No. 09-5327

IN THE
Supreme Court of the United States

ALBERT HOLLAND,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF ELEVEN LEGAL HISTORIANS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICI[1]

Amici curiae are professors of legal history at law schools and universities in the United States, England, and Australia with expertise in English and/or early American legal history. Judging from its Brief in Opposition to the Petition, Respondent will contend that the doctrine of equitable tolling is inapplicable in cases subject to the Antiterrorism and Effective Death Penalty Act of 1996. *Amici curiae*, who differ with that view, have a professional interest in ensuring that the Court is fully and accurately informed regarding the historical scope of the common law writ of habeas corpus and the centuries-old role that equity has played in its administration.

SUMMARY OF ARGUMENT

Since the early 17th Century, when the King's Bench imbued the writ of habeas corpus with the quasi-divine powers of the royal prerogative, habeas jurisdiction has been governed by equitable principles and habeas jurisprudence has been developed more by judicial exposition than by statute. Much the same is true in America, where this Court has repeatedly acknowledged the equitable under-pinnings of its habeas corpus jurisdiction and

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[1] A list of the *amici* appears in the Appendix. The parties have consented to the filing of this brief in letters of consent on file with the Clerk. No counsel for any party had any role in authoring this brief, and no one other than the *amici curiae* provided any monetary contribution to its preparation or submission.

repeatedly looked to its own precedents in addition to current habeas statutes.

Amici have no position on whether Petitioner has made a case for equitable tolling, but they are certain that Respondent errs in contending that application of the equitable tolling doctrine is precluded by the Antiterrorism and Effective Death Penalty Act, which this Court has often construed in light of its traditional equitable authority and which has no explicit prohibition against the courts' equitable power to toll statutes of limitations.

ARGUMENT

EQUITABLE PRINCIPLES HAVE HISTORICALLY GUIDED THE EXERCISE OF HABEAS CORPUS

Respondent's position – that equitable tolling of the limitations provision of the Antiterrorism and Effective Death Penalty Act is impermissible – ignores centuries of practice in English and American courts under which the disposition of habeas corpus petitions has been heavily influenced by equitable principles. As we show below, the issue as a matter of English jurisprudence may be seen in the writ's emergence as one of the royal prerogatives, while in America the point is made with striking clarity in many decisions of this Court.[2]

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[2] English precedent is important because, "[t]o determine whether habeas corpus could be used to test the legality of a given restraint on liberty, this Court has generally looked to common law usages and the history of habeas corpus both in England and in this country." *Jones v. Cunningham*, 371 U.S. 236, 238 (1963) (footnote omitted).

A. The King's Bench Used Equitable Principles When Adjudicating Habeas Corpus Petitions.

In early 17th Century England it came to be understood, through the persistent efforts of the Court of King's Bench (at which, in its medieval origins, the king actually sat) that the writ of habeas corpus derived from powers unique to the king – *i.e.*, his royal prerogative.[3] That power was repeatedly invoked by the King's Bench to persuade other courts and institutions that they were bound to answer the writ and return both the prisoner and an explanation for the prisoner's detention. The prerogative had such force because it "was both within and beyond law, a place where the king's authority mimicked the divine." Halliday & White at 601. Just as God could perform miracles beyond the laws of His created nature, so could the king through his prerogative slip the rigid fetters of the laws promulgated under his authority.

It was also accepted, however, that the prerogative could be exercised only on behalf of the good of the king's subjects, in furtherance of the bond between them and the king himself. *Id.* pp. 602-03.[4] "Miracles performed by the prerogative were a kind of equitable intervention into law's normal operation

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[3] Paul D. Halliday & G. Edward White, The Suspension Clause: English Text, Imperial Contexts, and American Implications, 94 Va. L. Rev. 575, 594 (2008) (hereinafter "Halliday & White.").

[4] The other prerogative writs were mandamus, prohibition, certiorari, and quo warranto. Edward Jenks, The Prerogative Writs in English Law, 32 Yale L.J. 523, 527 (1923).

made legal by their being directed 'for the public good."[5]

Sir Edward Coke in describing the prerogative writs stated that they conferred on the King's Bench

> not only jurisdiction to correct errors in judicial proceeding[s], but other errors and misdemeanors extrajudicial tending to the breach of the peace, or oppression of the subjects, or raising of faction * * * or any other manner of misgovernment, so that no wrong or injury, either public or private, can be done, but that this shall be reformed or punished * * *.[6]

Given its status as a writ of the king's prerogative, by which the King's Bench could perform miracles in law and according to Coke correct non-judicial errors "either public or private," it comes as no surprise that equitable principles routinely informed its exercise. Indeed, the key to the prerogative writs

> lay in the court's omnipotence when using them, and that omnipotence primarily stemmed from their equitable character: their embodiment of the King's mercy.

