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 U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY 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?

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REPLY

The Sixth Circuit affirmed an order, issued under the All Writs Act, requiring the Warden to transport an imprisoned habeas petitioner to a hospital for the development of unusable, immaterial evidence. It erred.

I. The Court has jurisdiction.

Twyford begins his response by resurrecting a jurisdictional argument he raised below but dropped at the certiorari stage. He says the collateral-order doctrine did not permit the Warden's appeal. Since the Warden's certiorari petition highlighted the doctrine's relevance to this case, Pet.33–34, the Court presumably "considered and rejected" any jurisdictional concerns before granting review. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 670 n.2 (2010) (quotations omitted). Rightly so: the collateral-order doctrine applies. If not, the Court must consider the Warden's never-resolved request for mandamus relief or remand for the Sixth Circuit to do so.

A. The collateral-order doctrine applies.

1. Appellate courts may hear "appeals from all final decisions of the district courts." 28 U.S.C. §1291. These "final decisions" include collateral orders that: (1) "are conclusive"; (2) "resolve important questions separate from the merits"; and (3) "are effectively unreviewable on appeal from" final judgment. *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009) (quotations omitted).

Transportation orders qualify, at least when issued under the All Writs Act. First, these orders conclusively require transportation.

Second, the question whether a court had power to order a prisoner's transportation implicates the always-important matter of judicial interference with the affairs of a separate sovereign or branch. *See, e.g.*, *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144–45 (1993); *Ashcroft v. Iqbal*, 556 U.S. 662, 671–72 (2009).

The question is separate from the merits of the underlying habeas petition—and in this case, it calls on the Court to address an "unresolved legal issue" about the governing standard in transportation-order cases. *Ivey v. Harney*, 47 F.3d 181, 183 (7th Cir. 1995); *accord Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982). If (as the Warden argues) transportation orders issued under the All Writs Act are never agreeable to the usages and principles of law, *see below* 8–9, then appeals seeking "protection" from such orders "will have no bearing on the merits," *Puerto Rico*, 506 U.S. at 145. If instead courts have authority to issue these orders in rare cases, *see below* 20–21, then appeals of those orders are still separate from the merits. Whether an all-writs order is "necessary" or "appropriate" will generally turn on whether "there are other, adequate remedies at law," *Clinton v. Goldsmith*, 526 U.S. 529, 537 (1999), or whether the order frustrates otherwise-applicable rules, *Carlisle v. United States*, 517 U.S. 416, 429 (1996). Neither issue implicates the merits. And the question whether the "requested evidence … could" further one of the petitioner's claims, Pet.App.22a (Batchelder, J., dissenting)—which will arise only in the subset of transportation-order cases about the necessity or appropriateness of evidentiary development—is "conceptually distinct from the merits." *Mitchell v. Forsyth*, 472 U.S. 511, 527 (1985). Certainly it is more distinct than the question

whether a plaintiff's allegations could "support a claim of violation of clearly established law." *Id.* at 528 n.9. That question is always appealable in qualified-immunity cases.

Third, transportation orders are effectively unreviewable after final judgment. Just as a criminal defendant "forced" to take antipsychotic drugs at trial cannot meaningfully appeal after final judgment, *Sell v. United States*, 539 U.S. 166, 176–77 (2003), denying "immediate review" of a transportation order "destroy[s]" the "legal and practical value of" appealing, *Jones v. Lilly*, 37 F.3d 964, 966 (3rd Cir. 1994). A post-judgment appeal of a transportation order would usually, perhaps always, be moot.

In sum, transportation orders cannot "be left until later." *Will v. Hallock*, 546 U.S. 345, 353 (2006). By their very nature, transportation orders irrevocably undermine "value[s] of a high order": a "State's dignitary interests" and the public's safety. *Id.* at 352; *see also* Br. of *Amici Curiae* Utah *et al.*, 7–19. This Court has blessed collateral-order appeals presenting much lower stakes. *See, e.g.*, *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 11–12 (1983) (stay of case seeking to compel arbitration); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170 (1974) (order regarding funding of class-member notices); *Roberts v. United States Dist. Ct.*, 339 U.S. 844, 845 (1950) (*per curiam*) (*in forma pauperis* denial). Indeed, given the irreparable damage that transportation orders threaten to sovereign interests and public safety, the need for an immediate appeal is even greater here than in the qualified- or sovereign-immunity contexts. *See Ashcroft*, 556 U.S. at 671–72; *Puerto Rico*, 506 U.S. at 143.

