No. 21-511

In the Supreme Court of the United States

TIM SHOOP, WARDEN,

Petitioner,

v.

RAYMOND TWYFORD,

Respondent.

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE – NO EXECUTION DATE

QUESTIONS PRESENTED

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

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

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REPLY

The Court should grant *certiorari* because this case presents an excellent vehicle for resolving two important questions that have divided the circuits. Twyford makes no convincing argument to the contrary. He cannot plausibly deny that the questions presented are the subject of circuit splits; he casts no doubt on the importance of the questions presented; and he identifies no vehicle flaw that would impede this Court's review. The Court should grant the Warden's petition.

I. The circuits are divided regarding both of the questions this case presents.

Both of the important questions this case presents are the subject of circuit splits.

A. The Sixth Circuit, unlike the Third, Seventh, and Ninth Circuits, allows courts to evade 28 U.S.C. §2241(c)(5) using the All Writs Act.

1. Traditionally, the writ of habeas corpus was the means by which courts ordered custodians to transport prisoners. *Edwards v. Vannoy*, 141 S. Ct. 1547, 1566 (2021) (Gorsuch, J., concurring). But the common law permitted courts to issue that writ in only limited circumstances. *See id.* Congress has incorporated those limits into the statutes governing habeas review. *See* 28 U.S.C. §2241(c). Of particular relevance here, §2241(c)(5) says that courts can issue a writ of habeas corpus requiring a custodian to transport a prisoner only if it is "necessary to bring [the prisoner] into court to testify or for trial." Section 2241(c)(5) thus codifies "the common law authority of federal courts to issue writs of habeas corpus *ad*

testificandum and *ad prosequendum*." *Barnes v. Black*, 544 F.3d 807, 809 (7th Cir. 2008).

This case asks whether courts may use the All Writs Act to order that custodians transfer inmates in situations other than those that §2241(c)(5) identifies. The All Writs Act 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). So the question presented can be rephrased as follows: Are orders requiring that custodians move prisoners for reasons other than those §2241(c)(5) specifies agreeable to the usages and principles of law?

This question divides the circuits, as the court below acknowledged. Pet.App.14a. In three circuits, courts *may not* use the All Writs Act to issue prisoner-transportation orders for reasons other than those laid out in §2241(c)(5). *See Ivey v. Harney*, 47 F.3d 181, 183–86 (7th Cir. 1995); *Jones v. Lilly*, 37 F.3d 964, 967–69 (3d Cir. 1994); *accord Jackson v. Vasquez*, 1 F.3d 885, 888–89 (9th Cir. 1993). Thus, district courts in these circuits cannot use the All Writs Act to order that custodians transport inmates for evidence-gathering purposes. *See Ivey*, 47 F.3d at 183–86; *Jackson*, 1 F.3d at 888–89.

The rule in the Sixth Circuit is different. In that circuit, §2241(c) imposes no limits on courts' all-writs authority. Pet.App.14a. Thus, courts may use the All Writs Act to order the transportation of a prisoner without regard to §2241(c) or the traditional limits on habeas corpus. Pet.App.13a–14a. In this case, for example, the District Court ordered the Warden to bring Twyford to a hospital so that he could obtain neurological imaging for possible use in his habeas case.

Pet.App.32a. The Sixth Circuit affirmed, concluding that the All Writs Act permitted the District Court to award this relief *even though* the order fell outside the scope of what §2241(c)(5) allows. Pet.App.14a.

2. Given that the Sixth Circuit candidly acknowledged its creation of a circuit split, Pet.App.14a, Twyford would have a hard time denying that a split exists. So he does not really do so. Instead, he points to a number of factual difference between his case and the decisions out of the Third, Seventh, and Ninth Circuits. But because each of these factual distinctions is legally irrelevant, they do not bear on the question of whether the circuits are divided.

