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 FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Does 28 U.S.C. § 1291, which permits review only of "final decisions of the district courts," provide appellate jurisdiction over a non-final ruling that does not qualify under any of the previously recognized categories of "collateral" orders immediately appealable under *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541 (1949)?

2. Did the Sixth Circuit correctly conclude that the All Writs Act provides courts with discretion to order prisoners transported for medical testing in appropriate circumstances?

3. Did the Sixth Circuit correctly conclude that, in the particular circumstances of this case, the district court did not abuse its discretion by granting the order to transport Respondent?

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INTRODUCTION

This case concerns two foundational principles of the federal judicial system, both of which derive from the Judiciary Act of 1789. If this Court applies either in conformity with established precedent, the district court order in this case must stand.

The first principle is that appellate jurisdiction lies only over "final decisions of the district courts." 28 U.S.C. § 1291. Petitioner is appealing a district court decision that he concedes is not final, and to justify that course, he asks this Court to invent a brand-new category of "collateral" orders that are exempt from the bedrock finality requirement under *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). Pet. Br. 2–3.

This Court should decline the request to further expand a doctrine it has not even "mentioned . . . recently without emphasizing its modest scope." *Will v. Hallock*, 546 U.S. 345, 350 (2006). It has been nearly 20 years since this Court created a new kind of immediately appealable non-final order, and the Court has strongly suggested that any further additions to that category should result only from the rulemaking process Congress has established.

But even if the Court were willing to continue "expan[ding *Cohen*] by court decision," *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 113 (2009) (internal quotations omitted), the order here would be a particularly poor candidate for membership in the collateral-order class. The district court's discretionary decision to permit an investigative step of this kind is inextricably intertwined with the particular facts, record, and procedural history of the underly-

ing case. Because Section 1291 does not permit interlocutory review of such a case-specific, fact-based order, this Court should vacate the Sixth Circuit's decision with instructions to dismiss the appeal for lack of jurisdiction.

The second foundational principle arises only if the Court concludes that the collateral-order doctrine permits this appeal. In that event, the case turns on the All Writs Act, 28 U.S.C. § 1651(a), 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." Since the Founding, that statute has provided courts with "a legislatively approved source of procedural instruments designed to achieve the rational ends of law." *United States v. N.Y. Tel. Co.*, 434 U.S. 159, 172 (1977) (internal quotations omitted).

The Sixth Circuit correctly held that the All Writs Act provides district courts authority in appropriate circumstances to order the transfer of a state prisoner for medical testing. That court also correctly held that, in the circumstances of this particular case, the district court did not abuse its discretion in granting the order. In the alternative to dismissing the appeal for want of jurisdiction, this Court should affirm the Sixth Circuit's ruling in both respects.

Congress delegated to the federal courts through the All Writs Act the "discretionary power" to craft procedures that they deem "reasonably necessary in the interests of justice." *Price v. Johnston*, 334 U.S. 266, 279, 286 (1948) (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 274 (1942)). This Court has explicitly held that this authority extends to habeas corpus proceedings of the kind at issue here. And the Court has held in multiple decisions

that courts may use the All Writs Act to order the transfer of prisoners in habeas cases for a range of reasons, including medical testing. Indeed, in one such case, this Court itself ordered a state habeas prisoner to undergo medical testing—including by transfer to a different facility if necessary—in aid of its certiorari jurisdiction. The Sixth Circuit's decision accords with those decisions and with the text, history, and purpose of the All Writs Act.

Petitioner seeks to strip federal courts of the discretion the All Writs Act provides and to replace that discretion with two rigid categorical rules: first, that district courts can never invoke the All Writs Act to order the transfer of a prisoner; and second, that even if such authority exists, district courts may never use it unless they decide at the outset how information resulting from a transfer order will entitle the prisoner to ultimate relief.

Neither of Petitioner's proposed rules finds support in text, precedent, or history. The first is foreclosed by controlling decisions of this Court and, as the United States explains, does not follow from the statutory provision on which Petitioner relies. That provision, 28 U.S.C. § 2241(c)(5), dictates only when courts may issue a habeas writ, not when they may issue the type of auxiliary order at issue here. And it applies only to proceedings where it supplies the jurisdictional basis—typically, requests by the government or another litigant to produce the prisoner in court as part of a separate case. When, as in this case, jurisdiction rests on a different provision of the habeas statute, Section 2241(c)(5) does not prescribe the ancillary orders that a court may employ in aid of its duty to address the legality of the prisoner's detention.

Petitioner's second categorical rule, which would invariably compel courts to address prisoner transfer motions in a rigid predetermined sequence, is equally unfounded. It rests primarily on a decision of this Court, *Cullen v. Pinholster*, 563 U.S. 170 (2011), which limits the evidence on which a district court may rely in granting habeas relief on claims presented and decided in state court. But *Pinholster* does not eliminate—and this Court has since reaffirmed—a district court's traditional discretion to allow the kind of preliminary investigative activity at issue here.

To be sure, in some cases, the most efficient path may be to resolve questions of admissibility and use at the outset. But that will not be true in every case, and the district judge, who plays a special role in managing ongoing litigation, is best positioned to decide what procedure and sequence is optimal on any particular record. The Sixth Circuit correctly concluded that on this record, the process the district court selected was within its discretion.

STATEMENT OF FACTS

Raymond Twyford had a short and traumatic childhood. He was born in 1962 in Youngstown, Ohio. He moved to Nevada with his father after his parents divorced but returned to Ohio at the age of six to live with his mother and abusive stepfather. Twyford's biological father died shortly thereafter. His stepfather—an alcoholic—beat him, his younger brother, and his mother. When Twyford was eight, his mother had a nervous breakdown; his stepfather blamed him and sent him to live with an aunt and

uncle, who introduced Twyford to drugs and alcohol at the age of nine. Pet. App. 193a.

In 1975, at just 13 years old, Twyford tried to commit suicide by shooting himself in the head. He survived, but the shooting destroyed his right eye and lodged at least 20 to 30 bullet fragments in his skull. Pet. App. 193a, 263a. Those fragments remain in his head today. Pet. App. 30a. As a teenager, Twyford spent time in juvenile detention facilities and prison, where he was raped multiple times. He attempted suicide several more times. After he was released from prison in 1992, Twyford's wife and stepdaughter refused to live with him. Pet. App. 193a–195a.

In 1992, Twyford was arrested in connection with the murder of Richard Franks. He later told police that he had become enraged upon learning that Franks had raped his girlfriend's disabled child. Twyford stated that he and another individual drove Franks to a remote location for a purported hunting trip, shot Franks in the back with a rifle, and disposed of the body. Pet. App. 44a–48a, 52a. Twyford later explained that he despised rapists and child molesters, largely because he was the victim of rape in prison, and that he did not believe law enforcement would punish Franks for the rape, having observed that the men who raped him had not been held accountable. Pet. App. 195a–196a.

A. State Proceedings

After he unsuccessfully moved to suppress his statements, Twyford was found guilty on all counts. Pet. App. 154a–155a. Following a penalty hearing, the jury recommended a sentence of death after de-

liberating for only two hours. Pet. App. 56a, 155a. At neither the guilt nor sentencing stages did the jury hear about the decades-long presence of bullet fragments in Twyford's skull, much less how that debris affected his cognition.

Twyford pursued both direct appeal and postconviction relief in state court. Because of certain rulings by the intermediate state appellate court, however, briefing on his postconviction proceeding occurred well in advance of his direct appeal, and both stages ran in parallel.[1] This resulted in a complex and unusual procedural history involving overlapping appellate and postconviction phases.

1. Direct Appeal

Twyford appealed his conviction, arguing, among other things, that trial counsel was ineffective. Pet. App. 57a–58a. On October 6, 1995, the Ohio Seventh District Court of Appeals affirmed his conviction and sentence, and the next month, Twyford appealed to the Ohio Supreme Court. Pet. App. 57a. After that direct appeal had been pending in the Ohio Supreme Court for 15 months, however, the Seventh District Court of Appeals reopened its review under a state-law procedure permitting additional proceedings on the ground that appellate counsel had been ineffective. Pet. App. 57a–58a.

On January 13, 1997, the Ohio Supreme Court stayed the direct appeal and transferred the record back to the Seventh District Court of Appeals for fur-

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[1] Petitioner is thus incorrect in asserting, Pet. Br. 7, that Twyford sought state postconviction relief "[a]fter exhausting his direct appeals."

ther proceedings in connection with the grant of his application to reopen his appeal before that court. Pet. App. 58a. On September 25, 1998, the Seventh District Court of Appeals denied relief in the reopened direct appeal and affirmed its original ruling. Pet. App. 65a.