2. This Court once heard a collateral-order appeal challenging a transportation order. *See Garland v. Sullivan*, 737 F.2d 1283, 1285 (3rd Cir. 1984), *aff'd sub nom. Pennsylvania Bureau of Correction v. United States Marshals Service*, 474 U.S. 34 (1985). But this Court's decision never addressed jurisdiction and thus contains no jurisdictional holding.

Twyford argues that the lack of any such holding is dispositive. He suggests that *Mohawk*, 558 U.S. 100, rejected the possibility that the collateral-order doctrine can apply to any "new class of orders." Twyford Br.21. But *Mohawk* carefully analyzed, under the longstanding three-factor test, the doctrine's application to a class of orders the Court had never before addressed. 558 U.S. at 106–13. If the doctrine were *per se* inapplicable to new classes of orders, *Mohawk*'s thorough analysis would have been unnecessary. And if the no-new-categories rule were right, *Mohawk*'s fourth footnote would be inexplicable: it reserved the question whether "rulings involving certain governmental privileges" are immediately appealable. *Id.* at 113 n.4.

Justice Thomas's *Mohawk* concurrence argued that the collateral-order doctrine should not be extended to any "order [that] is not on all fours with orders … previously … held to be appealable." *Id.* at 115 (Thomas, J., concurring in part and concurring in the judgment). But this appeal comports with that approach; the doctrine's applicability here follows *a fortiori* from this Court's precedents. Regardless, the concurrence proposed modifying the collateral-order doctrine—it did not describe the doctrine as it exists today. Twyford's certiorari- and merits-stage briefing never asked the Court to overrule or modify the doctrine. *See Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 556

U.S. 635, 638 n.* (2009). And the Court should not "functionally overrule" the doctrine by adopting a "cramped," hitherto unknown version of it. *Williams v. Homeland Ins. Co.*, 18 F.4th 806, 821 (5th Cir. 2021) (Ho, J., concurring) (quotations omitted). "Tellingly, the Courts of Appeals are unanimous in holding that [transportation] orders … are amenable to immediate review," *Osborn v. Haley*, 549 U.S. 225, 239 (2007), under this Court's precedents. Pet.App.7a.

Had Twyford preserved a challenge to the collateral-order doctrine, it would fail. First, *stare decisis* "carries enhanced force" with respect to statutory interpretations, *Kimble v. Marvel Entm't, LLC*, 576 U.S. 446, 456 (2015), and the collateral-order doctrine reflects this Court's interpretation of §1291. Further, before throwing out the doctrine, the Court would need to consider which of the doctrine's applications are justified by a proper understanding of §1292(a)(1), which makes orders concerning "injunctions" immediately appealable. The doctrine has likely spared courts from having to "wrestle[] with the general problem of defining orders that involve injunctions." 16 Wright & Miller, *Federal Practice and Procedure* §3922 (3d ed., Westlaw 2021).

Regardless, the collateral-order doctrine accurately reflects §1291's meaning. Jurists writing immediately after the section's enactment observed that it permits appeals of "final *decisions*," not "final *judgments*." *Stack v. Boyle*, 342 U.S. 1, 12 (1951) (op. of Jackson, J.) (emphases added). The doctrine reflects this difference. Moreover, after this Court adopted the doctrine, Congress repeatedly amended §1291 without altering the relevant language. One such amendment appears in a bill reenacting a modified version of the entire statute. Act of Oct. 31, 1951, ch.

655, §48, 65 Stat. 710, 726. Because Congress "presumptively was aware of" this Court's interpretation of §1291, the amended statute should be understood as "retain[ing] its established meaning." *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1762 (2018); *see also* Scalia & Garner, *Reading Law* §54 (2012). Congress's adoption of 28 U.S.C. §2072(c), which empowers this Court to adopt rules defining finality, does not alter the analysis. That statute counsels against adopting new exceptions to the general rule allowing appeals only from final judgments. But it did not impliedly repeal the collateral-order doctrine. *See* Fed. R. App. P. 3 advisory committee's note to 2021 amendment.

