No. 21-511

In the
Supreme Court of the United States

TIM SHOOP, WARDEN,

Petitioner,

v.

RAYMOND A. TWYFORD, III,

Respondent.

On Writ of Certiorari to the U.S. Court of Appeals for the Sixth Circuit

BRIEF OF 18 FORMER FEDERAL JUDGES AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE [1]

Amici are 18 former Article III judges who have devoted much of their professional lives to improving both the criminal justice system and the appearance of justice in criminal cases. Collectively, they served more than 325 years in the federal judiciary. Based on their experience as Article III judges, Amici submit this brief to emphasize the importance of construing the All Writs Act broadly and flexibly so that justice and the appearance of justice can be achieved. Those considerations take on a heightened importance in the context of a capital case, such as this, where federal courts are called upon to decide whether a person can legally be put to death.

INTRODUCTION AND SUMMARY OF ARGUMENT

Raymond Twyford was sentenced to die by an Ohio state court for murdering the alleged rapist of his girlfriend's disabled daughter, but he has raised significant issues in his federal habeas corpus petition as to whether he received ineffective assistance of counsel for failing to fully address his diminished mental capacity. As a young child, Twyford was regularly beaten by his alcoholic stepfather, until his mother had a nervous breakdown and sent him to live with relatives. Those relatives introduced him to drugs and alcohol at age nine, which led him to juvenile detention facilities and prison as a teenager

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[1] No counsel for a party authored this brief in whole or in part and no person other than Amici or their counsel made a monetary contribution to its preparation or submission. Counsel of record for both parties received the required notice of this brief and have provided their written consent. A full list of Amici appears in the Appendix to this brief.

where he was gang-raped. At age thirteen, he made his first of many suicide attempts. He shot himself in the head, causing the loss of his right eye, and lodging more than 20 bullet fragments into his brain. Resp. Br. 5.

At trial, a defense psychologist told the jury that Twyford "did not have violent tendencies except to protect children who were threatened," but the jury heard nothing about the impact of the gunshot to Twyford's brain on his cognitive abilities. Pet. App. 172a; *see* Resp. Br. 6. Remarkably, the Ohio Supreme Court found on direct appeal that Twyford's counsel "fell below an objective standard of reasonable representation" and engaged in conduct that was "inexplicable," but found that ineffectiveness harmless as to both guilt and sentencing. Pet. App. 189a. The majority found harmless error as to the death sentence due, in part, to the absence of any "mental disease or defect." *Id.* at 197a. Even without hearing any evidence as to the extent of Twyford's gunshot-related brain injury, three justices dissented as to the penalty, with Justice Lundberg Stratton concluding that, but for Twyford's ineffective counsel, she believed "this jury would have chosen life imprisonment." *Id.* at 205a–206a.

The issue before the Court now is whether Twyford should be allowed to investigate his habeas claims further by being transported from prison to a medical facility so that he can receive a brain scan. Dr. Douglas Scharre, a neurologist and the Director of the Ohio State University Wexner Medical Facility, advised the district court that Twyford's medical history suggests that he "may suffer neurological defects resulting from childhood abuse, alcohol and drug use, and a self-inflicted gunshot wound to the

head." *Id.* at 30a. He explained that prior brain scans reveal 20–30 bullet fragments in various parts of Twyford's brain, but there is no clear image of damage done to his frontal lobe. Dr. Scharre recommended that such a scan be completed, which would reveal any frontal lobe damage from the gunshot or prior drug use and enable him to assess any neurological injury. *Id.* 30a–31a. On the basis of Dr. Scharre's recommendation, the district court invoked the All Writs Act in aid of its ability to address the pending habeas claims and ordered Twyford transported so that he could have the brain scan. The Sixth Circuit affirmed.

