No. 21-511

In the Supreme Court of the United States

TIM SHOOP, WARDEN, PETITIONER

v.

RAYMOND A. TWYFORD, III

(CAPITAL CASE)

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING NEITHER PARTY

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether the All Writs Act, 28 U.S.C. 1651, can authorize a federal district court to order a state prisoner to be transported for a medical test.

2. Whether a court asked to invoke the All Writs Act to order the transportation of a state prisoner for a medical test in connection with a habeas petition under 28 U.S.C. 2254 must first determine that the results of the test could be used to establish the prisoner's entitlement to relief.

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INTEREST OF THE UNITED STATES

This case presents the question whether the All Writs Act, 28 U.S.C. 1651, can authorize a district court to order a state prisoner to be transported for a medical test or examination. The United States litigates cases that could require such orders. For example, it prosecutes state and local correctional and law-enforcement officers who willfully violate, or conspire to violate, constitutional rights while acting under color of law. See 18 U.S.C. 241-242. Because state prisoners may be victims of such crimes, the United States has a substantial interest in ensuring that it would be able to obtain transport of state prisoners for medical tests if necessary. The United States also has a substantial interest in ensuring that constitutional rights can be vindicated

through private suits under 42 U.S.C. 1983, which likewise may require medical testing of state prisoners. And the United States has a particular interest in opposing the warden's argument that 28 U.S.C. 2241(c)'s authorization of writs of habeas corpus in specified circumstances prohibits courts from ordering prisoner transport in any other circumstances. That interpretation of Section 2241(c) would not only foreclose ancillary orders like those directly at issue here, but also call into question federal courts' authority to grant ultimate relief requiring prisoner transport—such as, for example, for medical treatment or a transfer to a different prison.

This case also presents a question about the circumstances in which it is appropriate for a federal court to invoke the All Writs Act to order a state prisoner transported for a medical test in connection with the prisoner's habeas petition under 28 U.S.C. 2254. The answer to that question turns in part on the standards governing discovery in Section 2254 cases, which overlap with the standards that apply in postconviction proceedings for federal prisoners under 28 U.S.C. 2255. The United States has previously participated as amicus curiae in Section 2254 cases that involve the same or similar standards as those applied in Section 2255 cases. See, *e.g.*, *Banister* v. *Davis*, 140 S. Ct. 1698 (2020); *Wood* v. *Milyard*, 566 U.S. 463 (2012); *Gonzalez* v. *Thaler*, 565 U.S. 134 (2012).

STATEMENT

1. In 1992, respondent Raymond Twyford and a coconspirator lured Richard Franks to a remote location, then shot and killed him. Pet. App. 214a-215a. Twyford confessed to the crime, claiming that Franks had raped his girlfriend's daughter. *Ibid.* Twyford was prosecuted in Ohio state court. A jury found him guilty of

aggravated murder, and a penalty-phase jury recommended a capital sentence, which the trial court imposed. *Id.* at 217a-218a. The Ohio Court of Appeals and the Ohio Supreme Court affirmed the conviction and sentence on direct appeal, *id.* at 149a-211a, and this Court denied certiorari, 537 U.S. 917 (2002).

A state trial court denied Twyford's application for post-conviction relief, and the Ohio Court of Appeals affirmed. Pet. App. 212a-244a. As relevant here, the court rejected Twyford's argument that his counsel was ineffective for failing to call a psychologist during the penalty phase of his trial to present a theory that head injuries he sustained during a teenage suicide attempt left him "unable to make rational and voluntary choices." *Id.* at 234a; see *id.* at 238a. The court noted that counsel had called a different psychologist who testified in support of a different theory: that Twyford's "commission of the murder was his way of protecting the alleged rape victim from the same type of abusive behavior [he] had experienced when he was young." *Id.* at 239a; see *id.* at 217a. The court concluded "that a finding of ineffective assistance cannot be based upon the trial counsel's choice of one competing psychological explanation over another." *Id.* at 239a. The Ohio Supreme Court denied discretionary review. *Id.* at 148a.

2. In 2003, Twyford filed a habeas petition in the United States District Court for the Southern District of Ohio. Pet. App. 75a. In 2017, the court dismissed most of his claims as procedurally defaulted, *id.* at 43a-147a, but allowed some ineffective assistance of counsel claims to proceed, *id.* at 131a-133a, 144a-147a.

In 2019, Twyford moved for an order directing petitioner, the warden of his prison, "to transport [him] to The Ohio State University Medical Center for medical

testing necessary for the investigation, presentation, and development of claims." Pet. App. 253a; see *id.* at 253a-271a. Twyford attached a letter from a neurologist stating "that a CT/FDG-PET scan would be a useful next step to further evaluate [him] for brain injury." *Id.* at 272a. Twyford explained that such testing could not be conducted at the prison, *id.* at 257a, and argued that the testing was "necessary * * * to determine the existence, severity, and effect of brain damage and cognitive impairment on [his] behavior and mental functioning," *id.* at 262a. He asserted that his cognitive impairment "must be explored both as to any ineffective assistance of counsel claim as well as any substantive claim pertaining to the head trauma." *Id.* at 263a.

