No. 21-___

In the Supreme Court of the United States

TIM SHOOP, WARDEN,

Petitioner,

v.

RAYMOND TWYFORD,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE – NO EXECUTION DATE

QUESTIONS PRESENTED

1. 28 U.S.C. §2241(c) allows federal courts to issue a writ of habeas corpus ordering the transportation of a state prisoner *only* when necessary to bring the inmate into court to testify or for trial. It forbids courts from using the writ of habeas corpus to order a state prisoner's transportation for any other reason. May federal courts evade this prohibition by using the All Writs Act to order the transportation of state prisoners for reasons not enumerated in §2241(c)?

2. Before a court grants an order allowing a habeas petitioner to develop new evidence, must it determine whether the evidence could aid the petitioner in proving his entitlement to habeas relief, and whether the evidence may permissibly be considered by a habeas court?

LIST OF PARTIES

The Petitioner is Tim Shoop, the Warden of the Chillicothe Correctional Institution.

The Respondent is Raymond Twyford, an inmate imprisoned at the Chillicothe Correctional Institution.

LIST OF DIRECTLY RELATED PROCEEDINGS

1. *State v. Twyford*, Case No. 92-CR-116 (Ct. of Common Pleas, Jefferson County, Ohio) (judgment entered April 7, 1993).
2. *State v. Twyford*, Case No. 93-J-13 (Ohio Ct. App., 7th Dist.) (decisions issued October 6, 1995 & September 25, 1998).
3. *State v. Twyford*, Case No. 98-JE-56 (Ohio Ct. App., 7th Dist.) (decision issued March 19, 2001).
4. *State v. Twyford*, Case Nos. 98-2360 & 95-2379 (Ohio) (decision issued March 6, 2002).
5. *State v. Twyford*, Case No. 2001-0788 (Ohio) (jurisdiction declined May 1, 2002).
6. *State v. Twyford*, Case No. 2005-0291 (Ohio) (decision issued July 26, 2005).
7. *Twyford v. Warden*, Case No. 2:03cv906 (S.D. Ohio) (transportation order issued March 19, 2020).
8. *Twyford v. Shoop*, Case No. 20-3346 (6th Cir.) (judgment entered August 26, 2021).

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INTRODUCTION

This case presents two questions. Both concern the power that the All Writs Act vests in federal courts. Both concern the States' authority to operate their prison systems free from undue federal interference. Both are the subject of a circuit split. Both deserve this Court's review.

The first question involves the relationship between the All Writs Act and a habeas statute. The habeas statute is 28 U.S.C. §2241(c). It allows federal courts to issue a writ of habeas corpus ordering the transportation of a state prisoner *only* if "necessary to bring him into court to testify or for trial." §2241(c)(5). The All Writs Act, for its part, says that federal courts "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).

These two statutes give rise to the following question: Are orders requiring the transportation of a prisoner for reasons other than those spelled out in §2241(c) "agreeable to the usages and principles of law" and thus permitted by the All Writs Act? The Sixth Circuit held that the answer is "yes." It thus affirmed an order, issued under the All Writs Act, requiring that Ohio transport a convicted murderer to a hospital for a brain scan that the inmate thinks will produce evidence relevant to his habeas case. Pet.App.12a–15a. The Sixth Circuit admitted to parting ways with the Seventh Circuit. That court has held that transportation orders contrary to §2241(c) *are not* "agreeable to the usages and principles of law" and that courts, therefore, *cannot* issue such orders under the All Writs Act. *Ivey v. Harney*,

47 F.3d 181, 183–86 (7th Cir. 1995). But the split is even deeper than the Sixth Circuit realized. The Third Circuit, much like the Seventh, has held that courts cannot use the All Writs Act to evade traditional limits on writs of habeas corpus—limits codified by §2241(c). *Jones v. Lilly*, 37 F.3d 964, 967–69 (3d Cir. 1994). And the Ninth Circuit has held that courts may not, in furtherance of their habeas jurisdiction, use the All Writs Act to order the transportation of inmates who wish to develop evidence for their habeas cases. *Jackson v. Vasquez*, 1 F.3d 885, 889 (9th Cir. 1993). Thus, the transportation order that the Sixth Circuit affirmed would have been reversed in the Third, Seventh, and Ninth Circuits.

The second issue on which the courts are split concerns the following question: What must a habeas petitioner show to win an order allowing him to develop evidence for his case? The Sixth Circuit held that courts may issue these orders whenever the evidence in question "plausibly relates" to a petitioner's claims. Even inadmissible evidence, the court held, can satisfy this "plausibly relates" standard. Pet. App.16a–17a. That conflicts with cases from the Ninth and Tenth Circuits. Those circuits have held that habeas petitioners cannot engage in discovery to obtain inadmissible evidence. *Lafferty v. Benzon*, 933 F.3d 1237, 1245 n.2 (10th Cir. 2019); *Runningeagle v. Ryan*, 686 F.3d 758, 773–74 (9th Cir. 2012).

Because the Sixth Circuit's decision gives district courts a license to wrongfully interfere with state prerogatives, and because its decision creates two circuit splits, the Court should grant the Warden's petition for a writ of *certiorari* and reverse.

OPINIONS BELOW

The Sixth Circuit's opinion is published at *Twyford v. Shoop*, 11 F.4th 518 (6th Cir. 2021), and reproduced at Pet.App.1a.

The District Court's decision ordering Twyford's transportation is online at *Twyford v. Warden*, No. 2:03-cv-906, 2020 WL 1308318 (S.D. Ohio Mar. 19, 2020), and reproduced at Pet.App.23a.

JURISDICTIONAL STATEMENT

The District Court had jurisdiction over this habeas case under 28 U.S.C. §§1331, 2254(a). The Warden appealed the District Court's transportation order on an interlocutory basis under the collateral-order doctrine. *See Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949); Pet.App.6a–7a. The Sixth Circuit issued its opinion and judgment on August 26, 2021. This petition timely invokes this Court's jurisdiction under 28 U.S.C. §1254(1) and the collateral-order doctrine.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the Constitution provides, in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right … to have the Assistance of Counsel for his defence.