As former federal judges, Amici support the decisions below. Amici fear that the categorical arguments raised by the warden, if accepted, would cripple the power of federal courts to deliver justice. As a legal matter, the authority of the district court to issue an order in aid of fact-finding concerning a habeas petition is well-established. *See Harris v. Nelson*, 394 U.S. 286, 298 (1969) (permitting invocation of the All Writs Act to determine "facts relevant to disposition of a habeas corpus petition"); *accord Bracy v. Gramley*, 520 U.S. 899, 904 (1997). Indeed, this Court has used that very authority to authorize an inmate to be transported for a medical assessment of his mental competency. *Rees v. Peyton*, 384 U.S. 312, 313–14 (1966) (per curiam).

The warden simply looks to the wrong body of law in claiming that 28 U.S.C. § 2241(c)(5) limits the power of federal courts, under a different statute, the All Writs Act, 28 U.S.C. § 1651, to order an inmate transported for reasons other than to testify or be tried. The transportation order under the All Writs Act is an auxiliary writ in aid of the federal court's

habeas jurisdiction, and this Court has repeatedly allowed it to be used to transport an inmate for reasons other than to testify or be tried. *See Rees*, 384 U.S. at 314 (transportation for mental examination); *United States v. Hayman*, 342 U.S. 205, 220 (1952) (transportation for attending a post-trial habeas hearing); *Price v. Johnston*, 334 U.S. 266, 284 (1948) (transportation for inmate to argue his own appeal).

Given that the All Writs Act confers the authority to issue the transportation order, the only remaining question is whether the district court abused its discretion by doing so. It did not. The All Writs Act leaves it to the district court's "sound judgment" to decide what is "reasonably necessary in the interest of justice." *Adams v. United States ex rel. McCann*, 317 U.S. 269, 274 (1942); *accord Price*, 334 U.S. at 279. Given the objective fact that Twyford was shot in the head and has bullet fragments scattered throughout his brain, coupled with a neurologist's recommendation for a brain scan to determine the impact of that trauma on Twyford's cognitive abilities, the district court's order to allow Twyford to collect brain scan evidence is well-justified.

The warden's effort to displace the All Writs Act standard with the standard for ordering habeas discovery was appropriately rebuffed by the Sixth Circuit because this case does not involve a discovery order at all. Twyford is conducting his own examination of his own brain, something he would be free to do on his own if he were not confined. The warden is not compelled to produce evidence for Twyford, but merely transport him so that Twyford can collect that evidence for himself.

The warden's final argument that there is no point to collecting evidence that cannot be used does

him no better because the argument itself presumes too much. Even the warden seems to acknowledge that *Cullen v. Pinholster*, 563 U.S. 170 (2011), is not an absolute bar to a federal court's consideration of new evidence in a habeas petition and, as Amici show below, there are numerous ways in which Twyford's brain scan may be admissible. Thus, the district court did not abuse its discretion in allowing Twyford to collect evidence that could prove useful to his claims.

The warden seems to lose sight of the fact that all Twyford seeks at this stage is to investigate his claims; not to prove his claims. Courts authorize discovery, testing, and the pursuit of investigatory leads all the time, without any assurance that the information obtained will be either helpful or admissible. Twyford's brain scan results may not end up being helpful to him, whether that is due to what the scan reveals or due to issues of admissibility, but that is not a reason to preclude him from gathering the very evidence that may prove that his life is worth sparing. Amici believe that letting Twyford die without allowing him to examine available evidence that could save his life will be seen for what it is by the public—a travesty of justice.

ARGUMENT

I. THE ALL WRITS ACT AUTHORIZES FEDERAL DISTRICT COURTS TO ORDER A STATE PRISONER TRANSPORTED FOR MEDICAL TESTING IN SUPPORT OF HABEAS CLAIMS

A. The All Writs Act Is Applied Expansively In Habeas Corpus Proceedings

The All Writs Act traces its roots back to 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). The statute's "all-writs" provision contained "[t]he most expansive and open-ended language" in the Judiciary Act. Wythe Holt, *"To Establish Justice": Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L. J. 1421, 1507 (1989).[2] That expansive language is understandable, as the All Writs Act was intended to serve as a necessary gap-filler, a species of common-law authority empowering the judiciary to fill statutory voids left by Congress. *See* William F. Ryan, *Rush to Judgment: A Constitutional Analysis of Time Limits on Judicial Decisions*, 77 B.U. L. REV. 761, 777 n.66

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[2] The All Writs Acts provides: "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). Although the Act has been subject to slight amendments since 1789, Congress "intended to leave the all writs provision substantially unchanged." *Pa. Bureau of Corr. v. U.S. Marshals Serv.*, 474 U.S. 34, 42 (1985).