The district court granted the transport order. Pet. App. 23a-33a. The court first held that it had authority to issue the order under the All Writs Act, which empowers federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law," 28 U.S.C. 1651(a). Pet. App. 30a. The court then considered whether Twyford had "sufficiently demonstrated a need for obtaining the testing he seeks." *Ibid.* The court concluded that Twyford had made the necessary showing because the test "could aid the Court" in judging "the constitutionality of [his] incarceration." *Id.* at 32a. The court did not, however, identify any specific claim or legal theory to which the test results would relate. *Ibid.*

The warden had argued that the district court should not order transport because 28 U.S.C. 2254(d) would preclude consideration of any evidence revealed by the test. Pet. App. 31a-32a. Section 2254(d) provides that if a state prisoner's claim was adjudicated on the merits

by a state court, a federal court may grant habeas relief only if, as relevant here, the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. 2254(d)(1). In *Cullen* v. *Pinholster*, 563 U.S. 170 (2011), this Court held that review under Section 2254(d)(1) "is limited to the record that was before the state court." *Id.* at 181. Here, the district court stated that it was not "in a position at this stage of the proceedings to make a determination as to whether or to what extent" *Pinholster* would preclude the court from considering the results of the test. Pet. App. 32a.

3. The district court stayed the transport order pending appeal, Pet. App. 35a-36a, and the court of appeals affirmed, *id.* at 1a-22a.

a. The court of appeals first held that "a district court has the authority under the All Writs Act to order the state to transport a habeas petitioner for medical imaging in aid of its habeas jurisdiction." Pet. App. 12a. The court rejected the warden's contention that such an order violates 28 U.S.C. 2241(c). Section 2241(c) provides that a writ of habeas corpus "shall not extend to a prisoner unless" he satisfies one of five conditions, including if "[i]t is necessary to bring him into court to testify or for trial." 28 U.S.C. 2241(c)(5). The warden had argued that Section 2241(c)'s "allowance of transport orders in these narrow circumstances is best read to *prohibit* orders mandating the transportation of prisoners in other circumstances." Pet. App. 13a (citation omitted).

The court of appeals disagreed. It interpretated Section 2241(c) "as limiting when the district court may issue the writ of habeas corpus *itself*, not forbidding ancillary orders needed to aid in adjudicating a petitioner's

habeas petition." Pet. App. 14a. The court reasoned that an order requiring transportation for medical testing is not a writ of habeas corpus covered by Section 2441(c), but is instead an ancillary order that may be necessary to ensure that "states cannot prevent federal habeas petitioners from presenting their cases to the district court." *Ibid.*

The court of appeals next held that a transport order was justified in the circumstances of this case. Pet. App. 14a-19a. The court reasoned that the "[r]ules limiting habeas discovery ha[d] no bearing on the transport order because Twyford's request" for "neurological imaging of his own brain" was "not a request for discovery." *Id.* at 15a. The court therefore held that Twyford was not required to satisfy the "good cause" standard for discovery imposed by Rule 6(a) of the Rules Governing Section 2254 Cases in the United States District Courts (Section 2254 Rules). Pet. App. 15a. And the court concluded that the order was "necessary or appropriate" under the All Writs Act because the requested test "plausibly relates" to Twyford's ineffective assistance of counsel claims. *Id.* at 16a. The court declined to address the warden's argument that *Pinholster* would preclude consideration of the test results, stating that it "need not consider the admissibility of any resulting evidence" before approving a transport order. *Id.* at 17a.

b. Judge Batchelder dissented. Pet. App. 19a-22a. She agreed that "the All Writs Act empowers the district court to issue orders that enable a habeas petitioner's collection of evidence," including transport orders. *Id.* at 21a; see *id.* at 22a. But she believed that such an order satisfies the All Writs Act only if "(1) the petitioner has identified specific claims for relief that the evidence being sought would support or further; and

(2) the district court has determined that if that evidence is as the petitioner proposed or anticipated, then it could entitle the petitioner to habeas relief"—which would require at least some showing that "*Pinholster* would not bar admission" of the evidence. *Id.* at 21a-22a. Judge Batchelder criticized the district court for allowing Twyford "to proceed in reverse order by collecting evidence before justifying it." *Id.* at 22a.

SUMMARY OF ARGUMENT

The court of appeals correctly held that the All Writs Act may authorize a district court to order a state prisoner transported in circumstances not covered by Section 2241(c)(5), including when necessary for medical testing. This Court should therefore reject the warden's categorical argument that the All Writs Act never authorizes such transport orders. But the court of appeals erred in concluding that a transport order was necessary or appropriate in this Section 2254 case without identifying any specific claim to which the resulting evidence would relate, or even establishing that the district court would be able to consider that evidence.

I. The All Writs Act authorizes a district court to order a state prisoner transported for a medical examination or test in appropriate circumstances. The Act permits courts to issue orders that are "necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. 1651(a). In some cases, an order requiring prisoner transport for medical testing will aid a federal court in exercising its jurisdiction; indeed, this Court has directed issuance of such an order in aid of its own jurisdiction. See *Rees* v. *Peyton*, 384 U.S. 312 (1966) (per curiam). Litigation in federal district courts may also require medical examinations or testing of state prisoners,

including in suits under 42 U.S.C. 1983 or prosecutions of state or local officials who violate constitutional rights under color of law.

Contrary to the warden's assertion, Section 2241(c)'s limit on federal courts' authority to issue writs of habeas corpus does not prohibit orders requiring transportation of state prisoners in other circumstances, including for a medical test. The common law recognized a variety of forms of the writ of habeas corpus, but all of them addressed prisoner transportation only insofar as they required that a prisoner be produced *before a court* for specified purposes. Consistent with that understanding, the only type of transport that Section 2241(c) addresses is transport to a court for the purpose of testimony or to be prosecuted. 28 U.S.C. 2241(c)(5).