On November 6, 1998, Twyford filed a notice of appeal in the Ohio Supreme Court, which consolidated the appeals of both the Seventh District Court of Appeals' decisions. On March 6, 2002, the Ohio Supreme Court affirmed in a divided opinion. Pet. App. 65a–69a, 149a–208a. The majority concluded that, although trial counsel's performance "fell below an objective standard of reasonable representation" for reasons related to counsel's "inexplicable" approach to witness examination, Twyford was not harmed by that constitutionally "deficient performance." Pet. App. 189a–190a. The court then reasoned that imposition of the death penalty was appropriate and proportional in light of aggravating and mitigating circumstances. Pet. App. 198a–199a. In reaching that conclusion, the court did not consider the effects of bullet fragments in Twyford's head and deemed it significant to the proportionality analysis that Twyford "did not suffer from any mental disease or defect." Pet. App. 197a–198a (internal quotations omitted).

Three justices dissented from the portion of the decision concerning the appropriate penalty. Pet. App. 199a–208a. Even without any record evidence of Twyford's brain injury, two justices noted that the case involved "compelling evidence in mitigation" and concluded that the deficient performance of trial counsel should have precluded imposition of a death sentence. Pet. App. 203a–206a.

Twyford later filed a second application to reopen his direct appeal in state court. In 2004, the Seventh District Court of Appeals denied the request to reopen and in 2005, the Ohio Supreme Court affirmed. Pet. App. 80a (citing *State v. Twyford*, 833 N.E.2d 289, 290 (Ohio 2005)).

2. Postconviction Proceedings

In September 1996, while his direct appeal was pending in the Ohio Supreme Court and before the Seventh District Court of Appeals reopened that appeal, Twyford sought postconviction relief in the state trial court. Pet. App. 69a, 218a. On November 16, 1998, the trial court dismissed petitioner's postconviction action, and Twyford appealed to the Seventh District Court of Appeals. Pet. App. 73a. On March 19, 2001, that court affirmed the trial court's judgment denying postconviction relief, rejecting Twyford's contentions that, among other things, his trial counsel was constitutionally ineffective for failing to investigate and introduce evidence related to intoxication and its effect on cognition, and for failing to develop and present mitigation evidence during his trial. Pet. App. 74a, 212a–244a.

On May 1, 2002, the Ohio Supreme Court declined jurisdiction to review the postconviction proceedings. Pet. App. 148a.

B. Federal Proceedings

1. In 2003, Twyford sought a writ of habeas corpus in the Southern District of Ohio, raising 22 grounds for relief, including ineffective assistance of counsel and incompetency to stand trial. Pet. App. 75a–79a. He subsequently sought and was granted a

stay of those proceedings while his attempt to reopen his direct appeal was pending in state court. Pet. App. 80a.

On September 27, 2017, the district court addressed Petitioner's motion to dismiss certain grounds for relief on the basis of procedural default.[2] In a detailed opinion, the district court meticulously untangled the implications for each claim of the particular arguments advanced in the trial court, the first intermediate state-court appeal, the reopened direct appeal, the Ohio Supreme Court direct appeal, and the parallel and overlapping state postconviction proceedings. Pet. App. 43a–147a. The court dismissed a number of Twyford's claims as procedurally defaulted but allowed several others to move forward, including ineffective assistance of counsel at the mitigation stage of trial. Pet. App. 144a–146a.

2. In 2017, Twyford sought an order from the district court for his transportation to undergo neurological testing at the Ohio State University Wexner Medical Center ("OSU"), the official outside prison hospital for Ohio inmates. The district court denied that motion without prejudice in a sealed opinion. *See* Pet. App. 253a.

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[2] Petitioner notes that the federal habeas case has "progressed slowly," Pet. Br. 7, but fails to acknowledge his own role in that delay. Petitioner waited years to move to dismiss the petition and still has not filed an Answer. *See generally Twyford v. Bradshaw*, No. 2:03-cv-00906-ALM (S.D. Ohio). His interlocutory appeal of the order here has added more than two years to the proceedings. Thus, while the case has been pending for some time, from a procedural perspective it remains at an early stage.

Twyford renewed the motion in 2019. He requested that the court permit him to undergo the testing as part of counsel's investigation of the case and its factual background. Pet. App. 255a–256a (citing 18 U.S.C. § 3599 and *McFarland v. Scott*, 512 U.S. 849 (1994)). In support, he submitted a letter from the Director of Cognitive Neurology at OSU Medical Center, who noted that based on his evaluation, Twyford suffered from neurological defects resulting from childhood abuse, drug and alcohol use, and the gunshot wound to the head. Pet. App. 23a–24a, 272a–273a. The neurologist stated that previous scans revealed at least 20 to 30 metal fragments scattered throughout Twyford's skull but did not provide a clear view of Twyford's frontal lobes or the rest of his brain. Pet. App. 272a–273a. He therefore recommended additional CT and PET scans in order to determine "how the brain is functioning and if there is evidence particularly of frontal lobe damage" that would impair Twyford's cognition or ability to think and act rationally. Pet. App. 30a–31a, 273a.

The district court granted the motion. It began by addressing the "threshold matter" of whether it had authority under the All Writs Act for a medical transport order of the kind Twyford sought. Pet. App. 25a. Recognizing that its powers were defined by Congress, the court stated that it was "loath to assume jurisdiction to interfere with state criminal proceedings." Pet. App. 26a (internal quotations omitted). The court concluded, however, that it "possesse[d] jurisdiction via the All Writs Act" to issue orders that "may aide this Court in the exercise of its congressionally mandated habeas review[,]" including, where appropriate, an order to transport a prisoner for medical testing. Pet. App. 30a.

The court next turned to the question whether, based on the particular facts, "the court should issue an order to transport in this case." Pet. App. 30a. Because the results of the tests could support a number of Twyford's claims, the district court concluded that transport "for medical testing to facilitate the completion of [the medical] evaluation" was "warranted and necessary" and would "aid the Court in its existing habeas corpus jurisdiction to assess the constitutionality of [Twyford's] incarceration." Pet. App. 31a–32a. The court cautioned that it was not "in a position at this stage of the proceedings"—before an Answer had even been filed and before the test results were known—"to make a determination as to whether or to what extent it would be precluded" from relying on the information when the case ultimately reached resolution. Pet. App. 32a.

3. The Sixth Circuit affirmed. That court first reasoned that it had jurisdiction to review the district court's non-final order because such rulings should be treated as immediately appealable under the collateral-order doctrine. Pet. App. 6a–8a. Turning to the merits, the court concluded that the district court had correctly determined that it had authority to issue the transport order under the All Writs Act. Pet. App. 9a. Such transport orders, the court reasoned, "do not conflict with habeas statutes or the common law and are consistent with congressional intent to provide for counsel for capital defendants." Pet. App. 12a, 15a (noting that Section 3599 "indicates Congress considered it important that persons sentenced to death have counsel and investigative services in post-conviction proceedings"). The court also rejected Petitioner's invocation of habeas discovery rules, noting that

"Twyford is seeking neurological imaging of his own brain" as part of counsel's investigation, "not information from the other party." Pet. App. 15a.

On the case-specific application of the All Writs Act, the Sixth Circuit emphasized the preliminary nature of the order and deferred to the district court's determination that it could not decide at the outset whether the testing results would ultimately entitle Twyford to relief. "At this stage, on review of Twyford's interlocutory appeal," the court concluded, it was unnecessary to resolve "the admissibility of any resulting evidence." Pet. App. 16a–17a. The court of appeals reasoned that the district court "is best situated in the first instance to untangle the knotty" admissibility and "evidentiary issues" that will arise when the case proceeds. Pet. App. 17a.

Judge Batchelder dissented. She agreed that the district court had authority under the All Writs Act to order a transfer of this kind in appropriate circumstances. In her view, however, the district court should have issued the order only after addressing whether the results of the scan would be admissible and entitle Twyford to relief. Pet. App. 19a–22a.

SUMMARY OF THE ARGUMENT

This Court should vacate the decision below, with instructions to remand, on the ground that there is no appellate jurisdiction. In the alternative, the Court should affirm.

I. Section 1291 limits appellate jurisdiction to "final decisions of the district courts." As Petitioner concedes, the order he has appealed in this case is not final. He contends that jurisdiction nevertheless exists under the "collateral-order" doctrine created in

Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949). *Cohen* does not support him.