(1997) ("Congress . . . has always recognized that the federal courts would inevitably encounter procedural gaps, and has in various ways empowered the courts to fill those voids. This is clearly the purpose of the famous All Writs Act . . . ."). Indeed, in two founding-era decisions, this Court described the All Writs Act in precisely this manner, characterizing the All Writs Act as a tool for filling "the interstices of federal judicial power when those gaps threatened to thwart the otherwise proper exercise of federal courts' jurisdiction." *See Pa. Bureau of Corr.*, 474 U.S. at 41 (discussing *McClung v. Silliman*, 19 U.S. (6 Wheat) 598 (1821), and *McIntire v. Wood*, 11 U.S. (7 Cranch) 504 (1813)).

Although the All Writs Act is an important source of a federal court's power in every context, it has proven to be an especially powerful tool for ensuring that inmates have the opportunity to establish their right to a writ of habeas corpus. Addressing the writ of habeas corpus, this Court explained that "[t]he very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected." *Harris*, 394 U.S. at 291. The *Harris* Court found that it was the "inescapable obligation of the courts" to "fashion appropriate modes of procedure" for "securing facts" that may enable an inmate to determine his right to a writ of habeas corpus, and to be mindful of the "fact that the petitioner, being in custody, is usually handicapped in developing the evidence needed to support" his claims. *Id.* at 291, 299; *accord Bracy*, 520 U.S. at 904. The Court found "that authority is expressly confirmed in the All Writs Act," so that the "facts are fully developed" in support of petitioner's

habeas corpus claims. *Harris*, 394 U.S. at 299 (authorizing petitioner to submit interrogatories); *see also Am. Lithographic Co. v. Werckmeister*, 221 U.S. 603, 609 (1911) (recognizing that the All Writs Act authorizes issuance of subpoenas duces tecum because the ability to compel the production of evidence "seems essential to the very existence and constitution of a court of common law" (quoting *Amey v. Long*, 103 Eng. Rep. 653, 608 (1808))). Thus, "it would be an abuse of discretion to deny discovery" where "good cause" is shown, although "the scope and extent of such discovery is a matter confided to the discretion of the District Court." *Bracy*, 520 U.S. at 909; *see also United States v. Roane*, 378 F.3d 382, 402–03 (4th Cir. 2004) (explaining that *Harris* and *Bracy* hold "that 'good cause' for discovery exists when a petition for habeas corpus establishes a prima facia case for relief").[3]

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[3] Consistent with *Bracy*, each of the U.S. Courts of Appeals has reviewed discovery orders in habeas corpus under an abuse of discretion standard. *See, e.g.*, *Bader v. Warden*, 488 F.3d 483, 488 (1st Cir. 2007); *Batista v. United States*, 792 F. App'x 134, 136 (2d Cir. 2020); *Lee v. Gunt*, 667 F.3d 397, 404 (3d Cir. 2012); *Roane*, 378 F.3d at 403; *Teague v. Scott*, 60 F.3d 1167, 1172 (5th Cir. 1995); *Cornwell v. Bradshaw*, 559 F.3d 398, 410 (6th Cir. 2009); *Brown-Bey v. United States*, 720 F.2d 467, 471 (7th Cir. 1983); *Newton v. Kemna*, 354 F.3d 776, 783 (8th Cir. 2004); *Jones v. Wood*, 114 F.3d 1002, 1009 (9th Cir. 1997); *LaFevers v. Gibson*, 182 F.3d 705, 723 (10th Cir. 1999); *Arthur v. Allen*, 452 F.3d 1234, 1247 (11th Cir. 2006); *United States v. Gale*, 314 F.3d 1, 6 (D.C. Cir. 2003); *see also United States v. N.Y. Tel. Co.*, 434 U.S. 159, 171 (1977) (reviewing order issued under the All Writs Act under an abuse of discretion standard). To be clear, the order here is not a discovery order. It is merely an order to transfer Twyford, so that he can gather evidence for himself. But there is no reason why an order permitting Twyford to self-collect evidence should be held to a more strin-