Twyford's remaining arguments fare no better. For example, he stresses that appeals of transportation orders present factbound questions. Twyford Br.24. In fact, such appeals either always or generally "present 'purely legal' issues capable of resolution 'with reference only to the undisputed facts.'" *Ortiz v. Jordan*, 562 U.S. 180, 190 (2011). The Warden's arguments—which question the power to issue these orders rather than the discretionary choice to do so—prove the point. Regardless, the Court has interpreted the doctrine to allow collateral appeals of orders presenting judgment- and fact-laden questions. *See Sell*, 539 U.S. at 179–80; *Puerto Rico*, 506 U.S. at 147. Although the Court forbids factbound collateral appeals of qualified-immunity orders, *see Ortiz*, 562 U.S. at 190, it has never held that an entire class of orders falls outside the collateral-order doctrine's scope simply because some subset raises factual questions.

Finally, Twyford mistakenly suggests that allowing immediate appeal here would "open the door" to

immediate appeals of mill-run discovery rulings. Twyford Br.23. This overlooks the unique nature of transportation orders. Whereas "postjudgment appeals generally suffice to protect the rights of litigants" in discovery disputes, *Mohawk*, 558 U.S. at 109, the opposite is true of transportation orders, Pet.App.7a; *Jones*, 37 F.3d at 966; *cf. Mohawk*, 558 U.S. at 113 n.4. And whereas parties in traditional discovery disputes might violate the order and appeal from any contempt finding, *Mohawk*, 558 U.S. at 607, requiring state officials to choose between being held in contempt and challenging judicial overreach would inflict a serious sovereign injury, *cf. United States v. Nixon*, 418 U.S. 683, 691–92 (1974). In sum, the Warden's appeal does not threaten the doctrine's "narrow and selective" application. *Mohawk*, 558 U.S. at 113 (quotations omitted).

B. Alternatively, mandamus relief is appropriate.

Alternatively, the Warden is entitled to a writ of mandamus. 28 U.S.C. §1651(a). The All Writs Act empowers courts to issue mandamus relief. *Cheney v. United States Dist. Ct.*, 542 U.S. 367, 378 (2004). The writ should issue if a party shows: (1) it has "no other adequate means to attain the relief" it desires; (2) its right to relief is "clear and indisputable"; and (3) relief is "appropriate under the circumstances." *Id.* at 380. The Warden asked the Sixth Circuit to correct the District Court "either" in an appeal under "the collateral-order doctrine or" through "a writ of mandamus." Pet.App.6a. The Sixth Circuit did not reach the mandamus request in light of its collateral-order holding. *Id.* But if the collateral-order doctrine is inapplicable, the Warden is entitled to mandamus relief: the absence of another avenue for averting the harm caused

by a transportation order would satisfy the first mandamus factor; the egregiousness of the District Court's error satisfies the second; and the injuries the order threatens satisfy the third.

If the Court deems the collateral-order doctrine inapplicable, it could: hold that the Sixth Circuit erred by failing to address the merits through a mandamus framework; announce the standard that governs whether courts can issue transportation orders under the All Writs Act; and then remand with instructions to either award mandamus relief or conduct the proper analysis. *See Schlagenhauf v. Holder*, 379 U.S. 104, 111–12 (1964). Or it could treat the Warden's certiorari petition as a request for mandamus relief in this Court. *Cf. Calderon v. Thompson*, 521 U.S. 1136 (1997). But in no event should the Court command dismissal before anyone can address the Warden's mandamus request. *Contra* Twyford Br.50.

II. Transportation orders facilitating out-of-court evidentiary development are not agreeable to the usages and principles of law.

The All Writs Act "authorizes courts to issue writs 'agreeable to the usages and principles of law'—traditional writs that have not been altered or abolished by some other statute." *Lowery v. McCaughtry*, 954 F.2d 422, 423 (7th Cir. 1992) (quoting §1651(a)). The writ of habeas corpus was the only "traditional writ" available for ordering custodians to transport prisoners. But it was used to require that custodians "produce the body of a person before a court." *Price v. Johnson*, 334 U.S. 266, 283 (1948). The writ was not used to facilitate out-of-court evidentiary development. Today, a federal statute forbids awarding writs of habeas

corpus except in five enumerated circumstances, none of which involves out-of-court evidentiary development. 28 U.S.C. §2241(c).