A. Because the finality requirement of Section 1291 goes to subject-matter jurisdiction, the Court must address that issue at the outset, and it may proceed to the merits only if it creates a new category of immediately appealable non-final orders exemplified by the order issued below.

B. This Court has emphasized repeatedly that the class of orders subject to *Cohen* must remain small and selective. In light of Congress's decision to create a rulemaking process specifically for the purpose of considering new exceptions to the finality rule, the Court has suggested that it will not continue to invent new *Cohen* categories through judicial decision-making. As Petitioner concedes, this order does not fit within a previously recognized category of "collateral" orders. That alone provides sufficient reason to conclude that appellate jurisdiction is absent.

C. Even if this Court were willing to expand *Cohen* further through adjudication, this order would not qualify for three reasons. First, Petitioner and the United States contend that it is effectively a discovery ruling, and although that characterization is incorrect, for purposes of the *Cohen* analysis the order shares all the features that have led this Court to treat discovery rulings as particularly unsuited for interlocutory review. Second, orders of this kind present inherently fact-based and case-specific questions, not pure abstract issues of law. And third, review of such orders would turn not on any important issue of federal-state relations, but instead on context-dependent determinations about whether, based on an individual prisoner's specific circumstances

and the particular record, that prisoner is properly transported to the prison hospital. *Cohen* does not encompass orders of this kind.

II. If this Court reaches the merits, it should affirm the Sixth Circuit's conclusion that the All Writs Act empowers district courts in appropriate situations to order the transfer of prisoners for medical testing.

A. The history, text, and purpose of the All Writs Act confirm both the essential role that provision plays in the structure of Article III and the broad discretion it affords district courts. The Act is framed in expansive terms to ensure that judicial processes can adapt along with the law, providing courts with a discretionary power to fashion procedural orders that the circumstances warrant.

B. This Court has "held explicitly" that the Act's authority "extend[s] to habeas corpus proceedings." *Harris v. Nelson*, 394 U.S. 286, 299–300 (1969). More specifically, the Court has repeatedly held that the Act permits orders to transport prisoners in habeas proceedings. This Court has itself ordered medical testing, by transfer if necessary, of a state habeas prisoner in aid of its certiorari jurisdiction. *See Rees v. Peyton*, 384 U.S. 312, 314 (1966). The Court has held that courts have power under the All Writs Act to require the transfer of a habeas petitioner to argue his appeal. And it has affirmed an All Writs Act order requiring a prisoner's presence at a pretrial proceeding. These auxiliary orders, like the one issued below, represented appropriate uses of the All Writs Act "to fill statutory interstices" in the habeas laws. *Pa. Bureau of Corr. v. U.S. Marshals Serv.*, 474 U.S. 34, 42 n.7 (1985).

2. Consistent with these precedents, the All Writs Act provided authority for the order the district court issued here. The order was in aid of the court's existing jurisdiction over Twyford's habeas petition. The court could decide that the order was "reasonably necessary" to achieve the ends of justice. *See infra* Part III. And under this Court's precedents, use of the All Writs Act for a transfer to facilitate medical testing was consistent with the usages and principles of law. As the United States explains—and Petitioner concedes—federal courts have long had authority to order the transportation of prisoners for a range of reasons.

C. Petitioner is incorrect that 28 U.S.C. § 2241(c)(5) prohibits use of the All Writs Act to order a prisoner transported. That contention conflicts with multiple decisions of this Court and, for reasons the United States explains, reflects a fundamental misunderstanding of the function of Section 2241(c)(5) within the broader statutory framework. Section 2241 contains five separate grants of adjudicatory authority that cover different cases depending on the asserted legal basis for the writ. In a case like this one, involving a prisoner's challenge to the legality of his confinement, Section 2241(c)(5) does not apply. The district court issued an auxiliary order in support of its jurisdiction under Section 2241(c)(3), not a writ of habeas corpus under 2241(c)(5). The latter provision does not apply across all categories of cases as a blanket limitation on what procedures courts may employ when, as here, the case arises under one of the other subsections.

D. The district court was not required to identify a precise common-law ancestor for this order. That contention, too, is foreclosed by this Court's deci-

sions. The "usages and principles" inquiry may begin with the common law, but this Court has made clear that the All Writs Act is not "an ossification of the practice and procedure of more than a century and a half ago." *Price v. Johnston*, 334 U.S. 266, 282 (1948). To the contrary, Congress deliberately kept the Act broad and flexible, and decisions of this Court applying it have reflected that adaptability.

III. The district court did not abuse its discretion by granting the transfer order.

A. This order should be reviewed for abuse of discretion. District courts generally have wide discretion in managing ongoing litigation. And decisions about how or whether to invoke the All Writs Act in particular circumstances are entrusted to the district court's "sound judgment" based on what the court believes is "reasonably necessary." *Adams v. United States ex rel. McCann*, 317 U.S. 269, 273–74 (1942).

The district court's decision to grant the motion was a reasonable exercise of discretion. This case presented unusual circumstances involving the documented presence of bullet fragments in Twyford's skull since childhood. The medical testing was recommended by a leading neurologist, who indicated that the procedure was warranted to determine the extent of brain function. And the district court credited counsel's assertion that the testing is critical to the investigation of pending and potential claims. In these circumstances, the district court acted within its discretion in concluding that the transfer order was "reasonably necessary in the interests of justice." *Adams*, 317 U.S. at 274.

B. The district court does not automatically abuse its discretion by addressing a transfer request

before deciding the separate question whether any information that results from it will ultimately lead to relief. To be sure, in many cases the most efficient course will be to resolve questions about admissibility and use at the outset. But nothing in AEDPA, this Court's decisions, or the All Writs Act requires a court invariably to proceed in that sequence when considering investigative requests of this kind.

This case demonstrates why Petitioner's absolute rule is inefficient and wasteful. Under that rule, before addressing Twyford's transfer motion, the district court would have been required to predict what information might result from medical tests about which the court has no expertise, then analyze how each of the potential outcomes would hypothetically factor into a range of different legal doctrines against the backdrop of an extraordinarily complicated procedural history. Petitioner's contention that the resulting decision is automatically appealable would compound these inefficiencies, requiring the court of appeals to engage in the same hypothetical exercise.

ARGUMENT

Congress limited appellate jurisdiction to review of "final decisions," and the "collateral-order" exception to that statutory requirement does not encompass a fact-bound challenge to a district court's exercise of discretionary authority. Unless this Court wishes dramatically to expand the scope of the *Cohen* doctrine, it should vacate the decision below and let the case proceed to conclusion in the district court.

In the alternative, the Court should affirm the Sixth Circuit's ruling on the merits. The Sixth Circuit correctly held that the All Writs Act is available

for this type of order in appropriate circumstances. As the United States explains, that conclusion is consistent with multiple decisions of this Court, as well as with the text, history, and purpose of the All Writs Act. The Sixth Circuit also correctly concluded that, in the particular circumstances of this case, the district court's decision to grant the transportation order was not an abuse of discretion.

I. THERE IS NO APPELLATE JURISDICTION OVER THE DISTRICT COURT'S NON-FINAL ORDER

Although the Sixth Circuit reached the correct result on the merits, that court did not have jurisdiction to review the district court's order. Petitioner concedes that because that order was not "final" within the meaning of 28 U.S.C. § 1291, jurisdiction in the Sixth Circuit depended on the collateral-order doctrine. Pet. Br. 2–3. To invoke that doctrine here would require this Court to create a brand-new class of appealable orders exempt from the statutory requirement of finality and outside the rulemaking process Congress established for that specific purpose. This Court should decline the invitation to further expand *Cohen*.

The class of orders for which Petitioner seeks this new category is especially unsuited to interlocutory appellate review. These orders turn not on some pure, important, and abstract issue of law but instead on whether the district court appropriately exercised its discretion in ordering the movement of a single prisoner on a unique record. Pet. App. 25a, 30a, 32a. The collateral-order doctrine does not

permit automatic review of such a discretionary, fact-based, and case-specific question.

This Court should therefore "vacate the judgment of the court of appeals and remand the case with instructions to dismiss the appeal for lack of jurisdiction." *Will v. Hallock*, 546 U.S. 345, 355 (2006); *see Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 379–80 (1981).