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[5] Paul D. Halliday, *Habeas Corpus: From England to Empire* (Harvard/ Belknap, 2010) (hereinafter "Halliday"). Publication is expected in February 2010. We have requested permission under Supreme Court Rule 32.3 to lodge a galley copy with the Clerk and have offered galley copies to the parties.

[6] Sir Edward Coke, *The Fourth Part of the Institutes of the Laws of England* (1644), iv, 71.

Halliday & White p. 608. Accordingly, "equitable ideas provide the best explanation for how so many seventeenth- and eighteenth-century subjects could employ habeas to win their freedom" (*id.* pp. 608-09), and records of judicial proceedings in the 17th Century support the conclusion "that seventeenth-century English judges frequently entertained uses of habeas corpus that were equitable in character." *Id.* pp. 610-11 & nn.88-90 (giving examples).[7]

In short, habeas "was an equitable device in all but name, enabling action in response to the particulars of a given circumstance rather than imposing obedience to a set of rules prescribed in precedents." Halliday ch. 4 p. 4 (footnote omitted).

Equity's influence was visible in the *process* employed and the *remedies* imposed by the King's Bench in exercising its habeas jurisdiction. The writ issued "because the justices had become convinced by a story that they should examine more closely the circumstances of a person's imprisonment. The telling of tales, and the discretion of judges in deciding to heed the moral of such tales, was quite like the process used in most courts of equity." Halliday ch. 3 p. 36. And the habeas writ's recipient was commanded to provide a return on pain of punishment, one form of which "had a clear connection to practice in equity: the insertion in *alias* and *pluries* writs of the kind of *subpoena* clauses found in Chancery writs." *Id.* Indeed, so heavily did the King's Court borrow practices from the other side

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[7] *See also* J. H. Baker, An Introduction to English Legal History 144 (4th ed. 2002) (speaking of the prerogative writs and noting that their "jurisdiction was, in other words, equitable").

that Lord Chancellor Ellesmere complained that it "'confound[ed] the distinct jurisdictions of common laws and equity.'" *Id.* p. 37 (citation omitted). Thus, the King Bench

> exercised equity in the conceptual sense by using the tools of equity in the institutional sense: judicial action at common law on the prerogative writs was enforced by borrowing practices of attachment and imprisonment for contempt that were used in courts of equity. The problem was not that common law thought ill of equity. If anything, common law loved equity so well that it threatened to smother it in its embrace. [*Id.* p. 35.]

Habeas practice also mimicked equity in its imaginative accommodations of the strict habeas rule that the factual averments made in the return provided by the writ's recipient could not be challenged. Facts (often dispositive facts) were received "off the return" from people in court, from counsel, and from the court's own officers. *Id.* ch.4 pp. 12-16. And facts (even contradictory facts) might be received before the return was actually filed. *Id.* pp. 16-17. The adoption of these and other practices showed that the "King's Bench worked most energetically in gathering and assessing the facts of people's detention." *Id.* p. 22.

In sum, "[t]hrough the prerogative writs and procedural innovations connected to their development at the opening of the seventeenth

century, equity had been domesticated for use at common law." *Id.* ch. 3, p. 37.

It is also important as an historical matter that the development of the uses of habeas corpus was far more the province of the English courts than the legislature (as would be true in America as well). The Habeas Corpus Act of 1679 "merely codified practices generated by the King's Bench justices," and in the following century "all the important innovations in habeas corpus jurisprudence occurred through judicial use of the common law writ rather than the statutory one." Halliday & White at pp. 611, 612.

B. This Court Has Repeatedly Recognized The Equitable Underpinnings of Habeas Corpus.

1. Equity's persistent role.

Many decisions of this Court, and many Justices in concurring or dissenting opinions, have long acknowledged and relied on the equitable principles that underlie habeas corpus jurisdiction. Thus, in *Sanders v. United States,* 373 U.S. 1, 17 (1963), the Court noted that "'habeas corpus has traditionally been recognized as governed by equitable principles.") (citation omitted). Similarly, in *Schlup v. Delo,* 513 U.S. 298, 319 (1995), the Court said that it "has adhered to the principle that habeas corpus is, at its core, an equitable remedy." *See also id.* ("This Court has consistently relied on the equitable nature of habeas corpus to preclude application of strict rules of res judicata.").

In *Herrera v. Collins,* 506 U.S. 390, 404 (1993), the Court refused relief to a petitioner whose innocence claim was unaccompanied by an independent constitutional violation, but not without noting that an innocence claim coupled with a constitutional claim may be heard under "the 'equitable discretion' of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons." *Herrera* cited *McClesky v. Zant*, 499 U.S. 467, 502 (1991), in which the Court ruled that, in exercising its habeas jurisdiction, the Court has "equitable discretion to correct a miscarriage of justice." Cf. *Dugger v. Adams,* 489 U.S. 401, 410 (1989) (refusing to "exercise our equitable power to overlook respondent's state procedural default."); *Reed v. Farley,* 512 U.S. 339, 361 n.2 (1994) (Blackmun, dissenting, noting "the equitable considerations that might guide the Court's exercise of its discretion").