An order directing that a prisoner be transported for a medical test is not a writ of habeas corpus governed by Section 2241(c). It does not direct a custodian to produce a prisoner before a court for one of the purposes traditionally served by writs of habeas corpus. Instead, it directs a custodian to transport the prisoner to a third-party facility for a medical test. Nothing in the common law or the statutory text suggests that Section 2241(c) governs all transport orders to all locations for all purposes. The warden's contrary reading would prohibit a federal court from ordering a state prisoner transported even as part of a final judgment granting relief for a constitutional violation—a result that the warden appears to recognize is untenable.

II. Although the All Writs Act can in some circumstances authorize a transport order, the court of appeals erred in concluding that a transport order was necessary or appropriate in this case without identifying any specific claim to which the resulting evidence would

relate—or even establishing that the district court would be able to consider that evidence. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, Tit. I, 110 Stat. 1217, and the rules applicable to Section 2254 cases significantly limit the ability of habeas petitioners to develop and present new evidence. Before using the All Writs Act to facilitate the development of evidence in a Section 2254 case, therefore, a court must at minimum find that the request satisfies the general standard governing discovery in such cases, which requires a showing that the evidence could be used to demonstrate the prisoner's entitlement to relief. Absent such a showing, the order would be neither "necessary or appropriate" nor "agreeable to the usages and principles of law." 28 U.S.C. 1651(a). Because the court of appeals failed to engage in the analysis required by the All Writs Act, this Court should vacate the judgment below and remand to allow the lower courts to consider Twyford's transport request under the proper standard.

ARGUMENT

I. THE ALL WRITS ACT ALLOWS A DISTRICT COURT TO ORDER TRANSPORT OF A STATE PRISONER FOR A MEDICAL TEST IN APPROPRIATE CIRCUMSTANCES

The All Writs Act authorizes federal courts to issue orders not specifically addressed by statute when such orders are necessary or appropriate to the exercise of their jurisdiction and consistent with other relevant law. An order requiring that a state prisoner be transported for medical testing may satisfy those standards. In fact, this Court has authorized such an order in aid of its own jurisdiction. And those orders are entirely consistent with Section 2241(c), which governs writs of habeas corpus but does not limit courts' authority to

order prisoner transportation for other purposes. The Court should therefore reject the warden's categorical argument that a federal court can *never* order a state prisoner transported for a medical test. In so doing, however, the Court should also reiterate the settled All Writs Act principles that define and limit the circumstances in which such orders are appropriate.

A. The All Writs Act Authorizes District Courts To Issue Orders That Are Necessary Or Appropriate In Aid Of Their Jurisdiction

1. The All Writs Act was originally adopted in the Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 81-82. It now provides that "courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. 1651(a); see *Pennsylvania Bureau of Corr.* v. *United States Marshals Serv.*, 474 U.S. 34, 40-41 (1985). This Court has long recognized that the Act serves to fill "the interstices of federal judicial power when those gaps threaten[] to thwart the otherwise proper exercise of federal courts' jurisdiction." *Pennsylvania Bureau of Corr.*, 474 U.S. at 41. The text of the Act and this Court's precedents define the scope of that gap-filling authority.

First, the All Writs Act authorizes a federal court to issue orders "in aid of" its existing jurisdiction, 28 U.S.C. 1651(a); "the Act does not enlarge that jurisdiction," *Clinton* v. *Goldsmith*, 526 U.S. 529, 535 (1999). Any exercise of authority under the Act thus must be grounded in an independent grant of subject matter jurisdiction. *Ibid.*; see *United States* v. *Denedo*, 556 U.S. 904, 913-914 (2009).

Second, the Act authorizes orders that are "agreeable to the usages and principles of law." 28 U.S.C. 1651(a).

A court thus must ensure that any exercise of authority under the Act is "consistent with" the governing statutory scheme and other relevant laws. *United States* v. *New York Tel. Co.*, 434 U.S. 159, 176 (1977). And a party "may not, by resorting to the All Writs Act, avoid complying with" other "statutory requirements." *Syngenta Crop Prot., Inc.* v. *Henson*, 537 U.S. 28, 32-33 (2002). "Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling." *Pennsylvania Bureau of Corr.*, 474 U.S. at 43. The Court has held, for example, that the Act cannot be invoked to "avoid complying with the statutory requirements for removal," *Syngenta Crop Prot.*, 537 U.S. at 32-33, to circumvent Federal Rule of Criminal Procedure 29, *Carlisle* v. *United States*, 517 U.S. 416, 429 (1996), or "as a substitute for an authorized appeal," *United States Alkali Export Ass'n* v. *United States*, 325 U.S. 196, 203 (1945).

Third, the All Writs Act authorizes courts to issue orders that are "necessary or appropriate." 28 U.S.C. 1651(a). That grant of authority is "not limited to those situations where it is 'necessary' to issue the writ or order 'in the sense that the court could not otherwise discharge its * * * duties.'" *New York Tel. Co.*, 434 U.S. at 173 (citation omitted). But the Act confers "a power essentially equitable and, as such, not generally available to provide alternatives to other, adequate remedies at law." *Goldsmith*, 526 U.S. at 537. For the same reason, courts invoking the Act should take into account other equitable considerations, including any "burden[]" imposed on third parties. *New York Tel.*, 434 U.S. at 175.