Consider, for example, what Twyford has to say about *Jones* and *Ivey*. He stresses that the plaintiffs in both cases sought relief under 42 U.S.C. §1983, whereas he is seeking federal habeas relief. BIO.12–13. But the Sixth Circuit's disagreement with *Jones* and *Ivey* does not turn on the underlying cause of action. Instead, as the Warden explained already, the "cases came out differently based on the courts' irreconcilable understandings of §2241(c) and that provision's relationship to the All Writs Act." Pet.21. The Third and Seventh Circuits held that §2241(c)(5) limits courts' ability to order the transportation of prisoners under the All Writs Act. *Ivey*, 47 F.3d at 183–86; *Jones*, 37 F.3d at 967–69. The Sixth Circuit held otherwise. Pet.App.14a. Nothing in the opinions would permit the courts to apply different rules in habeas cases and §1983 cases.

Indeed, if the habeas context of this case matters, it only sharpens the circuits' disagreement. The reason is that §2241(c) is a habeas statute. Courts ought to pay *more* respect to §2241(c)'s limits in habeas cases

than in §1983 cases. *See* Pet.21. As a result, *Jones* and *Ivey*, which interpreted §2241(c)(5) as limiting judicial authority to issue prisoner-transportation orders under the All Writs Act, necessarily apply to habeas cases just as they do to §1983 cases. Therefore, *Jones* and *Ivey* would require "a different result from the decision below" in a case presenting identical facts. *Contra* BIO.12.

Twyford identifies one other factual distinction between this case and *Ivey*: unlike the Warden, the custodian ordered to transport the inmate in *Ivey* was not a party to the underlying suit. BIO.14. But that distinction is once again legally irrelevant. The Seventh Circuit held that §2241(c)(5), by permitting courts to order the transportation of prisoners in only limited circumstances, leaves no "'gap' that a judge may fill" through the All Writs Act. *Ivey*, 47 F.3d at 185. The non-existent gap in §2241(c)(5) did not have anything to do with the custodian's non-party status—that status played no role in the Seventh Circuit's interpretation of the statutory text. And because the Seventh Circuit's interpretation conflicts with the Sixth Circuit's, the Warden's party-status does not diminish the conflict with the Seventh Circuit. The courts reached fundamentally inconsistent answers to the question presented: whether §2241(c)(5) limits courts' authority to order prisoner transportation via the All Writs Act.

Twyford's attempt to distinguish away the Ninth Circuit's decision in *Jackson*, 1 F.3d 885, is equally unavailing. He notes that the petitioner in *Jackson* (unlike Twyford) had not yet filed a habeas petition; that *Jackson* (unlike this case) involved an *ex parte* request for transportation; and that the district court in *Jackson* (unlike the District Court below) ordered

the inmate's transportation without giving notice to the respondent. BIO.13. None of those distinctions helps harmonize the Sixth and Ninth Circuits' irreconcilable legal conclusions, however. The Sixth Circuit, for its part, held that the All Writs Act empowered the District Court to order the transportation of a prisoner who wanted a brain scan for use in a habeas case. Pet.App.14a. *Jackson*, in contrast, held that the All Writs Act gave the district court no power to order the transportation of another inmate who wanted a brain scan for use in his habeas case. 1 F.3d at 888–89. True enough, *Jackson* reserved the question whether courts may order a prisoner's transportation "at a proper stage in habeas corpus proceedings" under the discovery provisions in the Federal Rules of Civil Procedure or the Rules Governing §2254 Cases. *Id*. at 889; *see* BIO.13–14. But it did not leave open the question whether courts could award that relief under the All Writs Act in circumstances not covered by those rules. That second question is the question here, since Twyford "repeatedly disclaimed that he is seeking discovery" under those rules. Pet.App.14a n.4.

Twyford concludes his discussion of the circuit split by trying to diminish its importance. He contends that "disputes about the appropriateness of transport orders do not frequently arise." BIO.14. This argument overlooks the fact that the Sixth Circuit created the split. With its decision on the books, disputes regarding transportation orders are sure to proliferate—especially since the Sixth Circuit's decision permits courts to issue these orders whenever the evidence the prisoner wants "plausibly relates" to his case. Pet.App.16a. Indeed, even before the Sixth Circuit's decision, when no circuit permitted courts to issue prisoner-transportation orders under the All

Writs Act, prisoners nonetheless requested transportation with some frequency. *See* Pet.30–31. And Twyford's own brief all but admits that other inmates will seek to benefit from the Sixth Circuit's ruling when he describes the importance of investigating "mental impairments" in capital cases. *See* BIO 10–11.

