No. 21-511

In the Supreme Court of the United States

TIM SHOOP, WARDEN,

Petitioner,

v.

RAYMOND TWYFORD,

Respondent.

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

BRIEF OF PETITIONER

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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.

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INTRODUCTION

Raymond Twyford is a murderer living on Ohio's death row. He would prefer not to be there. With that in mind, he filed a federal habeas petition challenging his state conviction and sentence. He then moved the District Court for an order requiring the Warden to bring him to a hospital for a brain scan. Twyford suggested that a brain scan might reveal evidence that would help him win relief. But he never explained how the results of a brain scan would support his habeas claims. Further, even though federal habeas courts are generally prohibited from considering evidence outside the state-court record, Twyford never explained how the evidence he wanted might permissibly be considered in his habeas case.

The District Court granted the transportation order anyway. It claimed the All Writs Act, 28 U.S.C. §1651(a), empowered it to do so. The Sixth Circuit affirmed. It held that federal habeas courts can order a state prisoner's transportation to facilitate the development of evidence that "plausibly relates" to a habeas claim. Pet.App.16a. The circuit further held that courts can issue these transportation orders *regardless* of whether the evidence the petitioner wants could permissibly be considered in a habeas case. Pet.App.17a.

The Sixth Circuit erred. The All Writs Act says that courts may issue "writs" that are "necessary or appropriate in aid of their … jurisdictions" and "agreeable to the usages and principles of law." §1651(a). For two reasons, this language cannot be understood as permitting the transportation order at issue here. *First*, transportation orders designed to facilitate evidence gathering are *not* "agreeable to the

usages and principles of law." They bear no resemblance to any "writ" available at common law. And they contravene a habeas statute, 28 U.S.C. §2241(c), that limits the circumstances in which courts may order custodians to produce prisoners at a location outside of prison. *Second*, because Twyford failed to show that the order would facilitate evidence useful to and capable of being considered in his habeas case, the order was not "necessary or appropriate in aid of" the District Court's habeas jurisdiction. §1651(a). For either of these reasons, the Court should reverse the Sixth Circuit's judgment.

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 is unpublished, *Twyford v. Warden*, No. 2:03-cv-906, 2020 WL 1308318 (S.D. Ohio Mar. 19, 2020), but reproduced at Pet.App.23a.

JURISDICTIONAL STATEMENT

The District Court had jurisdiction under 28 U.S.C. §§1331, 2241(a), and 2254(a). The District Court issued its transportation order on March 19, 2020, and the Warden timely appealed on March 25.

The Sixth Circuit had jurisdiction over the appeal under 28 U.S.C. §1291 and the collateral-order doctrine, which empowers parties to immediately appeal not-otherwise-final decisions that: (1) "are conclusive"; (2) "resolve important questions completely separate from the merits"; and (3) "would render such important questions effectively unreviewable on appeal from final judgment in the underlying action." *Dig. Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S.

863, 867 (1994). The Sixth Circuit rightly held that it had jurisdiction under this doctrine. *See* Pet.App. 6a–7a. *First*, the District Court's "transport order conclusively determined that the State must transport Twyford" to the hospital "for neurological imaging." *Id.* *Second*, the District Court's "authority to order the transport of Twyford … is unrelated to the merits of Twyford's habeas petition but implicates important issues of state sovereignty and federalism." Pet.App.7a. *Finally*, the important question whether the District Court has such authority would be effectively unreviewable on appeal from final judgment—by then, the State would "already have undertaken the burden, risk, and expense of transporting Twyford." *Id.* So this case falls squarely within the collateral-order doctrine. Indeed, every circuit to have addressed the issue has held that custodians may immediately appeal transportation orders under the collateral-order doctrine. *Jones v. Lilly*, 37 F.3d 964, 966–67 (3d Cir. 1994); *Ballard v. Spradley*, 557 F.2d 476, 479 (5th Cir. 1977); *Jackson v. Vasquez*, 1 F.3d 885, 888 (9th Cir. 1993); *see also Barnes v. Black*, 544 F.3d 807, 810 (7th Cir. 2008).

The Sixth Circuit issued its judgment on August 26, 2021. The Warden timely filed his petition for a writ of certiorari on October 4. This Court has 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
>
> (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. On a fall evening in 1992, Athena Cash went for a walk in Jefferson County, Ohio. Pet.App.149a. From the crest of a hill, she noticed something "floating in an old strip-mining pond." *Id.* She "summoned her boyfriend to view the object." *Id.* He "concluded" it was a "human body." *Id.* The couple contacted police.

Officers arrived to a grisly scene. They found "parts of a skull and flesh on the ground." *Id.* Nearby, they "found blood, a pair of glasses, a baseball cap and six shell casings fired from a .30-06-caliber rifle." *Id.* The victim's skull and hands were missing, though his face was still partially attached. Pet.App. 150a.

Authorities soon identified the victim: Richard Franks. Pet.App.150a. They soon identified the killers, too: Daniel Eikelberry (Franks's roommate) and Raymond Twyford (the petitioner). *Id.* Twyford confessed to the crime. He claimed that Franks raped the daughter of a woman with whom Twyford was living. Pet.App.151a. (It is unclear whether these allegations were true. *See* Pet.App.197a; *cf. also* Pet. App.187a–88a.) According to Twyford, he and Eikelberry killed Franks to ensure Franks paid a penalty. The men tricked Franks, who was intellectually disabled, Pet.App.214a, into going with them on what Franks thought was a deer hunt. They told him "to hold the light in the eye of the deer." Pet. App.152a. Franks obliged. Twyford shot him in the back. Franks fell, but was "still 'gurgling,'" so Eikelberry shot him in the head. The two men then "repeatedly shot Franks in the head with the rifle and also shot his hands," hoping to make him uni-

dentifiable. Pet.App.152a. They gathered Franks's identification and pushed what remained of his body into a nearby pond. For good measure, they dropped Franks's severed hands in a boot, loaded it with rocks, and threw it in a creek eighteen miles away. Pet.App.152a–53a.

Twyford pleaded not guilty. A jury convicted him and the trial court imposed a death sentence. *See* Pet.App.155a.

2. After exhausting his direct appeals, Twyford sought state-postconviction relief. He argued that his trial counsel and expert were ineffective for failing to present evidence about a "head injury [that he] had suffered as a teenager." Pet.App.234a. The Ohio trial and appellate courts rejected those claims on the merits. Pet.App.238a–240a. They also rejected Twyford's other postconviction claims. The Ohio Supreme Court declined Twyford's request for review. Pet.App.148a.

3. This appeal grows out of Twyford's federal habeas case, which he filed in 2003. The case has progressed slowly. For example, the Warden moved in 2008 to have many of Twyford's claims dismissed on the ground that Twyford failed to raise them in state-court proceedings. It took nine years for the District Court to rule on that motion. When it did, it agreed that Twyford had procedurally defaulted many of his claims by failing to raise them in state court. Pet.App.43a–147a.

Two years later, Twyford filed a "Motion to Transport for Medical Testing." Pet.App.253a. The motion invoked the All Writs Act, which empowers 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). Twyford sought an order requiring the Warden "to transport … Twyford to The Ohio State University Medical Center for medical testing necessary for the investigation, presentation, and development of claims in his pending petition for writ of habeas corpus." Pet.App.253a. Twyford wanted a brain scan, which he thought might indicate "neurological defects due to childhood physical abuse, alcohol and drug abuse, and a self-inflicted gunshot wound to the head during an adolescent suicide attempt." Pet.App.255a. He characterized his request as "akin to" an attempt at obtaining "new evidence through discovery." Pet.App.267a. Twyford said he wanted this "discovery to support many of his constitutional claims." Pet.App.270a. (He later denied that his motion sought "discovery" in the procedural sense of that term. Pet.App.245a–46a.)

In his briefing to the District Court, Twyford provided no details regarding how the brain scan might bear on his claims. He came closest when he asserted that his habeas petition implicated issues "relating to his family history, mental health issues, and the impact of his suicide attempt." Pet.App.262a. But Twyford supported this unexplained assertion with speculation: he said it was "plausible that the testing to be administered is likely to reveal evidence in support of" six claims for relief. *Id.* Twyford never explained *how* the evidence might bear on these claims—he simply assured the court that it might. Twyford also suggested that the testing might "plausibly" help counter arguments that he defaulted claims by failing to properly raise them in state court. *Id.* He did not say which defaulted claims he was hoping to pursue. Nor did he detail how the

testing might relate to or excuse any procedural default. *Id.*

Twyford also failed to explain how the District Court could permissibly consider the evidence he hoped to obtain. The Antiterrorism and Effective Death Penalty Act of 1996, or "AEDPA," generally forbids federal habeas courts from considering evidence outside the state-court record. *Cullen v. Pinholster*, 563 U.S. 170, 181–82, 185 n.7 (2011). Twyford never explained why a different rule would apply to his case. He instead speculated that, depending on what the evidence revealed, there might be some way to use the evidence without violating *Pinholster*. Pet.App.266a–70a.