It follows that the transportation order Twyford obtained is not agreeable to the usages and principles of law. Of course, the "fact that a writ of habeas corpus may not issue … does not compel a conclusion that no other writ is available." *Ivey*, 47 F.3d at 185. "Yet what other writ would be appropriate here?" *Id.* Nobody can "identify one." *Id.* And the "All Writs Act contains limitations that prevent a judge from using it to undermine other laws," including §2241(c), through *ad hoc* writs. *Id.* This is not to suggest that a "federal court can *never* order a state prisoner transported for a medical test." U.S. Br.10. As explored below, a statute or rule might permit the issuance of transportation orders in some contexts—even for reasons not laid out in §2241(c). But courts cannot use "*the All Writs Act* to order the transportation of state prisoners for reasons not enumerated in §2241(c)." Pet.i (emphasis added).

Twyford and the United States see things differently. Twyford reads the Act broadly. He claims the Act grants courts discretion to issue *ad hoc* writs unless another statute squarely forbids doing so. The United States takes a narrower view. It agrees the Sixth Circuit erred. U.S. Br.25–30. But it argues that the Act empowers courts to issue transportation orders facilitating out-of-court evidentiary development in extreme circumstances. Its position thus "leaves a door ajar and holds out the possibility that someone, someday, might walk through it." *Edwards v. Vannoy*, 141 S. Ct. 1547, 1566 (2021) (Gorsuch, J., concurring).

The Court should reject both positions and bolt the door before someone blows it open. *Cf., e.g.*, *Trevino v. Thaler*, 569 U.S. 413, 434 (2013) (Scalia, J., dissenting).

A. *Rees v. Peyton* is irrelevant.

The United States and Twyford suggest that *Rees v. Peyton*, 384 U.S. 312 (1966) (*per curiam*), interpreted the All Writs Act as empowering courts to order prisoner transports for medical exams. Twyford Br.29–31; U.S. Br.12–13, 22–23. In fact, *Rees* never discussed or cited the Act.

The petitioner in *Rees* tried to "withdraw" his certiorari "petition and forgo any further legal proceedings." 384 U.S. at 313. This Court, in "aid of the proper exercise of" its "certiorari jurisdiction," ordered the district court to assess Rees's "mental competence." *Id*. at 313–14. Citing 18 U.S.C. §4244 and §4245, the Court suggested the district court might "subject Rees to psychiatric and other appropriate medical examinations and, so far as necessary, to temporary federal hospitalization." *Id*. at 314.

The United States describes *Rees* as "[e]choing the All Writs Act." U.S. Br.13. It means the opinion uses language ("in aid of … jurisdiction") similar to the Act's. Twyford takes a bolder position, describing *Rees* as "conclud[ing] that the All Writs Act provides authority in habeas cases to order the transportation of prisoners." Twyford Br.29. Both positions are wrong. Because *Rees* never mentioned the Act, the most one can hear in *Rees*'s echo or glean from its pages is an implicit assumption that the Act allowed issuance of a transportation order. Unexamined assumptions do not bind this Court. *Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993). In any event, *Rees* appears not to

have relied on the Act; it relied (without analysis) on a rough analogy to statutes (18 U.S.C. §4244 and §4245) that permitted transportation orders in limited circumstances.

Rees does not inform this case's resolution.

B. Habeas law provides relevant usages and principles.

1. One pillar of the United States' brief is the claim that habeas law does not provide relevant "usages and principles." It observes that, at common law, courts used writs of habeas corpus when ordering a "custodian" to bring a "prisoner … to a court for specified purposes." U.S. Br.22; *accord* Twyford Br.30. The order here requires the Warden to bring Twyford to a hospital, not a court. On this basis, the United States argues the order was *not* in the nature of a habeas writ and thus did not need to be "agreeable to" habeas law's "usages and principles."

This argument—that habeas law provides relevant usages and principles only for orders "direct[ing] a custodian to produce a prisoner before a court," U.S. Br.22—contradicts *Pennsylvania Bureau*, 474 U.S. 34. That case asked whether a court exceeded its all-writs authority by issuing a transportation order. The order lacked an essential feature of habeas writs: it was issued to a *non*-custodian. *Id.* at 42–43. Had the Court embraced the approach the United States urges here, it would have deemed habeas law irrelevant. Instead, it held that, precisely because the order was inconsistent with habeas law, the lower court lacked authority to issue the order under the All Writs Act. *Id.* *Pennsylvania Bureau* thus proves that an order may be in the nature of a writ of habeas corpus—and must

be agreeable to habeas law—even if it lacks a traditional feature of the writ.