A. Jurisdiction Exists Only If the "Collateral-Order" Doctrine Applies

"Finality as a condition of review is an historic characteristic of federal appellate procedure" that, like the All Writs Act, dates back to the Judiciary Act of 1789. *Cobbledick v. United States*, 309 U.S. 323, 324 (1940). That finality requirement is now codified in 28 U.S.C. § 1291, which "confers on federal courts of appeals jurisdiction to review 'final decisions of the district courts.'" *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 103 (2009). "A 'final decisio[n]' is typically one 'by which a district court disassociates itself from a case,'" *id.* at 106 (quoting *Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 42 (1995)), "end[ing] the litigation on the merits and leav[ing] nothing more for the court to do but execute the judgment." *Digit. Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)).

"[T]he finality requirement embodied in § 1291 is jurisdictional in nature." *Firestone*, 449 U.S. at 379; *see Digit. Equip. Corp.*, 511 U.S. at 869 n.3 (applicability of collateral-order doctrine "go[es] to an appellate court's subject-matter jurisdiction"). "Subject-matter jurisdiction cannot be forfeited or waived and

should be considered when fairly in doubt." *Ashcroft v. Iqbal*, 556 U.S. 662, 671 (2009).[3] This Court therefore is "not free to pretermit the question"; it may address the merits of Petitioner's challenge only if it first concludes that the collateral-order doctrine applies. *Id.* Petitioner, moreover, must establish that all components of the order he challenges independently satisfy each of the *Cohen* requirements. *Swint*, 514 U.S. at 51; *see also id.* at 49–50 (rejecting a "rule loosely allowing pendent appellate jurisdiction" over aspects of an order that do not satisfy *Cohen*).

B. The "Collateral-Order" Doctrine Does Not Apply Because This Order Is Not Within Any Previously Recognized Category

Although Congress limited appellate jurisdiction to final decisions, this Court has permitted appeals from a "'small class' of collateral rulings that, although they do not end the litigation," should be reviewable in an interlocutory posture because they "resolve important questions separate from the merits" and would be "effectively unreviewable on appeal from the final judgment in the underlying action." *Mohawk*, 558 U.S. at 106 (quoting *Cohen*, 337 U.S. at

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[3] While the Brief in Opposition did not specifically cite the collateral-order doctrine, counsel urged this Court to deny certiorari because "the petition seeks review of an interlocutory appeal of a transport order, not a final judgment on the merits." BIO at 16. In any event, arguments that "go to jurisdiction" cannot be waived in a brief in opposition, Sup. Ct. R. 15.2, and Twyford must notify the Court in this brief of disagreement with Petitioner's Jurisdictional Statement, Sup. Ct. R. 24.2.

545–46, and *Swint*, 514 U.S. at 42). The Court has "stressed that [this exception] must 'never be allowed to swallow the general rule that a party is entitled to a single appeal, to be deferred until final judgment has been entered.'" *Id.* (quoting *Digit. Equip. Corp.*, 511 U.S. at 868).

This Court has unanimously and repeatedly "reiterate[d] that the class of collaterally appealable orders must remain 'narrow and selective in its membership.'" *Id.* at 113 (quoting *Will*, 546 U. S. at 350). That "admonition has acquired special force in recent years," the Court has explained, because Congress established a process for considered review by the bench and bar of any additional exceptions to the finality rule. *Id.* at 113–14 (noting that Congress amended the Rules Enabling Act, 28 U. S. C. § 2071 *et seq.*, to authorize this Court to adopt rules "defining when a ruling of a district court is final for the purposes of appeal under section 1291" (quoting 28 U.S.C. § 2072(c))).

Indeed, the Court has not recognized a new class of orders appealable under *Cohen* in nearly two decades. *See Sell v. United States*, 539 U.S. 166, 176–77 (2003). That reflects the recognition that any further dilution of the final-decision requirement should result from the rulemaking process Congress established, not from "expansion by court decision." *Mohawk*, 558 U.S. at 113–14. Because the rulemaking mechanisms "warrant the Judiciary's full respect," *id.* at 114 (quoting *Swint*, 514 U.S. at 48), the collateral-order doctrine is unavailable unless the challenged order is "on all fours with orders [this Court] previously ha[s] held to be appealable" under *Cohen*, *id.* at 115 (Thomas, J., concurring in part and concurring in the judgment); *cf. Sell*, 539 U.S. at 189,

192–93 (Scalia, J., dissenting) (opposing further expansion of the "so-called 'collateral order doctrine'" and describing it as a "misguided," "textually unsupported" judicial "invent[ion]").

The order challenged here does not fall into any previously recognized category. Indeed, it is nowhere close, and Petitioner readily concedes that finding jurisdiction would require inducting a new member—"transportation orders"—into the class of judicially created exceptions to the finality requirement. Pet. Br. 3. That alone is sufficient reason to conclude that appellate jurisdiction is absent. *Mohawk*, 558 U.S. at 115 (Thomas, J., concurring in part and concurring in the judgment). The arguments of Petitioner and his *amici* may be persuasive in the rulemaking process Congress established, but they do not warrant further "expansion by court decision." *Id.* at 113–14.[4]

C. This Court Should Not Expand the *Cohen* Doctrine to Permit Immediate Review of This Order

Even if this Court were willing to create a new category of appealable non-final order, the class of

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[4] That all "transportation orders" are not immediately appealable under the "blunt, categorical instrument" of *Cohen* does not leave wardens without interlocutory recourse in specific cases. *Mohawk*, 558 U.S. at 101. There remain "several potential avenues of immediate review apart from collateral order appeal," including certification of an interlocutory appeal under 28 U.S.C. § 1292(b) or writ of mandamus. *Id.*; *Digit. Equip. Corp.*, 511 U.S. at 883 (emphasizing these case-specific "safety valve[s]"). None of those alternatives is properly before this Court.

order at issue here would be a particularly poor candidate. For three reasons, this Court could not permit appellate review here without drastically broadening *Cohen*.

First, Petitioner insists that the district court's decision to issue the transport order "qualifies as a discovery order . . . on any understanding of 'discovery.'" Pet. Br. 49. The United States agrees that the permissibility of such an order depends on application of discovery rules. U.S. Br. 15, 28–29 (arguing that the district court's ruling "resembles a classic discovery order").

While that characterization is incorrect—the order in fact permitted investigative activity by counsel, not discovery, *see* Pet. App. 32a; *infra* Part III—the district court's order does share all the features that have prompted this Court consistently to "den[y] review of pretrial discovery orders" on the ground that they are not final under Section 1291. *Mohawk,* 558 U.S. at 108 (citing 15B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3914.23 (2d ed. 1992), for the proposition that "the rule remains settled that most discovery rulings are not final"). If anything, the case for collateral-order appeal is even weaker here than for a discovery order because the court's role is simply to make possible an investigative step that counsel could otherwise independently pursue. *See* Pet. App. 15a.

Extending the collateral-order doctrine to a ruling of this kind would break significant new ground under *Cohen*. It would categorically open the door not only to interlocutory appeals of discretionary "discovery" rulings in habeas cases and beyond, but also to orders of an even more preliminary nature in which the court imposes some obligation on state

actors. *See Digit. Equip. Corp.*, 511 U. S. at 868 (noting that appealability "is to be determined for the entire category to which a claim belongs," so extending *Cohen* to one order extends it to all of the same type).

Second, whether the district court properly exercised its discretion to issue a transport order on this record is exactly the kind of "'fact-related' legal inquiry" that this Court has long deemed unsuitable for collateral-order review. *Iqbal*, 556 U.S. at 674 (quoting *Johnson v. Jones*, 515 U.S. 304, 314 (1995)). In *Cohen* itself, the Court explained that the analysis would be different if, instead of a crisp legal "claimed right" unconnected to the specific facts, the challenged order "involved only an exercise of discretion as to the" application of a legal rule. 337 U.S. at 546–47. Consistent with that observation, this Court has explained that the *Cohen* doctrine is "limited to cases presenting neat abstract issues of law." *Johnson*, 515 U.S. at 317; *see Ortiz v. Jordan*, 562 U.S. 180, 188 (2011) (*Cohen* applies only to an order that "presents a purely legal issue") (internal quotations omitted). The question whether a transportation order should issue is inextricably intertwined with the facts and procedural history of the underlying case. The prohibition against immediate review of "nonfinal orders that turn on the facts of a particular case" serves a number of "vital purpose[s] of the final-judgment rule." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978). That rule does not permit automatic review of the sort of idiosyncratic, fact-specific, and discretionary decision at issue here.