The District Court granted the motion. It held that the All Writs Act empowered it "to order the transport" of a habeas petitioner "for neurological testing and imaging, as such imaging may aid[]" the court "in the exercise of its congressionally mandated habeas review." Pet.App.30a. In defending its decision to exercise that power, the court quoted Twyford's arguments—arguments that, as just discussed, failed to give any details regarding how the evidence would bear on his claims. Pet.App.30a–31a. It then asserted that a brain scan "*could* aid the Court in its existing habeas corpus jurisdiction to assess the constitutionality of [Twyford's] incarceration." Pet.App.32a (emphasis added). The District Court recognized that *Pinholster* might forbid considering the evidence that Twyford wanted. 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 by *Cullen v. Pinholster* from considering any evidence." Pet.App.32a. Instead of making that determination *before* issuing the transportation or-

der, the court issued the order and left the *Pinholster* issue for another day.

4. The Warden appealed, and a divided Sixth Circuit affirmed.

According to the majority, "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 began by considering whether transportation orders are "agreeable to the usages and principles of law," §1651(a), as all orders issued under the All Writs Act must be. Pet.App.9a–15a. It concluded that they were. The majority recognized that, in "determining what auxiliary writs are 'agreeable to the usages and principles of law,'" courts look to the common law, statutory law, and congressional intent. Pet.App.9a-10a (quoting *United States v. Hayman*, 342 U.S. 205, 221 n.35 (1952)). It determined that transportation orders were consistent with each body of law.

It first discussed the common law. The circuit noted that the District Court issued the "transport order … in connection with a petition for a writ of habeas corpus challenging Twyford's detention." Pet. App.13a. Because the common law recognized the writ of habeas corpus, the court reasoned, the transportation order was "not contrary to the common-law understanding of habeas." *Id.*

The court next turned to statutory law. It found no statute *permitting* transportation orders like the one issued in this case. But it identified one—28 U.S.C. §2241(c)—that at least arguably prohibited them. Traditionally, courts issued writs of habeas corpus to order the transportation of prisoners by

their custodians. Today, §2241(c) empowers courts to issue writs of habeas corpus in only five enumerated circumstances. It thus prohibits courts from issuing writs of habeas corpus in other circumstances. Just one of the enumerated circumstances entails ordering a prisoner's transportation: courts may issue writs of habeas corpus when "necessary to bring [a prisoner] into court to testify or for trial." §2241(c)(5). The Warden argued that because the transportation order in this case fell outside §2241(c)'s enumerated circumstances, it was not "agreeable to the usages and principles of law." §1651(a). The Third and Seventh Circuits had previously accepted that argument. *See Ivey v. Harney*, 47 F.3d 181, 183–86 (7th Cir. 1995); *Jones v. Lilly*, 37 F.3d 964, 967–69 (3rd Cir. 1994). But the Sixth Circuit rejected it. The court concluded that §2241(c) limits *only* the power to issue writs of habeas corpus, not the power to issue "ancillary orders needed to aid in adjudicating a petitioner's habeas petition." Pet. App.14a.

Finally, the majority looked to congressional intent. It homed in on 18 U.S.C. §3599(f), which provides funds that death-row inmates can use to retain investigative services in their postconviction proceedings. This statute, the majority said, showed that "Congress considered it important that persons sentenced to death have counsel and investigative services in post-conviction proceedings." Pet.App.15a. Transportation orders facilitating such investigations were thus consistent with congressional intent.

Having concluded that transportation orders were consistent with the usages and principles of law, the circuit turned to the question whether the order in Twyford's case was "necessary or appropriate." *Id.*

(quoting §1651(a)). Under the rules governing discovery in habeas cases, petitioners who seek discovery must make "specific allegations" explaining how, "if the facts are fully developed," they may be able to demonstrate an "entitle[ment] to relief." *Bracy v. Gramley*, 520 U.S. 899, 908–09 (1997) (quoting *Harris v. Nelson*, 394 U.S. 286, 300 (1969)). But the Sixth Circuit deemed these rules irrelevant. Pet. App.14a–15a, 18a–19a. Discovery, the majority reasoned, is limited to compulsory disclosure of information in the control of another. Pet.App.15a (citing *Discovery*, Black's Law Dictionary (11th ed. 2019)). Because Twyford was seeking information from "his own brain," the court concluded, discovery rules had no bearing on Twyford's request. *Id.*

Instead of applying (or even considering) discovery rules, the court determined that a petitioner's transportation for evidence-gathering purposes is "necessary or appropriate" whenever the desired evidence "plausibly relates" to his claims. Pet.App.16a. Under that test, courts need not consider the limits of *Pinholster*. Pet.App.17a. The Sixth Circuit determined that a brain scan could plausibly relate to some of Twyford's claims. (It did not explain how.) Without determining whether the District Court could lawfully consider the results of Twyford's brain scan, the court deemed the transportation order "necessary or appropriate" and affirmed.

5. Judge Batchelder dissented. She argued that "a habeas court may use the [All Writs] Act to aid the petitioner's efforts to develop facts and evidence" only if the petitioner establishes "reason to believe that [he] may, if the facts are fully developed, be able to demonstrate that he is confined illegally and is therefore entitled to relief." Pet.App.20a (Batchel-

der, J., dissenting) (quoting *Harris*, 394 U.S. at 300). Twyford could not satisfy that test. For one thing, he never explained how the evidence he anticipated would support specific claims. Pet.App.21a–22a. (Batchelder, J., dissenting). Further, he never explained whether the District Court could lawfully consider the evidence in light of *Pinholster*. *Id.* Twyford should have been required to make both showings. By requiring him to make neither, the District Court wrongly "enabled Twyford to proceed in reverse order by collecting evidence before justifying it." Pet.App.22a (Batchelder, J., dissenting).

6. The Warden timely filed a petition for a writ of certiorari, which this Court granted.

SUMMARY OF ARGUMENT

The All Writs Act 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). The District Court's order in this case—which required the Warden to transport Twyford to a public hospital for evidence gathering—was neither "agreeable to the usages and principles of law" nor "necessary or appropriate in aid of" the District Court's habeas jurisdiction.

I. To determine whether a writ is "agreeable to the usages and principles of law," §1651(a), courts "look first to the common law," *United States v. Hayman*, 342 U.S. 205, 221 n.35 (1952). At least presumptively, writs without a common-law analogue are not "agreeable to the usages and principles of law." S*ee De Beers Consol. Mines, Ltd. v. United States*, 325 U.S. 212, 221–23 (1945). Courts also consider whether an existing statute "specifically ad-

dresses the particular issue at hand." *Pa. Bureau of Corr. v. U.S. Marshals Serv.*, 474 U.S. 34, 43 (1985). If an area is already "covered by statute," then the statute—"not the All Writs Act"—controls the exercise of judicial power. *Id.* Courts may not invoke the All Writs Act as authority to "issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate." *Id.*

The District Court's transportation order was not "agreeable to the usages and principles of law." §1651(a). Its order compels a custodian (the Warden) to produce a prisoner (Twyford) at a location outside of prison (a hospital). Historically, courts used writs of habeas corpus to require that custodians "produce (*habeas*) a prisoner's person (*corpus*)." *Edwards v. Vannoy*, 141 S. Ct. 1547, 1566 (2021) (Gorsuch, J., concurring); *see also Ex parte Bollman*, 8 U.S. 75, 97–98 (1807). Thus, habeas law provides "usages and principles of law" relevant to the All Writs Act inquiry. Those usages and principles do not permit transportation orders like the one issued in this case.

Begin with the common law. Courts used writs of habeas corpus to order the transportation of inmates for certain, specified reasons. For example, through writs of habeas corpus *ad testificandum* and *ad prosequendum*, courts ordered custodians to transport prisoners into court so that they could testify or face prosecution. *Ex parte Bollman*, 8 U.S. at 98. But neither the writs of habeas corpus nor any other writ gave courts a general power to order custodians to transport prisoners for evidence gathering that might facilitate litigation. *See Ivey v. Harney*, 47 F.3d 181, 185 (7th Cir. 1995); *Jones v. Lilly*, 37 F.3d 964, 968–69 (3d Cir. 1994). Thus, the transportation order has no common-law analogue.

