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 United States Court of Appeals for the Sixth Circuit

BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

JONATHAN P. SCHNELLER
(*Counsel of Record*)
DIMITRI D. PORTNOI
HEATHER WELLES
KATIE E. SINCLAIR
NICOLE A. MEIER
O'MELVENY & MYERS LLP
400 South Hope Street
18th Floor
Los Angeles, CA 90071
(213) 430-6000
jschneller@omm.com

JILLIAN T. GOODMAN
O'MELVENY & MYERS LLP
1999 Avenue of the Stars
8th Floor
Los Angeles, CA 90067

Attorneys for Amici Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

CONSTITUTIONAL PROVISIONS

STATUTES AND RULES

TABLE OF AUTHORITIES
(continued)

Page(s)

OTHER AUTHORITIES

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are scholars who teach and write about federal jurisdiction, procedure, and the remedial authority of federal courts. *Amici*'s expertise can assist the Court with two issues in this case: (1) whether the court of appeals appropriately exercised jurisdiction and (2) the function and history of the All Writs Act, 28 U.S.C. § 1651(a), including its use to effectuate habeas jurisdiction. A full list of *amici* is included as Appendix A.

SUMMARY OF ARGUMENT

A. All federal courts must ensure that they have jurisdiction over the cases before them. The use of the collateral order doctrine to provide an appeal as of right, as set forth by *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), is narrow. The use of the All Writs Act in this case does not fall within the limited scope of that doctrine. This Court has applied *Cohen* in limited instances, such as double jeopardy and qualified immunity, when a litigant has a right not to be in court at all. As illustrated by cases including *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100 (2009), as-of-right appellate jurisdiction is unavailable for interim orders such as the

---

[1] Counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amici curiae* or their counsel has made a monetary contribution to the preparation or submission of this brief. All parties received notice of *amici*'s intent to file this brief at least ten days before the filing deadline. The parties have consented in writing to the filing of this brief.

one at issue here, which can be effectively reviewed at a later stage. In addition to review after a final decision on the merits, other potential sources of appellate jurisdiction for such interim orders in appropriate cases include 28 U.S.C. § 1292(b) and a petition for a writ of mandamus.

B. This Court must decide whether Congress's grant of subject-matter jurisdiction over certain habeas corpus writ petitions in 28 U.S.C. § 2241 precludes the use of another congressional grant of authority, Section 1651(a), to issue auxiliary writs in effectuating that jurisdiction. The Sixth Circuit's rejection of that proposition is consistent with the governing statutes, their history, and this Court's precedent.

1. Effectuating habeas jurisdiction using the All Writs Act is "agreeable to the usages and principles of law" as that phrase is used in Section 1651(a). Congress provided courts authority to issue writs under Section 1651(a) to complement existing grants of federal jurisdiction. Courts may invoke that "legislatively approved source of procedural instruments designed to achieve the rational ends of law" when "agreeable and consistent" with resolution of the case before the court, including in habeas cases. *Price v. Johnston*, 334 U.S. 266, 282 (1948). To that end, the *form* of orders issued under Section 1651(a) need not mirror precisely the form of historical writs that predated the 1789 Judiciary Act. *See, e.g.*, *Bank of United States v. Halstead*, 23 U.S. (10 Wheat.) 51, 60–62 (1825).

2. There is no evidence that Congress, through 28 U.S.C. § 2241(c)(5), eliminated authority federal

courts would otherwise have to issue auxiliary orders under Section 1651(a).

a. When enacting the 1789 Judiciary Act—the precursor to both Section 1651(a) and Section 2241(c)—Congress had no basis to assume that only habeas writs could be used to order movement of bodies, or that any writ deemed a species of "habeas" was equivalent to the Great Writ of habeas corpus *ad subjicidendum*. And in modern practice, federal courts order transportation of prisoners under authority other than the habeas statutes.

b. The statutory structure also makes clear that Section 2241(c)(5) does not displace Section 1651(a). Section 2241(c)(5) is one of several bases, listed in the disjunctive, on which a district court may grant a petition for a writ of habeas corpus. Section 2241(c)(5) does not preclude the court's use of Section 1651(a) as auxiliary to jurisdiction over a petition seeking relief under another statutory provision. Moreover, as this Court explained in *Carbo v. United States*, 364 U.S. 611 (1961), Section 2241(c) is focused on the Great Writ. Congress did not address in that section courts' existing power under Section 1651(a) to effectuate jurisdiction by issuing other writs, including other types of habeas writs.

c. There is no evidence that Congress in Section 2241(c)(5) intended to implicitly deny district courts' existing powers under Section 1651(a). This Court has repeatedly recognized that Congress does not by implication eliminate Section 1651(a) authority when it imposes other statutory requirements. Moreover, finding an implied repeal here would be

inconsistent with this Court's broader treatment of jurisdictional grants.

d. The All Writs Act has long provided federal courts with an important device to effectuate their jurisdiction in many contexts, including facilitating law enforcement investigations, bankruptcy, habeas proceedings, class actions, military tribunals, and corporate mergers. If this Court were to hold that Congress—without ever mentioning the All Writs Act or its power—precluded the Act's use by granting courts other statutory authority, it could disrupt ongoing practices that Congress authorized to enable the regular operation of the federal courts.