Third, for similar reasons, the district court's order fails the stringent *Cohen* requirement that it must present "*important* questions separate from the

merits." *Mohawk*, 558 U.S. at 107 (quoting *Swint*, 514 U.S. at 42). According to Petitioner, *Cohen* applies because the general question "whether the District Court has . . . authority" under the All Writs Act "implicates important issues of state sovereignty and federalism." Pet Br. 3. But the decision whether to issue an order like this turns on case-specific discretion, and that involves far more mundane considerations and consequences. At stake are not grand questions of federal-state relations, but whether the particular record justifies one prisoner's transportation in one specific case for one medical test. As Petitioner's *amici* note, "[t]housands of juvenile and adult inmates are moved daily by state and local law enforcement" for all sorts of reasons. Utah Br. 7 (internal quotations omitted). Twyford himself has been transported without incident at least once to this same facility, *see* Pet. App. 272a, which is specifically designed to accommodate inmates, Pet. App. 257a.[5] Courts of appeals should not be required to delve mid-case into the facts and circumstances to determine whether a particular inmate is properly on the bus to the prison hospital.

Petitioner's reliance on circuit court cases holding transport orders appealable under *Cohen*, Pet. Br. 3, is not persuasive. All of those decisions preceded *Mohawk*; indeed, the most recent is 14 years old. And none of them concerned the same kind of

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[5] The Ohio Department of Rehabilitation and Correction explains that its "partnership with The Ohio State University Medical Center" provides an established "third level of health care" for Ohio inmates at that facility. https://drc.ohio.gov/correctional-healthcare (last visited March 26, 2022).

order Petitioner seeks to appeal here. In *Jackson v. Vasquez*, 1 F.3d 885, 888 (9th Cir. 1993), the appeal "present[ed] pure questions of law that c[ould] be reviewed without reference to the merits" because the prisoner had not yet filed a habeas petition. All of the other cases Petitioner cites were Section 1983 actions in which the custodian who was ordered to transport the prisoner was "a stranger to the case." *Barnes v. Black*, 544 F.3d 807, 812 (7th Cir. 2008). In that situation, unlike here, the custodian "will not be allowed to appeal from the final decision," so the argument for "effective unreviewability" of the transport order was much stronger. *Id.*

II. THE ALL WRITS ACT EMPOWERS FEDERAL COURTS TO ORDER THE TRANSFER OF PRISONERS

If this Court concludes that there is appellate jurisdiction over the district court's non-final order, it should affirm the Sixth Circuit's holding that courts have authority under the All Writs Act in appropriate circumstances to order prisoners transferred for medical testing. That conclusion is consistent with the broad terms of the All Writs Act, its traditional role as a source of authority for auxiliary writs of this kind, and multiple precedents of this Court.

A. The All Writs Act Affords Courts Broad Discretion to Issue Orders in Support of Their Jurisdiction

The All Writs Act 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. § 1651(a). The authority codified in that statute is a structural bulwark of the Article III judiciary. For over 200 years, it has promoted the efficient and effective management of litigation by granting federal courts a "legislatively approved source of procedural instruments designed to achieve the rational ends of law." *Harris v. Nelson,* 394 U.S. 286, 299 (1969) (quoting *Price v. Johnston*, 334 U.S. 266, 282 (1948)).

The history of the All Writs Act reflects its foundational status. The law originated with the Judiciary Act of 1789, "the last of the triad of founding documents, along with the Declaration of Independence and the Constitution itself." Sandra Day O'Connor, *The Judiciary Act of 1789 and the American Judicial Tradition*, 59 U. Cin. L. Rev. 1, 3 (1990). It has remained largely unchanged since. Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81–82 (codified as amended at 28 U.S.C. § 1651(a)). The Act thus springs from the same source that established this Court and defined the basic powers and structure of the Third Branch.

In Section 14 of the Judiciary Act, Congress expressly granted federal courts authority to issue certain specific writs, including writs of habeas corpus for the purpose of addressing illegal imprisonment. *Id.* "But the legislature foresaw that many other writs might, in the course of proceedings, be found necessary for enabling the courts to exercise their ordinary jurisdiction . . . . Congress, therefore, instead of a specific enumeration of them, wisely chose to employ a general description." *Ex parte Bollman*, 8 U.S. 75, 83–84 (1807) (argument of counsel). This broad and flexible grant of residual authority is firm-

ly rooted in the well-established discretionary authority that characterized the classic English writ system. *Id.* at 97–98; *see also* Robert J. Pushaw, Jr., *The Inherent Powers of the Federal Courts and the Structural Constitution*, 86 Iowa L. Rev. 735, 801–16 (2001).

This Court has applied the Act "flexibly in conformity with these principles," its history, and its expansive text. *United States v. N.Y. Tel. Co.*, 434 U.S. 159, 173 (1977). In particular, the Court has interpreted the term "necessary" to require only that the district court determine that invocation of the Act "is calculated in its sound judgment to achieve the ends of justice entrusted to it." *Id.* at 173 (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 273 (1942)). All Writs Act authority is "not limited to those situations where it is 'necessary' to issue the writ or order in the sense that the court could not otherwise discharge its . . . duties." *Id.*

Similarly, in interpreting the requirement that auxiliary writs be "agreeable to the usages and principles of law," 28 U.S.C. § 1651(a), this Court has emphasized the adaptability of the Act to unforeseen circumstances and challenges. *Price*, 334 U.S. at 282. The Act is not "an ossification of the practice and procedure of more than a century and a half ago." *Id.* To the contrary, this Court has ensured that the Act allows "variation or a modification of an established writ" so that courts have the ability to adapt as the law "develops a[nd] new problems arise." *Id.* at 282–84.

New York Telephone Company exemplifies the dynamic nature of the All Writs Act as a source of auxiliary authority. There, the Court held that a district court could use the Act to compel a private

third-party company to assist law enforcement in installing devices that register telephone numbers. 434 U.S. at 172–73. Although no such writ existed at common law, and although Congress had legislated extensively in adjacent areas, this Court reasoned that the All Writs Act was flexible and adaptable enough to permit a solution to the particular challenge the district court confronted. *Id.* at 172–78.

B. The All Writs Act Provides Authority for the Kind of Order Issued in This Case

Multiple precedents of this Court make clear that the authority the district court exercised here fits within the bounds of the All Writs Act.

1. This Court has "held explicitly" that the All Writs Act is an available source of authority in habeas cases. *Harris*, 394 U.S. at 299–300. Where "habeas corpus jurisdiction and the duty to exercise it [are] present, the courts may fashion appropriate modes of procedure." *Id.* at 299. Thus, in *Harris*, the Court concluded that in light of Congress' decision not to extend the civil discovery rules to habeas cases, district courts were permitted to "arrange for procedures which will allow development . . . of the facts relevant to disposition of a habeas corpus petition." *Id.* at 298. That "authority," the Court explained, "is expressly confirmed in the All Writs Act." *Id.* at 299.

More to the point, this Court has repeatedly concluded that the All Writs Act provides authority in habeas cases to order the transportation of prisoners. Indeed, this Court has itself issued such an order. In *Rees v. Peyton*, a state inmate on death row filed a petition for certiorari seeking review of the denial of habeas relief. 384 U.S. 312, 313 (1966) (per curiam).

He later "directed his counsel to withdraw [his] petition and forgo any further legal proceedings." *Id.* Counsel "advised th[e] Court that he could not . . . accede to these instructions without a psychiatric evaluation" of the petitioner. *Id.* In response, the Court directed the district court to "subject [the petitioner] to psychiatric and other appropriate medical examinations, and so far as necessary to temporary federal hospitalization for this purpose." *Id.* at 314. That order was warranted "in aid of the proper exercise of this Court's certiorari jurisdiction." *Id.* at 313.

The Court confirmed the same authority in *Price v. Johnston*, 334 U.S. 266 (1948). In that case, the Court held that courts have power under the All Writs Act to order the transfer of a habeas petitioner to federal court to argue his appeal. *Price*, 334 U.S. at 278–79. The Court explained that such a "writ is auxiliary" to the underlying habeas case and appropriate when, in "the sound discretion of the court," the prisoner's movement is "reasonably necessary in the interest of justice." *Price*, 334 U.S. at 278–79 (quoting *Adams*, 317 U.S. at 274).

And in *United States v. Hayman*, the Court affirmed a district court's authority under the All Writs Act to order a prisoner confined in another district to be produced before the sentencing court for a hearing on his Section 2255 motion. 342 U.S. 205, 220–21 (1952). Because no express statute specifically authorized production of the prisoner, the Court concluded that the district court's order was "auxiliary to the jurisdiction of the trial court over respondent granted in Section 2255 itself and invoked by respondent's filing of a motion under that Section." *Id.* at 220.

