

No. 25-5930

In the Supreme Court of the United States

WILLIAM MAXWELL, PETITIONER

v.

SANDRA DINIS, ACTING WARDEN

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

**BRIEF FOR HABEAS SCHOLARS AS
AMICI CURIAE IN SUPPORT OF PETITIONER**

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INTEREST OF *AMICI CURIAE*¹

Amici curiae are legal scholars at universities across the country with expertise in habeas corpus and criminal law. Together, they have devoted decades to researching, teaching, and writing about habeas corpus. *Amici* have a strong interest in ensuring that habeas law reflects the writ's proper scope. Historical analysis is especially important here because the question presented turns on the scope of the habeas statute as enacted.

¹ Pursuant to S. Ct. Rule 37.6, no counsel for any party authored this brief in whole or in part and no person or entity other than *amici curiae* and their counsel made a monetary contribution to its preparation or submission.

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SUMMARY OF ARGUMENT

In interpreting the habeas statutes, “a page of history is worth a volume of logic.” *Jones v. Hendrix*, 599 U.S. 465, 472 (2023) (quoting *N.Y. Tr. Co. v. Eisner*, 256 U.S. 345, 349 (1921)). From English common law, through the Founding, to the 1948 codification of the provisions at issue, the writ has never been confined to challenges to the fact or duration of confinement. Nor have its remedies been confined to a binary choice between discharge and continued detention. The writ has always allowed petitioners to challenge the *type* of custody—where, by whom, and under what degree of restraint a petitioner is held—and has always empowered courts to calibrate relief to the illegality proved. The Fifth Circuit’s holding is divorced from the statute’s

² Institutions are listed for identification purposes only.

meaning and the history it codified. This Court should reverse.

1. In 1948, Congress did not create a new writ; it merely “recodified the federal courts’ pre-existing habeas authority” in 28 U.S.C. §§ 2241 and 2243. *Jones*, 599 U.S. at 473. The Reviser’s Notes describe only “changes in phraseology” to §§ 2241 and 2243, and the recodification’s principal architects confirmed that those provisions merely restated the practice already worked out by judicial decision. Congress adopted the judicial construction the reenacted language had already received. The meaning of §§ 2241 and 2243 therefore turns on what habeas practice encompassed in 1948—a practice that included claims about the manner and place of custody, redressable through remedies short of total discharge.

2. English common law and early American statutory developments confirm that habeas reaches non-discharge claims.

a. At English common law, the King’s Bench routinely used habeas to address various forms of custody and grant relief short of release—bail, conditional discharge, and transfer between custodians. And in spousal-confinement, child-custody, and madhouse cases, the King’s Bench adjusted the particular restraint rather than dissolving custody altogether. The writ’s function was to conform custody to law, not merely to open or close the custodial door.

b. The Judiciary Act of 1789 carried that writ, with its accumulated remedial practice, into federal law. Section 14 authorized an inquiry into the “cause of commitment” without limiting petitions to attacks on convictions or demands for discharge. And when the First Congress wanted to limit the writ, it knew how: It

restricted the class of custodians, not the remedies available. Accordingly, this Court’s first habeas decisions included relief that changed the form of restraint, not just its existence.

c. Each time Congress returned to the writ in the nineteenth century, it broadened or preserved the writ’s reach, never narrowed it. The 1867 Act reached any person “restrained of his or her liberty” in violation of federal law—language that survives today as § 2241(c)(3) and that this Court immediately read to reach “every possible case of privation of liberty” and give courts jurisdiction that was “impossible to widen.” *Ex parte McCardle*, 73 U.S. (6 Wall.) 318, 325-26 (1867); see *Felker v. Turpin*, 518 U.S. 651, 659 n.2 (1996). And the 1874 revision preserved that expanded writ while directing courts to “dispose of the party as law and justice require”—a deliberately open-ended remedial command, carried forward essentially unchanged in § 2243, that is incompatible with an all-or-nothing writ.

3. The decisional law against which Congress legislated in 1948 confirms the same: Habeas was calibrated to the illegality at issue, not limited to unconditional discharge.

a. For a century before the 1948 recodification, state and lower federal courts tailored habeas relief to the custody at issue: deferring discharge so lawful sentences could replace unlawful ones, entertaining bail claims seeking not freedom but a less restrictive confinement, and reassigning custody among competing claimants.

b. This Court’s own decisions read that same flexibility into the “law and justice” language Congress later reenacted. *Ex parte Snow*, 120 U.S. 274 (1887), eliminated the portion of the punishment exceeding the trial court’s authority, leaving lawful custody intact. *United*

States v. Pridgeon, 153 U.S. 48 (1894), read the “law and justice” language that survives in § 2243 to require relief tailored to the void portion of a sentence—not total discharge. And *Ex parte Hull*, 312 U.S. 546 (1941), administered the writ to remedy an obstruction of court access—without any change in custody.

c. The 1948 codification ratified this framework. Section 2241(c)(3) carries forward the 1867 Act’s “restrained of his or her liberty”—which this Court had already construed to reach “every possible case of privation of liberty.” *McCardle*, 73 U.S. at 325-26. And § 2243 carries forward the command to “dispose of the matter as law and justice require”—language courts had already construed to authorize corrective dispositions short of discharge. Reenactment of language bearing a settled judicial construction presumptively adopts that construction, *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978), and nothing in the 1948 revision purports to narrow either the types of restraint the writ reaches or the remedies it affords. Reading the statute to exclude type-of-custody claims would repeal the framework that the 1948 codification adopted.