In any event, habeas law today is "covered by statute." *Pa. Bureau of Corr.*, 474 U.S. at 43. Relevant here, 28 U.S.C. §2241(c) says that federal courts "shall not" issue writs of habeas corpus "unless" one of five scenarios obtains. Only one of those scenarios addresses the transportation of state prisoners. And the key text says that a federal court may order a prisoner's transportation only when "[i]t is necessary to bring him into court to testify or for trial." §2241(c)(5). In other words, the statute (§2241(c)) that governs the traditional means of ordering custodians to move prisoners (writs of habeas corpus) forbids requiring custodians to bring inmates anywhere but to court, and even then only "to testify or for trial." The All Writs Act gave the District Court no power to issue an "ad hoc" writ evading these statutory limits. *Pa. Bureau of Corr.*, 474 U.S. at 43.

The Sixth Circuit erred in holding otherwise. Its opinion identifies no common-law analogue for the District Court's use of the All Writs Act. Further, the circuit's analysis failed to respect §2241(c). In the circuit's view, §2241(c) limits only "the writ of habeas corpus *itself*," and has no bearing on "ancillary orders" issued under the All Writs Act. Pet. App.14a. That logic ignores that courts traditionally used writs of habeas corpus to order that custodians move prisoners. It follows that "habeas corpus statute[s]," *Pa. Bureau of Corr.*, 474 U.S. at 38, including §2241, supply "usages and principles of law" to which the District Court's order had to be "agreeable," §1651(a). Because the order was not agreeable to §2241(c), the District Court had no power to issue it.

II. Courts may issue writs under the All Writs Act only when doing so is "necessary or appropriate in aid of their respective jurisdictions." §1651(a). To

determine whether a writ is "necessary or appropriate," a court must be mindful of the jurisdiction it is trying to aid. *See Hayman*, 342 U.S. at 222–23. A writ is not "necessary or appropriate" if it is unhelpful to the issuing court's jurisdiction, *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34–35 (1980) (*per curiam*), or if it circumvents applicable procedural rules, *Carlisle v. United States*, 517 U.S. 416, 429 (1996).

Given the limits of federal habeas jurisdiction, an order requiring a habeas petitioner's transportation for evidence gathering can be "necessary or appropriate" *only if* the petitioner makes two showings.

First, the petitioner must show that the court will be allowed to consider the evidence. Pet.App.22a (Batchelder, J., dissenting). That requirement derives from AEDPA, which normally prohibits federal courts from considering evidence outside the state-court record. 28 U.S.C. §2254(d); *Cullen v. Pinholster*, 563 U.S. 170, 181–82, 185 n.7 (2011). Absent an explanation of how a court could consider new evidence, facilitating the gathering of new evidence would frustrate—rather than aid—federal habeas review.

Second, the petitioner must identify the specific claims that new evidence would further and explain how the anticipated evidence could entitle the petitioner to relief. Pet.App.21a (Batchelder, J., dissenting). That is precisely what the procedural rules governing habeas cases require of petitioners seeking to discover new evidence. *Bracy v. Gramley*, 520 U.S. 899, 908–09 (1997). Evading the rules that govern the proper exercise of habeas jurisdiction is not a "necessary or appropriate" means of aiding habeas

jurisdiction. *See Carlisle*, 517 U.S. at 429. Indeed, habeas courts should refer to these rules even in circumstances to which the rules do not directly apply, as they provide "familiar procedures" for courts acting under the All Writs Act to "utilize" in analogous contexts. *Harris v. Nelson*, 394 U.S. 286, 300 (1969).

Twyford came nowhere near making the necessary showings. He offered what was, at best, an undeveloped picture of how the evidence he desires relates to his case. *See* Pet.App.262a. He disavowed any need to explain how the District Court could lawfully consider new evidence. *See* Pet.App.266a–70a. And he dodged any comparison between his request and normal habeas discovery. *See* Pet.App.14a n.4.

The Sixth Circuit wrongly held that Twyford's transportation was "necessary or appropriate" because the evidence Twyford wants "plausibly relates" to his habeas claims. Pet.App.16a. In reaching that conclusion, the court refused to consider whether new evidence could be lawfully considered. Pet.App. 17a. Instead, the court employed an easy-to-meet standard that, by "either design or effect," runs counter to the limits AEDPA imposes on federal habeas jurisdiction. Pet.App.22a (Batchelder, J., dissenting). Beyond that, the Sixth Circuit's standard is dangerous: if allowed to stand, it will require States to bring dangerous criminals to public settings so that they may collect irrelevant, unusable evidence.

ARGUMENT

The All Writs Act 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). This case presents two questions regarding the Act's scope.

First, may federal habeas courts, under the All Writs Act, order that state officials transport state prisoners for reasons other than those enumerated in 28 U.S.C. §2241(c)? No, they may not, because transportation orders that exceed the limits of §2241(c) are not "agreeable to the usages and principles of law."

Second, if courts can use the All Writs Act to issue transportation orders facilitating evidentiary development, is it appropriate for them to do so without first determining that the anticipated evidence is likely material to, or capable of being permissibly considered during, federal habeas review? Again, the answer is no. Orders that facilitate the development of immaterial, unusable evidence are not "necessary or appropriate" in aid of the issuing court's jurisdiction.

The District Court issued a transportation order that exceeds the limits of §2241(c). And it did so without determining that the evidence would be material or capable of being permissibly considered. Thus, its order was neither "agreeable to the usages and principles of law" nor "necessary or appropriate" in aid of its jurisdiction. The Sixth Circuit held otherwise. This Court should reverse.

I. Federal habeas courts cannot use the All Writs Act to issue transportation orders for reasons not enumerated in 28 U.S.C. §2241(c).

The writ of habeas corpus was the traditional means by which courts ordered custodians to release or transport prisoners. Today, a federal statute, 28 U.S.C. §2241(c), codifies the traditional limits of the writ. It empowers courts to order a custodian to

transport a prisoner in only limited circumstances. Those circumstances do not include evidentiary development. Thus, §2241(c) does not permit—and therefore prohibits—writs of habeas corpus commanding custodians to transport prisoners for evidence gathering.

Federal courts cannot use the All Writs Act to circumvent this limit on their authority. That Act 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). An order requiring a custodian to transport a prisoner for reasons not laid out in the statute governing such orders, *see* §2241(c), is not "agreeable to the usages and principles of law."

Here, the District Court ordered the Warden to transport Twyford for medical testing. That order clashed with §2241(c). Thus, the District Court exceeded its authority under the All Writs Act by issuing an order that was not "agreeable to the usages and principles of law."

A. The All Writs Act empowers federal courts to issue writs "agreeable to the usages and principles of law."

Often, "statutory provisions are most easily understood in light of their history." *Washington v. United States*, 460 U.S. 536, 538 (1983). That is true of the All Writs Act and §2241(c), each of which derives from centuries-old legal traditions. This brief begins with that history.

1. The All Writs Act

a. Before the founding, courts in England and colonial America exercised power by issuing writs. The

"writ," in its earliest form, was actually a "written directive" that came straight "from the king." Geoffrey C. Hazard Jr., *The Early Evolution of the Common Law Writs: A Sketch*, 6 Am. J. Legal Hist. 114, 117 (1962). Around the twelfth century, Anglo-Norman kings began issuing writs in an effort "to enforce the peace of the realm." *Id.* But kings gradually delegated to their judges the task of sorting out alleged wrongdoing. *Id.* at 118–19. Thus, although writs started as "an extraordinary executive interference," they evolved into "an ordinary judicial function of the crown." *Id.* at 119. The King's Bench, for instance, employed a variety of writs—such as writs of certiorari and mandamus—to ensure its supremacy over rival courts. *Pulliam v. Allen*, 466 U.S. 522, 532 (1984). And "various kinds" of writs of habeas corpus were "made use of by the courts at Westminster." 3 W. Blackstone, *Commentaries on the Law of England* 129 (1768); *accord Ex parte Bollman*, 8 U.S. 75, 97–98 (1807).

After Americans won their independence, they retained much of the writs tradition. This is evident from the Judiciary Act of 1789. Section 13 of the Act empowered this Court to issue "writs of *mandamus*, … in cases warranted by the principles and usages of law, to any courts apportioned, or persons holding office, under the authority of the United States." 1 Stat. 73, 81. Section 14 empowered all "courts of the United States … to issue writs of *scire facias*, *habeas corpus*, … and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law." 1 Stat. at 81–82. The very first Congress thus approved of, and codified, the courts' authority to issue many of the tradi-

tional writs. Early courts issued those writs in appropriate cases. *See, e.g.*, *Ex parte Bollman*, 8 U.S. at 100–01; *Bank of United States v. Halstead*, 23 U.S. 51, 55–56 (1825); *Ex parte Crane*, 30 U.S. 190, 193–94 (1831); *Sibbald v. United States*, 37 U.S. 488, 492–93 (1838).