2. Consistent with these precedents, the All Writs Act furnishes authority for the type of order the district court issued here. The order was "in aid of [the] jurisdiction" the district court independently possessed under 28 U.S.C. §§ 2241(c)(3) and 2254(a) by virtue of the pending habeas petition. *See Harris*, 394 U.S. at 298–300 (citing 28 U.S.C. § 2243) (permitting invocation of the All Writs Act to determine "facts relevant to disposition of a habeas corpus petition"); *N.Y. Tel. Co.*, 434 U.S. at 175 n.23.

On the particular record here, the district court could conclude in its discretion that the order was "reasonably necessary in the interests of justice." *See infra* Part III. And under this Court's precedents, use of the All Writs Act to order the transport of a prisoner was consistent with the "usages and principles of the law." *See Rees*, 384 U.S. at 313*; Price,* 334 U.S. at 279; *Hayman*, 342 U.S. at 220–21. As the United States explains, federal courts have long had authority to order the transfer of prisoners for a range of reasons. U.S. Br. 23–25. Indeed, Petitioner *concedes* that federal courts have authority to issue such orders in "specific contexts" and under "other statutes or rules or equitable principles." Pet. Br. 38. He offers no logical reason why such authority would be permissible in those other "contexts" but somehow conflict with the "usages and principles of the law" when grounded in the one statute that Congress specifically designed for the purpose of issuing procedural orders.

C. Section 2241(c)(5) Does Not Prohibit an Order of This Kind

Petitioner challenges the existence of authority to issue the order under the All Writs Act primarily on the ground that one provision of the habeas laws, Section 2241(c)(5), "forbids requiring custodians to bring inmates anywhere but to court, and even then only 'to testify or for trial.'" Pet. Br. 15. That contention is squarely foreclosed by this Court's precedents and principles of statutory interpretation.

1. This Court's Decisions Foreclose Petitioner's 2241(c)(5) Argument

Petitioner's contention that Section 2241(c)(5) displaces the All Writs Act in this context runs inexorably into this Court's decisions in *Rees*, *Price*, and *Pennsylvania Bureau of Correction v. U.S. Marshals Service*, 474 U.S. 34 (1985).

According to Petitioner, courts hearing habeas cases may order a prisoner transferred (a) only under Section 2241(c)(5); (b) only to court; and (c) only to testify or for trial. But in *Rees*, this Court ordered a state prisoner transferred (a) under the All Writs Act; (b) to a hospital; and (c) for psychiatric evaluation. 384 U.S. at 313–14. And in *Price*, this Court held that the All Writs Act authorized an order to transfer a prisoner to argue an appeal. 334 U.S. at 286, 294. The same statutory language on which Petitioner relies here was in effect when the Court issued both decisions. Section 2241(c)(5) took its modern form 21 years before *Rees*, and at the time of *Price*, the operative language was even more restrictive. *See* 28 U.S.C. § 453 (1946) ("The writ of habeas

corpus shall in no case extend to a prisoner in jail unless . . . it is necessary to bring the prisoner into court to testify."). Petitioner's principal argument cannot survive these decisions.[6]

Pennsylvania Bureau of Correction similarly forecloses Petitioner's Section 2241(c)(5) theory. Petitioner cites that decision for the proposition that Section 2241(c)(5) "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." Pet. Br. 36. But the case actually stands for exactly the opposite rule. There, the magistrate judge issued a writ of habeas corpus *ad testificandum* ordering a non-custodian—the Marshals—to transport state prisoners to testify in a Section 1983 action. 474 U.S. at 35–36. Because in that case "the traditional writ *ad testificandum* [was] sufficient" and "indisputably provide[d] a district court with a means of producing a prisoner-witness," this Court held that the order had to conform with

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[6] The Seventh Circuit's decision in *Ivey v. Harney*, 47 F.3d 181 (7th Cir. 1995), on which Petitioner heavily relies, is thus based on a flawed central premise. The panel concluded that a court could not invoke the All Writs Act as authority to transfer a prisoner for medical testing in support of his Section 1983 action. *Id.* at 186. Justifying that conclusion, the court stated that "in its current incarnation," Section 2241(c) is "close-ended, a ceiling rather than a floor." *Id.* at 184. The court distinguished *Price* on the ground that it was decided "[b]efore Section 2241(c) took its current form." *Id.* at 183–84. But there is no material difference between the text of Section 2241(c)(5) at issue in *Ivey* and the text of its predecessor statute at issue in *Price*. Both were phrased in "an 'unless . . . not' form." *Id.* at 185.

the requirements of Section 2241(c)(5). *Id.* at 42 n.7, 43.

The Court specifically distinguished *Price* on the ground that Section 2241(c)(5) did *not* limit or control the auxiliary writ issued in that case. "In *Price*," the Court reasoned, "there was no alternative" mechanism in existing statutes to order the prisoner's transport for oral argument because 2241(c)(5) was limited to testimony. *Id.* at 42 n.7. That left a "statutory interstice[]" that the court could "fill" by "use of an extraordinary writ" under the All Writs Act. *Id.*

Petitioner contends that "Congress' decision [in 2241(c)(5)] not to authorize . . . orders [to transport prisoners for reasons other than trial or testimony] is a limit to be respected, not a gap to be filled." Pet. Br. 37. Like *Rees* and *Price*, *Pennsylvania Bureau of Correction* says just the opposite.

2. Section 2241(c)(5) Does Not Apply to the Type of Auxiliary Order at Issue

The same conclusion follows from basic principles of statutory interpretation. Petitioner's heavy reliance on Section 2241(c)(5) reflects both a mischaracterization of the nature of the challenged order and a misunderstanding of the function of that provision.

a. Petitioner conflates two distinct inquiries: first, whether a court has jurisdiction to issue a writ of habeas corpus; and second, whether a court may in its discretion invoke the All Writs Act to issue auxiliary orders in support of such jurisdiction. Once the first inquiry is satisfied—the court concludes it has jurisdiction to entertain a habeas petition—the court may then decide whether to issue auxiliary orders

"necessary or appropriate" under the All Writs Act to adjudicate that case efficiently. *See Harris*, 394 U.S. at 298–99 ("[W]here "habeas corpus jurisdiction and the duty to exercise it [are] present, the courts may fashion appropriate modes of procedure" under the authority "expressly confirmed in the All Writs Act.").

Petitioner assumes that because this is a habeas case, and because the court issued a transport order, that order must be a writ of habeas corpus. As the United States explains, U.S. Br. 22–23, that characterization is incorrect. The transport order was not a writ of habeas corpus pursuant to Section 2241(c)(5), but rather an auxiliary writ issued in aid of the district court's jurisdiction under a different provision of the habeas statute, Section 2241(c)(3). *See Hayman*, 342 U.S. at 220 (concluding that a district court ordering a prisoner transfer "would not be issuing an original writ of habeas corpus to secure respondent's presence from another district"; rather, "[i]ssuance of an order to produce the prisoner is auxiliary to the jurisdiction of the trial court over respondent granted in Section 2255 itself and invoked by respondent's filing of a motion under that Section."); *Price*, 334 U.S. at 279 ("[contemplated writ] is auxiliary" to the court's existing habeas jurisdiction); *Pa. Bureau of Corr.*, 474 U.S. at 42 n.7 (writ in *Harris* was an "extraordinary writ" under the All Writs Act, not a writ of habeas corpus).

b. The error in Petitioner's characterization stems from a basic misconception of the function of Section 2241(c)(5) and its role in the broader statutory framework.

Section 2241(c) functions as a grant of authority for federal courts to adjudicate habeas cases. In par-

ticular, the statute provides for such authority in five disjunctive categories:

> (1) [The prisoner] is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or
> (2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States; or
> (4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or
> (5) It is necessary to bring him into court to testify or for trial.

28 U.S.C. § 2241(c).

Subsections (c)(1), (c)(2), and (c)(4) provide courts with jurisdiction over habeas cases brought, respectively, by prisoners held in federal custody; by prisoners who are held because of their actions pursuant to an Act of Congress or court order; or by foreign individuals held because of an action done at the direction of another country. None of those is relevant here.

Subsection (c)(3), in turn, creates jurisdiction when the petition is filed by a prisoner, whether in state or federal custody, on the ground that he is held in violation of federal law or the Constitution.

See, e.g., *Zadvydas v. Davis*, 533 U.S. 678, 687 (2001) (Section 2241(c)(3) "authoriz[es] any person to claim in federal court that he or she is being held 'in custody in violation of the Constitution or laws . . . of the United States'"). That provision, combined with the parallel grant of authority in Section 2254(a), is the basis for district court jurisdiction over a case like this one, in which a state prisoner contends that the Constitution renders his detention unlawful.

