any other through subsequent discussions. William West's treatise *Symboleography* channeled St. German when he wrote that equity "dispenseth with many points of the Law." It was never to sharpen law's rigor, but was "a mittigation, or moderation of the Lawe written." William West, *The Second Part of Symboleography* folio 174v (1601). In this way, equity produced justice "allayed with the sweetness of mercy." *Id.* (spelling modernized); *see*

also John Dodderidge, *The Lawyers Light* 64 (1629) (likewise using St. German's language that equity involved the "sweetnesse of mercy"); Halliday, *Habeas Corpus* at 87-93.

Judicial ideas were fully entwined with theological ideas about equity. Equity solved a great problem for early modern believers: how shall an unavoidably sinful person be redeemed? None could claim to obey God's commandments with the perfection that those commandments require. As one theologian put it, "in the Gospell of Christ is propounded a way how the severitie of God[']s justice should be moderated with equitie, and tempered in mercie, or else no flesh should be saved." Andrew Willet, *Hexapla* 269 (1611).

This idea informed human law: "As in humane Courts there is a double kind of justice, either strict or rigorous justice, or justice moderated and tempered with equitie and clemencie … So is it with God …." *Id.* at 270. Theologians and lawyers alike cited *Ecclesiastes* 7:16: "Be not righteous over much." Edward Hake, *Epieikeia: A Dialogue on Equity in Three Parts* 8 (D.E.C. Yale ed. 1953) (c. 1600). William Perkins, invoking the same verse, warned magistrates who failed to do so that they would "make the name of justice[] a cover for cruelty." *Epieíkeia: or, a Treatise of Christian Equitie* 9 (1604). The sweetness of equity was simultaneously a religious obligation and a juristic principle.

Early modern lawyers and preachers consistently used the words "allay," "temper," and "mitigate" to describe equity's operation, emphasizing that equity was not unbounded discretion to depart from the law

in either direction—away from mercy or toward it. To the contrary, equity was purposive, intended to produce justice allayed with mercy, and not an opportunity for the indulgence of unbounded discretion. It permitted, in the words of Thomas Ashe, "setting aside the common rules of the law" to produce "a ruled kind of justice, allayed with the sweetness of mercy." Halliday, *Habeas Corpus* at 88 (quoting Thomas Ashe, *Epieikeia* sig. Aiiii (1609)). As a "ruled" justice, *id.*, equity pointed the judge in only one direction: toward mitigation. Conscience and reason informed equity's operation toward this end. *See generally* Klinck, *Conscience, Equity, and the Court of Chancery* at 41-106.

B. Habeas practice incorporated equitable principles to operationalize the pursuit of mercy.

The same was true of the equitable principles applied in the common law courts' use of habeas corpus. The purpose of the writ was to protect the king's prerogative to ensure the legal and just treatment of his subjects. *See* Halliday, *Habeas Corpus* at 74-84. It was an exercise of equitable power—which means it was, by definition, an exercise of mercy.

Use of equity in habeas was part of a broader practice of using equity at common law, which had existed since the thirteenth century. Paul Brand, *The Equity of the Common Law Courts*, *in* LAW & EQUITY: APPROACHES IN ROMAN LAW AND COMMON LAW 41 (E. Koops and W.J. Zwalve eds., 2014). Common lawyers in the sixteenth century, like Sir Thomas More, un-

derstood conscience as the instrument by which judgments in equity might operate in and through law. 2 *The Reports of Sir John Spelman* 41 (J. H. Baker ed. 1978). Equitable ideas often worked their way silently into the practices of common law courts—for instance, in changes in evidence practices. Michael R.T. MacNair, *The Law of Proof in Early Modern Equity* 36, 277 (1999).

As a writ conceived as arising from the king's prerogative and transposed into the hands of his justices, habeas corpus was analogized "to the government of God himself, who suffers things generally to go in their usual course, but reserves to himself to go out of that by a miracle when he pleases." Halliday, *Habeas Corpus* at 67 (quoting John Davies, British Library (London), MS Stowe 1011, fol. 88). Like the king's prerogative generally, habeas corpus was to be used only "to the general benefit of the people and is *salus populi*." Fleming, C.B. in *Bates's Case* (1606), quoted in J.W. Tubbs, *The Common Law Mind: Medieval and Early Modern Conceptions* 137 (2000).