ARGUMENT

I. The 1948 Codification of the Modern Habeas Statute Inherited the Historical Scope of the Writ

Section 2241 allows a prisoner to challenge whether he “is in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2241(c)(3). The corresponding remedial provision, § 2243, directs federal courts to “dispose of the matter as law and justice require.” 28 U.S.C. § 2243.

When enacted, these provisions adopted the extant judicial understanding of the writ’s scope—a meaning informed by English law, early American statutory

enactments, and pre-codification judicial application of the writ. As understood at the time of enactment, § 2241 extended not just to petitions seeking total release from custody or relief from a conviction, but also to petitions seeking non-discharge remedies—and § 2243 conferred the remedial authority to grant them.

This Court has already recognized as much. In the “1948 recodification and reorganization of the Judiciary Code,” Congress “recodified the federal courts’ pre-existing habeas authority in §§ 2241 and 2243, which, respectively, confer the power to grant the writ and direct the issuing court to ‘dispose of the matter as law and justice require.’” *Jones*, 599 U.S. at 473 (quoting Act of June 25, 1948, ch. 646, 62 Stat. 869, 964-65). And the Court described that pre-existing authority as encompassing “a prisoner[’s] challenge[] [to] ‘the legality of his *detention*’ without attacking the validity of his *sentence*”—for example, a claim “that he is being detained in a *place or manner* not authorized by the sentence, that he has unlawfully been denied parole or good-time credits, or that an administrative sanction affecting the conditions of his detention is illegal.” *Id.* at 475 (third emphasis added) (citing *Samak v. Warden, FCC Coleman–Medium*, 766 F.3d 1271, 1280 (11th Cir. 2014) (Pryor, J., concurring)).

The recodification history confirms *Jones*’s account. Twice—in 1874 and in 1948—Congress reenacted habeas language that courts had already authoritatively construed. Each reenactment was “a legislative adoption of the[] known judicial construction.” William W. Barron, *The Judicial Code*, 8 F.R.D. 439, 447 (1949) (citation omitted); accord *Lorillard*, 434 U.S. at 580-81. And each time, Congress disclaimed any change in meaning that might unsettle what it was adopting.

Section 2243's operative "law and justice" language first emerged in the Revised Statutes of 1874. Rev. Stat. of 1874, 18 Stat. 1, § 761. And "[w]hen Congress passed legislation in 1874 to consolidate and collect all federal statutes and laws in the Revised Statutes, . . . it expressed no intention to change the meaning of the laws." *Kush v. Rutledge*, 460 U.S. 719, 724 n.6 (1983) (citation omitted).

The 1948 revision was no different. The Reviser's Notes to § 2241 report only "changes in phraseology necessary to effect the consolidation" of the prior statute, and not a substantive revision. H.R. Rep. No. 80-308, at A177 (1947); see Lee Kovarsky, *Habeas and the 1948 Judicial Code*, 79 Stan. L. Rev. (forthcoming 2027) (manuscript at 29), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=6151606. The same is true of § 2243: The House Report "makes clear . . . that there were no substantive changes to what had been section 761"—the "law and justice" provision. Lee Kovarsky, *The New Negative Habeas Equity*, 137 Harv. L. Rev. 2222, 2240 (2024) (citing H.R. Rep. No. 80-308, at A178).

The recodification's principal architects said the same. William Barron, the Chief Reviser, explained that Congress "must be presumed to have known the judicial construction which had been placed on the former statutes; and therefore the re-enactment in the Code of provisions substantially the same as those contained in a former statute is a legislative adoption of their known judicial construction." 8 F.R.D. at 447 (quoting *Duramus v. Harrison & Whitman*, 26 Ala. 326 (1855)). Judge John J. Parker, who chaired the revision committee, described the habeas revisions the same way: as "very largely a mere codification of the best practice already

worked out by court decisions.” John J. Parker, *Limiting the Abuse of Habeas Corpus*, 8 F.R.D. 171, 178 (1949); see Kovarsky, *Habeas and the 1948 Judicial Code* (manuscript at 25). And Barron’s rules for construing the revised Code left no doubt: Although the habeas chapter was “completely rewritten to restate and simplify the practice,” 8 F.R.D. at 444 (citing H.R. Rep. No. 80-308, at A177; Title 28 Special Congressional Pamphlet, at 1698, 1905-08), “no changes of law or policy will be presumed from changes of language in revision unless an intent to make such changes is clearly expressed,” and “[m]ere changes of phraseology indicate no intent to work a change of meaning but merely an effort to state in clear and simpler terms the original meaning of the statute revised,” *id.* at 445-46 (collecting authorities).

In short, Congress enacted §§ 2241 and 2243 against the backdrop of—and adopted—the prevailing judicial understanding of the habeas power. Those provisions therefore mean what habeas practice encompassed leading up to 1948. As *amici* show below, that practice included type-of-custody claims and remedies short of discharge.