28 U.S.C. §1651(a) states:

> The Supreme Court and all 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. §2241(c) states:

> The writ of habeas corpus shall not extend to a prisoner unless—
>
> (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
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> (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. §2254(d) states:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated

on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT

1. In the fall of 1992, Raymond A. Twyford, III murdered Richard Franks. Pet.App.149a–153a. Twyford and an accomplice lured Franks into rural Jefferson County, Ohio. They told him they planned to go deer hunting. As Franks walked off looking for deer, Twyford shot Franks in the back with a rifle. His accomplice then shot Franks in the head. To hide their crime, the pair mutilated Franks's body and pushed it into a pond.

A few days later, a sheriff found Franks's body. Pet.App.150a. An investigation led to Twyford, who waived his *Miranda* rights and confessed. Pet.App. 151a–152a. A jury convicted Twyford of aggravated murder (and other crimes as well). The jury recommended, and the trial court imposed, a death sentence. Pet.App.155a.

Twyford has been fighting his conviction and sentence ever since. He first appealed to Ohio's Seventh District Court of Appeals, which affirmed. *See* Pet. App.156a. The Ohio Supreme Court did the same. Pet.App.157a. And Twyford fared no better in state-

postconviction proceedings. At that stage, he argued that his trial counsel and expert were ineffective for failing to present evidence of "neuropsychological deficits … due to a head injury [that he] had suffered as a teenager." Pet.App.234a. The trial and appeals courts rejected those claims on the merits. *See* Pet. App.238a–240a. They likewise rejected Twyford's other claims for postconviction relief. The Ohio Supreme Court then declined to hear Twyford's case. Pet.App.148a.

2. In 2003, Twyford filed a petition for a writ of habeas corpus in federal court. Twyford's petition alleged twenty-two claims for relief, including claims that his trial counsel and expert failed to adequately account for his neurological condition. Pet.App.75a.

Despite the age of Twyford's habeas case, relatively little has happened. The District Court stayed the case early on so that Twyford could pursue more state-court litigation. That litigation proved futile. Once the federal case rebooted, the Warden moved to dismiss many of Twyford's claims, citing his failure to raise them in state-court proceedings. The District Court eventually ruled on that motion, agreeing that Twyford had procedurally defaulted many of his claims. Pet.App.43a–146a. At no point during this case's eighteen years has the District Court determined that new evidence was necessary to resolve, or could permissibly be considered when resolving, any issue.

3. Two years ago, Twyford sought an order compelling the Warden to transport him to The Ohio State University Medical Center for neurological testing. Twyford argued that the District Court could award such relief under a funding statute, 18

U.S.C. §3599, and under the All Writs Act, 28 U.S.C. §1651(a). Those statutes, Twyford said, set a permissive standard that allowed him to freely develop an evidentiary record for his federal habeas case. Twyford insisted, however, that his request to develop an evidentiary record *was not* a request for discovery. Pet.App.14a n.4, 246a, 255a.

Twyford, in seeking an order requiring his transportation, relied heavily on a hired expert—neurologist Douglas Scharre. In a short letter to Twyford's counsel, Dr. Scharre wrote that a brain scan would be a "useful next step" in evaluating whether Twyford has neurological defects caused by a past trauma. Pet.App.272a. Twyford, however, did little to connect the legal dots between the desired testing and his habeas claims. He asserted, with few details, that it was "plausible" that the testing would relate to six of his claims. Pet.App.262a. He also asserted—again with no development—that the testing might "plausibly" help counter arguments that he defaulted his claims by failing to properly raise them in state court. *Id.*

Over the Warden's opposition, the District Court granted Twyford's transportation request. It first held that the All Writs Act empowered it to issue a transportation order. Pet.App.30a. It then decided to issue such an order. It deemed the neurological testing "warranted and necessary." Pet.App.32a. And it suggested that "the evidence-collection" Twyford wanted would aid the court in "assess[ing] the constitutionality of [Twyford's] incarceration." *Id.* But the District Court never explained *how* the evidence would bear on *any* of Twyford's claims.

Nor did the District Court address the question whether it would even be allowed to consider the evidence that Twyford hoped to develop. In *Cullen v. Pinholster*, 563 U.S. 170 (2011), this Court interpreted "AEDPA," the Antiterrorism and Death Penalty Act of 1996, as generally prohibiting habeas courts from considering evidence outside the state-court record. *Id.* at 181–82, 185 n.7. Because Twyford's case is governed by AEDPA, the District Court acknowledged that *Pinholster* might bar it from considering the results of Twyford's testing. Pet.App. 32a. But the court said it was not "in a position … to make a determination as to whether or to what extent it would be precluded … from considering any [new] evidence." *Id.* Rather than resolving that issue *before* ordering the State to transport a convicted murderer to a major hospital, the court flagged the issue as one to be resolved in the future.

The District Court initially stayed its transportation order for thirty days because of the COVID-19 pandemic. *Id.* The court later extended that stay so that the Warden could pursue his appeal. Pet.App. 36a.

4. The Warden appealed. A divided panel of the Sixth Circuit affirmed.

The Sixth Circuit majority first determined that it had jurisdiction to hear the Warden's interlocutory appeal. Under the collateral-order doctrine, "decisions that are conclusive, that resolve important questions apart from the merits of the underlying action, and that are effectively unreviewable on appeal from final judgment may be appealed immediately." *Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 40 (1995) (citing *Cohen v. Beneficial Indus. Loan Corp.*,

337 U.S. 541, 546 (1949)). The District Court's transportation order, the panel explained, satisfied all of those conditions. It "conclusively determined that the State must transport Twyford"; it implicated the "important issues of state sovereignty and federalism" bound up with a federal court's ordering the transportation of a state inmate; and it would be "effectively unreviewable" absent immediate appeal, since by that time the transportation the Warden wished to stop would already be completed. Pet.App. 6a–7a. The majority observed that other circuits had uniformly reached the same conclusion when faced with interlocutory appeals challenging similar transportation orders. Pet.App.7a.

The majority then turned to the merits. It recognized that the All Writs Act "is not an independent source of jurisdiction." Pet.App.9a. Instead, the All Writs Act says that courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." *Id.* (quoting 28 U.S.C. §1651(a)). With this in mind, the court first considered the question whether orders requiring the transportation of prisoners for purposes of evidentiary development *can be* "agreeable to the usages and principles of law." It determined that they can be. Pet.App.13a–14a.