Habeas corpus became the most significant means by which common law courts performed, on the sovereign's behalf, the protection of the king's laws that was due to all subjects. *See* Halliday, *Habeas Corpus* at 69-74; *Calvin's Case* 77 Eng. Rep. 377, 382-83, 7 Co. Rep. 1a, 4b-5b (1608) (discussing the reciprocity between the subject's obedience and the sovereign's protection). The king's prerogative to ensure that his subjects received the protection of his laws, and equity's requirement to attend to "the sweetness of mercy," came together in the use of habeas corpus,

as when the justices of King's Bench, citing "the equity of the cause," released three fishermen jailed by the High Court of Admiralty. Halliday, *Habeas Corpus* at 87 (quoting John Vaughan et al., *reported in* Lincoln's Inn (London), MS Maynard 21, fol. 265v (1610)).

This is apparent, for example, in the habeas courts' flexible approach to evidence. Adopting practices from equity, King's Bench—England's principal common law court—circumvented apparent rules restricting their inquiries to information supplied in a jailer's return to the writ. Increasingly, the court asked people before them—counsel, court officers—for information outside the jailer's written return. Halliday, *Habeas Corpus* at 110. King's Bench also began by the 1620s to receive information by affidavits, a practice used in courts of equity. *Id.* at 46-48, 110-12. Allowing the use of affidavits proved crucial when King's Bench innovated by extending habeas corpus to examine detentions within families in the seventeenth century and the imprisonment of sailors in the eighteenth. *Id.* at 35-38, 121-33, 205-06.

This expansion of jurisdiction and of the otherwise permissible body of evidence in aid of prisoners reflected equity's influence on common law habeas practice. Thomas Ashe wrote that equity works with those "particular facts, which daily fall out, and have not certain line and square for them in the laws already made." *Id.* at 102 (quoting Thomas Ashe, *Epieikeia*, sig. Av. Verso (1609)). Henry Curson, at the end of the seventeenth century, parroted St. German in insisting that equity required "weighing all circumstances." Henry Curson, *A Compendium of the Laws*

and Government Ecclesiastical, Civil and Military, of England, Scotland & Ireland 96 (1699).

Another way habeas courts employed equitable principles to circumvent the ordinary evidentiary rules of Kings Bench was to use proceedings on orders *nisi* to make full factual inquiries before the writ issued. The court used such orders as early as 1601. Halliday, *Habeas Corpus* at 48, 112-15. Like affidavits, which were often linked in practice to orders *nisi*, this practice encouraged other innovations: for instance, permitting investigations of the status of alleged prisoners of war. *Id.* at 173.

Equity's influence on common law habeas practice is also apparent from subpoena clauses in the writ, which specified cash penalties jailers might suffer for noncompliance, a usage drawn straight from Chancery and the other courts of equity. *See id.* at 60-63, 92-93; John Baker, *Introduction to English Legal History* 111-12 (5th ed. 2019); Daniel Gosling, *The Records of the Court of Star Chamber at the National Archives and Elsewhere*, *in* STAR CHAMBER MATTERS: AN EARLY COURT & ITS RECORDS 32-33 (K.J. Kesselring & Natalie Mears eds., 2021). Such clauses began to appear in a significant number and became uniform in use in the 1590s. *See* Halliday, *Habeas Corpus* at 61.

When threats of financial penalties proved insufficient against nonresponsive detainers, the court might issue attachments for contempt, a practice drawn from courts of equity. *Id.* at 83-84, 92-95. In extreme cases, this entailed jailing the jailer himself. *Id.* at 11-14. It was this new power that King's Bench

used to push habeas corpus, as a prerogative writ, into places where other writs did not run. *Id.* at 81-84, 259-302. In *Bourne's Case*, in which King's Bench insisted that habeas might go to the normally exempt jurisdiction of the Cinque Ports, the court warned the writ's recipient not to contest its commands. To do so would be to dispute "the power of the King and his Court, which is not to be disputed." *Bourne's Case*, 79 Eng. Rep. 465, 466, Cro. Jac. 543 (1619). After all, "the King ought to have an account why any of his subjects are imprisoned." *Id.*; *see also* Halliday, *Habeas Corpus* at 82-83.