II. English Common Law and Early American Statutory History Confirm That Habeas Reaches Non-Discharge Claims

The writ that Congress codified did not begin in 1948. Its scope was fixed by centuries of practice: The King’s Bench routinely used habeas to test the lawfulness of a particular restraint and to grant relief short of release; the Judiciary Act of 1789 carried that writ into federal law; and each nineteenth-century revision broadened or

preserved it. At every step, the writ reached non-discharge claims.³

A. Habeas Corpus at English Common Law Was Routinely Used for Non-Discharge Claims

King’s Bench practice confirms that the writ reached beyond outright release. The court provided an array of remedies—remand, bail, conditional discharge, transfer from one custodian to another—depending on the nature of the custody and the legal defect that the writ unearthed. Comprehensive studies conclude that the court “us[ed] habeas to resolve conflicts beyond simply declaring someone remanded or released.” Paul D. Halliday, *Habeas Corpus: From England to Empire* 121 (2010).

That practice was routine in penal cases. John Harper, committed to Westminster’s house of correction, was discharged on the condition that he return for further proceedings. Halliday, *supra*, at 116-17. James Lock and two others were discharged from Colchester jail on their promise to report for naval service three weeks later—substituting one form of legal restraint for another. *Id.* at 117. And bail, the paradigmatic intermediate disposition, relaxed the severity of confinement without ending it. *Id.* at 59-60. In each instance, the claim was not that no restraint could be imposed, but that the particular restraint was unlawful—and the remedy conformed the custody to law.

³ See Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 Va. L. Rev. 575, 580-81 (2008) (“The Supreme Court, for its part, has consistently maintained that the contemporary constitutional jurisprudence of habeas corpus needs to be informed by the legal and constitutional history of the ‘Great Writ,’ both in England and in the framing period of the Constitution.”).

The writ's non-penal applications confirm its essential function: to test the lawfulness of a *particular* restraint, not merely the existence of restraint. The King's Bench used the writ to modify the legal authority that husbands asserted over their wives. Halliday, *supra*, at 124-26. Because coverture gave husbands wide latitude to control their wives, *id.* at 177-78, these cases did not test the lawfulness of "confinement" in general, but of a specific legal restraint. See Halliday & White, *supra*, at 611 n.90. In *Lister's Case*, (1721) 88 Eng. Rep. 17 (K.B.), for example, the court granted relief to a wife held in close confinement by her estranged husband, but it did not purport to dissolve the marital relation or emancipate her from every legal restraint of marriage. It adjusted the *level* of restraint the husband could impose.

Beginning in the 1670s, English courts likewise used the writ to adjudicate child-custody disputes. "The court routinely negotiated education and maintenance arrangements for children whose parents fought." Halliday, *supra*, at 131. In 1690, Chief Justice Holt used the writ to settle "arrangements for the education and care of Francis Vaughan with his guardian." *Id.* at 128. The writ was likewise used to permit minors of sufficient age to "determine custody according to [their] own wishes." *Ibid.* And in a 1724 case concerning the custody of Frances Howland, the King's Bench "considered whether they could turn Frances over to her uncle, 'or only set her at liberty'; deeming Frances too young to choose for herself, the court assigned her to her uncle's custody. *Id.* at 128-29. The decision used "the writ to assign to custody, not simply to release from it." *Id.* at 129. Lord Mansfield did the same, using the writ to award custody of a disputed child to the mother based on the

child's welfare. *Blisset's Case*, (1774) Lofft 748, 98 Eng. Rep. 899 (K.B.). This Court has invoked this line of authority in construing the writ's reach, observing that "an English court permitted a parent to use habeas corpus to obtain his children from the other parent." *Jones v. Cunningham*, 371 U.S. 236, 239 (1963) (citing *Earl of Westmeath v. Countess of Westmeath*, as set out in a reporter's footnote in *Lyons v. Blenkin*, (1821) 37 Eng. Rep. 842, 848 (Ch.)).

Colonial courts inherited the same understanding. In 1749, on a widow's complaint that her son's master had failed "to provide suitable and sufficient meat drink lodging and clothing," the New Hampshire Superior Court issued the writ, examined the indenture, and returned the boy to his mother's custody. See Eric M. Freedman, *Making Habeas Work: A Legal History* 16-17 (2018). No one denied the apprenticeship was lawful; the defect was in the manner of the restraint, and the remedy—transfer, not release—conformed the custody to law.

The same pattern appeared in the cases of supposed "lunatics," many of which "involved wives confined by their husbands: declaring wives 'lunatics,' then consigning them to a doctor"—a "variation on the theme of spousal constraint." Halliday, *supra*, at 127. A successful petition did not "discharge" the wife from marriage's legal restraints; it altered the level of restraint she was under. Thus, in *Rex v. Turlington*, (1761) 97 Eng. Rep. 741 (K.B.), Lord Mansfield issued the writ for a woman confined in a private madhouse and directed her removal to different custody pending an inquiry into her condition.

Across penal and non-penal cases alike, the result of a successful petition was rarely the removal of all legal

restraint. Instead, as centuries of King’s Bench practice show, the writ’s function was to conform custody to law.

B. The 1789 Act Codified the English Writ, Including Its Non-Discharge Remedies

The first federal habeas statute carried English practice forward. Section 14 of the Judiciary Act of 1789 authorized the federal courts to issue writs of habeas corpus “for the purpose of an inquiry into the cause of commitment.” Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 73, 81-82. The statute did not limit petitions to attacks on convictions or requests for total discharge; it allowed an inquiry into the “cause” (legal basis) of the prisoner’s commitment. And because pre-1789 English practice shows that such inquiries frequently resulted in non-discharge relief, Congress took the “centuries of practice” attached to habeas and carried those non-discharge remedies forward into the Judiciary Act of 1789. See *Morissette v. United States*, 342 U.S. 246, 263 (1952) (“[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken.”).