The court acknowledged that the Seventh Circuit reached a contrary decision in *Ivey v. Harney*, 47 F.3d 181 (7th Cir. 1995). *Ivey* held that, in light of 28 U.S.C. §2241(c), courts cannot use the All Writs Act to order a prisoner's transportation for evidence-gathering purposes. Section 2241(c) forbids courts from issuing writs of habeas corpus except in five enumerated situations. Relevant here, it says that courts can order the transportation of a state inmate

only when doing so is "necessary to bring" the inmate "into court to testify or for trial." §2241(c)(5). According to the Seventh Circuit, an order that requires a prisoner's transportation for some other reason ignores the limits of §2241(c)(5). Such orders are not agreeable to the usages and principles of law, and thus not permitted by the All Writs Act. Pet.App. 13a–14a (citing *Ivey*, 47 F.3d at 185). The Sixth Circuit "disagree[d] with the Seventh Circuit's interpretation of §2241(c)(5)." Pet.App.14a. It read that statute as "limiting when the district court may issue the writ of habeas corpus *itself*," not forbidding "ancillary orders" that fill potential gaps in federal habeas law. *Id.* The majority concluded that a transportation order could be a proper gap-filling measure. And, after determining that the issuance of such an order did not contradict other principles of law, it held that courts may, in aid of their habeas jurisdiction, use the All Writs Act to issue transportation orders that §2241(c) does not authorize. *Id.*

After determining that the All Writs Act empowers courts to issue transportation orders, the majority turned to the question whether the District Court properly exercised that authority in Twyford's case. The circuit answered that question in the affirmative. In the majority's view, the transportation order was "'necessary or appropriate' to aid the district court in its adjudication of Twyford's habeas petition." Pet.App.15a (quoting 28 U.S.C. §1651). That was so, the majority continued, because the medical testing that Twyford desired "plausibly relates to his claims of ineffective assistance of counsel." Pet.App. 16a. The majority later clarified that, when conducting that "plausibly relates" inquiry, a court "need not consider the admissibility of any resulting evidence."

Pet.App.16a–17a. Rather, a district court can order a prisoner's transportation before "untangl[ing] the knotty … evidentiary issues" that arise in habeas cases. Pet.App.17a.

Judge Batchelder dissented. She reasoned that the effect of the panel's decision was "to circumvent" the high thresholds that govern discovery and the consideration of new evidence in federal habeas cases. Pet.App.19a–20a (citing *Harris v. Nelson*, 394 U.S. 286 (1969), and *Pinholster*, 563 U.S. 170). According to Judge Batchelder, the District Court should have first required Twyford to explain "how the anticipated results" of testing would actually further his habeas claims. Pet.App.22a. After that, Judge Batchelder would have required the District Court to address whether *Pinholster* would bar the consideration of the evidence Twyford sought to develop. *Id.* She criticized the majority for enabling "Twyford to proceed in reverse order by collecting evidence before justifying it." *Id.*

5. The Sixth Circuit stayed its mandate pending this Court's review of the Warden's petition for a writ of *certiorari*. Pet.App.34a. The Warden timely filed this petition about one month later.

REASONS FOR GRANTING THE PETITION

Federal habeas review represents an extreme intrusion into state sovereignty. *See Harrington v. Richter*, 562 U.S. 86, 103 (2011). For that reason, even case-specific errors in the habeas context tend to attract this Court's attention. *See, e.g.*, *Alaska v. Wright*, 141 S. Ct. 1467 (2021) (*per curiam*); *Mays v. Hines*, 141 S. Ct. 1145 (2021) (*per curiam*); *Shinn v. Kayer*, 141 S. Ct. 517 (2020) (*per curiam*); *Shoop v. Hill*, 139 S. Ct. 504 (2019) (*per curiam*).

In its decision below, the Sixth Circuit erred in a habeas case. And its errors were far from case-specific. The Sixth Circuit held that the All Writs Act empowers district courts to issue orders requiring that States transport prisoners for the development of evidence that "plausibly relates" to their cases. Pet.App.16a. What is more, the Sixth Circuit held that a court may issue these transportation orders *without even deciding* whether *Pinholster* forbids consideration of the evidence the petitioner seeks to develop. Pet.App.17a.

These holdings create two circuit splits. The first concerns the scope of the federal courts' power to order the movement of prisoners under the All Writs Act. The second involves the question whether habeas petitioners, to win an order facilitating the development of new evidence, must show that the evidence they desire can lawfully be considered by a habeas court. Because both splits implicate an important issue—the extent to which federal courts may interfere with the States' criminal justice systems—this case deserves this Court's attention.

I. The decision below created two independently important circuit splits.

The Sixth Circuit's decision below created two circuit splits. The Court should grant *certiorari* to resolve them. Resolving either one in the Warden's favor would require reversing the Sixth Circuit's judgment.

A. The Sixth Circuit's interpretation of the All Writs Act contradicts that of the Third, Seventh, and Ninth Circuits.

Section 2241(c) forbids courts from issuing writs of habeas corpus except in five enumerated circumstances. Relevant here, §2241(c)(5) says that courts may issue a writ of habeas corpus when doing so is "necessary to bring [the prisoner] into court to testify or for trial." Section 2241 does not permit, and thus forbids, issuing a writ of habeas corpus requiring the transportation of a state inmate in any other circumstance. May courts evade this limitation through the All Writs Act? In other words, may courts use the All Writs Act to issue the sort of transportation orders that §2241(c) forbids? In the Third, Seventh, and Ninth Circuits, the answer is "no." But in the Sixth Circuit, the answer is "yes."

The division is easiest to understand in light of various background principles. This section starts with those principles, before turning to the disagreement between the circuits.

1. Article III of the Constitution leaves to Congress the decision whether to have lower courts at all. U.S. Const. art. III, §1. And Congress's power to create inferior courts includes the power to define their authority. *Palmore v. United States*, 411 U.S. 389, 401 (1973). As a result, district courts can exercise only that power for which there is some "statutory basis." *Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct. 1743, 1746 (2019) (quotation omitted).

This case involves one particular statutory grant of judicial authority: the All Writs Act. 28 U.S.C. §1651. The Act "originated in the Judiciary Act of

1789." *United States v. Morgan*, 346 U.S. 502, 506 (1954). It says that federal courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." §1651(a). As this language reflects, the Act "is a gap filler." *United States v. Blake*, 868 F.3d 960, 971 (11th Cir. 2017). It exists to "fill[] the interstices of federal judicial power when those gaps threaten[] to thwart the otherwise proper exercise of federal courts' jurisdiction." *Pa. Bureau of Corr. v. U.S. Marshals Serv.*, 474 U.S. 34, 41 (1985). Put differently, the Act is a "procedural instrument" that allows federal courts to take auxiliary actions needed "to achieve the rational ends of law." *United States v. New York Tel. Co.*, 434 U.S. 159, 172 (1977) (quotation omitted).