2. Based on those considerations, this Court has approved the use of the All Writs Act in a variety of circumstances. The Act is the source of the Court's authority

to issue injunctions pending appeal. See *Wisconsin Right to Life, Inc.* v. *FEC*, 542 U.S. 1305, 1306 (2004) (Rehnquist, C.J., in chambers). The Court has also held, for example, that the Act authorizes orders compelling "telephone companies to assist in the installation and operation of pen registers" (before Congress provided statutory authority for such orders, 18 U.S.C. 3123(b)(2)), *New York Tel. Co.*, 434 U.S. at 177; orders governing discovery in habeas proceedings (before the Court issued rules governing that subject), *Harris* v. *Nelson*, 394 U.S. 286, 299-300 (1969); orders enjoining mergers pending review by the Federal Trade Commission, *FTC* v. *Dean Foods*, 384 U.S. 597, 603-605 (1966); and orders requiring that a prisoner be brought to court "to argue his own appeal," *Price* v. *Johnston*, 334 U.S. 266, 284 (1948), or to attend a hearing, *United States* v. *Hayman*, 342 U.S. 205, 220-222 (1952).

B. An Order Requiring Transport Of A State Prisoner For A Medical Test May Be Necessary Or Appropriate In Aid Of A District Court's Jurisdiction

An order directing that a state prisoner be transported for medical testing is not categorically outside the authority conferred by the All Writs Act. Such orders should not be issued lightly, but they may in some cases aid courts in the exercise of their jurisdiction, be consistent with other relevant law, and qualify as "necessary or appropriate" under the circumstances.

1. Ordering that a prisoner be transported for a medical test will sometimes aid a federal court in exercising its jurisdiction. This Court, for example, directed issuance of such an order in *Rees* v. *Peyton*, 384 U.S. 312 (1966) (per curiam). Melvin Rees, a state prisoner, filed a petition for a writ of certiorari seeking review of the denial of his federal habeas petition. *Id.* at 313.

Rees later directed his counsel to withdraw the petition, but counsel advised the Court that he had doubts about Rees's mental competence. *Ibid.* The Court explained that whether Rees should be allowed to withdraw his petition "is a question which it is ultimately the responsibility of this Court to determine, in the resolution of which Rees' mental competence is of prime importance." *Ibid.* Echoing the All Writs Act, the Court ordered that, "in aid of the proper exercise of [the] Court's certiorari jurisdiction," the district court should determine Rees's competence. *Id.* at 313-314. The Court further directed that, if necessary, the district court should order Rees transported to a federal facility for examination: "[I]t will be appropriate for the District Court to subject Rees to psychiatric and other appropriate medical examinations and, so far as necessary, to temporary federal hospitalization for this purpose." *Id.* at 314.[1]

Rees was, of course, an unusual case. But litigation in federal district courts may also require medical examinations or testing of state prisoners. The United States, for example, prosecutes state and local correctional or law-enforcement officers who willfully violate or conspire to violate state prisoners' constitutional rights. See 18 U.S.C. 241-242. In cases involving excessive force, medical examinations or testing may be necessary to resolve a dispute over the existence and extent of the victim's injuries. Cf. *Wilkins* v. *Gaddy*, 559 U.S. 34, 37 (2010) (per curiam) ("The extent of injury suffered by an inmate is one factor that may suggest

[1] The district court found Rees incompetent, and after discussions with the parties this Court held his petition for a writ of certiorari until his death several decades later. See *Ryan* v. *Valencia Gonzales*, 568 U.S. 57, 69 (2013).

'whether the use of force could plausibly have been thought necessary' in a particular situation.") (brackets and citation omitted). Similar issues can arise in private excessive-force suits brought by prisoners under 42 U.S.C. 1983, or in Section 1983 suits alleging that prison officials were deliberately indifferent to a prisoner's need for medical care. See, *e.g.*, *Christy* v. *Robinson*, 216 F. Supp. 2d 398, 404 (D.N.J. 2002) (noting that the court had ordered the state prison's medical care provider to "arrange for" the prisoner plaintiff "to be examined by two independent doctors"); *Delker* v. *Maass*, 843 F. Supp. 1390, 1395 (D. Or. 1994) (explaining that the plaintiff "was examined by * * * a court appointed independent medical expert" "while the action was pending"); see also *Ivey* v. *Harney*, 47 F.3d 181, 187-188 (7th Cir. 1995) (Rovner, J., concurring).

Simple physical examinations can be done at the prison, but some tests may "require[] equipment that only [is] available at an outside facility." *Ivey*, 47 F.3d at 187-188 (Rovner, J., concurring). If courts have no authority to order transportation to those facilities, prison officials could effectively have an unreviewable veto over the ability of the United States and Section 1983 plaintiffs to secure important evidence supporting their cases.

2. An order requiring that a state prisoner be transported for medical testing may also be "agreeable to the usages and principles of law." 28 U.S.C. 1651(a). No statute "specifically addresses the particular issue," *Pennsylvania Bureau of Corr.*, 474 U.S. at 43, of prisoner transportation for medical tests. A party invoking the All Writs Act for that purpose is thus relying on the Act as a "residual source of authority" to address a matter that is "not otherwise covered by statute." *Ibid.*

As this Court has long recognized, moreover, "courts may rely upon [the All Writs Act] in issuing orders appropriate to assist them in conducting factual inquiries." *Harris*, 394 U.S. at 299. In *Harris*, which the Court decided before it issued rules governing habeas cases, the Court held that district courts could invoke the Act to "fashion appropriate modes of procedure" governing discovery in those cases. *Ibid.* And in *American Lithographic Co.* v. *Werckmeister*, 221 U.S. 603 (1911), the Court held that the Act authorizes a court to issue a subpoena duces tecum. *Id.* at 609.