This Court has even used the All Writs Act in the habeas corpus context to issue a similar order to the one raised here, requiring the transportation of a state inmate sentenced to death for mental health testing. *See Rees*, 384 U.S. at 313–14. In *Rees*, a state inmate sentenced to death had filed a petition for certiorari with this Court for it to review his habeas corpus claim, but the petitioner shortly thereafter instructed his counsel to withdraw the petition and abandon all legal proceedings. *Id.* at 313. After concerns were raised about the petitioner's mental competence, the Court ordered a limited remand to the district court for the purpose of determining the petitioner's mental capacity. This Court authorized the district court to have the necessary testing conducted and, if necessary, to obtain "temporary federal hospitalization for this purpose," and the Court allowed the state to examine the petitioner in "its own facilities." *Id.* at 314.

Ensuring that habeas corpus petitioners have an opportunity to establish their claims is of the utmost importance in capital cases. This Court has long acknowledged that "[t]here is no question that death, as a punishment, is unique in its severity and irrevocability. When a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed." *Greg v. Georgia*, 428 U.S. 153, 187 (1976) (plurality) (citations omitted); *see, e.g.*, *Hall v. Florida*, 572 U.S. 701, 724 (2014) ("The death penalty is the gravest sentence our society may impose. Persons facing that most severe

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gent standard of review than a discovery order compelling someone else to gather evidence for him. Twyford makes a powerful argument that the interim order at issue here is not a final order that is appealable at all. Resp. Br. 18–26.

sanction must have a fair opportunity to show that the Constitution prohibits their execution."); *Zant v. Stephens*, 462 U.S. 862, 885 (1983) ("[T]he severity of the [capital] sentence mandates careful scrutiny in the review of any colorable claim of error.").

B. Transporting Twyford For A Brain Scan To Gather Facts Necessary To Prove His Habeas Corpus Claims Is Not Precluded By 28 U.S.C. § 2241(c)(5)

The warden makes an argument that strikes Amici as peculiar and that no federal judge seems to have accepted: that because Section 2241(c)(5) limits the issuance of a writ of habeas corpus to travel only for the purpose of bringing an inmate "into court to testify or for trial," the All Writs Act precludes a habeas court from ordering an inmate transported for any other purpose. Pet. Br. 30. But the United States provides the obvious answer: "An order directing that a prisoner be transported for a medical test is not a writ of habeas corpus governed by Section 2241(c)." U.S. Br. 8. And the warden's contrary interpretation would produce the "untenable" result that federal courts would be powerless to order the transportation of state inmates to receive medical treatment, even when necessary to enforce a federal civil rights judgment. *Id.* at 24–25.

Section 2241(c)(5) codified two common law habeas writs for transporting an inmate to testify (*ad testificandum*) or to be tried (*ad prosequendum*), but the Sixth Circuit appropriately found that limitation is applicable to "when the district court may issue the writ of habeas corpus *itself*, not forbidding ancillary orders needed to aid in adjudicating a petitioner's habeas petition." Pet. App. 14a; *see also Ex parte Bollman*, 8 U.S. 75, 97–98 (1807) (addressing com-

mon law writs). Indeed, that very distinction is reflected in this Court's decision in *Rees* authorizing an inmate to be transported for a mental competence exam that was ancillary to deciding the petitioner's habeas petition. *See* U.S. Br. 7 (citing *Rees* in explaining that "[i]n some cases, an order requiring prisoner transport for medical testing will aid a federal court in exercising its jurisdiction").[4] The warden's brief makes no mention of *Rees* at all.