A court's power under the All Writs Act to issue writs "in aid of" its jurisdiction is not as broad as it might seem. By its very nature, the Act is a "residual source of authority" to issue supplemental writs. *Pa. Bureau of Corr.*, 474 U.S. at 43. The Act, therefore, "does not enlarge" a court's jurisdiction. *Clinton v. Goldsmith*, 526 U.S. 529, 535 (1999).

The Act's most important limit stems from its final words. The Act closes by permitting courts to issue extraordinary writs *only* when doing so is "agreeable to the usages and principles of law." 28 U.S.C. §1651(a). Because of this language, actions taken under the All Writs Act must be "agreeable to" common-law principles. *United States v. Hayman*, 342 U.S. 205, 221 n.35 (1952). The language also prohibits courts from using the Act in a manner that undermines or sidesteps other *statutory* laws. *Pa. Bureau of Corr.*, 474 U.S. at 43. Thus, the All Writs Act authorizes only "writs that are not otherwise

covered by statute." *Id.* Stated in reverse, "[w]here a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling." *Id.*; *accord Carlisle v. United States*, 517 U.S. 416, 429 (1996). Along the same lines, courts must use the All Writs Act in a manner "agreeable to" principles of equity and procedural rules. *See Dunn v. McNabb*, 138 S. Ct. 369 (2017); *Cooey v. Strickland*, 589 F.3d 210, 234 (6th Cir. 2009). Finally, even when federal law does not expressly address a judicial action, courts must still contemplate whether use of the All Writs Act is "consistent with the intent of Congress." *New York Tel. Co.*, 434 U.S. at 172.

In sum, the All Writs Act "does not authorize [federal courts] to issue ad hoc writs whenever compliance with" federal law "appears inconvenient or less appropriate." *Pa. Bureau of Corr.*, 474 U.S. at 43. The circumstances of *Pennsylvania Bureau of Correction* sharpen the point. The district court in that case experimented with a "'creative' use of federal judicial power." *Id.* at 40. It ordered the United States Marshals to take control of state prisoners so that the prisoners could testify in a §1983 action. *Id.* at 35–36. This Court did not question the district court's jurisdiction over the §1983 action. Nor did it question the relevance of the testimony to those proceedings. Even so, the Supreme Court held that the district court erred. It explained that "no statutory authority" empowered the district court to "command the Marshals to take custody of state prisoners" so as to produce their appearance at trial. *Id.* at 37. That included the All Writs Act, which, the Court reasoned, did not replace "traditional habeas

corpus" as the means by which courts order the movement of prisoners. *Id.* at 43.

2. In light of the foregoing, the permissibility of using the All Writs Act to order the transportation of a state prisoner turns on whether the order is "agreeable to" usages and principles of law. 28 U.S.C. §1651(a). At least two bodies of law inform that inquiry.

The first is the common law. At common law, the writ of habeas corpus was the means by which courts ordered "a custodian to produce (*habeas*) a prisoner's person (*corpus*)." *Edwards v. Vannoy*, 141 S. Ct. 1547, 1566 (2021) (Gorsuch, J., concurring); *see also* 3 Blackstone, Commentaries on the Laws of England 129–31 (1772); *Price v. Johnston*, 334 U.S. 266, 279–82 (1948); *Ivey v. Harney*, 47 F.3d 181, 185 (7th Cir. 1995). As a general matter, the great writ was limited to "securing release" from unlawful restraint. *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1969 (2020). But courts could use the writ of habeas corpus to order the transportation of prisoners in two circumstances. First, through writs of habeas corpus *ad testificandum*, they could order a prisoner's appearance as a witness. *Jones v. Lilly*, 37 F.3d 964, 967 (3d Cir. 1994). Second, using the writ of habeas corpus *ad prosequendum*, courts could order the production of prisoners for their prosecution. *Id.* But the common-law writ of habeas corpus did not include the power to order that prisoners be transported for purposes of evidence gathering. *See Ivey*, 47 F.3d at 185.

The second relevant body of law is statutory. Today, 28 U.S.C. §2241(c) limits the circumstances in which courts may award habeas relief:

> The writ of habeas *corpus shall not extend to a prisoner unless—*
>
> (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.

(emphasis added). This statute forbids awarding a writ of habeas corpus except in the five enumerated circumstances—the writ "shall not extend" to prisoners in other circumstances. The statute permits the transportation of state prisoners when "necessary to bring" the prisoner into court "to testify" or "for trial." §2241(c)(5). It thus "represents the codification of the common law writs of habeas corpus *ad testifi-*

candum and *ad prosequendum* issued when necessary to produce a prisoner to prosecute him or to obtain his appearance as a witness." *Jones*, 37 F.3d at 967. But it does not permit orders requiring prisoner transportation in other circumstances.

3. These principles give rise to the following question: Is an order requiring the transportation of a prisoner for reasons not set out in §2254(c) "agreeable to" the principles of law? §1651(a). The answer divides the circuits.

Return to the Sixth Circuit's opinion in this case. The Sixth Circuit began its analysis by acknowledging that a transportation order can be "agreeable to the usages and principles of law," §1651(a), only if it is consistent with "habeas statutes" and "the common law," Pet.App.10a, 12a. It further acknowledged that §2241(c), a habeas statute, allows courts to issue writs of habeas corpus in only specifically enumerated circumstances. *See* Pet.App.13a–14a. But it rejected the Warden's argument that these enumerated limits had any bearing on the scope of the power conferred by the All Writs Act. Section 2241(c), in the Sixth Circuit's view, "limit[s] when the district court may issue the writ of habeas corpus *itself*," but does not forbid "ancillary orders needed to aid in adjudicating a petitioner's habeas case." Pet.App.14a. In other words, transportation orders under the All Writs Act may "fill the gaps left by federal habeas statutes by ensuring that states cannot prevent federal habeas petitioners from presenting their cases." *Id.* The Sixth Circuit majority expressly rejected the Seventh Circuit's contrary interpretation of §2241(c) (discussed in a moment), under which that provision limits the circumstances in which a court can order a

prisoner's transportation under the All Writs Act. *Id.* (quoting *Ivey*, 47 F.3d at 185).