There is no reason to think that the First Congress understood itself to be redefining—much less narrowing—the writ the Constitution had just preserved. See Halliday & White, *supra*, at 679-80 (“Once those jurisprudential assumptions of the Judiciary Act of 1789 framers are understood, it becomes easier to see that they were treating the writ of habeas corpus as having substantive common law dimensions.”); see also Eric M. Freedman, *Habeas Corpus: Rethinking the Great Writ of Liberty* 37 (2001) (“[T]he [Philadelphia] Convention’s solicitude for habeas corpus led it to anticipate that the

federal courts would exercise common-law powers in that field.”). The one limitation Congress did impose confirms the point. The Judiciary Act confined federal courts’ habeas authority to prisoners in federal custody, leaving state prisoners to the habeas power of state courts. See 1 Stat. at 82. That line allocated jurisdiction in a new federal system—it said nothing about what counted as unlawful custody or what remedies were available once jurisdiction attached. Congress knew how to cabin the writ, and the line it drew was jurisdictional, not substantive.

Early practice bears this out. In one of its first habeas cases, this Court neither discharged nor remanded a petitioner committed for treason arising out of the Whiskey Rebellion; it admitted him to bail. See *United States v. Hamilton*, 3 U.S. (3 Dall.) 17, 18 (1795). Likewise, in *Ex parte Bollman*, Chief Justice Marshall construed Section 14 itself as authorizing bail as a form of habeas relief. 8 U.S. (4 Cranch) 75, 100, 125 (1807). In both of these cases, the significance is not that bail was novel—it was not—but that the Court treated a change in the *form* of the prisoner’s restraint, rather than his release from restraint, as relief cognizable on the writ.

Other early American habeas cases likewise concerned not *whether* a person was held, but *by whom* and *where*. When the military confined a civilian, the writ tested which authority could lawfully hold him. See *In re Stacy*, 10 Johns. 328 (N.Y. Sup. Ct. 1813) (Kent, C.J.) (issuing attachment against a military commander who detained a civilian without authority); see generally Amanda L. Tyler, *Habeas Corpus in Wartime: From the Tower of London to Guantanamo Bay* 141-58 (2017). And in a substantial body of enlistment cases, courts used habeas to decide whether an underage soldier or

sailor belonged in military custody or in that of his parent or guardian—reassigning the minor between custodians rather than releasing him from all restraint. See, e.g., *Commonwealth v. Harrison*, 11 Mass. 63 (1814); *In re Ferguson*, 9 Johns. 239 (N.Y. Sup. Ct. 1812); cf. *United States v. Bainbridge*, 24 F. Cas. 946 (C.C.D. Mass. 1816) (Story, J.) (upholding the enlistment on the merits).

**C. Nineteenth-Century Statutory Developments
Broadened the Writ’s Reach While Preserving Its
Function and Remedial Power**

The nineteenth-century legislative record forecloses any argument that §§ 2241 and 2243 should be read more narrowly than the common law writ. In 1867, Congress expanded the writ’s reach; in 1874, it replaced the 1867 Act’s discharge command with an expressly flexible remedial directive. At no point did Congress contract either.

1. The 1867 Act

In 1867, Congress replaced the 1789 Act’s operative language with a broader formulation. Where Section 14 had authorized habeas “for the purpose of an inquiry into the cause of commitment,” Judiciary Act of 1789, § 14, the 1867 Act extended the writ to reach any person “restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States.” Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385, 385. That language “is the direct ancestor of § 2241(c)(3).” *Felker*, 518 U.S. at 659 n.2.

The legislative history confirms the breadth of the writ. The Act’s sponsors described it as “a bill of the largest liberty” that “does not . . . restrain the writ of habeas corpus at all.” Cong. Globe, 39th Cong., 1st Sess. 4151

(1866) (emphasis omitted). This Court, interpreting the Act the year it was passed, left no doubt about its sweep: “This legislation is of the most comprehensive character. It brings 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. It is impossible to widen this jurisdiction.” *McCardle*, 73 U.S. at 325-26. “Every possible case of privation of liberty” includes deprivations in which the type of custody violates federal law. And jurisdiction that is “impossible to widen” cannot be read to exclude, by implication, a wide swath of claims the writ reached in England and in the earliest years of the Republic.

The statutory text likewise confirms what the legislative record and *McCardle* say. Congress chose the word “restrained” rather than “imprisoned” or “committed”—and where the 1789 Act had empowered courts only to inquire into the “cause of commitment,” the 1867 Act reached any unlawful restraint on “liberty.” Restraints on liberty come in many forms and are not limited to total imprisonment. That reality would have been especially salient to the 39th Congress, which legislated as southern states were using facially valid criminal laws and punishments to force freed people back into conditions of quasi-slavery. See Kovarsky, *Habeas and the 1948 Judicial Code* (manuscript at 9-10 & n.67). The objection in such cases was not to the imposition of punishment, but to its degree and form.

2. The 1874 Act

In 1874, Congress recodified the federal habeas statutes. Section 761 of the Revised Statutes provided that, once the habeas court held its hearing, “[t]he 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.” Rev. Stat. § 761; see Kovarsky, *The New Negative Habeas Equity*, *supra*, at 2238.