More broadly, an order requiring a prison to make a prisoner available for a medical examination is analogous to a range of discovery provisions requiring the production of evidence within a person's control for inspection, copying, or testing. See, *e.g.*, Fed. R. Civ. P. 34(a)(1)(B), 45(a)(1)(A)(iii) and (C); Fed. R. Crim. P. 16(a)(1)(E) and (b)(1)(A), 17(c)(1).[2] As the warden recognizes, the district court's order in this case closely resembles a classic discovery order: Twyford "is in the

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[2] In civil proceedings, Federal Rule of Civil Procedure 35(a)(1) authorizes a court to order a physical or mental examination of a party to the case, or to order "a party to produce for examination a person who is in its custody or under its legal control." The text of Rule 35 suggests that, at least in cases in which both the prisoner and the warden are parties, the court could order the warden to produce the prisoner for offsite examination. But the advisory committee's notes provide that the rule addresses the circumstances in which a court can compel an unwilling party to "submit to an examination" rather than situations involving prisoner transportation. Fed. R. Civ. P. 35(a)(1) advisory committee's note (1970 Amendment). And courts have generally held that the rule does not apply when a prisoner seeks an examination of himself. See *Cottle* v. *Nevada Dep't of Corrs.*, No. 12-cv-645, 2013 WL 5773845, at *2 (D. Nev. Oct. 24, 2013) (collecting cases).

State's possession," and the order "required the Warden to produce him" at a hospital where Twyford "hopes to obtain 'information that relates to the litigation.'" Br. 49 (citation omitted). "An order requiring a party to turn over something in its possession for an adverse party's review is a discovery order on any understanding of 'discovery.'" *Ibid.*

The warden nonetheless asserts that an order requiring that a prisoner be transported for medical testing is not "agreeable to the usages and principles of law," 28 U.S.C. 1651(a), because it lacks a "common-law analogue" in the "judicial powers exercised at the founding." Br. 23, 31. The warden is of course correct that identifying an analogue in founding-era common law is one way to show that an order is "agreeable to the usages and principles of law." 28 U.S.C. 1651(a); see *Hayman*, 342 U.S. at 221 n.35. But this Court has rejected the warden's assertion that it is the *only* way. The All Writs Act "says that the writ must be agreeable to the usages and principles of 'law,' a term which is unlimited by the common law or the English law." *Price*, 334 U.S. at 282. The Court has thus declined to read the Act "as an ossification of the practice and procedure" that prevailed "in 1789, when the original Judiciary Act containing the substance of [the All Writs Act] came into existence." *Ibid.* The Court did not, for example, rely on any common law analogue in approving an order requiring transportation for medical testing, see *Rees*, 384 U.S. at 314, or requiring a telephone company to assist in the installation and operation of a pen register, see *New York Tel. Co.*, 434 U.S. at 177.

3. Finally, an order requiring that a prisoner be transported for medical testing may qualify as "necessary or appropriate." 28 U.S.C. 1651(a). Whether that

standard is met will depend on the circumstances. As explained below, the restrictions on discovery in Section 2254 cases call for a particularly strong showing in that context. See pp. 25-29, *infra*. And in all contexts, the inquiry should reflect the All Writs Act's "essentially equitable" character. *Goldsmith*, 526 U.S. at 537. The relevant considerations include the requesting party's showing of need for the evidence sought and the availability of means for securing it. If, for example, the requested test or examination could be done in the prison, a transport order generally would not be appropriate. See *ibid.* Courts should also take into account the burden imposed on the prison and considerations relevant to the security and safety of the prisoner, medical and prison staff, and the public during the transportation and testing. See Warden Br. 46-47; cf. *Price*, 334 U.S. at 284-285 (describing the factors courts should consider before invoking the All Writs Act to order a prisoner to be brought to court to argue an appeal).

C. Section 2241(c) Does Not Prohibit Orders Requiring Transport Of State Prisoners For Medical Tests

In arguing that the All Writs Act can never authorize a court to order a prisoner transported for medical testing, the warden principally relies on 28 U.S.C. 2241(c). Br. 27-30, 33-34, 35-37. The warden begins with the premise that any order requiring the transportation of a prisoner is a "writ of habeas corpus" within the meaning of Section 2241(c). And he concludes that "[b]ecause [Section] 2241(c) does not permit" orders requiring transportation for medical testing, "it forbids them." Br. 33. But the warden's premise contradicts the long-settled understanding of what constitutes a writ of habeas corpus. And his conclusion would call into question courts' authority to order the transportation of prisoners

in *any* circumstances—including when necessary to enforce a judgment or provide relief for a proven constitutional violation.

1. This Court looks to the common law roots of habeas corpus when interpreting statutes defining federal courts' habeas authority. See, *e.g.*, *DHS* v. *Thuraissigiam*, 140 S. Ct. 1959, 1969, 1971-1974 (2020); *Rasul* v. *Bush*, 542 U.S. 466, 473-475 (2004). The common law recognized many forms of the writ, but the feature that unites them is that they required that a person be produced *before a court* for a specified purpose.

a. The most familiar form of the writ is known as the "'great writ'" or the "writ of habeas corpus *ad subjiciendum*." *Preiser* v. *Rodriguez*, 411 U.S. 475, 484 n.2 (1973) (citation and emphasis omitted); see 3 William Blackstone, *Commentaries on the Laws of England* 131 (1768) (Blackstone). The essence of the great writ "is an attack by a person in custody upon the legality of that custody." *Preiser*, 411 U.S. at 484. At common law, a court issuing such a writ addressed it to a prisoner's custodian, ordering him to produce (*habeas*) the body (*corpus*) of the prisoner before the court so the court could determine the legality of the prisoner's detention. 3 Blackstone 131 (explaining that the writ "command[ed]" "the person detaining another" "to produce the body of the prisoner"); see Rollin C. Hurd, *Treatise on the Right of Personal Liberty, and on the Writ of Habeas Corpus and the Practice Connected With It: With a View of the Law of Extradition of Fugitives* 243-244 (1858) (Hurd) ("The production of the body constitutes an essential element of this proceeding."). Once a prisoner was produced to the court, that court retained authority over the prisoner while considering the merits of the prisoner's challenge. See William S. Church,

Treatise on the Writ of Habeas Corpus: Including Jurisdiction, False Imprisonment, Writ of Error, Extradition, Mandamus, Certiorari, Judgments, Etc. 227 (1886) (explaining that at common law "the efficacy of the original commitment was considered to be superseded by the writ of habeas corpus while the proceedings under it were pending, and the safe keeping of the prisoner was entirely under the authority and direction of the court issuing it").