The United States' approach would encourage courts to violate statutes as flagrantly as possible. It treats statutory procedures as less analogous—and so less likely to provide relevant "usages and principles of law"—the more a court departs from them. To illustrate, imagine an order requiring a prisoner's custodian to bring him *into court* for a psychiatric examination. That hypothetical order, because it requires a custodian to bring a prisoner into court, is plainly "in the nature of a writ of *habeas corpus*." *Price*, 334 U.S. at 279. Habeas law would therefore provide relevant "usages and principles." Yet, according to the United States, those usages and principles would be irrelevant if the court more flagrantly violated habeas law by ordering the custodian to bring the prisoner to a hospital instead of a courtroom. That cannot be right.

One further point on *Pennsylvania Bureau*. Twyford interprets a footnote in that case to mean that, whenever there is "'no alternative' mechanism" in habeas statutes for securing a prisoner's transportation, courts can order transportation under the All Writs Act. Twyford Br.34 (quoting *Pennsylvania Bureau*, 474 U.S. at 42 n.7). The decision is not so broad. It observed that a transportation order not expressly permitted by statute might be "necessary or appropriate" if there is "no alternative way to bring the prisoner before the Court." *Pennsylvania Bureau*, 474 U.S. at 42 n.7. It never suggested, however, that courts can use the All Writs Act to issue transportation orders, like the one here, *that contradict* habeas statutes.

2. The United States and Twyford mistakenly rely on two cases decided before *Pennsylvania Bureau*: *United States v. Hayman*, 342 U.S. 205 (1952), and *Price*, 334 U.S. 266. These cases, they say, show that "the All Writs Act authorizes the issuance of orders requiring prisoners to be transported to court for purposes not covered by 28 U.S.C. 2241(c)(5) or its predecessors." U.S. Br.23; *accord* Twyford Br.35.

Both cases analogized to habeas law when considering the legality of transportation orders. *Hayman*, 342 U.S. at 221 & n.35; *Price*, 334 U.S. at 282–84. They therefore treated habeas law as supplying usages and principles relevant to the All Writs Act analysis in the transportation-order context.

Further, neither case gave courts permission to exceed the limits of 28 U.S.C. §2241(c) or its predecessors. *Hayman* upheld the issuance of an order securing a prisoner's presence at a hearing "on controverted issues of fact relating to [his] own knowledge." 342 U.S. at 220. So, despite never addressing §2241(c), it approved of an order requiring a custodian to "bring" an inmate "into court to testify or for trial," which is consistent with what §2241(c)(5) allows. *Price*, for its part, held that the All Writs Act allowed courts to "order the production of a prisoner … to argue his own appeal." 334 U.S. at 283. In light of §2241(c), no such order would be agreeable to the usages and principles of habeas law today. It likely was not agreeable with habeas law then, either. While the order in *Price* was analogous to a writ of habeas corpus *ad testificandum*, *id*. at 282–84; *Ivey*, 47 F.3d at 183–84, it was inconsistent with §2241(c)'s statutory predecessor, *see* 28 U.S.C. §453 (1946). But *Price* overlooked that now-superseded statute, which it nowhere mentioned. Accordingly, *Price* did not address the question whether

"the All Writs Act authorizes the issuance of orders requiring prisoners to be transported to court for purposes not covered by 28 U.S.C. 2241(c)(5) or its predecessors." U.S. Br.23.

C. Twyford cannot prevail by analogizing to discovery rules.

After wrongly claiming that habeas law *does not* provide relevant "usages and principles," the United States wrongly claims that modern discovery practices *do*. The United States identifies no historical analogue for the District Court's transportation order. But it interprets the All Writs Act as leaving courts with broad "residual" power to innovate whenever they issue orders without historical analogues. U.S. Br.14 (quotations omitted). The United States surmises that, in some extreme cases, courts may improvise with transportation orders roughly analogous to modern-day discovery orders.

The United States' reliance on modern discovery provisions fails. Thus, Twyford's more-extreme position—that courts may issue all-writs orders without identifying any analogue anywhere in the law, *see* Twyford Br.34–35, 38–40—necessarily fails too.