3. Moreover, auxiliary orders issued under the All Writs Act may be necessary and appropriate in aid of a federal court's existing jurisdiction in habeas cases. Under the Act, the key question is whether the order will assist the court in exercising its jurisdiction. Congress has assigned the issuing court the discretion to make that determination. Imposing rigid rules on district courts' exercise of that authority would negatively affect their ability to execute a host of tasks necessary to manage and adjudicate cases, including those pursuant to habeas jurisdiction.

ARGUMENT

I. THE DISTRICT COURT'S USE OF THE ALL WRITS ACT IS NOT APPEALABLE AS OF RIGHT AS A COLLATERAL ORDER

Under this Court's jurisprudence, the collateral order doctrine is limited in scope and focused on whether, were appeal to come later, the decision at

issue would be functionally unreviewable. Whether the order to perform neurological testing is an error depends on the rest of the proceedings and the use, if any, to which the test results may be put. Moreover, because any assessment of error is intertwined with the subsequent development of the case, the order also fails to meet the criterion that, to be appealed as of right, an order must be independent from the underlying litigation.

1. The collateral order doctrine is a "practical . . . construction" of the statutory instruction that courts of appeals have jurisdiction over "final decisions of district courts of the United States." *Cohen*, 337 U.S. at 545–46; 28 U.S.C. § 1291. In *Cohen*, this Court identified a "'small class' of collateral rulings that, although they do not end the litigation, are appropriately deemed 'final.'" *Mohawk*, 558 U.S. at 106 (quoting *Cohen*, 337 U.S. at 545–46). In the years since *Cohen*, the Court has limited the doctrine's application to circumstances where review as of right is necessary to protect a "right not to stand trial," such as in cases involving double jeopardy or qualified immunity. *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985) (citing *Abney v. United States*, 431 U.S. 651 (1977)). The Court routinely "emphasiz[es] [the doctrine's] modest scope" and its "narrow and selective . . . membership." *Will v. Hallock*, 546 U.S. 345, 350 (2006); *see Digit. Equip. Corp. v. Desktop Direct, Inc.* (*Digital Equipment*), 511 U.S. 863, 868 (1994) (characterizing the doctrine as "stringent"). As the Court has recognized, "[p]ermitting piecemeal, prejudgment appeals . . . undermines 'efficient judicial administration' and encroaches upon the prerogatives of district court judges, who play a 'spe-

cial role' in managing ongoing litigation." *Mohawk*, 558 U.S. at 106 (quoting *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981)).

The Court decided *Cohen* in 1949, when litigants had few means to seek appellate review of important interlocutory matters. About a decade later, in 1958, Congress added subsection (b) to 28 U.S.C. § 1292, authorizing appellate courts to accept appeals of questions district judges determined to be "controlling question[s] of law" about which there is "substantial ground for difference of opinion" and where determination would materially affect the "termination of the litigation." 28 U.S.C. § 1292(b). Litigants can also pursue appellate review, again under circumscribed parameters, by seeking mandamus, facilitated by the All Writs Act. For example, in *Harris v. Nelson*, 394 U.S. 286, 299 (1969), the Ninth Circuit issued a writ of mandamus vacating the district court's order requiring that a prison warden answer interrogatories. In 1990, Congress directed the Court to adopt rules governing appealability under Sections 1291 and 1292, giving "special force" to the Court's "admonition" that the *Cohen* doctrine be narrowly applied. *Mohawk*, 558 U.S. at 113–14.

2. The district court's order here, requiring that the Warden transport Raymond Twyford to The Ohio State University Medical Center for neurological testing, *see* Pet. App. 26a, 32a, does not meet the *Cohen* criteria, as it is neither independent of the merits nor "effectively unreviewable." *Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 42 (1995).

The ultimate wisdom of relying on the All Writs Act "in aid of jurisdiction" cannot be ascertained at

this juncture. 28 U.S.C. 1651(a). A federal court might eventually rule that Twyford's brain scan yielded information that can be admitted to show that his case satisfies an exception to 28 U.S.C. § 2254(d), which would allow Twyford to introduce new evidence to prove his entitlement to relief on the merits. There are also other potential scenarios that could make the All-Writs order a means of producing useful information. For example, if the neurological testing supported a claim that was not "adjudicated on the merits" in state court, then Section 2254(d) would not apply and new information could be used to demonstrate prejudice necessary to excuse procedural default, and to prove Twyford's entitlement to relief on his underlying claim. Or the court could hold that the information cannot be used because the state court adjudicated the claim on the merits and no exception to Section 2254(d) applies. In short, whether Section 2254(d) will eventually foreclose the introduction of evidence is unknowable at this time.