The common law also recognized various forms of the writ of habeas corpus used "for removing prisoners from one court into another for the more easy administration of justice." 3 Blackstone 129. Blackstone categorized those writs as writs of habeas corpus *ad respondendum*, *ad satisfaciendum*, *ad prosequendum*, *ad testificandum*, *ad deliberandum*, and *ad faciendum et recipiendum*. *Id.* at 129-131. Chief Justice Marshall identified the same traditional categories in *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 97-99 (1807).

Some of those writs were unique to the English system and do not apply in the courts of the United States. *Bollman*, 8 U.S. at 97-98. But federal courts recognized the common law writs of habeas corpus *ad prosequendum* and *ad testificandum*. *Ibid.* The writ of habeas corpus *ad prosequendum* ordered a custodian "to remove a prisoner" so he could be "prosecute[d] * * * in the proper jurisdiction wherein the offense was committed." *Carbo* v. *United States*, 364 U.S. 611, 615 (1961) (emphasis omitted); see *United States* v. *Mauro*, 436 U.S. 340, 357-358 (1978); *Bollman*, 8 U.S. at 98. And the writ of habeas corpus *ad testificandum* ordered a custodian to produce a prisoner to "bear testimony[] in any court." *Bollman*, 8 U.S. at 98; see *Pennsylvania Bureau of Corr.*, 474 U.S. at 38-39.

As this Court has recognized, "regardless of its particular form," "[t]he historic * * * usage of the writ * * * is to produce the body of a person *before a court* for whatever purpose might be essential to the proper disposition of a cause." *Price*, 334 U.S. at 283 (emphasis added); see Neil Douglas McFeeley, *The Historical Development of Habeas Corpus*, 30 SMU L. Rev. 586 (1974) ("[T]he ancestor to the modern writ was merely a procedural order to 'have the body' before a court for various reasons."); Thomas Carl Spelling, *A Treatise on Extraordinary Relief in Equity and at Law* 931 (1893) (explaining that the term "habeas corpus" was "at [the] common law used in a variety of writs having for their object the production of the body of persons before courts and judges") (emphasis omitted); Hurd at 143 ("The same words [habeas corpus] were * * * used in a variety of writs which had for their object the production of a person before a court or judge."). In all its forms, in other words, habeas corpus is "[a] writ employed to bring a person before a court." *Black's Law Dictionary* (11th ed. 2019). The warden identifies no form or use of the writ that does not fit that description. See Br. 27-30, 32-34, 35-37.

b. Section 2241 provides that "[t]he writ of habeas corpus shall not extend to a prisoner unless" one of five circumstances is present:

> (1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or
>
> (2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

> (3) He is in custody in violation of the Constitution or laws or treaties of the United States; or
>
> (4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or
>
> (5) It is necessary to bring him into court to testify or for trial.

28 U.S.C. 2241(c). Paragraphs (1)-(4) essentially codify the great writ by authorizing federal courts to determine the legality of a prisoner's confinement (subject to other statutory restrictions, see, *e.g.*, 28 U.S.C. 2254, 2255). Modern practice has, however, generally dispensed with the requirement that the custodian physically produce the prisoner in court. See *Hayman*, 342 U.S. at 222 n.38; see also 28 U.S.C. 2243.

Accordingly, Section 2241(c)(5), which permits a federal court to issue a writ of habeas corpus when "[i]t is necessary to bring [a prisoner] into court to testify or for trial," 28 U.S.C. 2241(c)(5), is the only provision in Section 2241 that directly addresses prisoner transport. Section 2241(c)(5) authorizes writs analogous to the common law writs of habeas *ad prosequendum* and *ad testificandum*. See *Mauro*, 436 U.S. at 357-358; cf. *Barber* v. *Page*, 390 U.S. 719, 723-724 (1968). And a Section 2241(c)(5) writ bears the same hallmarks of the common law writs of habeas corpus *ad prosequendum* and *ad testificandum*: it orders a prisoner's custodian to produce the prisoner to a specific court's jurisdiction for

the purpose of testimony or prosecution. See *Pennsylvania Bureau of Corr.*, 474 U.S. at 38-39.

c. To the extent that either the writ at common law or the writ as codified in Section 2241(c) addresses transport, therefore, it is transport of the prisoner by his custodian to a court for specified purposes. An order directing that a prisoner be transported for a medical test does not fit that description. It does not direct a custodian to produce a prisoner before a court for any of the purposes traditionally covered by writs of habeas corpus. Instead, it directs a custodian to transport the prisoner to a third-party medical facility for testing or an examination, just as the custodian would transport the prisoner for medical treatment if he became sick or injured and required care that could not be provided at the prison. And no one would refer to a prisoner's Section 1983 suit seeking such treatment as a petition for a writ of habeas corpus.