In sum, the Sixth Circuit held that, because §2241(c) does not limit federal courts' authority to issue auxiliary orders under the All Writs Act, district courts may use the Act to issue orders requiring the transportation of state prisoners who wish to develop evidence for their habeas cases. Its holding conflicts with a decision from the Seventh Circuit, as the majority below acknowledged. *Id.* But it also conflicts with decisions from the Third and Ninth Circuits. This petition explores each conflict in turn.

Seventh Circuit. In *Ivey v. Harney*, 47 F.3d 181, an inmate named Bobby Ivey sued his former jailers under 42 U.S.C. §1983. He challenged the adequacy of the medical care they provided to him after a slip and fall. *Id.* at 182. Ivey's attorney "concluded that expert medical evidence [was] called for and located a physician who [was] willing to examine Ivey." *Id.* But the physician was in Chicago and (apparently) unable or unwilling to travel downstate to visit with Ivey. *Id.* So Ivey moved for an order requiring that his custodian, the Illinois Department of Corrections, bring him to Chicago for a medical exam. *Id.* The district court granted his motion and issued the transportation order. It claimed the All Writs Act authorized it to do so.

The Seventh Circuit, in an opinion by Judge Easterbrook, reversed. It began by recognizing that the All Writs Act permits courts to issue "all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." *Id.* (quoting 28 U.S.C. §1651(a)). But the transportation order was *not* agreeable to the us-

ages and principles of law. The only extraordinary writ that even arguably permitted an order requiring the transportation of a prisoner by his custodian was the writ of habeas corpus—Ivey had not identified any other. *Id*. at 185. The trouble for Ivey was §2241(c). That statute, the circuit explained, "*forbids*" issuing the writ except in five enumerated circumstances; that is what it means to say that the writ "'shall not extend to a prisoner unless' one of five criteria obtains." *Id*. at 183 (quoting §2241(c)). Yet none of the enumerated circumstances include transportation for evidentiary development. Therefore, the transportation order in Ivey's case contradicted federal law and was not "agreeable to the usages and principles of law." §1651(a).

In reaching this conclusion, the Seventh Circuit acknowledged that the All Writs Act permits the issuance of orders that federal law nowhere expressly authorizes. *Ivey*, 47 F.3d at 183. In the court's words: "No one doubts that the All Writs Act may justify extraordinary relief" when no statute does. *Id*. at 185. The All Writs Act thus allows courts to issue orders addressing gaps in the federal law. But because §2241(c) "forbids" issuing the writ of habeas corpus for any reason other than those it lists, and because transportation for evidentiary development is not among the enumerated circumstances, §2241(c) leaves no "gap" to be filled by "judicial creativity." *Ivey*, 47 F.3d. at 183, 185. And courts cannot use the All Writs Act to "enlarge" their authority so as to "override" the express limits of federal law. *Id.* at 185.

Again, the Sixth Circuit "disagree[d] with the Seventh Circuit's interpretation of §2241(c)(5)." Pet. App.14a. So in the Sixth Circuit, but not in the Sev-

enth, §2241(c) imposes no limits on the power of courts to issue transportation orders *through the All Writs Act*. *See id.* For in the Sixth Circuit, but not in the Seventh, §2241(c) limits only "when the district court may issue the writ of habeas corpus" and has no bearing on a district court's power to issue "ancillary orders needed to aid in adjudicating" a prisoner's case. *Id.* Thus, in the Sixth Circuit, but not in the Seventh, §2254(c) poses no barrier to issuing "orders to transport an inmate … to an outside medical facility for a medical exam." *Id.* (citing *Ivey*, 47 F.3d at 185). The split could not be squarer.

True enough, the district court in *Ivey* issued the transportation order in a §1983 case, while the District Court below issued its order in a habeas case. That, however, is a distinction without a difference. The cases came out differently based on the courts' irreconcilable understandings of §2241(c) and that provision's relationship to the All Writs Act. The Sixth Circuit interpreted §2241(c) as limiting *only* the power of courts to issue "the writ of habeas corpus *itself*." Pet.App.14a. The Seventh Circuit interpreted the same statute as limiting the power of courts to issue ancillary orders under the All Writs Act. *Ivey*, 47 F.3d. at 183–86. The circuits' contradictory understandings of §2241(c) and its relationship to the All Writs Act do not turn on the nature of the underlying action. Moreover, even if the nature of the underlying action mattered, §2241(c), a habeas statute, would have *more force* in a habeas case like Twyford's than in a §1983 case like *Ivey*. Thus, *Ivey*'s holding—that courts cannot evade §2241(c)'s limits using the All Writs Act—necessarily applies to habeas cases just as it does to §1983 cases.

In sum, Twyford could not have won in the Seventh Circuit the transportation order he won in the Sixth.

Third Circuit. The Sixth Circuit's decision is also irreconcilable with *Jones v. Lilly*, 37 F.3d 964. That case raised the "novel question whether a writ of habeas corpus can be expanded in its use to produce a prison paralegal inmate to assist a fellow prisoner in his civil rights action." *Id.* at 965. The trial court thought an "inmate paralegal" would be a helpful alternative to appointing counsel. *Id.* So it ordered the warden to produce an inmate to assist with another inmate's litigation. *Id.* The Third Circuit reversed. It stressed that §2241(c)—which codified common-law limits on habeas corpus—authorized the habeas writ in certain listed circumstances only. *Id.* at 967. Those traditional limits did not permit issuing the writ to allow for paralegal assistance. And, according to the Third Circuit, the district court could not evade the traditional limits on habeas corpus through the All Writs Act. *Id.* at 967–69. It elaborated that the transportation order was "not directly or indirectly related to the usages or principles of law of any of the writs of habeas corpus." *Id.* at 969. The order, therefore, was not "agreeable to" federal law and did not constitute a proper use of the All Writs Act. *Id.* at 968–69.

While the petitioner in *Jones* did not seek a transportation order for *evidence-gathering* purposes, that factual distinction has no legal relevance. In *Jones*, as in *Ivey*, the court recognized that transportation orders issued under the All Writs Act must be "agreeable to" the principles of habeas law. And in *Jones*, as in *Ivey*, the circuit rejected the notion that a district court could order a prisoner's transporta-

tion for reasons other than those laid out in §2241(c) or permitted at common law. The Sixth Circuit held otherwise—at the risk of repetition, it determined that §2241(c) does not limit the federal courts' power under the All Writs Act. The decisions are therefore irreconcilable; Twyford could not have won in the Third Circuit the transportation order he won in the Sixth.