Through the years, Congress re-codified the power of federal courts to issue writs. *See United States v. Morgan*, 346 U.S. 502, 506 (1954); *In re Josephson*, 218 F.2d 174, 179 (1st Cir. 1954). In 1948, Congress enacted the All Writs Act in its modern form. It says: "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." §1651(a). There is "scant" history regarding Congress's enactment of the modern All Writs Act. *Pa. Bureau of Corr. v. U.S. Marshals Serv.*, 474 U.S. 34, 41 (1985). But the current text of the All Writs Act, this Court has explained, did not alter the power that the Judiciary Act long ago vested in courts. *Id.* at 41–42. Of particular note, changes to the All Writs Act's phrasing, including the addition of the word "appropriate," did not "mark a congressional expansion of the powers of federal courts." *Id.* at 42; *see also U.S. Alkali Export Ass'n v. United States*, 325 U.S. 196, 201–03 (1945). The All Writs Act thus embraces, without substantive change, Congress's tradition of giving federal courts a limited power to issue auxiliary writs when necessary in aid of their jurisdiction.

b. The All Writs Act has always operated "as a gap filler." *United States v. Blake*, 868 F.3d 960, 971 (11th Cir. 2017). The power to issue writs "necessary or appropriate in aid of their respective jurisdic-

tions," §1651(a), is the power 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.*, 474 U.S. at 41. 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) (quotations omitted). The All Writs Act is thus a Necessary and Proper Clause for the judiciary; it gives federal courts an "authority derivative of," and capable of being exercised "in service to, a granted power." *Cf. NFIB v. Sebelius*, 567 U.S. 519, 560 (2012) (op. of Roberts, C.J.).

A few examples illustrate the nature of this derivative power. Appellate courts have long relied on the All Writs Act when issuing writs of mandamus, which are used to "confine an inferior court to a lawful exercise of its prescribed jurisdiction." *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943). By restraining the excesses of inferior courts, writs of mandamus "remove obstacles" to an appellate court's future "appellate jurisdiction." *Id.* The All Writs Act also empowers federal courts to issue writs of *coram nobis*. *Morgan*, 346 U.S. at 506–13. That writ is an "extraordinary tool" that courts may sometimes use to belatedly correct errors in final judgments they previously entered. *United States v. Denedo*, 556 U.S. 904, 911–13 (2009). The writ thus acts in "belated" aid of a court's jurisdiction over the "original proceeding during which the error allegedly transpired." *Id.* at 913.

But the power the All Writs Act confers is best understood by examining the power the Act withholds. The Act allows courts to issue *only* writs that

are "necessary or appropriate in aid of their respective jurisdictions." §1651(a). That language arguably requires that writs "actually aid *the court* in the performance of *its* duties." *Jones v. Lilly*, 37 F.3d 964, 968 (3d Cir. 1994) (emphases added); *accord New York Tel. Co.*, 434 U.S. at 189 (Stevens, J., dissenting in part). The Court long ago abandoned that reading, however, in favor of one that empowers courts to issue writs that, while unneeded to preserve the court's jurisdiction, assist parties in presenting their claims. *See New York Tel. Co.*, 434 U.S. at 161, 172. Even so, the phrase "in aid of … jurisdiction[]" does some work. It makes clear that the All Writs Act is not an independent source of jurisdiction. *See, e.g.*, *Denedo*, 556 U.S. at 914; *Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28, 33 (2002). A federal court, therefore, cannot resort to the All Writs Act to create jurisdiction "where jurisdiction [does] not lie under an express statutory provision." *Pa. Bureau of Corr.*, 474 U.S. at 41. Nor can it use the Act to "enlarge" its statutory jurisdiction. *Clinton v. Goldsmith*, 526 U.S. 529, 534–35 (1999).

Another limit on the power conferred by the All Writs Act comes from its closing words: writs must be "agreeable to the usages and principles of law." §1651(a). Two bodies of law—the common law and statutory law—are especially important to determining whether a writ is "agreeable to the usages and principles of law."

The "agreeable to" inquiry "look[s] first to the common law." *United States v. Hayman*, 342 U.S. 205, 221 n.35 (1952). More precisely, a court should consider how a proposed use of the All Writs Act compares to judicial powers exercised at the founding.

Chief Justice Marshall's opinion for the Court in *Ex parte Crane* offers an early example of this type of comparison. *Crane* explained that §13 of the Judiciary Act empowered this Court to issue a writ of mandamus directing an inferior court to sign a bill of exceptions. 30 U.S. at 192. The signed bill was allegedly needed "to place the law of the case on the record." *Id.* at 194. Recall that, much like the All Writs Act, §13 required that mandamus relief be "warranted by the principles and usages of law." *Id.* at 193. In concluding that the requested writ could be "warranted by the principles and usages of law," *Crane* stressed that the laws of England allowed courts of chancery to award such relief. *Id.* at 193–94. The Supreme Court of New York had also issued a similar writ near the time of the founding. *Id.* at 194–95. With these historical analogues in hand, *Crane* approved of the Court's authority to issue the writ.

Writs issued by modern-day courts need not match "the precise forms" of writs "in vogue at the common law or in the English judicial system." *Price v. Johnston*, 334 U.S. 266, 282 (1948). But that "in no way implies that courts have the power to fashion any writ they deem desirable." *Jones*, 37 F.3d at 968. This Court, after all, has instructed lower courts to review the common law "[i]n determining what auxiliary writs are 'agreeable to the usages and principles of law.'" *Hayman*, 342 U.S. at 221 n.35. That consultation would be pointless unless the All Writs Act forbade courts from straying too far beyond common-law practices. Courts have thus understood the All Writs Act to incorporate, at least to some degree, common-law limits. *See, e.g.*, *De Beers Consol. Mines, Ltd. v. United States*, 325 U.S. 212, 221–23

(1945); *Rawlins v. Kansas*, 714 F.3d 1189, 1196 (10th Cir. 2013); *Jones*, 37 F.3d at 968–69; *Ivey v. Harney*, 47 F.3d 181, 185 (7th Cir. 1995); *Lowery v. McCaughtry*, 954 F.2d 422, 423 (7th Cir. 1992); *Hardwick v. Doolittle*, 558 F.2d 292, 296 (5th Cir. 1977).

The Tenth Circuit's decision in *Rawlins v. Kansas*, illustrates the point. The petitioner in that case (Rawlins) challenged her state-court conviction for battery. 714 F.3d at 1190. But she was no longer in state custody, making her ineligible for habeas relief. In hopes of winning relief by another means, Rawlins petitioned for a writ of *coram nobis* in federal court. *Id.* at 1191. The district court denied relief and the Tenth Circuit affirmed. It held that the relief Rawlins sought exceeded "the common law scope of *coram nobis*." *Id.* at 1196 (emphasis added). At common law, the writ of *coram nobis* "was a writ issued from the judgment-issuing court to itself, granting itself power to reopen" the challenged "judgment." *Id.* It was "not a writ that one court may issue to another." *Id.* Because Rawlins sought the latter type of relief, her request was not "agreeable to the usages and principles of law." *Id.*

The second body of law bearing on the "agreeable to" inquiry is statutory law. Congress has the power to define the jurisdiction of federal courts. *Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct. 1743, 1746 (2019). It may enact laws that "supersede the common law powers of the federal courts." *Ivey*, 47 F.3d at 184. Congress may supplement those powers, too. Thus, courts must consult validly enacted statutes in deciding whether a writ's issuance would be "agreeable to the usages and principles of law."

Of particular relevance here, the All Writs Act authorizes courts to issue only "writs that are not otherwise covered by statute." *Pa. Bureau of Corr.*, 474 U.S. at 43. "Where 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, the All Writs Act "does not authorize [courts] to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate." *Pa. Bureau of Corr.*, 474 U.S. at 43.

This Court's decision in *Pennsylvania Bureau of Correction* exemplifies these points. 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 they could testify in a §1983 case. *Id.* at 35–36. This Court held that the district court erred. It stressed that "the habeas corpus statute" governed the courts' authority to order the transportation of state prisoners. *Id.* at 38–39. And that statutory authority required that writs of habeas corpus *ad testificandum*—the writ used to order custodians to bring prisoners into court so that they may testify—"be directed to the person having custody of the person detained." *Id.* at 39 (quoting 28 U.S.C. §2243). The district court ignored this limit by directing its writ to the Marshals instead of to the prisoners' custodians. The All Writs Act does not authorize such "ad hoc" writs. *Id.* at 43.