The warden does correctly note that courts look to the common law to determine whether proposed All Writs Act relief is "agreeable to the usages and principles of law," *Hayman*, 342 U.S. at 221 n.35, but this Court has never required that relief under the Act follow the "precise forms" of the common law, *Price*, 334 U.S. at 282. As it does in other contexts, this Court often adapts common law principles to modern circumstances. *See, e.g.*, *Carpenter v. United States*, 138 S. Ct. 2206, 2216 (2006) (applying the Fourth Amendment to the "new phenomenon" of cell phone tower data). While the need to transport an inmate for a brain scan would have been unthinkable

[4] The warden cites *Ivey v. Harney*, 47 F.3d 181, 183–86 (7th Cir. 1995), and *Jones v. Lilly*, 37 F.3d 964, 967–69 (3d Cir. 1994), in support of his construction of Section 2241(c)(5), but those were Section 1983 cases that did not concern ancillary relief ordered to protect a federal court's habeas jurisdiction. Pet. Br. 11. Both Circuit Courts appreciate the distinction. *See Holmes v. Buss*, 506 F.3d 576, 579 (7th Cir. 2007) (citing *Rees* in remanding a state inmate sentenced to death for a mental competency examination as part of the federal court's habeas jurisdiction); *Michael v. Horn*, 459 F.3d 411, 420 (3d Cir. 2006) (same); *see also Pierce v. Blaine*, 467 F.3d 362, 373 (3d Cir. 2006) (citing *Rees* in approval of district court's order requiring temporary commitment of death-sentenced state prisoner for a mental competency evaluation).

at common law, the common law writs of habeas corpus *ad testificandum* and *ad prosequendum* demonstrate common law recognition that it may sometimes be necessary to transport an inmate for some purposes. Thus, the relief sought by Twyford is analogous to common law practice. *See also N.Y. Tel. Co.*, 434 U.S. at 176–78 (upholding All Writs Act order compelling a third party to install a pen-register). Moreover, the relief sought by Twyford is consistent with at least three decisions by this Court authorizing an inmate's transportation for reasons other than to testify or to be tried under Section 2241(c)(5). *See Rees*, 384 U.S. at 314 (transportation for mental examination); *Hayman*, 342 U.S. at 220 (transportation for attending a post-trial habeas hearing); *Price*, 334 U.S. at 284 (transportation for inmate to argue his own appeal).

II. THE DISTRICT COURT'S TRANSPORTATION ORDER WAS WITHIN ITS DISCRETION

Because the All Writs Act plainly authorizes the relief Twyford requested, the only remaining question is whether the district court abused its discretion in granting that relief. *See supra* p. 8 n.3 (addressing abuse of discretion standard). The warden improperly asks this Court to find barriers to the district court's transportation order that do not exist, and to presume that the testing that Twyford seeks will not yield results that will be of any use to him. But Twyford's life is on the line, and the district court did not abuse its discretion in giving Twyford a chance to prove his entitlement to habeas relief. The Sixth Circuit was right to affirm.

A. Habeas Discovery Rules Are Inapplicable

The warden claims that Rule 6(a) of the Rules Governing Section 2254 Cases in the United States District Courts, which requires a showing of "good cause . . . to conduct discovery," is applicable to Twyford's request for transportation to obtain a brain scan, but the Sixth Circuit appropriately determined that Twyford's request "is not a request for discovery . . . because Twyford is seeking neurological imaging of his own brain, not information from the other party." Pet. App. 15a (explaining "discovery" is undefined in the Rule and "Black's Law Dictionary defines it as the '[c]ompulsory disclosure, at a party's request, of information that relates to the litigation.'" (alteration in original) (quoting *Discovery*, Black's Law Dictionary (11th ed. 2019))). This is an investigatory effort by Twyford and his counsel, who simply need the government's aid in transporting Twyford because he is in custody so that Twyford can arrange for his brain scan to occur.