Equitable principles also informed how courts of law interpreted statutes that ostensibly permitted the petitioner's imprisonment. Judges were to "exclude all rigours and mischiefs, and stand with equity and good reason." *Stowell v. Lord Zouch*, *Commentaries* 1:363 (quoted in J.W. Tubbs, *The Common Law Mind* 125 (2000)). The sixteenth century legal commentator Edward Hake clarified that equitable interpretation was a quality inherent to the law, not the judge, that the interpreter was to draw out. He explained that one should not mistakenly conclude that

> *Equity* were a thing owt of the lawe or besyde the lawe, or as if it were the *Equity* of the judge, and not of the lawe, but that the *Equity* thereby ment is to be taken (as it is indeede) to be within the lawe, and that it being there founde is to be applied by the judge of the lawe according as the particularity of the case that is before him, not ayded by the letter of the lawe, shall requier.

Hake, *Epieikeia* at 46; *see also* Mark Fortier, *The Culture of Equity in Early Modern England* 71-73 (2005). In this way, Hake explained, "the Common lawe mighte seeme to consist most upon *Equity*." Hake, *Epieikeia* at 56.

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In short, equity as incorporated into common law habeas corpus practice empowered judges to supersede or circumvent ordinary legal rules and procedure, and interpret penal statutes, in pursuit of mercy. Such equitable authority was not a source of discretion that flowed in the other direction.

III. Equitable Discretion To Deny Habeas Relief Is Contrary To American Statutory History And Judicial Practice.

American habeas statutes carry forward the common law tradition. The operative habeas provisions today do not invest courts with equitable authority to deny relief, which would have introduced a power unknown to the common law. For most of American legal history, it was broadly understood that an applicant imprisoned in contravention of federal law was entitled to relief. *See* Lee Kovarsky, *The New Negative Habeas Equity*, 137 Harv. L. Rev. 2222, 2251-53 (2024); 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1333 (1833) ("[I]f no sufficient ground of detention appears, the party is entitled to his immediate discharge."); William S. Church, *A Treatise on the Writ of Habeas Corpus* § 362, at 472 (1884) ("[I]f the record on the hearing of the writ … shows the imprisonment to be in violation

of the constitution or a law or treaty of the United States, the prisoner will be discharged."). That principle was clearly reflected in the Reconstruction provisions extending habeas corpus to all state and federal custody, and Congress has made only ornamental changes since then.

Nonetheless, dicta in some of the Court's recent opinions have invoked two statutory provisions as supporting a court's equitable discretion to deny permissible relief. The first is in 28 U.S.C. § 2243, which provides that a habeas court "shall summarily hear and determine the facts, and dispose of the matter *as law and justice require*." (emphasis added). The second is in § 2241(a), which provides that "[w]rits of habeas corpus *may* be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions." (emphasis added).

But both the "law and justice" language in § 2243 and the word "may" in § 2241 were introduced as nonsubstantive changes to statutes that *required* federal courts to grant relief when a person was imprisoned in violation of the Constitution. A sea change in habeas practice cannot be attributed to these statutory fragments. Congress would have worked such a revolution with far more direct phrasing, and it would have left some evidence of intent. A careful statutory history instead reveals that Congress added the text at issue for much more mundane reasons.

A. The phrase "law and justice" in § 2243 did not establish equitable discretion to deny relief.

Congress significantly expanded the scope of federal habeas in the Habeas Corpus Act of 1867. Its language left no room for a court to deny relief discretionarily: Once a writ is issued and returned,

> [t]he said court or judge shall proceed in a summary way to determine the facts of the case, by hearing testimony and the arguments of the parties interested, and if it shall appear that the petitioner is deprived of his or her liberty in contravention of the constitution or laws of the United States, *he or she shall forthwith be discharged and set at liberty*.