The application of equitable principles has not always favored habeas petitioners. Rather, as Justice Scalia noted, concurring in *Reed v. Farley,* 512 U.S. 339, 356 (1994), the Court "has long applied equitable limitations to narrow the broad sweep of federal habeas jurisdiction" (citing his concurring and dissenting opinion in *Withrow v. Williams*, 507 U.S. 680, 716 (1993) ("Habeas jurisdiction is tempered by the restraints that accompany the exercise of equitable jurisdiction.").

Thus, in *Ex Parte Roya*l, 117 U.S. 241 (1886), the Court imposed on petitioners the requirement that they first exhaust available state remedies. In *Stone v. Powell,* 428 U.S. 465 (1976), the Court held that Fourth Amendment exclusionary rule claims fully

and fairly litigated in state court are not cognizable on federal habeas, balancing "values important to our system of government" and "the basis justice of [the prisoner's] incarceration." *Id.* p. 491 n.31. In *Gomez v. United States District Court,* 503 U.S. 653, 654 (1992), denying a claim that execution by lethal gas is cruel and unusual, the Court noted that petitioner "seeks an equitable remedy" and that "[e]quity must take into consideration the State's strong interest in proceeding with its judgment and [petitioner's] obvious attempt at manipulation." *Cf. Fay v. Noia,* 372 U.S. 391, 438 (1963) (equitable principles include "the principle that a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks").

2. Judicial vs. statutory exposition.

We saw above that the King's Bench was the driving force in the elucidation of habeas corpus jurisprudence in England, and a similar path has been followed in America. As the Court explained in *McClesky,* the Judiciary Act of 1789 empowered federal courts to issue writs of habeas corpus to prisoners in federal custody and in 1867 extended the writ to prisoners held in state custody as well. 499 U.S. at 477-78. Yet, "[i]n the early decades of our new federal system, English common law defined the scope of the writ" and "[f]or the most part * * * expansion of the writ has come through judicial decisionmaking." *Id.* pp. 478, 479.[8] And, with

[8] *See Ex Parte Bollman*, 8 U.S. 75, 93, 4 Cranch 75 (1807) ("[F]or the meaning of the term habeas corpus, resort may unquestionably be had to the common law; but the power to award the writ by any of the courts of the United States, must be given by written law.").

respect to the precise issue before it – the doctrine of abuse of the writ – the *McClesky* Court noted that the doctrine "refers to a complex and evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions." *Id.* p. 489.

Similarly, in *Wainwright v. Sykes,* 433 U.S. 72, 78 (1977), in which the Court reversed the grant of relief to a petitioner who had failed to object at trial to his statements allegedly admitted in violation of *Miranda*, the Court noted that, since the writ was extended by statute in 1867 to prisoners held by the states, it had "grappled with the relationship between the classical common-law writ of habeas corpus and the remedy provided in 28 U.S.C. § 2254." A review of the case law twists and turns demonstrated the "Court's historic willingness to overturn or modify its earlier views of the scope of the writ, even where the statutory language authorizing the judicial action has remained unchanged." *Id.* p. 81. *See also Schlup,* 513 U.S. at 319 n.35 ("This Court has repeatedly noted the interplay between statutory language and judicially managed equitable considerations in the development of habeas corpus jurisprudence.") (citing cases).

In particular, the Court has never hesitated to fill perceived gaps in the statutory scheme. *See Brecht v. Abrahamson,* 507 U.S. 619, 633 (1993) (holding that the *Kotteakos* harmless error standard applies in a case involving *Doyle* violations, and stating that "[w]e have filled the gaps of the habeas corpus statute with respect to other matters."); *O'Neal v. McAninch,* 513 U.S. 432, 445 (1995) (holding that the writ must issue when a court has "grave doubt" whether a error in

the trial proceedings was harmless, and stating that, "[w]hen faced with gaps in the habeas statute, we have 'looked first to the considerations underlying our habeas jurisprudence, and then determined whether the proposed rule would advance or inhibit these considerations'") (citation omitted); *Duncan v. Walker,* 533 U.S.167, 183 (2001), (Justice Stevens, joined by Justice Souter, concurring) ("[f]ederal habeas corpus has evolved as the product of both judicial doctrine and statutory law" and that therefore "equitable considerations may make it appropriate for federal courts to fill in a perceived omission on the part of Congress by tolling AEDPA's statute of limitations for unexhausted federal habeas petitions.").[9]

3. Interpretation of the AEDPA.

The strength and length of the Court's regard for its own precedents and equitable discretion as well as statutory text has carried over to its disposition of cases arising after passage of the Antiterrorism and Effective Death Penalty Act of 1966, Pub. L. 104-132, 110 Stat. 1214 (1996) ("AEDPA").