1. The All Writs Act does not permit ahistorical improvisation. When the Act speaks of "writs 'agreeable to the usages and principles of law,'" it means "traditional writs that have not been altered or abolished by some other statute." *Lowery*, 954 F.2d at 423. Put differently, the "auxiliary writs" available under the All Writs Act are those "historic aids" that courts traditionally used to "achieve the ends of justice." *Adams v. U.S. ex rel. McCann*, 317 U.S. 269, 273 (1942). Because the inquiry is grounded in tradition, courts must "look first to the common law." *Hayman*, 342

U.S. at 221 n.35. Of course, the Act "speaks of usages of law generally, not merely of common law." *Ex parte Crane*, 30 U.S. 190, 194 (1831). Thus, courts are not "necessarily confined to the precise forms of … writ[s] in vogue at the common law or in the English judicial system." *Price*, 334 U.S. at 282. Courts must consider the ways in which traditional writs have been "altered" by statute. *Lowery*, 954 F.2d at 423. And courts may consider how writs have evolved in state and federal practice. *Price*, 334 U.S. at 283–84; *Bank of United States v. Halstead*, 23 U.S. 51, 56 (1825). But courts must reason by analogy; they cannot "fashion any writ they deem desirable." *Jones*, 37 F.3d at 968.

Here, there is no close historical analogue; "no order to inspect the body of a party in a personal action appears to have been made, or even moved for, in any of the English courts of common law, at any period of their history." *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 253 (1891). That is fatal, because the All Writs Act does not empower courts to issue orders lacking any historical analogue. For example, while *Harris v. Nelson* interpreted the Act as allowing courts to issue orders facilitating the use of interrogatories, 394 U.S. 286, 288, 300 (1969), interrogatories are a traditional form of discovery, Alan K. Goldstein, *A Short History of Discovery*, 10 Anglo-Am. L. Rev. 257, 260 (1981). So are subpoenas duces tecum, which this Court interpreted the Act to permit. *Am. Lithographic Co. v. Werckmeister*, 221 U.S. 603, 609 (1911).

Even looking beyond cases dealing with evidentiary development, no case holds that courts can issue relief without some historical analogue. That includes *United States v. New York Telephone Company*, 434 U.S. 159 (1977). *Contra* U.S. Br.16; Twyford Br.39.

That case upheld an all-writs order requiring a telephone company to assist in a criminal investigation. The opinion embraces an "overly expansive interpretation" of the All Writs Act. *Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28, 35 (2002) (Stevens, J., concurring). But even *New York Telephone* hinted that the order in question was "closely akin" to a traditional "search warrant[]." 434 U.S. at 168 n.14. And it never held that courts can award relief under the Act without regard to traditional analogues—it simply ignored the issue, as the dissent observed. *Id.* at 187, 190 (Stevens, J., dissenting). Thus, courts still interpret the Act as demanding historical analogues. *See* Warden Br.24–25 (collecting cases).

2. Even if modern discovery practices provide relevant usages and principles, transportation orders facilitating out-of-court evidentiary development are not agreeable to those principles.

Initially, the discovery rules on which the United States relies do not permit anything like a transportation order. It points to rules regarding the production of "tangible things," "tangible objects," or simply "objects." Fed. R. Civ. P. 34(a)(1)(B), 45(a)(1)(A)(iii), 45(a)(1)(C); Fed. R. Crim. P. 16(a)(1)(E), 16(b)(1)(A), 17(c)(1). U.S. Br.15. Neither the United States nor Twyford identifies a case interpreting these phrases to encompass people. The strongest candidate for an analogue is Rule 35(a) of the Federal Rules of Civil Procedure, which says a court may "order a party to produce for examination a person who is in its custody or under its legal control." The United States mentions Rule 35(a) in a footnote. It observes that "courts have generally held that the rule does not apply when a prisoner seeks an examination of himself." U.S.

Br.15 n.2. Nevertheless, this rule provides a means for ordering transportation in some circumstances.