The 1874 Act’s direction to “dispose of the party as law and justice require” confirms that the statute codified a remedial power wider than a simple power to discharge. That conclusion follows from the text’s own history. The 1867 Act’s remedial clause had directed that a successful petitioner “shall forthwith be discharged and set at liberty.” 14 Stat. at 386. In 1874, Congress adopted instead the open-ended “law and justice” formulation for all habeas cases. Justice Scalia read this sequence as a deliberate expansion. See *Wilkinson v. Dotson*, 544 U.S. 74, 85 (2005) (Scalia, J., concurring) (suggesting that the “law and justice” language authorized a broader remedial toolkit). At a minimum, the comparison eliminates any doubt about drafting capacity: “Congress’ choice of words is presumed to be deliberate.” *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 353 (2013). The choice of “law and justice” over “discharged and set at liberty” should therefore be read as enshrining broader remedial powers. And that reading is consistent with the writ’s history as a flexible remedy that adapts to the needs and facts of a particular case. See *Cunningham*, 371 U.S. at 243 (habeas “is not . . . a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose”); *Boumediene v. Bush*, 553 U.S. 723, 779 (2008) (“[C]ommon-law habeas corpus was, above all, an adaptable remedy. Its precise application and scope changed depending upon the circumstances.”).

This Court’s decision in *In re Medley*, 134 U.S. 160 (1890), shows that remedial regime in operation.

Medley was sentenced to death—custody the State indisputably had authority to impose. See *id.* at 162. But a Colorado statute enacted after his offense also required that he be held in solitary confinement until his execution. See *id.* at 164. This Court held that solitary confinement was “an additional punishment of the most important and painful character” and that its retroactive imposition violated the Ex Post Facto Clause, warranting habeas relief. *Id.* at 171-72. The unlawfulness supporting the writ, in other words, was not Medley’s imprisonment but its form. If the habeas statute tested only the bare fact of detention, *Medley* would have come out the other way; the Court’s disposition makes sense only if “dispos[ing] of the party as law and justice require” empowered courts to evaluate the legality of the particular restraint imposed. The 1874 recodification thus preserved—and this Court promptly exercised—the writ’s centuries-old remedial flexibility.

III. Congress Legislated in 1948 Against the Backdrop of the Existing Judicial Interpretation of the Writ’s Function

When Congress enacted §§ 2241 and 2243, it legislated against a backdrop of decisional law that understood the writ’s remedial scope to be broad. Federal and state decisions—including this Court’s pre-codification decisions—reflect that habeas relief short of outright release was commonplace.⁴

A. Before 1948, Lower Federal and State Courts Adapted Habeas Relief to the Custody at Issue

Nineteenth- and twentieth-century practice in the lower federal and state courts confirms that habeas

⁴ This Court has long consulted the full body of American habeas practice, state as well as federal, in reconstructing the writ’s historical scope. See, e.g., *Cunningham*, 371 U.S. at 238-40.

relief was a calibrated remedy adaptable to the custody at issue, not a choice between discharge and remand. Three categories of cases exemplify the point: (1) sentencing substitutions; (2) bail—which at common law was itself a form of confinement; and (3) child custody.

1. Federal courts in the early and mid-twentieth century—administering the very statutes Congress would recodify in 1948—used habeas to correct unlawful sentences without disturbing lawful convictions. Where a sentence was void, the habeas court did not choose between leaving the prisoner in unlawful custody and setting him free. It crafted a single disposition that ended the unlawful component of custody while providing, within the habeas judgment, for the substitution of a lawful sentence. See *Biddle v. Thiele*, 11 F.2d 235 (8th Cir. 1926); *In re Fegler*, 36 F. Supp. 88 (E.D. Mich. 1940); *Bayless v. Johnston*, 48 F. Supp. 758 (N.D. Cal. 1943).

This remedial approach traces to *In re Bonner*, 151 U.S. 242 (1894), which held that when a prisoner’s conviction is valid but his sentence exceeds the court’s authority, the habeas remedy is not simply to set the prisoner free; it is to return him to the convicting court so that a lawful sentence can be substituted for the void one. See *id.* at 262. Where only the punishment exceeded the court’s power, “there does not seem to be any good reason why jurisdiction of the prisoner should not be reassumed by the court that imposed the sentence, in order that its defect may be corrected,” with the original court substituting the directions required by law for what it had no authority to do. *Id.* at 259. The function of the writ, on *Bonner*’s account, was the substitution of lawful custody for unlawful custody—not discharge.

The twentieth-century cases implemented *Bonner*’s substitution remedy. In *Biddle*, the Eighth Circuit

modified the district court's judgment precisely because it had not been properly structured—treating the corrective measure as part of the habeas judgment itself. 11 F.2d at 236-37. Thiele's convictions under the National Prohibition Act were valid, but his 18-month sentences far exceeded the statutory maximum. See *id.* at 236. The Eighth Circuit accordingly held the sentences void while leaving the convictions intact, and its mandate prescribed each step of the correction: The prosecutor was to receive notice, release would be reasonably delayed, and the sentencing court could order Thiele returned so that he could “be again taken before the court in which the convictions were had and sentenced by that court according to law.” *Id.* at 236-37.