Thus, in *Slack v. McDonald,* 529 U.S. 473, 483 (2000), the Court considered the AEDPA provision that requires a petitioner seeking appeal from a district court denial of relief to obtain a certificate of

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[9] *See also Kuhlmann v. Wilson*, 477 U.S. 436, 446 (1986), in which, speaking of the Court's decisions over the past several decades construing the reach of habeas statutes, Justice Powell's plurality opinion said that, "whether reading those statutes broadly or narrowly, the Court has reaffirmed that 'habeas corpus has traditionally been regarded as governed by equitable principles.'" (citing *Fay v. Noia*, 372 U.S. 391, 438 (1963)).

appealability ("COA") by making "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c). The District Court had denied relief on procedural grounds, and the State contended that no appeal was permissible because the Act limited appeals to constitutional grounds. The Court rejected that narrow interpretation of the Act because the "writ of habeas corpus plays a vital role in protecting constitutional rights * * * [and] Congress expressed no intention [in the AEDPA] to allow trial court procedural error to bar vindication of substantial constitutional rights on appeal." *Id.* p. 483. Instead, the Court held that a COA should issue when the petitioner shows "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.* p. 484.

In *Calderon v. Thompson*, 523 U.S. 538 (1998), the Court ruled that a court in a habeas case must act consistently "with the objects of the statute" but also "must be guided by the general principles underlying our habeas corpus jurisdiction." *Id.* p. 554. The Court's holding was that a Court of Appeals may *sua sponte* recall its mandate "to revisit the merits of an earlier decision denying habeas corpus relief to a state prisoner" only "to avoid a miscarriage of justice as defined by our habeas corpus jurisprudence" – a standard it recognized was "more lenient" than AEDPA's restrictions on successive petitions. *Id.* p. 558.

See also Williams v. Taylor, 529 U.S. 420, 432-35 (2002) (relying on pre-AEDPA case law to interpret the term "failed"); *Carey v. Saffold*, 536 U.S. 214, 227,

228 (2002) (Kennedy, J., dissenting, stating that the Court "departs from the text" of the AEDPA in giving an "expansive" definition to the term "pending"); *Stewart v. Martinez-Villareal*, 253 U.S. 637 (1998) (holding that a petitioner seeking to raise a claim previously dismissed by the District Court as premature is not raising a "second or successive" petition under § 2244(b), a ruling Justice Scalia said "flouts the unmistakable language of the statute to avoid what [the Court] calls a 'perverse' result." *Id.* p. 646 (Scalia, J. dissenting)).

C. The AEDPA Does Not Preclude Equitable Tolling.

Amici bring no expertise to the question whether attorney gross incompetence warrants application of the equitable tolling doctrine in this case. They do, however, take strong issue with Respondent's statement (Opp. p. 21) that equitable tolling of the AEDPA statute of limitations is impermissible. As the Court ruled in *Young v. United States,* 535 U.S. 43, 49-50 (2002):

> It is hornbook law that limitations periods are customarily subject to equitable tolling * * * unless tolling would be inconsistent with the text of the relevant statute. * * * Congress must be presumed to draft limitations periods in light of this background principle. [Inner quotation marks and citations omitted.]

Moreover, Congress is presumed to draft with knowledge of this Court's tradition of applying

equitable principles in the exercise of its habeas corpus jurisdiction,[10] and statutes should not be construed "to displace courts' traditional equitable authority absent the clearest command * * * or an inescapable inference to the contrary." *Miller v. French,* 530 U.S. 327, 340 (2000).

Accordingly, given the Court's historic recognition of habeas corpus as governed by equitable principles, its consistent development of the breadth and limits of the writ through judicial exposition as well as statutory construction, its caution that statutes depriving courts of traditional equitable discretion must do so with pellucid clarity, and the absence of any such language in the limitations provision of the AEDPA, *amici* conclude that the Court would be acting squarely within its historic equitable exercise of habeas corpus jurisdiction if it were to adopt the equitable tolling doctrine in this case.

CONCLUSION

The Court should hold that doctrine of equitable tolling applies in cases subject to the Antiterrorism and Effective Death Penalty Act of 1996.

Respectfully submitted,

William F. Sheehan

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[10] *See, e.g., Square D Co. v. Niagara Frontier Tariff Bureau,* 476 U.S. 409, 420 (1986) ("Congress must be presumed to have been fully aware of this interpretation of the [antitrust] statutory scheme, which had been a significant part of our settled law for over half a century.").

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