There is thus no basis in either the common law or the statutory text for the warden's contention that Section 2241(c) effects a sort of field preemption over the subject of prisoner transport, governing not just the issuance of traditional writs of habeas corpus, but also orders requiring transport to all locations in all situations for all purposes. Had Congress intended such a result, it would have used language addressing prisoner transport in general rather than writs of habeas corpus in particular.

The warden's broader conception of Section 2241(c) also contradicts this Court's precedents. The Court's decision in *Rees* neither described the contemplated court-ordered transfer of the prisoner to a federal medical facility as a writ of habeas corpus nor considered the limits in Section 2241(c), which was the same in 1966

as it is today. 384 U.S. at 313-314; see 28 U.S.C. 2241(c) (1964). And the Court has twice held that the All Writs Act authorizes the issuance of orders requiring prisoners to be transported to court for purposes not covered by 28 U.S.C. 2241(c)(5) or its predecessors—a circumstance far closer to the historical writ of habeas corpus. See *Price*, 334 U.S. at 284 (order that a prisoner be brought to the court of appeals to argue his own appeal); *Hayman*, 342 U.S. at 220-221 (order that a prisoner be brought to court for a hearing on his motion under 28 U.S.C. 2255).[3]

2. The warden's interpretation of Section 2241(c) would also have disruptive consequences extending far beyond the specific question presented here. The warden asserts that Section 2241(c) "*forbids* orders requiring prisoner transportation in 'other circumstances'" not specifically described in that provision. Br. 33 (citation omitted). Under that reading, Section 2241(c) would prohibit not just ancillary transportation orders issued under the All Writs Act, but *any* other federal court order requiring a state prisoner to be transported—even as final relief after finding a violation of the

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[3] The warden errs in asserting (Br. 37) that the limits in Section 2241(c) are particularly salient here "given that this is a habeas case." As discussed, see pp. 20-22, *supra*, Section 2241(c) does not limit prisoner transport orders for medical testing or examinations in *any* type of case—including habeas cases under Section 2254. The mere fact that such an order is issued *in* a habeas proceeding under Section 2254 does not transform the order *into* a writ of habeas corpus. Cf. *Hayman*, 342 U.S. at 220 (explaining that an order requiring "the presence of [the habeas petitioner] confined in another district" at a Section 2255 hearing would "not be * * * an original writ of habeas corpus" and that "[i]ssuance of" such an order "is auxiliary to the jurisdiction of the trial court over [the petitioner] granted in Section 2255 itself").

Constitution or a federal statute. A court could not, for example, order that a prisoner be transferred to a "facility [with a] specialist on staff with the appropriate training to care for his medical needs." *Reaves* v. *Department of Corr.*, 392 F. Supp. 3d 195, 200 (D. Mass. 2019), vacated as moot, No. 19-2089 (1st Cir. Dec. 14, 2021).

That result is of particular concern to the United States. Pursuant to its authority under the Civil Rights of Institutionalized Persons Act, 42 U.S.C. 1997 *et seq.*, and Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. 12131, the United States seeks and obtains consent judgments and other orders governing the conduct of state and local prisons. Those judgments may require the prison to transport prisoners for off-site medical treatment. See, *e.g.*, *United States* v. *Hampton Roads Regional Jail Authority*, No. 20-cv-410, Doc. 2-1, at 7 (E.D.V.A. Aug. 5, 2020), https://go.usa.gov/xzaDv (requiring the prison to "ensure timely medical specialist appointments * * * including those scheduled outside of the [prison]"); *id.* at 4 (requiring the prison to "increase security staffing to ensure that there are sufficient staff to * * * transport prisoners to outside medical appointments"). But under the warden's interpretation, a court would lack authority to enter such a judgment or to issue an order enforcing the judgment once entered, because any such judgment or order would involve transport for purposes other than those explicitly covered by Section 2241(c).

Even the warden appears to recognize that such a result would be untenable. In a conclusory paragraph, the warden asserts that this case "does *not* present the question whether other statutes or rules or equitable principles might entitle courts to order an inmate's

transportation in specific contexts." Br. 38. It is true enough that the specific question presented here is more limited. But the warden's central statutory argument is that Section 2241(c) "*forbids* orders requiring prisoner transportation" in "circumstances" not "enumerated" in that provision. Br. 33; see Br. 15, 18-19. And the warden does not explain how the Court could accept that premise without holding that Section 2241(c) forbids transport orders in other contexts. That provides further reason to reject the warden's interpretation.

II. A TRANSPORT ORDER IS NOT APPROPRIATE IN A SECTION 2254 CASE UNLESS, AT MINIMUM, THE PRISONER ESTABLISHES THAT THE EVIDENCE MAY BE USED TO SHOW HIS ENTITLEMENT TO RELIEF

The court of appeals correctly rejected the warden's assertion that the All Writs Act can *never* authorize an order requiring that a prisoner be transported for a medical test. But the court erred in approving the order in this case based solely on a determination that the evidence Twyford seeks to develop "plausibly relates" to his claims and without requiring any showing that the district court could properly consider the evidence. The Section 2254 Rules and AEDPA strictly limit the circumstances under which a habeas petitioner may seek and introduce new evidence. An order requiring that a prisoner be transported for medical testing cannot be deemed "necessary or appropriate" under the All Writs Act where the prisoner does not at least satisfy the "good cause" standard for discovery under the Section 2254 Rules. That standard requires a specific showing that the evidence sought may be used to establish the prisoner's entitlement to relief, which necessarily

includes a showing that the court will be able to consider that evidence.