Even when no federal statute expressly authorizes or forbids a judicial action, federal courts must still contemplate whether use of the All Writs Act is "consistent with the intent of Congress" in a given

area. *New York Tel. Co.*, 434 U.S. at 172. For example, *New York Telephone Company* held that courts may use the Act to order that telephone companies install pen registers to aid criminal investigations. No statute addressed the issue, but the Court deemed such orders to be "consistent with" a number of "recent congressional actions." *Id.* at 176–78.

2. The writ of habeas corpus

The previous subsection shows that writs issued under the All Writs Act should be "agreeable to" common-law practices and any federal statute covering a given action. In this case, the District Court said it was ordering Twyford's transportation to aid its "habeas review." Pet.App.30a. Determining whether the order was "agreeable to" federal habeas law requires some background on the common-law origins and statutory evolution of habeas corpus. This subsection addresses that history.

a. The "common law knew several" writs of habeas corpus. *Edwards v. Vannoy*, 141 S. Ct. 1547, 1566 (2021) (Gorsuch, J., concurring). Each required a custodian to produce a prisoner for a particular reason. *Id.* In other words, when early courts wanted a custodian to move a prisoner, they issued writs of habeas corpus. *See Ex parte Bollman*, 8 U.S. at 97–98; *see also* 3 Blackstone, Commentaries on the Laws of England 129–31 (1768).

The most powerful of these writs—"the most celebrated writ in the English law," 3 Blackstone, Commentaries at 129—was the writ of habeas corpus *ad subjiciendum*. The "Great Writ," as it came to be known, served as a means of forcing the government to explain why a prisoner was being restrained. *Edwards*, 141 S. Ct. at 1567 (Gorsuch, J., concurring).

Prisoners used the Great Writ "to secure release from custody." *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1970 (2020).

Other writs of habeas corpus served other ends. The writs of habeas corpus *ad prosequendum* and *ad testificandum* are most relevant here. Courts issued writs of habeas corpus *ad prosequendum* when it was necessary to move a prisoner to court for the prosecution of a crime. *Ex parte Bollman*, 8 U.S. at 98. The writ of habeas corpus *ad testificandum* "functioned more like a subpoena to procure a prisoner's presence to testify in court." *Edwards*, 141 S. Ct. at 1566 (Gorsuch, J., concurring).

None of these writs broadly empowered courts to facilitate the gathering of new evidence that might help a prisoner challenge his conviction. Indeed, so broad a power would have served no purpose. For most of British and American history, habeas relief was unavailable to prisoners "confined pursuant to a final judgment of conviction." *Id.* at 1567 (citing *Ex parte Watkins*, 28 U.S. 193, 209 (1830)). When a prisoner was "in custody under sentence of a court" with competent jurisdiction, habeas courts would not "look behind the sentence." *Remarks on the Writ of Habeas Corpus ad Subjiciendum, and the Practice Connected Therewith*, The American Law Register 274 (March 1856); *accord* Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 463–66 (1963). Federal courts certainly had no power to facilitate evidentiary development in cases attacking *state* convictions. It was not until after the Civil War that "Congress granted federal courts the power to issue habeas writs to state authorities." *Edwards*, 141 S. Ct. at 1567 (Gorsuch, J., concurring). Even then, "[i]f a

prisoner was in custody pursuant to a final state court judgment, a federal court was powerless to revisit those proceedings unless the state court had acted without jurisdiction." *Id.* at 1568; *accord* Bator, *Finality in Criminal Law*, 76 Harv. L. Rev. at 474–75.

b. Congress has codified and limited the circumstances in which federal courts may issue writs of habeas corpus. *See* 28 U.S.C. §§2241–54. The provision most relevant to this case is 28 U.S.C. §2241(c), which says:

> (c) 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.

The statute begins with a prohibition, declaring that the writ of habeas corpus "shall not extend to a prisoner." But it then makes an exception, stating that the prohibition applies "unless" one of five enumerated circumstances obtains. The statute thus prohibits courts from issuing writs of habeas corpus *except* in the five enumerated circumstances. *Ivey*, 47 F.3d at 185.

These five enumerated exceptions incorporate some, but not all, of the common-law writs of habeas corpus. The first four exceptions apply when prisoners challenge the lawfulness of their detentions. 17B Wright & Miller, *Federal Practice and Procedure* §4261 (3d ed., Westlaw 2021). These provisions thus codify the traditional power to issue the Great Writ. *See id.*; *see also I.N.S. v. St. Cyr*, 533 U.S. 289, 305 (2001). The fifth exception, in contrast, "represents the codification of the common law writs of habeas corpus *ad testificandum* and *ad prosequendum*." *Jones*, 37 F.3d at 967; *accord Carbo v. United States*, 364 U.S. 611, 619 (1961). Again, common-law courts issued those writs when they were needed "to produce a prisoner to prosecute him or obtain his appearance as a witness." *Jones*, 37 F.3d at 967. Section 2241(c)(5) empowers modern courts to do the same.

B. The District Court lacked authority to order Twyford's transportation under the All Writs Act.

Twyford sought, and the District Court issued, an order requiring the Warden to bring Twyford to a

hospital where Twyford hoped to develop evidence for his habeas case. This order was not agreeable to common-law principles or to §2241(c). Accordingly, the All Writs Act gave the District Court no power to issue that order.

1. Twyford's transportation was not "agreeable to" federal habeas law.

The above discussion contains a series of principles that resolve this case.

The first set of principles relates to the All Writs Act. The Act says that courts may, in limited circumstances, issue orders that no statute expressly authorizes. Courts may, in other words, "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.*, 474 U.S. at 41. But every order issued under the All Writs Act must be "agreeable to the usages and principles of law." §1651(a). Orders that have no common-law analogue do not typically satisfy this standard. *See Hayman*, 342 U.S. at 221 n.35. And orders that circumvent the limits of otherwise-controlling statutes are never agreeable to the usages and principles of law. *Pa. Bureau of Corr.*, 474 U.S. at 43.

The second group of principles comes from habeas law. These principles matter because habeas law provides usages and principles of law governing the court-ordered production of prisoners. *Jones*, 37 F.3d at 968; *Ivey*, 47 F.3d at 185. This follows from the fact that, traditionally, courts used the various writs of habeas corpus when ordering "a custodian to produce (*habeas*) a prisoner's person (*corpus*)." *Edwards*, 141 S. Ct. at 1566 (Gorsuch, J., concurring).

Today, the federal courts' authority to issue writs of habeas corpus is governed by statute. Relevant here, §2241(c) *prohibits* federal courts from issuing writs of habeas corpus except in five enumerated circumstances. *See* §2241(c)(1)–(5).

Combined, these principles limit the federal courts' power to issue transportation orders under the All Writs Act. Because the All Writs Acts permits the issuance only of orders that are "agreeable to the usages and principles of law," and because habeas law provides the relevant usages and principles with respect to orders requiring custodians to transport prisoners, courts issuing transportation orders must respect the limits of habeas law. Thus, the All Writs Act empowers courts to issue transportation orders only when such orders are analogous to common-law practices and consistent with §2241(c)—the statute that codifies (and limits) the courts' traditional habeas authority.

Common law. The District Court's transportation order was not agreeable to common-law practices. No common-law writ of habeas corpus empowered courts to order a prisoner's transportation to a location—outside of court—where the inmate could develop evidence to attack his conviction. And the Warden has not identified any other writ available "under the common law," in early American practice, or "prior thereto under the English judicial system," *Jones*, 37 F.3d at 968–69, issued in analogous circumstances. Courts at common law had no broad, generalized authority to issue writs moving prisoners to facilitate a party's litigation strategy. *See id.*; *Ivey*, 47 F.3d at 185.

Statutory law. The order is no more agreeable to the usages and principles embodied in statutory law. Again, §2241(c) prohibits courts from issuing writs of habeas corpus except in five enumerated circumstances. It thus *forbids* orders requiring prisoner transportation in "other circumstances." *Ivey*, 47 F.3d at 185. Just one of the five enumerated circumstances—subsection (5)—governs the transportation of prisoners, as opposed to their release from custody. And the language of subsection (5) permits the transportation of state prisoners *only* "into court," and *only* when "[i]t is necessary" for a prisoner "to testify" or to stand "trial." The order issued below requires the Warden to transport Twyford to a different place (a hospital) for a different reason (so that he may develop evidence that he hopes will undermine his conviction). Because §2241(c) does not permit such transportation orders, it forbids them.