Ch. 28, § 1, 14 Stat. 385, 386 (1867) (emphasis added). The substance of the rule has not changed since.

Congress amended this section in 1874—and introduced the "law and justice" language—when it enacted the Revised Statutes, its codification of then-existing federal law:

> The court, or justice, or judge shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon *to dispose of the party as law and justice require*.

1 Rev. Stat. § 761 (1874) (emphasis added).

One thing was clear about the 1874 revisions: they were not to be construed as making substantive

changes to federal habeas law. Rather, their purpose was "to consolidate and collect all federal statutes and laws," not "to change the[ir] meaning." *Kush v. Rutledge*, 460 U.S. 719, 724 n.6 (1983). This change to the habeas statute—replacing "shall forthwith be discharged" with "shall … dispose of the party as law and justice require"—accomplished two purely stylistic objectives.

First, the revisers were tasked with compiling "all federal statutes and laws," including all extant habeas statutes, into a single code. *Id*. This included the 1867 Act, which pertained to persons held in violation of federal law, but it also included other habeas statutes pertaining to prisoners awaiting trial and whose testimony was required in court. *See* Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 82; 1 Rev. Stat. § 753 (incorporating these provisions). The broader language—"as law and justice require"—encompasses those other categories for which discharge was not the traditional or appropriate remedy.

Second, the amendment fixed a slight inaccuracy in the 1867 Act's terminology. In addition to state prisoners, the 1867 Act extended federal habeas to enslaved people who had not yet secured their liberty. *See* Lewis Mayers, *The Habeas Corpus Act of 1867*, 33 U. Chi. L. Rev. 31, 47 (1965). For those people, the 1867 Act's use of the word "discharge" would not have been technically accurate. *See* 1 John Bouvier, *A Law Dictionary* 480 (14th ed. 1877) (defining "discharge" as pertaining to "a person in confinement under some legal process, or held on an accusation of some crime or misdemeanor").

In short, the introduction of the "law and justice" language was not intended to change the mandatory nature of the writ—a court's obligation to discharge an unlawfully held prisoner. It was a stylistic revision introduced during Congress's codification of federal law, which in turn required broader remedial language necessary to cover remedies for different types of custody.

Contemporaneous judicial interpretation shows that the ordinary meaning of "law and justice" did not change the mandatory character of relief. For example, in *In re Medley*, 134 U.S. 160, 174 (1890), the Court held that a state prisoner was "entitled to his discharge" because "he [wa]s in custody in violation of the constitution of the United States," despite being guilty of first degree murder. The Court in a similar case, *In re Savage*, 134 U.S. 176, 177 (1890), reached the same conclusion, finding that the prisoner was "entitled to have his liberty." And in *Cunningham v. Neagle*, 135 U.S. 1 (1890), the Court interpreted the "law and justice" language expressly:

> And section 761 [of the Revised Statutes] declares that when, by the writ of *habeas corpus*, the petitioner is brought up for a hearing, the 'court or justice shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require.' This, of course, means that if he is held in custody in violation of the constitution or a law of the United States, or for an act done or omitted in pursuance of a law of the United States, *he must be discharged*.

Id. at 41 (second emphasis added).

This Court in these cases affirmed what was well understood: under the habeas statutes, federal courts did not have discretion to deny relief to a person imprisoned in violation of federal law. To the contrary, the court was obligated to order the prisoner's release.

The final amendment to this language was made during another codification project—the 1948 enactment of the Judicial Code—which changed "dispose of the party" to "dispose of the matter." *See* Act of June 25, 1948, Pub. L. No. 80-773, § 2243, 62 Stat. 869, 965. This tweak to the language likewise made no substantive change, and it certainly did not newly grant courts discretion to deny relief to which a prisoner is otherwise entitled. This is clear because the drafters of the 1948 code were careful to designate which changes to statutory language were substantive and which were merely changes in "phraseology." H.R. Rep. No. 80-308, at A178 (1947) (contrasting substantive changes with "[c]hanges … in phraseology"). This change to § 2243 was designated as phraseological. *See id*. ("law and justice" language in § 2243 not identified as substantive).