Sections (c)(1)–(c)(4) thus correspond with the common law writ of habeas corpus *ad subjiciendum*—the so-called Great Writ—allowing a prisoner to challenge the legality of his conviction and sentence. *See* Fallon et al., *The Federal Courts and the Federal System* 1193 (7th ed. 2015) (citing 3 William Blackstone, *Commentaries* *129–32).

Section (c)(5) addresses a distinct type of proceeding that is not at issue here. That provision authorizes the district court to issue a writ of habeas corpus *ad testificandum* or *ad prosequendum* commanding that a prisoner be delivered from anywhere in the country to the court "to testify or for trial" in a case pending before that court. 28 U.S.C. § 2241(c)(5); *see, e.g.*, *Barnes*, 544 F.3d at 809 (citing *Carbo v. United States*, 364 U.S. 611, 619 (1961) and collecting cases).

The purpose of that (c)(5) source of authority is fundamentally different from the one underlying this case. District courts may issue writs of habeas corpus *ad testificandum* under Section 2241(c)(5) in cases unrelated to habeas proceedings. This is so because "[a] prisoner might be a crucial witness in a civil case in federal court that had nothing to do with prisons or criminal law." *Barnes*, 544 F.3d at 810. Conversely, unlike subsections (c)(1)–(c)(4), Section

2241(c)(5) does not provide federal courts with jurisdiction to inquire into the legality of a prisoner's custody. *See, e.g.*, *Miller v. Hambrick*, 905 F.2d 259, 261–62 (9th Cir. 1990) (finding that district court lacked jurisdiction to hear a habeas petition filed by a prisoner who was present pursuant to a Section 2241(c)(5) writ because "[t]he [habeas corpus *ad testificandum*] writ authorizes a trip not a change of custodians").

c. Because this is a case arising under Section 2241(c)(3), not one brought under Section 2241(c)(5), the latter provision does not apply. And contrary to Petitioner's argument, in cases where it does not apply, Section 2241(c)(5) does not cast a blanket limitation across all the other subsections, restricting what procedures a court may employ in aid of its duty to address the legality of the prisoner's detention when, as here, jurisdiction rests on a different source. *See* U.S. Br. 22 (explaining that "[t]here is thus no basis in either the common law or the statutory text for [Petitioner's] contention that Section 2241(c) effects a sort of field preemption over the subject of prisoner transport").

D. The District Court Was Not Required to Identify a Common Law Ancestor for the Transport Order

Petitioner contends that the All Writs Act is categorically unavailable unless its use parallels a writ that existed at common law. Once again, Petitioner fights controlling precedent.

The argument Petitioner advances is precisely the one this Court rejected in *Price*. Addressing whether an order to transport the prisoner for oral

argument was "agreeable to the usages and principles of law," the Court observed that while "[a]t common law there were several variants of the writ of habeas corpus," none was "devised for the particular purpose" at hand, "[n]or does it appear that the courts of England have used or developed the habeas corpus writ for this purpose." *Price*, 334 U.S. at 281–82.

The Court concluded, however, that the order was permissible. The All Writs Act, the Court reasoned, is not "confined to the precise forms of th[e] writ in vogue at the common law or in the English judicial system." *Id.* at 282. The operative language "says that the writ must be agreeable to the usages and principles of 'law,' a term which is unlimited by the common law or the English law." *Id.* Because the "'law' is not a static concept, but expands and develops as new problems arise," the Court rejected any limitation on the Act to "only those [kinds of orders] recognized in this country in 1789, when the original Judiciary Act containing the substance of this section came into existence." *Id.* "In short," the Court concluded, "we do not read [the All Writs Act] as an ossification of the practice and procedure of more than a century and a half ago." *Id.*

Thus, while common law may be a useful place to "look first" for relevant "usages and principles," *Hayman*, 342 U.S. at 221 n.35, that is the beginning, not the end, of the inquiry. Indeed, if Petitioner's argument were correct, then *New York Telephone Company*, this Court's pathmarking case on the All Writs Act, would have reached a different result. That case involved an order directing a telephone company to provide technical assistance in installing a pen register—concepts that were entirely unfore-

seen at common law. Petitioner's rigid approach represents the kind of "dry formalism" this Court has long rejected in interpreting the All Writs Act, lest it "sterilize procedural resources which Congress has made available to the federal courts." *Adams*, 317 U.S. at 274.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION

The Sixth Circuit also correctly held that the district court did not abuse its discretion by granting the transfer motion on the specific facts of this case. Based on its familiarity with the complex intersection of the procedural history and Twyford's claims for relief, the district court deemed the order "necessary or appropriate" under the All Writs Act. That judgment was reasonable and supported by the record. There is no merit to Petitioner's effort to replace the traditional discretion district courts employ in managing ongoing litigation with an inflexible rule categorically requiring them to proceed in a preordained sequence when considering orders of this kind.

A. The District Court Acted Within Its Discretion by Deeming the Order "Necessary or Appropriate"

The All Writs Act is an essential tool in furthering the district courts' "'special role' in managing ongoing litigation." *Mohawk*, 558 U.S. at 106 (quoting *Firestone*, 449 U.S. at 374); *cf. Dietz v. Bouldin*, 579 U.S. 40, 45 (2016) (observing this Court's recognition of district courts' power "to manage their own affairs

so as to achieve the orderly and expeditious disposition of cases" (quoting *Link v. Wabash R. Co.*, 370 U.S 626, 630–31 (1962))). To that end, the Act provides districts courts a "discretionary power" to issue procedural orders they regard as "necessary or appropriate" in the discharge of their duties. *Price*, 334 U.S. at 286.

Whether to invoke the All Writs Act in any specific context is entrusted to the district court's "sound judgment." *Adams*, 317 U.S. at 273; *see Price*, 334 U.S. at 278 (All Writs Act authority "may be exercised at the sound discretion of the court"); *id.* at 285 (emphasizing "[t]he discretionary nature of the power" the Act provides). The "real question," therefore, "is whether [the district court] abused its power in exercising" the All Writs Act "in the situation that confronted it." *Adams,* 317 U.S. at 273; *see N.Y. Tel. Co.*, 434 U.S. at 171 (applying abuse-of-discretion standard).

This Court has interpreted the scope of discretion under the All Writs Act with due regard for "the [] breadth of [the Act's] language." *Price*, 334 U.S. at 284. Even before Congress added the phrase "or appropriate," the Court "consistently applied the Act flexibly." *N.Y. Tel. Co.*, 434 U.S. at 173. The Court has refused to interpret the Act to mean it is available "only when . . . it is 'necessary' in the sense that the court could not otherwise physically discharge its" existing jurisdiction. *Adams*, 317 U.S. at 273; *see N.Y. Tel. Co.*, 434 U.S. at 173 (the Act is "not limited to those situations where it is 'necessary'" in the strictest sense). To the contrary, the Act is available "where, because of special circumstances, its use as an aid to [a proceeding] over which the court has jurisdiction may fairly be said to be reasonably neces-

sary in the interest of justice." *Adams*, 317 U.S. at 274.

The district court could "fairly conclude" that this standard was satisfied in the "special circumstances" of this case. *Price*, 334 U.S. at 279–80. The request for transfer was based not simply on the representations of counsel or the desires of the prisoner, but instead on the assessment of an experienced doctor—the Director of Neurology at The Ohio State University Medical Center—that imaging at his facility was necessary to determine the extent of basic brain "functioning." Pet. App. 272a–273a. The premise for testing was not conjectural or speculative; it rested on the undisputed fact that Twyford has, since the age of 13, had at least 20 to 30 bullet fragments scattered throughout his skull. The district court credited the assertion that "testing is crucial" to counsel's "ability to assist Petitioner with the development and presentation of his claims," and the court identified specific claims to which the results could relate. Pet. App. 31a–32a.

As the Sixth Circuit correctly held, the district court did not abuse its discretion in finding on this extraordinary record that the order was "reasonably necessary in the interest of justice." *Adams*, 317 U.S. at 274; *cf. Ayestas v. Davis*, 138 S. Ct. 1080, 1094 (2018) (concluding that application of a "reasonably necessary" standard is within the district court's discretion and requires the prisoner to demonstrate that "the underlying claim is at least plausible").