Regardless of the regularity with which these disputes arise, they implicate serious interests pertaining to state sovereignty and public safety. *See* Pet.29–32. Those interests would make this case worthy of review even without a circuit split. *Id.* That is no doubt why fourteen States joined Utah's *amicus* brief urging this Court to grant review. *See* Br. of *Amici Curiae* Utah, *et al.*

B. The Sixth Circuit, unlike the Ninth and Tenth Circuits, allows habeas petitioners to develop evidence without regard to whether it can be lawfully considered.

1. Habeas law greatly limits the evidence on which habeas petitioners may rely to win relief. Of particular relevance here, habeas review is almost always "limited to the record that was before the state court that adjudicated the claims on the merits." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011).

This insight gives rise to the second question presented: Must courts, before issuing an order facilitating a habeas petitioner's request for evidentiary development, consider whether the evidence in question could be legally relied upon in a habeas case? In the Ninth and Tenth Circuits, the answer is "yes." *Lafferty v. Benzon*, 933 F.3d 1237, 1245 n.2 (10th Cir. 2019); *Runningeagle v. Ryan*, 686 F.3d 758, 773–74 (9th Cir. 2012). The Third Circuit, in an unpublished

order, appeared to agree. *July v. Adm'r N.J. State Prison*, No. 17-2020, 2017 WL 5202012 (3d Cir. Aug. 4, 2017). But the Sixth Circuit blazed its own path. It held that courts may use the All Writs Act to facilitate evidentiary development whenever the desired evidence "plausibly relates" to the petitioner's habeas claims. Pet.App.16a. A petitioner can satisfy this "plausibly relates" standard without regard to whether habeas courts can lawfully consider the evidence the petitioner seeks to develop. Pet.App.17a. Thus, petitioners in the Sixth Circuit may "proceed in reverse order by collecting evidence before justifying" the need to do so. Pet.App.22a (Batchelder, J., dissenting).

2. Twyford says that the Warden "exaggerates the conflict." BIO.15. But he never disputes the Warden's description of the cases, so it is unclear what Twyford thinks the Warden exaggerated.

Twyford next says that none of the cases from outside the Sixth Circuit: (1) "acknowledge[d] a conflict on this question"; (2) "involved an interlocutory appeal of a collateral order"; or (3) "centered on an inmate's request for a medical examination to reveal information within the inmate's own body." BIO.15. None of that matters. *First*, the cases acknowledged no conflict because there was no conflict until the Sixth Circuit issued its decision below. *Second*, while it is true that none of the cases involved interlocutory appeals, the interlocutory posture of this case has nothing to do with the question on which the circuits are divided. *Finally*, it is equally irrelevant that Twyford wanted help gathering evidence from his "own body" rather than from depositions or from documents in the possession of others. The Sixth Circuit's holding—that courts may use the All Writs Act to issue orders

facilitating the development of any evidence that "plausibly relates" to their claims, Pet.App.16a—does not hinge on the identity of the person in possession of the relevant evidence. Pet.28. Nor does the source of the evidence affect whether a habeas court may lawfully consider it. So this factual distinction does not undermine the split's existence. *Id.*

Regardless, the second question, just like the first, is sufficiently important to warrant granting *certiorari* without regard to the presence of a split. *See* Pet.29–32, Utah Br.6–23.

II. Twyford fails to identify any vehicle flaw.

The Warden's petition explains why this case presents an ideal vehicle for addressing the questions presented. Pet.33–34. Most importantly, the Court clearly has jurisdiction. Under the collateral-order doctrine, courts may hear interlocutory appeals from orders that: (1) conclusively determine a disputed issue; (2) resolve "important questions separate from the merits" of the case; and (3) would become "effectively unreviewable" unless immediately appealed. *Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 42 (1995). The Sixth Circuit held that this doctrine permits immediate appeals of transportation orders like the one in this case. Pet.App.6a–8a. Every other circuit to have addressed the issue agrees. *See, e.g.*, *Jones*, 37 F.3d at 966; *Jackson*, 1 F.3d at 888; *Barnes*, 544 F.3d at 810; *Ballard v. Spradley*, 557 F.2d 476, 479 (5th Cir. 1977).