Ninth Circuit. The Ninth Circuit's decision in *Jackson v. Vasquez*, 1 F.3d 885 (9th Cir. 1993), deepens the split even further. That decision, like the one below, arose in the habeas context. And the petitioner in that case, just like Twyford, wanted a brain scan that he believed would produce evidence relevant to his habeas claims. *Id.* at 886. The district court granted an *ex parte* transportation order. The Ninth Circuit vacated that order. Relevant here, the circuit rejected the petitioner's argument that the All Writs Act authorized the transportation order. *Id.* at 888–89. The Act, the Ninth Circuit explained, permits actions that "preserve jurisdiction," not actions that "enlarge the power of the district court." *Id.* at 889. As a result, an "order is not authorized under the Act unless it is designed to preserve jurisdiction that the court has acquired from some other independent source in law." *Id.* The transportation order, it concluded, did not aid the district court in exercising its jurisdiction acquired from some other source.

While *Jackson* did not address §2241(c) in particular, its ruling is nonetheless irreconcilable with the Sixth Circuit's decision below. The Sixth Circuit's decision stands for the proposition that courts may issue transportation orders under the All Writs Act in aid of their habeas jurisdiction—§2241(c) notwith-

standing. Pet.App.14a–15a. The Ninth Circuit in *Jackson* rejected that logic; it held that habeas jurisdiction, standing alone, cannot qualify as the sort of "independent source of jurisdiction in aid of which" a "transportation order" can be issued under the All Writs Act. 1 F.3d at 889. So *Jackson* prohibits courts from doing what the Sixth Circuit did here: citing their habeas jurisdiction and the All Writs Act as justification for circumventing §2241(c)'s limits on the issuance of transportation orders. Thus, Twyford could not have won in the Ninth Circuit the transportation order that he won in the Sixth.

4. All told, the Sixth Circuit's decision is impossible to square with decisions out of the Seventh, Third, and Ninth Circuits. State inmates in those circuits cannot win, via the All Writs Act, orders requiring their transportation for evidence-gathering purposes. State inmates in the Sixth Circuit can. This Court should take this case and restore uniformity.

B. The circuits are split regarding when district courts may issue orders facilitating evidentiary development in habeas cases.

This case presents an additional question on which the circuits are split: Must courts, before issuing an order facilitating evidentiary development in a habeas case, consider whether the evidence the petitioner seeks to develop would be admissible? The Sixth Circuit held that the answer is "no." Pet.App. 16a–17a. The Ninth and Tenth Circuits have held otherwise. *Lafferty v. Benzon*, 933 F.3d 1237, 1245 n.2 (10th Cir. 2019); *Runningeagle v. Ryan*, 686 F.3d 758, 773–74 (9th Cir. 2012).

1. Habeas law limits the opportunities for state prisoners to develop and present new evidence. One limitation comes from the Rules Governing Section 2254 Cases. "A habeas petitioner, unlike the usual civil litigant in federal court, is not entitled to discovery as a matter of ordinary course." *Bracy v. Gramley*, 520 U.S. 899, 904 (1997). Instead, a petitioner must show "good cause" for discovery. *See* Rule 6(a) of the Rules Governing Section 2254 Cases. Good cause requires "specific allegations" demonstrating how further factual development will aid the petitioner in proving his "entitle[ment] to relief." *Bracy*, 520 U.S. at 908–09 (quoting *Harris v. Nelson*, 394 U.S. 286, 299 (1969)).

The second limit on the development and presentation of new evidence comes from AEDPA. AEDPA generally requires that federal habeas courts defer to the state courts' resolutions of claims the state courts adjudicated on the merits. 28 U.S.C. §2254(d). To overcome that deference, a petitioner must show that a state court's decision either: (1) contradicted or unreasonably applied clearly established federal law; or (2) hinged on factual determinations that were unreasonable in light of the evidence presented to the state courts. §2254(d)(1)–(2). In assessing whether a petitioner has made either showing, a habeas court's review "is limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011); *see also id.* at 185 n.7. Habeas courts, in other words, are generally barred from considering new evidence.

2. These principles give rise to the question whether a habeas court should consider the admissibility of evidence before issuing orders to facilitate its gathering.

At least two circuits—the Ninth and Tenth—have held that they should. In *Lafferty v. Benzon*, 933 F.3d 1237, the Tenth Circuit rejected a habeas petitioner's argument that a district court "erred in denying his request for discovery." *Id.* at 1245 n.2. It reasoned that, because the evidence the petitioner wanted would have been inadmissible under *Pinholster*, the petitioner had no entitlement to discovery. *Id*. The Ninth Circuit reached the same conclusion when rejecting an identical argument by another petitioner. It too relied on *Pinholster*. *See Runningeagle*, 686 F.3d at 773. And while the Third Circuit has no binding precedent on the issue, it adopted the same position in an unpublished order. *July v. Adm'r N.J. State Prison*, No. 17-2020, 2017 U.S. App. LEXIS 22714 (3d Cir. Aug. 4, 2017).

The Sixth Circuit's holding below conflicts with these decisions. At the very least, it empowers courts to use the All Writs Act as a tool for evading the Habeas Rules' limits on evidentiary development. Pet.App.22a (Batchelder, J., dissenting). Recall that the All Writs Act allows courts to award relief *only* if doing so is "necessary or appropriate in aid of their respective jurisdictions." 28 U.S.C. §1651(a). According to the Sixth Circuit, orders facilitating evidentiary development in habeas cases are "necessary or appropriate" whenever the desired evidence "plausibly relates" to a petitioner's habeas claims. Pet. App.15a–16a (majority opinion). The petitioner can meet this "plausibly relates" standard without even showing that the evidence can lawfully be considered in a habeas case. Pet.App.17a.