Nor would Congress, either in 1874 or in 1948, have established a major font of judicial discretion in so subtle a way. And it almost certainly would not have placed it at the end of a section that otherwise involves comparatively mundane procedure—the deadline for returning an order to show cause, the timeline for scheduling a hearing, and the process for collecting and amending testimony. *See* 28 U.S.C. § 2243. Congress, after all, does not "hide elephants

in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

B. The word "may" in § 2241 did not establish equitable discretion to deny relief.

Beginning with the Judiciary Act of 1789, Congress provided that certain federal courts and their judges "shall have power to issue writs of … *habeas corpus*." Ch. 20, § 14, 1 Stat. 73, 81 (emphasis in original). Equivalent language appeared in the 1867 Habeas Corpus Act, which the 1874 revision preserved. *See* ch. 28, § 1, 14 Stat. 385, 385 (1867) (providing that federal courts "shall have power to grant writs of habeas corpus"); 1 Rev. Stat. § 752 (same).

This language was eventually amended during the 1948 codification of the Judicial Code, which added the power of appellate judges to transfer habeas writs to district courts. A rule that permitted appellate courts to transfer writs, as well as new statutory restrictions on relief, required a corresponding change in the syntax of 28 U.S.C. § 2241(a): "Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions." The revisers described this and the other changes in this section as "changes in phraseology necessary to effect the consolidation" of three sections of the Revised Statutes. 28 U.S.C. § 2241, Historical and Revision Notes to the 1948 Act; *see also* H.R. Rep. No. 80-308 at A177. They were not intended to effect a substantive change, let alone make habeas relief discretionary. *See Jones v. Hendrix*, 599 U.S. 465, 473

(2023) (noting that the 1948 Judicial Code "largely recodified the federal courts' pre-existing habeas authority in §§ 2241 …, which … confer[s] the power to grant the writ.").

As mentioned above, the use of "may" was more mundane. It conformed the syntax of § 2241(a) to (1) § 2241(b), which allowed appellate judges to transfer writs to district courts; (2) § 2244, which restricted repeat litigation of certain claims; and (3) § 2254, which ordinarily barred relief unless state prisoners challenging their convictions exhausted state remedies. 62 Stat. at 964-67. Section 2241 could not make relief mandatory upon a showing of unlawful custody when subsequent parts of the 1948 Code specified conditions under which relief need not or could not be granted. The word "may" simply accommodated these other changes. It did not radically change habeas practice by creating discretion to deny relief to which prisoners were otherwise entitled. *Cf. Whitman*, 531 U.S. at 468.

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Outside of dicta and non-binding concurrences, this Court has properly understood the "law and justice" language of § 2243 and the word "may" in § 2241(a) to require only that lower courts follow certain judicially crafted, narrow rules carefully prescribed by this Court itself—such as those related to harmless error, procedural default, and retroactivity. *See Danforth*, 552 U.S. at 278; *Davenport*, 596 U.S. at 134. This Court should not press into a new frontier by reading this language to create lower court discretion to deny claims that otherwise merit relief.

CONCLUSION

The Court should confine its analysis in this case to the question on which it granted certiorari, namely the application of § 2254(d). The notion that federal habeas courts may possess equitable discretion to deny relief to which a prisoner is otherwise entitled is beyond the scope of that question, and it is inconsistent with the common law and statutory histories of habeas corpus. In any event, this is not the correct case for the Court to elaborate on it, as Respondents did not present or brief the issue below.

Respectfully submitted,

Elizabeth R. Moulton
ORRICK, HERRINGTON & SUTCLIFFE LLP
405 Howard Street
San Francisco, CA 94105

Tor Tarantola
ORRICK, HERRINGTON & SUTCLIFFE LLP
2100 Pennsylvania Avenue, NW
Washington, DC 20037

Geoffrey C. Shaw
Counsel of Record
ORRICK, HERRINGTON & SUTCLIFFE LLP
355 S. Grand Avenue
Suite 2700
Los Angeles, CA 90071
(213) 629-2020
geoffreyshaw@orrick.com

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