The All Writs Act gave the District Court no authority to evade the limits of §2241(c). The ability of a federal court sitting in habeas to order the transportation of state prisoners is an area "covered by statute." *See Pa. Bureau of Corr.*, 474 U.S. at 43. That makes the statutory text of §2241(c), "not the All Writs Act, … controlling." *Id.* It follows that the All Writs Act "does not authorize" a federal court to issue an "ad hoc writ[]" that bypasses §2241(c)'s limits. *Id.*

To be sure, the All Writs Act sometimes permits federal courts to issue orders that no federal statute expressly authorizes. *See Ivey*, 47 F.3d at 185. But this is not one of those times. As explained above, because courts traditionally used the writ of habeas corpus to order that custodians produce a prisoner at a specific location, the rules governing habeas corpus

provide "usages and principles of law" with which orders issued under the All Writs Act must accord. Here, §2241(c) sets forth the relevant habeas principles. And it "forbids" courts from issuing the writ of habeas corpus for any reason other than those it lists. *Ivey*, 47 F.3d at 183. Transportation for evidentiary development is not within the listed authority. *Id.* The relevant statutory text thus leaves no "gap" to be filled by "judicial creativity." *Id.* at 183, 185. Federal courts cannot use the All Writs Act to "override" the express limits of federal statutes. *Id.* at 185. Nor can they use the All Writs Act to "enlarge" their statutory authority. *Goldsmith*, 526 U.S. at 534–35; *accord Jackson v. Vasquez*, 1 F.3d 885, 889 (9th Cir. 1993). The District Court, by issuing the transportation order, lost sight of these principles.

Congressional intent. This Court has suggested that courts ought to consider "the intent of Congress" when acting pursuant to the All Writs Act. *New York Tel. Co.*, 434 U.S. at 172. But it has never held that an order contrary to common-law and statutory principles can nonetheless be held "agreeable to the usages and principles of law" simply because it accords with what a court perceives to be Congress's intent. Regardless, the "best evidence of Congress's intent is the statutory text," *NFIB*, 567 U.S. at 544, and the text of §2241(c) shows that Congress intended *not* to facilitate prisoner transfers like the one the District Court ordered.

2. The Sixth Circuit misapplied the All Writs Act.

The Sixth Circuit, in its decision below, held that the District Court's use of the All Writs Act was

agreeable to the common law, statutory law, and congressional intent. It was mistaken on all fronts.

Common law. The Sixth Circuit began with the common law. It stressed that the District Court issued its transportation order "in connection with a petition for a writ of habeas corpus challenging Twyford's detention." Pet.App.13a. And it noted that "the writ of habeas corpus 'has traditionally been a means to secure release from unlawful detention.'" *Id.* (quoting *Thuraissigiam*, 140 S. Ct. at 1963) (emphasis omitted). Because the order was designed to aid Twyford in obtaining this traditional form of relief, the Sixth Circuit reasoned, the order was "not contrary to the common-law understanding of habeas." *Id.*

The Sixth Circuit's analysis does not withstand the slightest scrutiny. Instead of asking whether *the transportation order* was agreeable to common-law principles, the court asked whether the order was issued "in connection with" a request for relief (release from custody) traditionally available at common law. Pet.App.13a. But the All Writs Act does not empower courts to issue writs "in connection with" relief of the sort available at common law. Instead, it empowers courts to issue writs that are *themselves* "agreeable to the usages and principles of law," including the common law. §1651(a). As explained above, the transportation order itself is not agreeable to common-law practices. Nothing in the Sixth Circuit's opinion suggests otherwise.

Statutory law. The Sixth Circuit's statutory analysis fares no better.

The court appeared to recognize that §2241(c) creates "a 'close-ended statutory list'" of the circum-

stances in which courts may issue writs of habeas corpus. Pet.App.14a (quoting *Ivey*, 47 F.3d at 185). And it acknowledged that §2241(c)(5), in particular, "permitted the district court to issue orders to transport an inmate only to court or to testify, not to an outside medical facility for a medical exam." Pet. App.14a (quoting *Ivey*, 47 F.3d at 185). But none of that deterred the court. It concluded that §2241(c) imposes limits on the power to "issue the writ of habeas corpus *itself*." *Id.* The statute did not, in other words, place any limits on the power to issue "ancillary orders," like the transportation order in this case, "needed to aid in adjudicating a petitioner's habeas petition." *Id.*

This analysis is deeply flawed. It is true enough that §2241(c) limits the power to grant writs of habeas corpus, and that it says nothing about ancillary orders issued under the All Writs Act. This, however, is irrelevant. At the risk of undue repetition, courts traditionally used writs of habeas corpus to order a custodian's production of an inmate. *See above* 27–28. So the usages and principles of habeas law are among the "usages and principles of law" to which an order requiring a custodian to move a prisoner must be "agreeable." Because §2241(c) is a federal statute about "the writ of habeas corpus *itself*," Pet.App.14a, it is precisely the sort of statute to which a court should look in discerning the limits that federal law places on orders directing the movement of prisoners. *Pennsylvania Bureau of Correction* proves the point. In that case, this Court looked to "the habeas corpus statute" when assessing whether a federal court could order the U.S. Marshals to bring "state prisoners to the federal courthouse." 474 U.S. at 38.

Section 2241(c), moreover, leaves no "'gap' that a judge may fill" through the All Writs Act. *Ivey*, 47 F.3d at 185. It prohibits courts from awarding writs of habeas corpus *except* in five enumerated situations. The Sixth Circuit claimed to find a "gap[]," but it never explained where the gap came from. Pet. App.14a. The court appeared to think that Congress, by failing to permit transportation orders for evidence-gathering purposes, lessened the ability of habeas petitioners to "present[] their cases." *Id.* And that, it seemed to think, created a gap. The problem with this argument is that it treats "the lack of authority as a 'vacuum' to be filled by the very" thing that Congress forbade in §2241(c)—namely, an order requiring a prisoner's production for reasons other than those laid out in the statute. *Ivey*, 47 F.3d at 184. Congress's decision not to authorize such orders is a limit to be respected, not a gap to be filled.

The Sixth Circuit's failure to abide by limits within a habeas statute, §2241(c), is especially troubling given that this is a habeas case. By its own account, the District Court was acting in aid of its habeas jurisdiction—not, for example, in aid of its jurisdiction to resolve other types of federal claims. *See* Pet.App. 30a. That makes §2241(c)'s relevance to the "agreeable to" inquiry particularly obvious.

Congressional intent. The Sixth Circuit declared that the District Court's transportation order was "consistent with congressional intent." Pet.App. 15a. It pointed to a single statute, 18 U.S.C. §3599(f), which gives indigent capital defendants federal funds that they can use to obtain counsel and investigatory services that are "reasonably necessary" for postconviction proceedings. This statute, the court reasoned, showed that Congress wanted

petitioners to have access to "meaningful" investigations during their "post-conviction proceedings." Pet. App.15a.

As explained above, because the District Court's ruling contradicted §2241(c), the order it issued contradicts congressional intent. Section 3599(f) cannot support a contrary conclusion. Congress's decision to make funding available for postconviction counsel and investigatory services hardly suggests that Congress intended for courts to enlist the State's support in facilitating whatever investigations the petitioner and his counsel might like.

*

In sum, the common law did not authorize the District Court's transportation order and statutory law forbids it. Therefore, the order was not "agreeable to the usages and principles of law." §1651(a). Because the Sixth Circuit held otherwise, this Court should reverse.

To avoid any confusion, one final distinction deserves mention. This case presents only the question whether courts may, in aid of their jurisdiction, order the transportation of inmates under the All Writs Act. The 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. The Warden's arguments do not, for example, cast doubt on whether courts may, when exercising their equitable authority to enjoin violations of the law, *see Ex parte Young*, 209 U.S. 123, 155–56 (1908), issue final orders requiring the transportation of a prisoner. *Cf. Vega v. Semple*, 963 F.3d 259, 282 (2d Cir. 2020).

II. The transportation order was not "necessary or appropriate" for purposes of the All Writs Act.

There is a second, independent basis for reversing the Sixth Circuit. Twyford never showed that the evidence he wanted would likely support his claim. Nor did he show that the District Court could permissibly consider new evidence in his habeas case. The Sixth Circuit nonetheless held that the transportation order was "necessary or appropriate" in aid of the District Court's jurisdiction. *See* Pet.App.16–17a. It erred.