The Sixth Circuit's decision is irreconcilable with the decisions from its sister circuits. In the Ninth and Tenth Circuits, habeas petitioners are not enti-

tled to discovery that would yield evidence habeas courts are barred from considering. In the Sixth Circuit, however, petitioners can skirt these limits using the All Writs Act; they can obtain evidence without explaining how that evidence will affect their entitlement to relief or whether the habeas court will be allowed to consider it. Pet.App.15a–17a. Thus, in comparison to habeas petitioners in the Ninth and Tenth Circuits, petitioners in the Sixth Circuit will be able to "proceed in reverse order by collecting evidence before justifying" the need to do so. Pet.App. 22a (Batchelder, J., dissenting).

The divide between the circuits is especially stark in light of the Sixth Circuit's holding that habeas courts can use the All Writs Act to facilitate the gathering of any evidence that "plausibly relates" to a habeas petitioner's claims. That is a far cry from the standard that is supposed to govern a habeas petitioner's entitlement to evidentiary development. This Court has said that habeas petitioners are entitled to discovery *only* if they make specific allegations showing that the evidence will help them prove that they are "entitled to relief." *Bracy*, 520 U.S. at 908–09 (quoting *Harris*, 394 U.S. at 299); *accord* Pet. App.19a (Batchelder, J., dissenting). Other circuits apply that standard. *See, e.g.*, *Simpson v. Carpenter*, 912 F.3d 542, 576 (10th Cir. 2018); *Sivak v. Hardison*, 658 F.3d 898, 927 (9th Cir. 2011); *Donald v. Spencer*, 656 F.3d 14, 16 (1st Cir. 2011). So does the Sixth Circuit when the petitioner seeks discovery under the Rules Governing Section 2254 cases. *See Williams v. Bagley*, 380 F.3d 932, 974 (6th Cir. 2004). But after the decision below, petitioners in the Sixth Circuit will be able to avoid that demanding standard by seeking relief under the All Writs Act instead.

Make no mistake—the "plausibly relates" standard is easy to meet. Twyford, for example, was able to win a transportation order simply by asserting that it was "plausible" that testing might support his claims. Pet.App.4a–5a (majority opinion). Beyond this assertion, Twyford provided little to no insight regarding how the evidence would, or even *might*, bear on his habeas claims. The District Court concluded that Twyford failed to prove that the evidence he wanted would be admissible in a habeas case. Pet.App.32a. The Sixth Circuit did not disagree. Instead, it held that courts need not consider the admissibility of the evidence a habeas petitioner desires before issuing an order, under the All Writs Act, facilitating the development of that evidence. Pet.App. 17a.

The Sixth Circuit stressed that Twyford was "seeking neurological imaging of his own brain," rather than "information from the other party." Pet. App.15a. But that factual wrinkle makes no difference. The Sixth Circuit's logic is not limited to cases in which petitioners want to develop their own evidence rather than to discover evidence in another party's possession. To the extent the Sixth Circuit purported to draw such a distinction, the distinction "lacks any principled basis, and will not last." *Martinez v. Ryan*, 566 U.S. 1, 19 n.1 (2012) (Scalia, J., dissenting). At day's end, however one labels Twyford's request, the Sixth Circuit's "plausibly relates" standard is far more forgiving than the standard that governs habeas petitioners' evidence-gathering requests in other circuits. Thus, habeas petitioners in Ohio, Kentucky, Michigan, and Tennessee will be able to win relief unavailable to petitioners in the westernmost circuits.

One final point. Insofar as the transportation order in this case was inconsistent with the Habeas Rules governing evidentiary development—either because the "plausibly relates" standard is too easy to satisfy or because habeas courts cannot order the gathering of inadmissible evidence—that is yet another reason to conclude that the order was not "agreeable to the usages and principles of law." §1651(a). In other words, it provides another reason for concluding that the District Court exceeded its power under the All Writs Act when it required the State to transport Twyford for neurological testing.

II. The questions presented are important.

The questions this case presents would be worthy of this Court's review even if they implicated no circuit split.

Questions regarding the power of federal habeas courts are always significant. "Federal habeas review of state convictions entails significant costs, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority." *Davila v. Davis*, 137 S. Ct. 2058, 2070 (2017) (internal citation and quotation omitted). Even when properly conducted, federal review of state convictions "frustrates … the States' sovereign power to punish offenders," while also upsetting the States' "significant interest in repose for concluded litigation." *Id.* (quotation omitted). It follows that this Court should carefully police the lower courts' resolutions of habeas cases. Failing to do so would "aggravate the harm to federalism that habeas review necessarily causes." *Id.*

Both of the questions presented implicate these federalism concerns. The District Court commanded Ohio to move a death-row inmate into a public set-

ting for medical testing. The inmate will (presumably) try to use the results of that testing to frustrate Ohio's "sovereign power to punish" him and to undermine Ohio's "significant interest in repose for concluded litigation." *Id.* (quotation omitted). The question whether the All Writs Act empowers courts to effect so substantial an intrusion into state affairs constitutes "an important question of federal law that has not been, but should be, settled by this Court." S. Ct. Rule 10(c). The same is true of the question whether courts can bring about this intrusion without even determining whether the intrusion will produce evidence that a court is allowed to consider.

The practical ramifications of the decision below are equally important. Transportation requests from habeas petitioners and other prison litigants are commonplace. *See, e.g.*, *Lindberg v. Cohen*, No. 2:21-cv-415, 2021 WL 2516117 (M.D. Ala. June 19, 2021); *Boland v. Wilkins*, No. 3:18-cv-1958, 2021 WL 2106184 (D. Conn. May 25, 2021); *Lamb v. Wilson*, No. 2:14-cv-218, 2015 U.S. Dist. LEXIS 83102 (W.D. Mich. June 26, 2015); *Odom v. Talens*, No. 2:12-cv-251, 2013 U.S. Dist. LEXIS 130888 (S.D. Ind. Sept. 13, 2013); *Turley v. Corr. Healthcare Mgmt.*, No. 10-cv-2772, 2011 U.S. Dist. LEXIS 106765 (D. Colo. Sept. 20, 2011); *Wilson v. Hill*, No. 2:08-cv-552, 2011 WL 1630814 (S.D. Ohio Apr. 27, 2011); *Davis v. Francis*, No. 07-cv-693, 2010 WL 3169379 (S.D. Ill. Aug. 11, 2010). As the dates of these rulings show, the prisoners in those cases all made their requests *before* the Sixth Circuit's ruling below. At the time, every circuit to have addressed the issue held that courts are barred from issuing transportation orders under the All Writs Act. *See Ivey*, 47 F.3d at 183–86;

Jones, 37 F.3d at 968–69; *Jackson*, 1 F.3d at 889. With the Sixth Circuit's contrary decision on the books, these requests will proliferate. The effects may be particularly harsh on Ohio where, for reasons the Warden cannot explain, prisoners seem to request neurological testing with unusual frequency. *Elmore v. Warden, Chillicothe Corr. Inst.*, No. 1:07-cv-776, 2019 WL 5704042 (S.D. Ohio Nov. 5, 2019); *In re Ohio Execution Protocol Litig.*, No. 2:11-cv-1016, 2019 WL 5078597 (S.D. Ohio Oct. 10, 2019); *Trimble v. Bobby*, No. 5:10-cv-00149, 2011 WL 900997 (N.D. Ohio Mar. 14, 2011); *Nields v. Bradshaw*, No. 1:03-cv-19, 2010 WL 148076 (S.D. Ohio Jan. 11, 2010).