Regardless, any attempt to justify an all-writs order by analogizing to Rule 35(a) (or any other discovery rule) fails. To understand why, start with Rule 6 of the Rules Governing Section 2254 Cases. Rule 6(a) says that courts may "authorize a party to conduct discovery under the Federal Rules of Civil Procedure" only "for good cause." Thus, assuming Rule 35(a) (or some other discovery rule) allows prisoners to seek transportation orders facilitating their own medical examinations, habeas petitioners who meet Rule 6(a)'s "good cause" threshold can use that rule to seek such orders. *See Foy v. United States*, 285 F.R.D. 407, 408–10 (N.D. Iowa 2012). But Twyford affirmatively waived any argument for relief under Rule 6(a), and he has never tried to make the good-cause showing. Pet.App.14a, 246a; Twyford Br.46–47. Therefore, this case does not ask whether habeas petitioners can win transportation orders under Rule 6(a). Instead, it asks whether transportation orders are "agreeable to the usages and principles of law"—and thus sometimes permitted by the All Writs Act—even when they are unavailable under Rule 6(a).

The answer is no. As the United States acknowledges, U.S. Br.11, orders circumventing otherwise-applicable rules are not "agreeable to the usages and principles of law." *See Carlisle*, 517 U.S. at 428–29. Thus, even if discovery rules provide relevant usages and principles of law, those "usages and principles" bar orders that facilitate evidence-gathering where discovery rules do not. Rule 6(a) either permits evidence-facilitating transportation orders or not, and it controls either way. *See id.*

All this accords with *Harris*. *Contra* Twyford Br.45–46. Again, *Harris* held that courts can use the All Writs Act to allow for the use of interrogatories in habeas cases. 394 U.S. at 300. At the time, there were no rules governing habeas discovery. *Id.* at 300 n.7. Today, there are. And courts cannot use the All Writs Act to allow for discovery "whenever compliance with" the governing "procedures appears inconvenient or less appropriate." *Pennsylvania Bureau*, 474 U.S. at 43.

D. Policy concerns cannot save the United States' position.

The United States worries about "unusual case[s]" that may "require medical examinations or testing of state prisoners" at a hospital. U.S. Br.13. The concern is legally irrelevant. Courts either have or lack the power to issue transportation orders under the All Writs Act; "no amount of policy-talk" changes the analysis. *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1486 (2021); *see also Ivey*, 47 F.3d at 186–87 (Rovner, J., concurring). Further "there are (at least) two sides to the policy question[]" whether federal courts should have this power. *Niz-Chavez*, 141 S. Ct. at 1486. Transportation orders intrude on the States' sovereign authority. And they pose serious risks to public safety. Given those concerns, the circumstances in which these orders are allowed should be decided by legislation or court-issued procedural rules, not by lower courts on an *ad hoc* basis.

Nothing in the Warden's argument hinders Congress's power to enact laws delineating the circumstances in which courts may order the transportation of state prisoners. Statutes permitting transportation in specific circumstances govern without regard to

§2241(c). *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012). Further, this Court may amend the Federal Rules of Civil Procedure, or the Rules Governing §2254 Cases, to allow for transportation orders. 28 U.S.C. §2072(a). Rules enacted via the Rules Enabling Act supersede earlier-enacted, contradictory statutes. *See* §2072(b); *Henderson v. United States*, 517 U.S. 654, 656 (1996). Thus, the Warden's position does not mean that §2241(c) "prohibits courts from ordering prisoner transport in any … circumstances" other than those enumerated in §2241(c). U.S. Br.2; *see also* Twyford Br.35.

The United States is likely wrong to speculate that it needs transportation orders when prosecuting "state and local … officers who" mistreat prisoners. U.S. Br.1. In those circumstances, if States refuse to transport prisoners for examinations, the government could presumably obtain orders allowing it to move and examine prisoners itself. Such orders would not be in the nature of a writ of habeas corpus—they would more closely resemble search warrants. *Cf. New York Tel.*, 434 U.S. at 168 n.14; *In re G.B.*, 139 A.3d 885, 891–95 (D.C. Ct. App. 2016).

The United States also suggests that it may need transportation orders in civil cases where it seeks "consent judgments and other orders governing the conduct of state and local prisons." U.S. Br.24. But why would it need to rely on the All Writs Act? Rule 35(a) empowers courts to "order a party to produce for examination a person who is in its custody." That language was adopted after, and thus supersedes, §2241(c).

The government next posits that prisoners might need transportation orders in §1983 suits. Rule 35(a) could be read as allowing them to seek such orders, although most courts have not interpreted it that way. U.S. Br.15 n.2. Even if those courts are right, that simply reflects the reality that "[l]awful incarceration curtails many opportunities." *Ivey*, 47 F.3d at 186.