In *Fegler*, the petitioner pleaded guilty to two indictments, and the sentencing court ordered that the one-year-and-one-day sentence in each case begin “at the expiration of the sentence imposed” in the other—an arrangement that was “technically” “impossible” because neither sentence could ever begin. 36 F. Supp. at 88. The question was “whether [Fegler] should be returned to the court by which he was sentenced or whether he is now entitled to his freedom.” *Id.* at 88-89. The court granted the writ, but its judgment built in the corrective mechanism: a twelve-day period during which the warden was to notify the United States Attorney for the sentencing district so that the sentencing court could “take any action it desires or deems advisable and proper” during that window. *Id.* at 89.

And in *Bayless*, the court extended this remedial approach to constitutional error—an invalid waiver of the right to counsel. 48 F. Supp. at 760. Bayless pleaded guilty to bank robbery and interstate transport of a stolen car and was sentenced to twenty-five years’

imprisonment, yet he was never represented by counsel, never asked whether he desired counsel, and never informed that counsel would be appointed if he could not provide his own. See *id.* at 759. The court held that Bayless had not intelligently waived his Sixth Amendment right, rendering the judgment void. Yet the writ's disposition was not release: The court remanded Bayless "for further proceedings upon the indictments against him." *Id.* at 760.

In each of these cases, the writ issued, yet the petitioner did not go free. The court instead ended the unlawful custody while restraining the petitioner's liberty long enough for the government to resentence him or otherwise proceed under the original indictments.

2. In bail cases spanning nearly a century of American practice, habeas courts entertained claims seeking not freedom, but a less restrictive form of confinement. See *Cunningham*, 371 U.S. at 240 (drawing on historical habeas practice in the state courts). At common law, bail was not a discharge from confinement but a substitution of one custodian for another. The accused was "regarded as delivered to the custody of his sureties," whose "dominion is a continuance of the original imprisonment." *Taylor v. Taintor*, 83 U.S. (16 Wall.) 366, 371 (1872); see *In re Emery*, 107 Mass. 172, 186 n.1 (1871) ("Bail for his appearance from day to day is simply a means by which this custody is maintained"). A habeas court that admitted a petitioner to bail thus did not release him; it moved him to a less restrictive form of confinement. Courts never treated such claims as beyond the writ's domain merely because the relief sought fell short of immediate discharge (or discharge at all).

People v. McLeod, an 1842 decision of New York's Court for the Correction of Errors, surveys habeas relief

reaching bail. 3 Hill 635 (N.Y. 1842). The court explained that “where the [petitioner] is neither discharged nor bailed, he is to be in general remanded to the original custody”—treating discharge, bail, and remand as three distinct dispositions available on the writ. *Id.* at 649 n.j. The court cataloged the circumstances in which bail remained available even after indictment: “want of jurisdiction over the subject matter,” falsification of the return, unreasonable delay in bringing the prisoner to trial, and even a defendant’s serious illness “as to be in danger of his life,” under which “he may be bailed, even after indictment for murder.” *Ibid.* Nor was the remedy confined to any single procedural moment. “[A] prisoner may be let to bail even after conviction, if it appear that there is doubt on the law of the case,” and “the party may, in cases not capital, sometimes be bailed after sentence” pending a writ of error. *Ibid.* By 1842, in short, American habeas practice had developed bail into a rule-governed intermediate remedy available across the entire arc of a criminal proceeding, from initial commitment through conviction and into the appellate stage. That is precisely the sort of calibrated relief that belies any claim that habeas historically produced only two outcomes.

Later decisions applied *McLeod*. In *In re Emery*, the Supreme Judicial Court of Massachusetts distinguished provisional bail from final discharge at the pretrial stage: “[p]ending the proceedings before the court, upon *habeas corpus*, the custody of the petitioner is, in all cases, and under all circumstances, entirely at the discretion of the court before which the writ is returned. Bail for his appearance from day to day is simply a means by which this custody is maintained.” 107 Mass. at 186 n.1. In *Ex parte Andrews*, 39 Okla. Crim. 193

(1928), and *Ex parte Black*, 140 Cal. App. 361 (1934), the courts entertained petitions directed at the amount of bail; each declined relief on the facts presented, but confirmed that bail, once set, remained subject to habeas oversight. In *Ex parte Kirkpatrick*, 119 Tex. Crim. 139 (1932), the Texas Court of Criminal Appeals, in a habeas posture, reduced bail from \$10,000 to \$3,000—the petitioners were neither discharged nor left in unconditional confinement but rather were repositioned within the bail system itself. See *id.* at 140. And in *People ex rel. Rothensies v. Searles*, 229 A.D. 603 (3d Dep’t 1930) (per curiam), the court confirmed that “the proper method of obtaining relief from excessive bail . . . is by a writ of habeas corpus,” before reversing a bail reduction made “with no new facts” and “no finding . . . that the bail was in fact excessive.” *Id.* at 603-04.

Whether granting provisional bail (*Emery*), declining to disturb an existing figure (*Andrews* and *Black*), recalibrating an excessive one (*Kirkpatrick*), or policing the limits of recalibration (*Rothensies*), these courts uniformly treated bail as an adjustment in the form of restraint, distinct from both discharge and continued unconditional detention. The petitioner admitted to bail remained in confinement; only the severity of the restraint changed.

3. Child-custody cases confirm that courts administering the writ never treated it as producing only two possible outcomes—custody unchanged or the petitioner walking free. Courts used habeas to reassign custody, attach conditions, and order collateral relief such as support obligations.