To make matters worse, the Sixth Circuit's decision has no limiting principle. Though this case involves transportation for medical testing, the panel's rationale is not cabined to medical testing. Prisoners could easily argue that transportation for other tasks would also help them better present their claims. *See, e.g.*, *Jones*, 37 F.3d 964 (rejecting request for transportation of inmate paralegal). And nothing in the Sixth Circuit's reasoning prevents its holding from being used to grant these requests. So if the Sixth Circuit's decision is left in place, States will be ordered to undertake more and more public outings with dangerous criminals.

That will cause serious problems. It will, for one thing, impose costs on taxpayers—costs that are unjustifiable if the evidence produced may not legally be considered in a habeas case. It will also create serious risks to public safety. Prisoner escapes are relatively rare. But they can and do occur. *See* Justin Wm. Moyer, *New York prison break just one of 2,000 per year*, Wash. Post (June 8, 2015), https://perma

.cc/S2ZY-392S; Phil Helsel, *Five inmates escape from Ohio correctional facility*, NBC News (Feb. 12, 2020), https://perma.cc/PFJ4-NB9J. And transporting criminals outside a prison's walls to a less-secure setting, like a hospital, increases opportunities for escape. *See, e.g.*, *Jones*, 37 F.3d at 966; *Logan v. Haslam*, No. 3:18-cv-00256, 2019 WL 4142160, *1 (D. Colo. Aug. 30, 2019); Becky Campbell, *Update: TBI names inmate who fled Johnson City Medical Center*, Johnson City Press (Dec. 11, 2020), https://perma.cc/R87J-PF53; *Ohio prison officials say inmate in hospital overpowers guard, escapes with weapon*, Action News 5 (Apr. 2, 2007), https://perma.cc/8ACU-PPJ2.

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Federal habeas review plays an exceptionally limited role in our legal system. *See, e.g.*, *Edwards*, 141 S. Ct. at 1554–55 (majority opinion); *id.* at 1569–73 (Gorsuch, J., concurring); *Davis v. Ayala*, 576 U.S. 257, 276 (2015); *Harrington*, 562 U.S. at 102–03. And this Court has repeatedly stressed the importance of observing those limits. *See, e.g.*, *Davila*, 137 S. Ct. at 2070; *Harrington*, 562 U.S. at 102–03. This case squarely presents the question of what the limits are when it comes to evidentiary development: When, if at all, can federal courts order that States help habeas petitioners develop evidence for use in challenging state-court convictions? When, if at all, can federal courts "compel" a prisoner's "custodian to act as his chauffeur"? *Ivey*, 47 F.3d at 186. The answers to these questions will significantly affect the States' sovereign right to run their criminal-justice systems free from undue federal interference. Since the answers are important, the case is too.

III. This case is an ideal vehicle for addressing the questions presented.

This case is an attractive vehicle for addressing the questions presented.

As an initial matter, the Court clearly has jurisdiction. The Sixth Circuit correctly held that it could hear the Warden's appeal under the collateral-order doctrine. Under that doctrine, courts may hear interlocutory appeals from any order that: (1) conclusively determines a disputed issue; (2) resolves "important questions apart from the merits of the underlying action"; and (3) would become "effectively unreviewable" unless immediately appealed. *Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 40 (1995). Appeals from orders requiring the transportation of prisoners fit neatly within that doctrine: such orders conclusively resolve the prisoner's request for transportation; they implicate the "important issues of state sovereignty and federalism" that arise whenever a federal court issues commands to a State or state official; and they cannot be meaningfully reviewed after final judgment, since at that point "the State will have already undertaken the burden, risk, and expense of transporting" the inmate. Pet.App.7a. Perhaps not surprisingly, every circuit to have addressed the matter agrees that the collateral-order doctrine permits immediate appeals of transportation orders. *See* Pet.App.6a–8a; *Jones*, 37 F.3d at 966; *Jackson*, 1 F.3d at 888; *Barnes v. Black*, 544 F.3d 807, 810 (7th Cir. 2008); *Ballard v. Spradley*, 557 F.2d 476, 479 (5th Cir. 1977). And this case offers a better candidate for the Court's review *because* it arises under the collateral-order doctrine. That setting allows the Court to zero in on the dis-

puted questions without considering the ultimate merit of Twyford's habeas claims.

Incidentally, *if* the collateral-order doctrine's application here were questionable, that would support, rather than undermine, the argument for granting *certiorari*. For if the circuits are uniformly erring in allowing these appeals under the collateral-order doctrine, this Court should say so.

In addition to the absence of jurisdictional concerns, this is a good vehicle for this Court's review because of two strategic choices that Twyford made below. *First*, in moving for his transportation order, Twyford gave an (at best) undeveloped picture of how the testing he wants fits with his habeas claims. *See* Pet.App.262a. Because of that approach, there is not, at this stage, any factual disagreement regarding what the testing could show or how it might be relevant. *Second*, as both lower courts seemed to agree, Twyford failed to demonstrate how a habeas court would be allowed to consider the results of the medical testing he sought. *See* Pet.App.16a–17a, 32a. Both courts said that any admissibility determination should come after Twyford's testing. *Id.* As such, there is no chance the Court will be dragged into a dispute about *whether* the evidence Twyford sought could be lawfully considered in a habeas case. Instead, if it reaches the second question, it need only decide whether, in evaluating a request for evidentiary development, habeas courts should consider whether habeas law would bar the evidence's use.

CONCLUSION

The Court should grant the petition for certiorari and reverse.

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