B. The District Court Was Not Obligated to Decide at the Outset Whether Twyford Would Ultimately Obtain Relief

Petitioner contends that the district court erred because it considered the issues in the wrong sequence. In particular, Petitioner argues that district courts may never order a prisoner transferred for medical testing unless the court first decides not only how the testing results would be admissible but also how they would entitle the prisoner to relief. Pet. Br. 43–44, 50. That position finds no basis in statute or precedent and would "undermine[] 'efficient judicial administration'" by "encroach[ing] upon the prerogatives of district court judges" to determine the optimal process in any particular context. *Mohawk*, 558 U.S. at 106 (quoting *Firestone*, 449 U.S. at 374).

1. Neither *Pinholster* nor *Harris* Compels Petitioner's Rigid Approach

Petitioner's argument is based primarily on two decisions of this Court: *Cullen v. Pinholster*, 563 U.S. 170 (2011), and *Harris v. Nelson*, 394 U.S. 286 (1969). Neither compels the categorical rule he advances.

a. *Pinholster* concerned the application of 28 U.S.C. § 2254(d)(1) to habeas claims adjudicated on the merits in state proceedings. This Court held that federal review of such claims is limited to the state-court record. 563 U.S. at 180-–82.

The district court recognized that *Pinholster* and other authorities may, in connection with certain asserted and potential claims, ultimately limit the use of information generated by Twyford's neurologi-

cal exam. *See* Pet. App. 32a. But the district court also correctly concluded that *Pinholster* does not control the separate question whether Twyford's counsel may take steps to develop the factual background of the case, to understand the implications of Twyford's mental capacity for previous proceedings, and to explore potential claims—investigative activities of the kind that have long been within the discretion of habeas counsel. Pet. App. 31a–32a.

This Court's decision in *Ayestas v. Davis,* 138 S. Ct. 1080 (2018), highlights both the importance of such activities and the error in Petitioner's *Pinholster* argument. *Ayestas* addressed 18 U.S.C. § 3599, which post-dates AEDPA and provides district courts discretion to permit "funding to a party who is facing the prospect of a death sentence and is 'financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services.'" 138 S. Ct. at 1092 (quoting 18 U.S.C. § 3599(a)). Interpreting that "reasonably necessary" standard—the same one that controls the All Writs Act, see *Adams*, 317 U.S. at 274—the Court unanimously concluded that the inquiry turns on "a determination by the district court, in the exercise of its discretion, as to whether a reasonable attorney" would regard the investigative services as having "likely utility." 138 S. Ct. at 1093–94.

In *Ayestas*, as here, the State relied heavily on *Pinholster* and urged this Court categorically to prohibit funding unless the prisoner established at the outset that any resulting information would entitle him to relief. Br. for Respondent, No. 16-6795, at 32-34. But the Court did not even mention *Pinholster*, much less adopt such a sweeping rule. Instead, it emphasized the district court's "broad discretion" to

facilitate access to investigative services where a reasonable lawyer would deem it helpful. 138 S. Ct. at 1094. While one "natural consideration informing the exercise of that discretion" is "the potential merits of the claims," the prisoner need only show that "the underlying claim is at least plausible" and that obtaining the requested services "stands a credible chance of enabling" him to overcome procedural obstacles. *Id.* at 1094 (internal quotations omitted). That is consistent with the way the courts below approached Twyford's request in this case.

b. Petitioner's reliance on *Harris v. Nelson*, 394 U.S. 286 (1969), is similarly misplaced. Indeed, the thrust of that case undercuts Petitioner's broader effort to erase the All Writs Act from the habeas context. In *Harris*, this Court held that the civil discovery provisions of the Federal Rules did not by their terms permit habeas petitioners to serve interrogatories on their jailers. 394 U.S. at 297. The Court concluded, however, that the All Writs Act filled that gap, supplying the necessary authority for a district court to "arrange for procedures which will allow development . . . of the facts relevant to disposition of a habeas corpus petition." *Id.* at 298. Like other All Writs Act cases, *Harris* emphasized that district courts control the availability of such procedures "in the exercise of their discretion." *Id.* at 300. An auxiliary order to facilitate fact-finding may issue, this Court explained, "when the [district] court considers that it is necessary" for a "fair and meaningful" proceeding." *Id.*

Petitioner attempts to contort *Harris* into a restrictive ruling, Pet. Br. 41–42, by seizing on a single concluding paragraph in which the Court expressed confidence that district courts would exercise their

discretion prudently and not "pursue or authorize pursuit of all allegations presented to them." 394 U.S. at 300. To illustrate the point, the Court described two poles. At one extreme, the Court noted that district courts would not permit a prisoner to chase a "fantasy which has its basis in the paranoia of prison rather than in fact." *Id.* At the other end, the Court described a case in which a petitioner made "specific allegations" that "may, if the facts are fully developed, be able to demonstrate that he is confined illegally and is therefore entitled to relief." *Id.* In the latter situation, the Court explained, it would be "the *duty* of the court to" facilitate the inquiry. *Id.* (emphasis added).

Contrary to Petitioner's characterization, the Court did not purport to hold that the All Writs Act was available "*only if*" the prisoner's allegations rose to that obviously compelling level. Pet. Br. 42. Instead, consistent with other precedents, the Court entrusted the decision whether to permit fact-finding in any particular case to the district court's "sound judgment" within these broad limits. *Adams*, 317 U.S. at 273; *cf. Bracy v. Gramley*, 520 U.S. 899, 909 (1997) (noting that while "it would be an abuse of discretion *not* to permit any" fact-finding on a compelling showing, "the scope and extent" of the necessary procedures "is a matter confided to the discretion of the District Court") (emphasis added).

Courts have adopted the language Petitioner cites in *Harris* as the operative standard for the narrow purpose of determining whether "good cause" exists to permit a prisoner to serve discovery demands in habeas cases. But as the Sixth Circuit correctly concluded, Twyford never sought discovery within the meaning of the rules governing such re-

quests. Those rules are specifically geared toward compulsory demands for information: "interrogatories," "depositions," "requested documents," and "requests for admission." Rules Governing § 2254 Cases in the United States District Courts, Rule 6.

Twyford is not asking for compulsory disclosure of information from Petitioner or a third party; instead, he is seeking to investigate information contained in his own body. If he were not incarcerated, he would not need a writ from the court to conduct this investigation and the state would have no role to play. His request falls outside the scope of "discovery" as that term is generally understood. *See, e.g.*, Fed. R. Civ. P. 26 (addressing disclosure of information and production of documents to a counterparty); Rules Governing Section 2254 Cases in the United States District Courts, Rule 6 (referencing the Federal Rules of Civil Procedure governing discovery).

2. Petitioner's Categorical Rule Would Be Inefficient and Wasteful

Petitioner's categorical rule requiring a decision on the ultimate issues first would lead to inaccurate outcomes and inefficient proceedings. To be sure, in some cases involving a straightforward procedural history, testing that would yield predictable or binary results, or an isolated number of claims, proceeding in the sequence Petitioner prefers will make sense.

But that will not invariably be true, as this case aptly demonstrates. To abide by Petitioner's proposed categorical rule, the district court here would have been required first to predict what the outcome

of the medical testing would be. That is an inherently misguided inquiry. It is impossible for medical experts—let alone federal judges—to know with any reasonable degree of confidence what results PET-CT scans will produce before they are conducted. Next, based on that uninformed prediction, the court would have been compelled to conduct a full merits analysis of every permutation of possible testing outcomes under each of the potentially applicable habeas provisions and doctrines. The court would have had to perform that series of exhaustive analyses against an extraordinarily complex procedural history involving five different stages of proceedings, dozens of claims and assignments of error, and overlapping direct-appeal and postconviction phases in state court.

And under Petitioner's approach, the inefficiencies would only multiply from there. If the district court's decision is automatically appealable under *Cohen*—as Petitioner must establish to prevail here—the court of appeals would also have no choice but to replicate, mid-case, the district court's record-intensive analysis of hypothetical results. The result would be exactly the kind of delay that Congress sought to avoid. Utah Br. 26–27.

The district court made a reasonable judgment that, on this particular record, it would be most efficient and accurate to defer decision on the ultimate questions until the results of the testing are known. That court was best positioned to make such a determination given its familiarity with the complex procedural history and the particular claims. *See*

generally Pet. App. 43a–147a. It did not abuse its discretion by proceeding in the sequence it selected.[7]

[7] If this Court believes the district court applied an incorrect standard, then it should adopt the position of the United States and vacate the judgment of the court of appeals so the district court can apply the correct standard in the first instance. *See* U.S. Br. 25, 30; *Ayestas*, 138 S. Ct. at 1095.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded with instructions to dismiss the appeal. In the alternative, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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