The medical-testing order is preliminary and does not meet the "effectively unreviewable" requirement. The same is true for a variety of decisions district courts make, such as "erroneous evidentiary rulings." *Digital Equipment*, 511 U.S. at 872. And as with an erroneous trial ruling, the order here is reviewable in the usual course because, if necessary, the court of appeals can "vacat[e] an adverse judgment and remand[] for a new trial" after the case is completed. *Mohawk*, 558 U.S. at 109 (order on attorney-client privilege not immediately appealable).

This analysis does not leave litigants without options to seek review of All Writs Act orders before

final judgment. Congress has created two routes: writs of mandamus and 28 U.S.C. § 1292(b), which authorizes district and appellate judges to assess appealability on a case-by-case basis. Yet another route, albeit a heavily freighted one, is that "a party may defy the order, permit a contempt citation to be entered against him, and challenge the order on direct appeal of the contempt ruling." *Firestone*, 449 U.S. at 377. This Court has recognized that these routes to review weigh against expanding the collateral order doctrine, which would provide for an appeal as-of-right across the board. *See Mohawk*, 558 U.S. at 110–11; *Digital Equipment*, 511 U.S. at 883. In short, the Sixth Circuit should not have heard this appeal at this stage in the proceedings, and this Court should remand on that basis.

II. THE ALL WRITS ACT ENABLES FEDERAL COURTS EXERCISING HABEAS JURISDICTION TO ISSUE AUXILIARY ORDERS

The current All Writs Act, 28 U.S.C. § 1651(a), traces its lineage to the Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81–82, and grants the federal courts the power to issue writs in aid of existing subject-matter jurisdiction. The All Writs Act's text, history, and precedent supply three key limits on the auxiliary power it provides: (1) the court must have an independent source of jurisdiction other than the Act; (2) the order must be "agreeable to the usages and principles of law"; and (3) the order must be "necessary or appropriate" in aid of the court's jurisdiction. There is no dispute that the district court has jurisdiction to hear habeas cases; thus, we focus on the second and third criteria.

A. All Writs Act Orders Are Agreeable To The Usages And Principles Of Law In Habeas Cases

An order under the All Writs Act must be "agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). This language reflects that Section 1651(a) is an auxiliary source of authority to assist federal courts in resolving the matters over which Congress assigned them subject-matter jurisdiction. Courts cannot use that authority to contradict other existing statutes or rules.

1. Article III of the Constitution vests judicial power in the Supreme Court and any "inferior" courts Congress creates. U.S. Const., art. III, § 1. At the same time, Articles I and III grant Congress significant power to determine the federal judiciary's size and structure, the allocation of subject-matter jurisdiction, and auxiliary powers and procedures. *See* U.S. Const., art. I, § 8 & art. III, §§ 1, 2; *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850) ("Courts created by statute can have no jurisdiction but such as the statute confers."). This Court has long held that one way Congress has exercised that power is through the All Writs Act, granting federal courts authority to issue various orders in aid of their jurisdiction. *See Halstead*, 23 U.S. at 62.

When Congress granted All-Writs power consistent with "usages and principles of law," it did not limit courts' ability to shape orders to suit the needs of each case. Take *Halstead*, an 1825 case that emphasized that the "usages and principles" requirement evolves to accommodate the changing needs of judicial power. *Halstead* explained that when Con-

gress crafted the Act, it was well aware that state courts issued writs beyond those used at common law. 23 U.S. at 62. Had it wanted to stop that practice, Congress could have "restrict[ed] the power [of the All Writs Act] to common law writs." *Id.* at 56. But instead, the statutory text refers to "law" more generally. Thus, narrowing the Act to common-law writs would be "too limited a construction," and "open a door to many and great inconveniencies." *Id.* at 56, 62. Rather, the Act provides courts with authority to formulate orders as necessary "to enlarge the effect and operation of the process" and "to meet whatever changes might take place" in the law. *Id.* at 60, 62.