A. "Congress enacted AEDPA to advance the finality of criminal convictions," *Mayle* v. *Felix*, 545 U.S. 644, 662 (2005), and to "reduce delays in the execution of state and federal criminal sentences," *Woodford* v. *Garceau*, 538 U.S. 202, 206 (2003). Congress furthered those goals "in large measure [by] revising the standards used for evaluating the merits of a habeas application." *Ibid.*

This Court has recognized that, in adopting Section 2254, Congress "modified a federal habeas court's role in reviewing state prisoner applications in order to prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under law." *Bell* v. *Cone*, 535 U.S. 685, 693 (2002). To accomplish that goal, AEDPA cabins a district court's ability to develop and consider new evidence. As particularly relevant here, Section 2254(d) provides that if a claim was adjudicated on the merits in state court, a federal court cannot grant relief unless the state court's adjudication:

> (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). By its terms, Section 2254(d)(2) is limited to the evidence presented in state court. And in *Cullen* v. *Pinholster*, 563 U.S. 170 (2011), this Court held that review under Section 2254(d)(1) is also

"limited to the record that was before the state court." *Id.* at 181. As the Court explained, "AEDPA's statutory scheme is designed to strongly discourage" state prisoners from "submit[ting] new evidence in federal court." *Id.* at 186.

The Section 2254 Rules also limit discovery. They specify that "leave of court [is] required" for discovery; that a party requesting discovery "must provide reasons for the request"; and that a "judge may, for good cause, authorize a party to conduct discovery." Section 2254 Rule 6(a) and (b) (capitalization and emphasis omitted); accord Rules Governing Section 2255 Proceedings in the United States District Courts, Rule 6(a) and (b). This Court has explained that a habeas petitioner shows "'good cause' for discovery under Rule 6(a)" when he makes "specific allegations" that "show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief." *Bracy* v. *Gramley*, 520 U.S. 899, 908-909 (1997) (quoting *Harris*, 394 U.S. at 300).

B. Before using the All Writs Act to order or permit the development of evidence in a Section 2254 case, a district court must—at minimum—find that the evidence the prisoner anticipates obtaining could be used to demonstrate his entitlement to relief. That requirement follows naturally from the application of general All Writs Act principles in the specific context of a Section 2254 case.

First, an All Writs Act order must be "necessary or appropriate" to the resolution of the case before the court. 28 U.S.C. 1651(a). Ordering transportation to allow a habeas petitioner to develop evidence that could not establish an entitlement to relief—even if the

evidence were precisely as the petitioner anticipates—would be neither necessary nor appropriate.

Second, an All Writs Act order must be consistent with applicable law and cannot be used to circumvent other statutory requirements. A court thus should not allow a petitioner to use the Act to obtain evidence based on a lesser showing than the good cause the Section 2254 Rules require for ordinary discovery.

Twyford objects (Br. in Opp. 8-9) that Rule 6(a)'s good cause standard does not expressly apply to a transport order like the one at issue here. But even if that is correct, this Court has explained that when a court is acting under the All Writs Act to "fashion appropriate modes of procedure," it should do so "by analogy to existing rules or otherwise in conformity with judicial usage." *Harris*, 394 U.S. at 299. Here, Rule 6(a)'s good cause requirement supplies the most analogous standard even if it does not apply by its terms. And adherence to that standard is especially appropriate because it codifies the approach this Court articulated in *Harris*, which invoked the All Writs Act to authorize discovery in habeas cases before there were rules addressing that subject. See *Bracy*, 520 U.S. at 908-909.

Requiring a district court to find that evidence could be used to demonstrate a prisoner's entitlement to relief before permitting development of the evidence is consistent with the approach that this Court endorsed in a similar context in *Schriro* v. *Landrigan*, 550 U.S. 465 (2007). There, the Court held that "[i]n deciding whether to grant an evidentiary hearing" under 28 U.S.C. 2254(e)(2), "a federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief."

Schriro, 550 U.S. at 474. The Court explained that this approach "accords with AEDPA's acknowledged purpose of 'reducing delays in the execution of state and federal criminal sentences.'" *Id.* at 475 (brackets and citation omitted). That logic applies equally here: If the anticipated evidence would not support a claim for relief, court-sanctioned development of that evidence would be inconsistent with AEDPA.

C. To conclude that evidence could be used to demonstrate a habeas petitioner's entitlement to relief in a given case, a district court necessarily must determine that the evidence would support relief on a particular claim or theory. And in making that determination, the court must take account of AEDPA's substantive and procedural limitations, including the limitation on new evidence imposed by Section 2254(d)(1) as interpreted in *Pinholster*. Cf. *Schriro*, 550 U.S. at 474 ("Because the deferential standards prescribed by [Section] 2254 control whether to grant habeas relief, a federal court must take into account those standards in deciding whether an evidentiary hearing is appropriate.").

The court of appeals failed to engage in the analysis required by the All Writs Act before ordering Twyford transported for testing. Instead of identifying particular claims that neurological imaging evidence could be used to prove, the court found that "imaging establishing the extent of [Twyford's] neurological deficits plausibly relates to" his ineffective assistance of counsel claims. Pet. App. 16a. That "plausibly relates" standard has no basis in the All Writs Act, AEDPA, or the Section 2254 Rules. And the court compounded its error by failing to consider AEDPA's limits, including those set forth in *Pinholster*, when deciding that transport for imaging was necessary or appropriate.

This Court should vacate the court of appeals' judgment so the court can reconsider Twyford's transport request under the correct legal standards.

CONCLUSION

The judgment of the court of appeals should be vacated, and the case should be remanded for further proceedings.

Respectfully submitted.

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MARCH 2022