A. The All Writs Act gives courts no authority to compel the production of unusable or immaterial evidence.

1. The All Writs Act says that courts may issue writs "necessary or appropriate in aid of their respective jurisdictions." §1651(a). That language vests "a court with a power" that is "essentially equitable" in nature. *Goldsmith*, 526 U.S. at 537. To determine whether to use this equitable power, courts must consider the nature of the jurisdiction "in aid of" which the requested writ would issue. *See Hayman*, 342 U.S. at 222–23. A writ that gives the movant what could be obtained through "alternative remedies" is "unjustifiable either as 'necessary' or as 'appropriate.'" *Goldsmith*, 526 U.S. at 534–35, 537. The same is necessarily true of a writ that will not help the court adjudicate the case before it. *See Hayman*, 342 U.S. at 222–23.

Consider again the writ of mandamus. Appellate courts use this writ to restrain lower courts that exceed their authority. *In re Univ. of Mich.*, 936 F.3d 460, 466 (6th Cir. 2019). The All Writs Act permits

them to do so because, by restraining lower-court excesses that might obstruct a future appeal, an appellate court acts "in aid of appellate jurisdiction." *Roche*, 319 U.S. at 26. Mandamus, however, is a drastic remedy reserved for extraordinary cases. *Cheney v. United States Dist. Court*, 542 U.S. 367, 380 (2004). A petitioner must demonstrate a clear legal right to relief and the absence of an alternative remedy. *Id.* at 380–81. Further, the issuing court must "be satisfied that the writ is appropriate under the circumstances." *Id.* at 381. The reason for these demanding standards is straightforward: when issued unnecessarily, writs of mandamus "defeat[] the very policies" they are supposed to serve. *See Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35 (1980) (*per curiam*) (quotations omitted). That is, overuse of the writ would make appellate litigation inefficient and thus hinder—rather than aid—the issuing court's "appellate jurisdiction." *See Roche*, 319 U.S. at 26.

Along similar lines, it is never "necessary or appropriate" to issue a writ that circumvents otherwise-binding procedural rules. This Court's decision in *Carlisle* illustrates that point. There, a defendant moved for a judgment of acquittal under Federal Rule of Criminal Procedure 29. But he filed the motion one day late. 517 U.S. at 417–18. This Court considered whether the district court could, through a writ of *coram nobis*, grant the same relief under the All Writs Act. *Id.* at 428–29. It rejected that possibility. Because detailed rules of criminal procedure address how to correct errors in judgments, the Court found it "difficult to conceive of a situation in a federal criminal case today where" a writ of *coram nobis* "would be necessary or appropriate." *Carlisle*,

517 U.S. at 429 (quoting *United States v. Smith*, 331 U.S. 469, 475 n.4 (1947)).

In thinking about that last point, it is worth recalling that the All Writs Act contains two textual limits. Orders satisfy the Act only if they are both "necessary or appropriate in aid of … jurisdiction[]" and "agreeable to the usages and principles of law." §1651(a). Those independent limits will sometimes overlap. For instance, a writ that evades procedural rules is neither "necessary or appropriate" nor "agreeable to the usages and principles of law." *See Carlisle*, 517 U.S. at 429; *Pa. Bureau of Corr.*, 474 U.S. at 43. The remainder of this section focuses on the "necessary or appropriate" language, but both textual limits lead to the same result.

2. When can a petitioner's transportation for evidence gathering be "necessary or appropriate" to a federal court's exercise of habeas jurisdiction? The short answer is: almost never. The longer answer derives from the interplay between AEDPA and principles of habeas discovery.

Begin with AEDPA. When a habeas petitioner seeks relief on a claim that state courts already "adjudicated on the merits," AEDPA bars federal courts from awarding 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 and large, petitioners may not prove their entitlement to relief using evidence from outside the state-court record. Section 2254(d)(2) expressly limits review to "the evidence presented in the State court proceeding." And §2254(d)(1), which is phrased in "backward-looking language," also limits federal courts "to the record that was before the state court." *Cullen v. Pinholster*, 563 U.S. 170, 181–82 (2011). As a result, newly developed evidence will rarely serve any purpose.

Even before AEDPA limited the relevance of new evidence in habeas cases, habeas petitioners were rarely entitled to develop new evidence. The key decision on this issue is *Harris v. Nelson*, 394 U.S. 286 (1969). At the time of *Harris*, the Court had not yet adopted procedural rules governing habeas cases. *See id.* at 300 n.7. *Harris* presented the question whether, and in what circumstances, the All Writs Act empowered federal habeas courts to issue orders allowing state prisoners to conduct discovery through interrogatories. *Id.* at 288. The Court observed that the All Writs Act allowed courts to issue only "necessary or appropriate" orders. *Id.* at 300. That standard foreclosed courts from using the All Writs Act to facilitate the sort of evidentiary development available under "the broad discovery provisions" applicable to "ordinary civil litigation." *Id.* at 295; *see also id.* at 300 n.7. According to *Harris*, an order facilitating discovery in habeas cases could qualify as "necessary or appropriate" *only if* "specific allegations before the court show[ed] reason to believe that the petitioner may, if the facts are fully developed, be able to

demonstrate that he is confined illegally and is therefore entitled to relief." *Id.* at 300.

After *Harris*, this Court promulgated the Rules Governing Section 2254 Cases. *Bracy v. Gramley*, 520 U.S. 899, 904 (1997). Rule 6(a) says that federal courts may authorize the discovery of new evidence in habeas cases only if there is "good cause" to do so. And the "good cause" standard is identical to the standard this Court adopted in *Harris*: to justify discovery, petitioners must make "specific allegations" showing that they may be able, "if the facts are fully developed," to prove their "entitle[ment] to relief." *Bracy*, 520 U.S. at 908–09 (quotations omitted).

Combining the standards of AEDPA and habeas discovery, Judge Batchelder aptly summarized what a petitioner must do to show that a transportation order is "necessary or appropriate" for purposes of the All Writs Act. *First*, the petitioner must explain how the anticipated evidence "could overcome" AEDPA's general prohibition on the consideration of evidence not included in the state-court record. Pet. App.22a (Batchelder, J., dissenting). That squares with the standards governing habeas discovery, as there "cannot be good cause to collect evidence which cannot be presented." *Blevins v. Warden,* No. 1:05-cv-038, 2011 WL 6141062, at *4 (S.D. Ohio Dec. 9, 2011); *accord Jurado v. Davis*, 12 F.4th 1084, 1101–02 (9th Cir. 2021); *Lafferty v. Benzon*, 933 F.3d 1237, 1245 n.2 (10th Cir. 2019). *Second*, and also owing to the standards governing habeas discovery, petitioners must show how new evidence will bear on "specific claims" that "could reasonably entitle [them] to habeas relief." Pet.App.22a (Batchelder, J., dissenting). Any other standard would enable habeas petitioners to circumvent the rules governing habeas dis-

covery. And an order circumventing rules that otherwise govern the exercise of a court's jurisdiction are not "necessary or appropriate in aid of" that jurisdiction. *See Carlisle*, 517 U.S. at 429.

B. Twyford was not entitled to relief and the Sixth Circuit erred in holding otherwise.

1. Twyford failed to demonstrate that the transportation order was "necessary or appropriate in aid of" the District Court's habeas jurisdiction.

As an initial matter, Twyford provided little to no insight regarding how the evidence he desired would, or even might, bear on his habeas claims. *See* Pet. App.262a. Indeed, he made no attempt to demonstrate "good cause" for the gathering of new evidence under habeas-discovery standards. Pet.App.14a n.4 (majority op.); Pet.App.19a (Batchelder, J., dissenting). Moreover, his motions seeking transportation shed no light on how he might persuade a court to consider newly developed evidence notwithstanding *Pinholster*. *See* Pet.App.266a–70a. He presumably wants testing to support a claim that his trial counsel and trial expert were ineffective. He faults them for failing to focus on the psychological effects of the self-inflicted gunshot wound he sustained as a teenager. Pet.App.234a, 238a. The problem for Twyford is that state courts adjudicated and rejected his ineffective-assistance claims on the merits during state-postconviction proceedings. Pet.App.238a–40a. Any habeas review of those claims will therefore be governed by §2254(d), and review under that statute will presumptively be limited to "the record that was before the state court." *Pinholster*, 563 U.S. at 181.

Twyford's trial-court motion also suggested, in passing, that the desired evidence might (somehow) "plausibly" bear on the question whether to excuse a procedural default. Pet.App.262a. By way of background, federal courts may not normally review procedurally defaulted claims—in other words, claims that a habeas petitioner failed to adequately present to state courts. *Davila v. Davis*, 137 S. Ct. 2058, 2064 (2017). But a habeas petitioner "may overcome the prohibition on reviewing procedurally defaulted claims if he can show cause to excuse his failure to comply with the state procedural rule and actual prejudice resulting from the alleged constitutional violation." *Id.* at 2064–65 (quotations omitted). Twyford's motion thus speculates that the evidence could help him show cause and prejudice.