The warden argues that "discovery" should be defined "as covering all evidentiary development," Pet. Br. 48, but the United States only goes so far as to claim the request is "analogous" to seeking discovery." U.S. Br. 15. Neither is correct. It would make no sense for Rule 6 to require an inmate to seek leave of court whenever he seeks to engage in "evidentiary development" on his own, for example, when his counsel interviews witnesses who may have come forward. Rather, leave of court is needed when an inmate seeks to place evidence-gathering burdens on someone else. An independent investigation and discovery are analogous in the sense that the inmate

hopes to gain valuable evidence through both means, but Rule 6 and the policies that animate it come into play only when discovery is sought.

B. The All Writs Act Standard For Issuing The Transportation Order Was Met

Rather than the habeas discovery rules, it is the "necessary and appropriate" language of the All Writs Act that applies, which leaves it to the district court's "sound judgment" to decide what is "reasonably necessary in the interests of justice." *Adams*, 317 U.S. at 274; *accord Price*, 334 U.S. at 279. The district court decided that Twyford should be able to gather brain scan evidence in support of his habeas claims to the court, and the Sixth Circuit justifiably found no abuse of discretion in that decision because there was none.

The warden misrepresents the facts in characterizing Twyford's request as an attempt "to fish for evidence" with the "mere hope" that the evidence may be useful. Pet. Br. 46. The actual facts before the district court were that Twyford had been shot in the head, at least 20–30 bullet fragments were known to be lodged in his brain, and there was no clear scan of the frontal lobe of Twyford's brain. A noted neurologist found that Twyford may suffer from neurological defects due to his physical abuse, his drug and alcohol abuse, and the gunshot to his brain; and the neurologist recommended the very brain scan that the district court ordered Twyford transported to receive. Resp. Br. 10–11. Thus, Twyford presented the district court with ample reason to authorize him to obtain a brain scan.

The warden also contests the eloquence in which Twyford presented his habeas claims, but the warden appreciates that Twyford "wants testing to support a claim that his trial counsel and trial expert were ineffective," particularly for "for failing to focus on the psychological effects of the self-inflicted gunshot wound he sustained as a teenager." Pet. Br. 44; *see id.* at 8 ("Twyford wanted a brain scan, which he thought might indicate 'neurological defects due to childhood physical abuse, alcohol and drug abuse, and a self-inflicted gunshot wound to the head during an adolescent suicide attempt.'" (quoting Pet. App. 255a)). That concern appears warranted. There is no question that an intellectual impairment may provide a jury with a mitigating circumstance to justify sparing a petitioner from the death penalty. Indeed, such an impairment may be so severe as to preclude the imposition of the death penalty altogether under the Eighth Amendment. *See, e.g.*, *Moore v. Texas*, 137 S. Ct. 1039, 1053 (2017); *Hall v. Florida*, 572 U.S. 701, 705 (2014).

The warden dismisses Twyford's claim that the brain scan will be helpful to his claim as "speculation," but the warden loses sight of the fact that this is true whenever a court orders testing or any investigation begins. Pet. Br. 8. This Court has never expected petitioners to divine what testing will show or where an investigation will lead before authorizing such relief. *See, e.g.*, *Bracy*, 520 U.S. at 908 (authorizing discovery where petitioner's claim was "only a theory at this point; it is not supported by any solid evidence"). Just as this Court had grounds to question the petitioner's mental competence in *Rees*, every judge should question whether a gunshot to

Twyford's brain would have left him mentally impaired.

C. The District Court Was Not Required To Determine The Admissibility Of Brain Scan Results Before Allowing Twyford To Obtain A Brain Scan

The warden argues that the All Writs Act precludes issuing an order to obtain "unusable or immaterial evidence," but even the warden does not go so far as to claim that the results of Twyford's brain scan would be unusable or immaterial evidence. Pet. Br. 39. Relying on *Pinholster*, 563 U.S. 170, which the warden accurately explains "*generally* forbids federal habeas courts from considering evidence outside the state-court record," he instead claims "newly developed evidence will *rarely* serve any purpose." *Id*. at 42 (emphasis added). Nevertheless, even the warden's concession that *Pinholster* is not an absolute bar to considering new evidence does not go far enough.