Finally, the Warden's arguments will not affect courts' ability to award meaningful relief to plaintiffs who prove violations of federal law. *Contra* U.S. Br.25. When a plaintiff proves that prisoners are being denied their federal rights, courts need not rely on the All Writs Act or §2241(c) when fashioning injunctive relief. Some laws, including the Americans with Disabilities Act, *see* U.S. Br.24, expressly empower courts to enjoin violations, 42 U.S.C. §§1997a, 12133. And the power to hear equitable challenges to illegal government action entails the power to enjoin illegal conduct. *Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320, 327 (2015); *see also* Fed. R. Civ. P. 65. Because courts need not rely on the All Writs Act when issuing final relief, the Warden's position cannot affect the power to enjoin violations of federal law.

III. The transportation order was not necessary or appropriate in aid of the District Court's habeas jurisdiction.

1. A writ is not "necessary or appropriate" for purposes of the All Writs Act, §1651(a), unless it helps the issuing court exercise jurisdiction. *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34–35 (1980) (*per curiam*). Accordingly, the Act gives courts no authority to issue orders facilitating the development of unusable or immaterial evidence. In the habeas context, this means courts can issue orders facilitating

evidentiary development under the All Writs Act *only if* the petitioner: (1) shows that the court will be allowed to consider the evidence he seeks to develop; and (2) explains how the evidence he seeks will further specific claims for relief. Pet.App.21a–22a (Batchelder, J., dissenting).

Twyford has never argued that he could make either of the two required showings. So the transportation order was not "necessary or appropriate."

2. Twyford develops no alternative standard. True, he observes that all-writs orders need not be "'necessary' in the sense that the court could not otherwise physically discharge its … duties." *Price*, 334 U.S. at 279. It is enough that they be "reasonably necessary in the interest of justice." Twyford Br.41–42 (quoting *Adams*, 317 U.S. at 274). Twyford, however, never unpacks what he takes "reasonably necessary" to mean. Nor does he explain how an order facilitating the development of unusable or immaterial evidence is "reasonably necessary." Indeed, the main case on which Twyford relies undermines his position. In *Ayestas v. Davis*, 138 S. Ct. 1080 (2018), this Court considered the meaning of 18 U.S.C. §3599(f). That statute allows courts to provide funding for "reasonably necessary" investigatory services. *Ayestas* has no direct bearing on the meaning of the All Writs Act; it interpreted a different statute with different language. Regardless, *Ayestas* supports the Warden. It held that, in determining whether services are "reasonably necessary," courts must consider "the likelihood that the services will generate useful and admissible evidence." 138 S. Ct. at 1094.

Twyford fares no better when he criticizes the Warden's proposed standard. He first notes that *Cullen v.*

Pinholster, 563 U.S. 170 (2011), governs the question whether habeas courts can consider newly developed evidence, not the "separate question whether Twyford's counsel may take steps to develop" new evidence or investigate his claims. Twyford Br.44. That is true as far as it goes. But Twyford never explains how an order supporting the development of unusable evidence could be "necessary or appropriate" in aid of habeas jurisdiction.

Twyford also denies that he needed to make "specific allegations" showing that he "may, if the facts are fully developed, be able to demonstrate that he is confined illegally and is therefore entitled to relief." Twyford Br.46 (quoting *Harris*, 394 U.S. at 300). This language comes from *Harris*. But Twyford denies that *Harris* was announcing a governing standard; he says it was offering just one extreme example of a situation where discovery would be appropriate. That is a poor reading of *Harris*, which offered this standard as a means for ensuring that habeas discovery would be available only rarely. 394 U.S. at 300. Cases interpreting Habeas Rule 6(a) further weaken Twyford's reading. Rule 6(a) is "consistent with *Harris*," *Bracy v. Gramley*, 520 U.S. 899, 909 (1997), and courts have adopted *Harris*'s language as the "operative standard" for Rule 6(a), Twyford Br.46.

3. The Court should reverse instead of vacating and remanding. *Contra* U.S. Br.30. The record here "warrant[s] reaching" just one conclusion. *Moore v. Texas*, 139 S. Ct. 666, 672 (2019) (*per curiam*). Twyford does not even argue that he can satisfy the governing standard. Thus, vacatur would serve no purpose. And it would do affirmative harm: signaling that Twyford *might* prevail on remand would suggest that the governing standard is easily satisfied.

CONCLUSION

The Court should reverse the Sixth Circuit's judgment.

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