The abstract possibility that newly developed evidence could affect a procedural-default analysis hardly shows that a transportation order is "necessary or appropriate." Twyford did not identify what procedurally defaulted claim he hopes to resurrect. Nor did he explain how the testing he wants would matter. Again, the testing he wants most directly relates not to procedurally defaulted claims, but to claims that Ohio courts adjudicated on the merits. *See* Pet.App.238a–40a. Twyford himself said he wanted a brain scan because he thought it would bear on "the factual bases for his *exhausted* habeas claims." Pet.App.255a–56a (emphasis added). The District Court, moreover, dismissed many procedurally defaulted claims in 2017. *See* Pet.App.43a–147a. Twyford's briefing on the transportation order never suggested that he could somehow salvage claims the District Court dismissed years ago.

Regardless, even if Twyford *could have* shown that the transportation order was "necessary or appropriate," he never did. Instead, Twyford sought "to proceed in reverse order by collecting evidence before justifying it." Pet.App.22a (Batchelder, J., dissenting). Even the District Court, despite granting the transportation order, concluded that Twyford failed to show how the court could consider the evidence in light of *Pinholster*. Pet.App.32a. The Sixth Circuit agreed but affirmed anyway. *See* Pet.App.16a–17a (majority op.). Writs that enable habeas petitioners to fish for evidence—on the mere hope that such evidence might undermine their convictions in ways they cannot explain—are not "necessary or appropriate" to facilitating the resolution of habeas cases.

Indeed, the District Court's transportation order is especially inappropriate *because* this is a habeas case. "Federal habeas review of state convictions … intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority." *Harrington v. Richter*, 562 U.S. 86, 103 (2011) (quotations omitted). Orders that require state officials to assist habeas petitioners in undermining their state convictions "aggravate the harm to federalism that federal habeas review necessarily causes." *Davila*, 137 S. Ct. at 2070. Requiring a prisoner's "custodian to act as his chauffeur," *Ivey*, 47 F.3d at 186, is not a responsible use of the "essentially equitable" power the All Writs Act confers. *Goldsmith*, 526 U.S. at 537; *see also Hohn v. United States*, 524 U.S. 236, 263–64 (1998) (Scalia, J., dissenting).

The intrusion on state affairs is especially stark because Twyford is a convicted murderer sentenced to die. Once sentenced to die, inmates have little to lose by attempting escape. It stands to reason that

orders requiring the State to bring desperate and dangerous people to public settings—The Ohio State University Medical Center, for example—present serious risks to public safety. *See* Br. of Amici Curiae Utah et al. in Support of Cert. 6–18. An order commanding the State to risk public safety for the development of immaterial or unusable evidence is not a "necessary or appropriate" means of aiding habeas review.

2. The Sixth Circuit nonetheless concluded that the transportation order was "necessary or appropriate" to aid the District Court's habeas jurisdiction. Pet.App.19a. It reached this conclusion by rejecting any comparison to habeas discovery and by crafting a new "plausibly relates" standard. The Sixth Circuit erred at both steps.

Discovery. The Sixth Circuit first concluded that habeas discovery rules had no bearing on the appropriateness of the transportation order. Pet.App.14a–15a, 17a–19a. Quoting Black's Law Dictionary, the Sixth Circuit said that "discovery" includes only the "[c]ompulsory disclosure, at a party's request, of information that relates to the litigation." Pet.App.15a (quoting *Discovery*, Black's Law Dictionary (11th ed. 2019)). It then noted that, because Twyford was seeking information from "his own brain," he was not seeking "discovery" at all. *Id.* On that basis, it deemed Rule 6's standards governing habeas discovery irrelevant. *Id.*

This analysis fails for three reasons. *First*, regardless of whether Twyford's order constituted a request for "discovery," the rules governing habeas discovery bear on the question whether the transportation order is "necessary or appropriate." To decide

what uses of the All Writs Act are proper, courts consult "familiar procedures" and draw "analog[ies] to existing rules." *Harris*, 394 U.S. at 299–300. Here, even if the evidentiary development Twyford wants does not fit the precise definition of "discovery," it is nonetheless analogous to discovery. Twyford said so himself in his briefing on the motion for a transportation order. Pet.App.267a, 270a. Thus, the rules regarding discovery provide, if nothing else, a useful analogy for courts to consider in determining whether an order aimed at facilitating evidentiary development is "necessary or appropriate."

Second, the Sixth Circuit relied on a too-narrow definition of "discovery." Twyford seeks court-compelled medical testing to help his new expert develop an opinion. *See* Pet.App.272a–73a. Any seasoned trial lawyer would be surprised to learn that expert-related testing, *see* Fed. R. Civ. P. 26(a)(2)(B)(ii), or court-compelled medical testing, *see* Fed. R. Civ. P. 35(a)(1), falls outside the scope of "discovery." *See also DA's Office v. Osborne*, 557 U.S. 52, 78–79 (2009) (Alito, J., concurring); *Leavitt v. Arave*, 682 F.3d 1138, 1141 (9th Cir. 2012); *Cornwell v. Bradshaw*, 559 F.3d 398, 410 (6th Cir. 2009); *Thomas v. Taylor*, 170 F.3d 466, 474–75 (4th Cir. 1999). And indeed, the very dictionary the Sixth Circuit invoked confirms that the word "discovery" can refer broadly to "[t]he act or process of finding or learning something that was previously unknown." Black's Law Dictionary. It can also refer (even more broadly) to the entire "pretrial phase of a lawsuit." *Id.* Because Rule 6 is the *only* rule governing the "extent of discovery" in habeas cases, it is best understood as using "discovery" in its broader senses, covering all evidentiary development.

Finally, the order here qualifies as a discovery order even under the Sixth Circuit's narrow definition of "discovery." Twyford, a convicted murderer, is in the State's possession. And the District Court's order required the Warden to produce him at The Ohio State University Medical Center, where Twyford hopes to obtain "information that relates to the litigation." Pet.App.15a (quoting *Discovery*, Black's Law Dictionary). 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."

"Plausibly relates" standard. Even assuming that the rules governing habeas discovery are completely irrelevant, the Sixth Circuit still erred. It held that courts may issue transportation orders under the All Writs Act whenever those orders would help a habeas petitioner obtain evidence that "plausibly relates" to his claims. Pet.App.16a. And it held that, in applying this standard, courts "need not consider the admissibility of any resulting evidence." Pet.App.17a.

The Sixth Circuit never explained how its standard would ensure that all transportation orders are "necessary or appropriate in aid of" the issuing court's jurisdiction. Nor could it have. By announcing this incredibly relaxed standard, the Sixth Circuit created a tool for frustrating, rather than aiding, the proper exercise of habeas jurisdiction. Congress enacted AEDPA, in large part, to eliminate delays during federal habeas review. *Ryan v. Gonzales*, 568 U.S. 57, 76 (2013). Further, by generally restricting habeas review to the state-court record, Congress "strongly discourage[d]" state prisoners from treating habeas proceedings as an "alternative forum for try-

ing facts and issues which a prisoner made insufficient effort to pursue in state proceedings." *Pinholster*, 563 U.S. at 186 (quotations omitted). Congress thus sought to better ensure that the "state trial on the merits" would be the "'main event,' so to speak, rather than a 'tryout on the road' for what will later be the determinative federal habeas hearing." *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977). The Sixth Circuit's easy-to-satisfy standard would, by "either design or effect," undermine AEDPA's efforts to restrain the role of federal habeas courts. Pet.App. 22a (Batchelder, J., dissenting).

*

Even if transportation orders aimed at facilitating evidentiary development in habeas cases are sometimes "agreeable to the usages and principles of law," they are not "necessary or appropriate" unless the petitioner can satisfy two conditions. First, the petitioner must show that the court will be allowed to consider the evidence he anticipates developing. Pet. App.22a (Batchelder, J., dissenting). Second, the petitioner must "identif[y] specific claims for relief that the evidence being sought would support or further" and explain how, if the "evidence is as the petitioner" anticipates, "it could entitle the petitioner to habeas relief." Pet.App.21a (Batchelder, J., dissenting).

Twyford made neither showing. He never explained how the results of the brain scan might survive a "confrontation with *Pinholster*'s inadmissibility standard" or entitle him to relief. *Id.* The District Court erred by issuing the transportation order. The Sixth Circuit erred by affirming.

CONCLUSION

The Court should reverse the Sixth Circuit's judgment.

Respectfully submitted,

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