Pinholster held that review under 28 U.S.C. § 2254(d)(1) "is limited to the record that was before the state court that adjudicated the claim on the merits," 563 U.S. at 180, but *Pinholster* will not necessarily bar the district court from considering new evidence in the course of deciding Twyford's habeas claims. There are at least three reasons why *Pinholster* may not bar the district court from considering new evidence.

First, *Pinholster* applies only to claims that, by the terms of Section 2254(d), were "adjudicated on the merits in State court proceedings," but it does not apply to claims under Section 2254(e) where "the factual basis for a claim in State court proceedings" was

not developed. Twyford maintains that he seeks the brain scan to develop existing claims and "to explore potential claims" that have not yet been raised, claims which would arise under Section 2254(e). Resp. Br. 44. Thus, some of Twyford's potential claims do not implicate *Pinholster* at all and these claims could be bolstered by the results of his brain scan. *See also Martinez v. Ryan*, 566 U.S. 1, 17 (2012) (holding that ineffective assistance of state habeas counsel can excuse procedural defaults in those proceedings).

Second, even *Pinholster* recognized that "state prisoners may sometimes submit new evidence in federal court." 563 U.S. at 186. Justice Sotomayor's dissent in *Pinholster* noted that Section 2254(d)(1) "only applies when a state court has adjudicated a claim on the merits. There may be situations in which new evidence supporting a claim adjudicated on the merits gives rise to an altogether different claim." *Id.* at 213 n.5 (Sotomayor, J., dissenting). The majority agreed that new evidence may sometimes "present a new claim," but it declined to "decide where to draw the line between new claims and claims adjudicated on the merits." *Id.* at 186 n.10; *see also Ryan v. Gonzalez*, 568 U.S. 57, 76 (2013) (noting that there are cases where a claim will be "unexhausted and not procedurally defaulted"); *Clark v. Stephens*, 627 F. App'x 305, 309 (5th Cir. 2015) ("*Pinholster* might not apply to prevent the admission of new evidence because this new claim was never adjudicated on the merits in state court, thus rendering § 2254(d) inapplicable."); *Dickens v. Ryan*, 740 F.3d 1302, 1320 (9th Cir. 2014) (en banc) (finding new ineffective assistance claim could go forward based on new evidence that fundamentally

altered the ineffective assistance claim raised in the state court). Depending on what the brain scan shows, Twyford may very well be able to establish a fundamentally new claim.

Third, if the new evidence demonstrates that "the state court made its decision 'on a materially incomplete record,'" a court may find that it was not a decision on the merits at all for purposes of *Pinholster* or Section 2254(d). *Burr v. Jackson*, 19 F.4th 395, 417 (4th Cir. 2021) (quoting *Winston v. Pearson*, 683 F.3d 489, 496 (4th Cir. 2012)). This Court has made clear that Section "2254(d)'s on-the-merits requirement" involves a consideration of the parties' evidence and argument, and that a state court decision that fails to do that is not on the merits. *Johnson v. Williams*, 568 U.S. 289, 302–03 (2013). Twyford's brain scan may reveal that the state court had a materially incomplete record before it.

If the "new evidence" from Twyford's brain scan proves useful to any of his unexhausted claims, the federal court can stay his habeas claim and remand the unexhausted claims to the state court to be addressed in the first instance in accordance with the procedure this Court set out in *Rhines v. Weber*, 544 U.S. 269 (2005). *Id.* at 276–78 (utilizing this procedure for mixed petitions of both exhausted and unexhausted claims); *see also Mena v. Long*, 813 F.3d 907, 910 (9th Cir. 2016) (joining the Third, Seventh, and Tenth Circuits in finding this procedure warranted for non-mixed petitions raising solely unexhausted claims).