In *Bartlett v. Bartlett*, 175 Or. 215 (1944), a father petitioned for habeas against his ex-wife and her mother to obtain custody of his son after an Idaho divorce decree

awarded the mother “sole control and custody.” *Id.* at 218. The Oregon Supreme Court confronted two questions: (1) whether a habeas court sitting in a custody dispute may do anything beyond a discharge-or-remand disposition, and (2) whether it may impose collateral financial obligations as part of that relief. See *id.* at 223-25. On the first, the court held that because the Constitution’s protection of the writ “is a protection of the writ as it obtained under the common law, no Legislature can abrogate or impair its efficiency,” and “the use of the writ, as it was available at common law, is still available in courts of equity”—including relief beyond discharge or continued custody. *Id.* at 225. On the second, it held that a habeas court has power “not only to award custody, but to require of a father that he support his minor children whose custody has been awarded to the mother.” *Id.* at 240-41.

Other courts described child-custody habeas in the same terms. See *Tunnell v. Reeves*, 35 S.W.2d 707, 709 (Tex. Comm’n App. 1931) (“The writ of habeas corpus is used in this state as a form of procedure for the purpose of litigating questions as to the proper custody of children and ascertaining what would be to the best interest of the child, to society and to the state, and is addressed to the equity powers of the court, and the power is given to the courts to make the change as a remedial right.”); *Ex parte Badger*, 226 S.W. 936, 940 (Mo. 1920) (“The ascertainment and enforcement of the custody of minor children by the use of the writ of habeas corpus is of an equitable nature, and in such cases the question of personal freedom is not involved, for an infant, from humane and obvious reasons, is presumed to be in the custody of some one until it has attained its majority.”).

These decisions are the American descendants of the English practice described *supra* Part II.A: Courts used the writ not merely to test the legality of a particular restraint but affirmatively to assign custody among competing claimants, exactly as the King’s Bench had done with Frances Howland two centuries earlier.

Together, the sentencing substitution, bail, and child-custody cases all show that the historical habeas practice consistently resisted any categorical rule confining relief to a strict binary of complete discharge or continued detention.

B. This Court’s Pre-Codification Decisions Embedded That Same Flexibility in the Statutory Text Congress Reenacted

This Court’s early decisions interpreting the 1867 Act and the writ’s reach confirm that habeas relief has always been measured and proportional to the illegality of the petitioner’s custody.

In *Ex parte Snow*, this Court used the writ to excise an excessive punishment without ordering discharge. 120 U.S. at 286-87. Snow was convicted and sentenced on three separate indictments for unlawful cohabitation, each covering a different segment of one continuous period. He petitioned for habeas on the ground that the trial court lacked jurisdiction to punish him more than once for a single, continuous offense. See *id.* at 278, 281-82. This Court agreed. Although Snow’s first conviction and sentence were valid, the trial court had “no jurisdiction to inflict a punishment in respect of more than one of the convictions,” and “the objection may be taken on habeas corpus when the sentence on more than one of the convictions is sought to be enforced.” *Id.* at 285. The relief was correspondingly precise: not outright

discharge, but remand to grant the writ and “take such proceedings thereon as may be in conformity with law and not inconsistent with the opinion of this court.” *Id.* at 286-87. The writ operated surgically, removing the two unlawful consecutive sentences while leaving the lawful first sentence—and the custody it authorized—intact.

In *United States v. Pridgeon*, 153 U.S. 48 (1894), this Court again confined the writ to the unlawful portion of a sentence—and condemned total discharge as a disproportionate remedy. Pridgeon was convicted of horse stealing and sentenced to five years’ imprisonment “at hard labor.” See *id.* at 49-50. His habeas petition argued that the statute of conviction authorized imprisonment but not hard labor; the circuit court discharged him on the theory that the hard-labor component rendered the entire sentence void. See *id.* at 50. This Court reversed. Where a sentence is “valid in part and void in part,” the void portion “should not necessarily, or generally, vitiate the valid portion”; “a sentence is legal so far as it is within the provisions of law and the jurisdiction of the court over the person and offense, and only void as to the excess, when such excess is separable, and may be dealt with without disturbing the valid portion of the sentence.” *Id.* at 62-63.

Critically, the Court grounded that proportionality in the statute’s remedial command—“dispose of the party as law and justice require”: “There is no law or justice in giving to a prisoner relief under habeas corpus that is equivalent to an acquittal, when, upon writ of error, he could only have secured relief from that portion of the sentence which was void.” *Id.* at 63. Because that language survives essentially unchanged in § 2243, *Pridgeon* is strong historical evidence that habeas courts have

authority to—and sometimes must—tailor relief to the illegality rather than grant total discharge.

Finally, in *Ex parte Hull*, 312 U.S. 546 (1941), the writ’s disposition was not confined to the question of release. Hull’s petition attacked his conviction, but prison officials repeatedly confiscated it under a regulation requiring habeas filings to be screened by prison authorities. *Id.* at 547-49. When Hull’s petition finally reached this Court, it first held the regulation invalid—“the state and its officers may not abridge or impair petitioner’s right to apply to a federal court for a writ of habeas corpus”—while making clear that “the invalidity of the prison regulation does not compel petitioner’s release.” *Id.* at 549. Only then did the Court take up the petition itself. See *id.* at 549-51. In *Hull*, the remedy tracked the wrong: The violation was an obstruction of access to the courts, so the Court’s relief was to remove the obstruction and hear the claim, not to alter Hull’s custody.