Twyford does not disagree—he identifies no jurisdictional concerns. Instead, he points to four supposed vehicle flaws. Not one of them counsels against granting review.

First, Twyford argues that the Sixth Circuit correctly resolved the case on the merits. BIO.7–12. The Warden, of course, takes a different view of the merits. But even if Twyford were right, that would not undercut the argument for review. This Court often affirms after granting *certiorari* to resolve disagreement in the lower courts. *See, e.g.*, *Terry v. United States*, 141 S. Ct. 1858 (2021); *Jones v. Mississippi*, 141 S. Ct. 1307 (2021). This reflects the fact that the Court grants *certiorari* in cases involving circuit splits to ensure uniformity, not to correct one court's errors. Regardless of whether the Sixth Circuit erred in this case, the Court should grant review and restore uniformity to the law.

Second, Twyford invokes this case's interlocutory posture. This Court, he notes, "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." BIO.16–17 (quoting *Va. Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting the denial of the petition for writ of *certiorari*)). The Court "generally" awaits a final ruling because the Court sometimes benefits from a more-developed record, because it is sometimes more efficient to consider a case once lower-court proceedings are over, and because a party denied *certiorari* at the interlocutory stage can often raise "the same issues in a later petition, after final judgment has been rendered," *id.* But "generally" does not mean "always," and the Court will grant review of interlocutory orders where there are reasons not to await final judgment. *See*, *e.g.*, *Plumhoff v. Richard*, 572 U.S. 762, 771–73 (2014). This is one such case. Again, this appeal arises under the collateral-order doctrine. The whole point of the doctrine is to allow for meaningful review of important issues that become "effectively

unreviewable" unless immediately appealed. *Swint*, 514 U.S. at 42. Transportation orders, for instance, involve "important issues of state sovereignty and federalism" that cannot be meaningfully reviewed after the State has already transported the prisoner. Pet. App.7a. It follows that, if this Court denies review and allows Twyford's transportation to go forward, the Warden will *not* be able to fully defend the State's interests in a later appeal. And it is doubtful the Warden could raise "the same issues in a later petition, after final judgment." *Va. Military Inst.*, 508 U.S. at 946 (Scalia, J., respecting the denial of the petition for writ of *certiorari*). While the Court would be able to review the permissibility of considering whatever evidence Twyford develops, the question whether he should have been transported in the first place would at least arguably be moot.

Third, Twyford argues that his request for transportation "may not affect the outcome of" his habeas proceedings. The Warden would take the premise a bit further: Twyford's transportation *will not* affect the outcome of his habeas proceedings, since it will not produce evidence that a habeas court can consider. That reinforces the need for immediate review, as it suggests the questions may be mooted and evade review after final judgment. Absent this Court's intervention, the Sixth Circuit's lenient "plausibly relates" standard will remain in place. Pet.App.16a. As a result, States will have to take dangerous inmates into public spaces with greater frequency. And they will have to do so for no good reason, as habeas courts will not generally be permitted to consider the evidence the petitioners develop. The Court should consider the legality of these orders now, before federal courts

issue more of these pointless and dangerous excursions. *See* Utah Br.6–18.

Fourth¸ Twyford argues that the decision below was factbound. BIO.17–18. He is wrong again. The Sixth Circuit held, as a purely legal matter, that a district court may issue a transportation order via the All Writs Act without regard to §2241(c). Pet.App.14a. The Sixth Circuit went on to craft a broad standard for when district courts may use that all-writs power—it held that courts may issue transportation orders facilitating the gathering of any evidence that "plausibly relates" to a petitioner's habeas claim. Pet. App.16a. Nothing in the Sixth Circuit's decision turns on factbound disputes. Indeed, Twyford did not introduce many facts about which there could have been a dispute. He sought neurological testing without explaining in any detail why he needed it. *See* Pet. App.262a–66a; 272a. Even in this Court, he cannot quite explain what the evidence is for, what it will show, or what the courts will be allowed to do with it. *See* BIO.4–5, 12, 17–18. The lack of factual disputes concerning Twyford's evidence makes this an especially good vehicle for reviewing the questions presented. Pet.34.

CONCLUSION

The Court should grant the petition for *certiorari*.

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DECEMBER 2021