At this juncture, it is unclear what the results of a brain scan will show, but the district court was well within its discretion to give Twyford the oppor-

tunity to find out. The evidence that Twyford seeks may very well help him prove that he should not be put to death.

Amici ask the Court to affirm that the All Writs Act and the writ of habeas corpus afford the district court the ability to do justice in this case and "to insure that miscarriages of justice within its reach are surfaced and corrected." *Harris*, 394 U.S. at 291. A cloud of injustice will forever hang over the memory of Twyford's execution if this Court allows him to be put to death without allowing him to collect and present evidence that may show that his life should have been spared. The All Writs Act and the Great Writ enable the federal courts to do better and that is what the lower courts are trying to do. This Court should not stand in the way of justice.

CONCLUSION

The Court of Appeals' judgment should be affirmed.

Respectfully submitted,

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APPENDIX

LIST OF SIGNATORIES

Judge Mark W. Bennett (Ret.)—District Judge (1994–2015; Chief Judge 2000–2007), Senior Judge (2015–2019), U.S. District Court for the Northern District of Iowa

Judge Dennis M. Cavanaugh (Ret.)—District Judge (2000–2014), U.S. District Court for the District of New Jersey; Magistrate Judge (1993–2000), U.S. District Court for the District of New Jersey

Judge Christopher F. Droney (Ret.)—Circuit Judge (2011–2019), Senior Judge (2019–2020), U.S. Court of Appeals for the Second Circuit; District Judge (1997–2011), U.S. District Court for the District of Connecticut

Judge Jeremy D. Fogel (Ret.)—District Judge (1998–2014), Senior Judge (2014–2018), U.S. District Court for the Northern District of California

Judge David Folsom (Ret.)—District Judge (1995–2012; Chief Judge 2009–2012), U.S. District Court for the Eastern District of Texas

Judge Katherine B. Forrest (Ret.)—District Judge (2011–2018), U.S. District Court for the Southern District of New York

Judge W. Royal Furguson, Jr. (Ret.)—District Judge (1994–2008), Senior Judge (2008–2013), U.S. District Court for the Western District of Texas

Judge Nancy Gertner (Ret.)—District Judge (1994–2011), Senior Judge (2011), U.S. District Court for the District of Massachusetts

Judge Richard A. Holwell (Ret.)—District Judge (2003–2012), U.S. District Court for the Southern District of New York

Judge Barbara S. Jones (Ret.)—District Judge (1995–2012), Senior Judge (2012–2013), U.S. District Court for the Southern District of New York

Judge Beverly B. Martin (Ret.)—Circuit Judge (2010–2021), U.S. Court of Appeals for the Eleventh Circuit; District Judge (2000–2010), U.S. District Court for the Northern District of Georgia

Judge John S. Martin, Jr. (Ret.)—District Judge (1990–2003), Senior Judge (2003), U.S. District Court for the Southern District of New York

Judge A. Howard Matz (Ret.)—District Judge (1998–2011), Senior Judge (2011–2013), U.S. District Court for the Central District of California

Judge Stephen M. Orlofsky (Ret.)—District Judge (1996–2003), Magistrate Judge (1976–1980), U.S. District Court for the District of New Jersey

Judge Shira A. Scheindlin (Ret.)—District Judge (1994–2011), Senior Judge (2011–2016), U.S. District Court for the Southern District of New York; Magistrate Judge (1982–1986), U.S. District Court for the Eastern District of New York

Judge Kevin H. Sharp (Ret.)—District Judge (2011–2017; Chief Judge 2014–2017), U.S. District Court for the Middle District of Tennessee

Judge Thomas I. Vanaskie (Ret.)—Circuit Judge (2010–2018), Senior Judge (2018–2019), U.S. Court of Appeals for the Third Circuit; District Judge (1994–2010; Chief Judge 1999–2006), U.S. District Court for the Middle District of Pennsylvania

Judge T. John Ward (Ret.)—District Judge (1999–2011), U.S. District Court for the Eastern District of Texas