The petition itself is equally telling. Hull was imprisoned under his first sentence after his parole was revoked following a second conviction—but his petition attacked his second conviction, though he had not yet begun to serve its sentence. See *id.* at 549-50. Success on the merits therefore could not have freed him entirely; at most, it would have restored him to parole, a lesser restraint under his continuing first sentence. Yet the Court held the petition was not premature on the ground that Hull’s parole revocation flowed from the challenged conviction, see *ibid.*, and it proceeded to evaluate the petition’s sufficiency on the merits, see *id.* at 550-51. The Court thus treated as cognizable a

habeas claim whose only possible fruit was a reduction in the severity of custody—not release.⁵

Taken together, this trilogy shows that this Court’s pre-codification jurisprudence calibrated relief to illegality rather than treating the writ as an all-or-nothing key to the custodial gate. The writ’s remedial reach spanned a spectrum—from guaranteeing access and adjudication (*Hull*) to severing the unlawful excess of an otherwise valid sentence (*Snow* and *Pridgeon*)—with outright release just one point, and often the last, on that continuum.

In sum, state, lower federal, and Supreme Court decisions alike reflect a settled understanding that the writ’s relief was flexible and proportionate. That was the backdrop against which Congress legislated in 1948.

C. Congress Ratified the Writ’s Scope and Remedial Flexibility in Sections 2241 and 2243

As Part I demonstrated, the 1948 revision worked no substantive change to the habeas statutes. What

⁵ *McNally v. Hill*, 293 U.S. 131 (1934), is not to the contrary. *McNally* held that a prisoner serving a valid sentence could not use habeas to attack a consecutive sentence he had not yet begun to serve—a holding about *when* a restraint becomes challengeable, not about the remedies available once a cognizable restraint is shown to be unlawful. See *id.* at 138-40. To the extent *McNally*’s reasoning suggested that habeas serves only to secure immediate release, see *id.* at 137-38, this Court—construing the 1948 statute—unanimously rejected that premise and overruled *McNally* in *Peyton v. Rowe*, 391 U.S. 54, 66-67 (1968). *Peyton* explained that § 2243’s command to dispose of habeas matters “as law and justice require” contemplates relief other than immediate release, and that the writ is not “a static, narrow, formalistic remedy.” *Id.* at 66 (quoting *Cunningham*, 371 U.S. at 243). The authoritative construction of §§ 2241 and 2243 is thus *Peyton*’s, not *McNally*’s.

remains is to identify what the reenacted language had come to *mean*—and by 1948, the answer was settled.

First, the text Congress enacted was the text the courts had already construed over several decades. Section 2241 authorizes the writ for any prisoner “in custody in violation of the Constitution or laws or treaties of the United States,” 28 U.S.C. § 2241(c)(3)—language that directly descended from the 1867 Act’s “restrained of his or her liberty” language, *Felker*, 518 U.S. at 659 n.2. And § 2243’s command that the habeas court “dispose of the matter as law and justice require” likewise carried forward, in substance unchanged, the remedial standard of the 1874 Act. That was the very language this Court interpreted in *Pridgeon* to forbid relief “equivalent to an acquittal” where the illegality infected only part of the sentence. 153 U.S. at 63. When Congress reenacts statutory language that has received a settled judicial construction, it is presumed to adopt that construction. See, e.g., *Lorillard*, 434 U.S. at 580-81; *Shapiro v. United States*, 335 U.S. 1, 16 (1948). Congress in 1948 did not write on a blank slate; it reenacted a jurisdictional grant courts had read to reach every unlawful restraint, and a remedial formula that courts had already given a definite, flexible meaning through decades of decisions—*Snow*, *Pridgeon*, *Hull*, and the lower-court practice described above.

Second, if Congress had intended to eliminate the continuum of habeas remedies that courts had exercised for a century—bail, sentencing substitution, remand for resentencing, custody reallocation, and purely procedural relief—and compress habeas into a binary of release or remand, some indication of that dramatic contraction would appear in the text or revision history. None does. *Supra* Part I.

Third, the two provisions together confirm that the writ reaches petitions seeking non-discharge remedies. Section 2241 defines the writ's object as "custody" in violation of federal law—language that asks *whether* the restraint is lawful, not merely whether the petitioner should be discharged. And § 2243's directive to "dispose of the matter as law and justice require" is not an instruction to choose between custody and discharge; it is an instruction to let the remedy fit the wrong. Read together, the provisions describe a writ that tests the legality of the particular custody before the court (§ 2241) and conforms that custody to law (§ 2243). Reading §§ 2241 and 2243 to permit only two dispositions would repeal, by implication, the framework that the codification adopted. And repeals by implication are disfavored nowhere more than where the statute's own words point the other way.

In short, the 1948 Congress understood the writ to reach any unlawful restraint and to provide relief that was flexible and proportionate. And it codified that writ. Section 2241's custody language and § 2243's "law and justice" standard are the textual embodiment of the framework the pre-1948 cases built—and they should be read to preserve, not truncate, the full spectrum of relief those cases reflect.

CONCLUSION

This Court should interpret the reach of § 2241, consistent with centuries of historical practice, to permit habeas petitions seeking a transfer of custody. Accordingly, this Court should reverse.

Respectfully submitted,

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