Price reaffirmed the proposition that the "usages and principles" language does not limit federal courts to historical writ forms. Echoing *Halstead*, the Court explained that "'law' is not a static concept, but expands and develops as new problems arise." 334 U.S. at 282, 284. The Court held that the Act authorized an order producing a prisoner to argue his appeal, notwithstanding that "[n]one of [the English habeas writs] . . . seems to have been devised for the particular purpose of producing a prisoner to argue his own appeal." *Id.* at 281–82. Similarly, in *United States v. New York Telephone Co.* (*New York Telephone*), 434 U.S. 159, 171–73 (1977), this Court held that the district court's order authorizing federal agents to install pen registers and directing the phone company to support the installation was "clearly authorized" by the All Writs Act and consistent with the intent of Congress, notwithstanding the lack of historical analogue. And this Court itself has ordered that, to "proper[ly] ex-

ercise" its appellate jurisdiction over habeas petitions, it may order a district court to "subject [a prisoner] to psychiatric and other appropriate medical examinations," including "temporary federal hospitalization" if necessary—without citing any historical writ. *Rees v. Peyton*, 384 U.S. 312, 313–14 (1966) (per curiam).

The Court in *Pennsylvania Bureau of Correction v. U.S. Marshals Service*, 474 U.S. 34 (1985), did not hold that the All Writs Act is restricted to historical writs. In *Pennsylvania Bureau*, this Court acknowledged that district courts could use Section 1651(a) to issue extraordinary writs in habeas cases, but that "exceptional circumstances" were needed to justify recourse to the All Writs Act when the habeas statute "specifically addresse[d] the particular issue" at hand. *Id.* at 43. A federal magistrate judge had ordered the U.S. Marshals Service to bear the cost of transporting state prisoners to court for trial. *See id.* at 35–36. This Court held that, insofar as the order might be construed as a writ of habeas corpus *ad testificandum*, it could not be issued to the U.S. Marshals Service because the Marshals were not the prisoners' custodian. *See id.* at 38. And the magistrate had made no findings to justify why some other writ would be necessary. *See id.* at 43. In other words, because the *ad testificandum* writ was available by statute to facilitate transport by the state wardens, the court could not use All-Writs power to devise a substitute transport mechanism paid for by the Marshals. *Id.*

Pennsylvania Bureau distinguished *Price*, *Harris*, and *New York Telephone*, reasoning that in those cases, the courts used the All Writs Act to "fill statu-

tory interstices," as they "had no alternative means" of effecting their orders. 474 U.S. at 42 n.7. And the Court emphasized that its holding was not "categorically rul[ing] out reliance on the All Writs Act" in future cases where habeas corpus *ad testificandum* was inadequate. *Id.* at 43. Rather, the case clarified that a statute does not "cover[]" a scenario as to limit application of Section 1651(a) unless it "specifically addresses the particular issue," *id.*, in the sense that it expressly provides a remedy functionally identical to the one the movant seeks. *See also Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28, 32–33 (2002) (because "[t]he right of removal is entirely a creature of statute" and "statutory procedures for removal are to be strictly construed," the All Writs Act could not be used to "avoid complying with the statutory requirements for removal").

2. Section 1651(a)'s usage is not limited to the powers of historical courts at equity any more than it is limited to common-law writs. Habeas jurisdiction—through which courts grant a legal remedy—provides an apt example. In England, courts at law, not courts at equity, had jurisdiction over the Great Writ. *See, e.g.*, Paul D. Halliday, Habeas Corpus: From England to Empire 40 (2010). As part of that jurisdiction, the King's Bench used other writs that had originated in the court of Chancery, including "an account of [a body's] detention from another court." *Id.* at 17–18; *see also id.* at 47–48, 52, 61 (discussing evolution of overlapping powers in law and equity courts). Thus, courts at law were issuing extraordinary writs, the antecedent to the All Writs Act codified in Section 1651(a), in furtherance of their jurisdiction to adjudicate the Great Writ. *See*

id. This practice aligned with the English system more broadly, as a court with jurisdiction could always issue "judicial writs" as needed to carry on its proceedings, such as "to ensure compliance with its processes." Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution,* 86 Iowa L. Rev. 735, 802 (2001). The All Writs Act simply follows in a longstanding Anglo-American legal tradition under which courts retain the auxiliary powers needed to exercise their jurisdiction.

Moreover, historically, courts at both law and at equity used extraordinary writs other than the various forms of habeas corpus to mandate the appearance of bodies. Indeed, "courts routinely deal in bodies," so "[a]ll the courts of Westminster Hall, and courts across England, issued commands in the king's name for the appearance of certain bodies in certain places, for certain reasons"—not limited to the group of "habeas corpus" writs. Halliday, *supra*, at 40. Similarly, this Court has held that the All Writs Act grants federal courts a separate source of power to address new problems—a power not limited by traditional law/equity divisions or the traditional writ forms. *See, e.g.*, *Halstead*, 23 U.S. at 62; *Price*, 334 U.S. at 282, 284. And from its first cases on the subject, this Court recognized that the authority Congress had granted to issue "all other writs, not specifically provided for by statute" was available to courts when exercising habeas jurisdiction. *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 94–96 (1807) (internal quotation marks omitted).

This historical relationship is reflected in statutory habeas jurisdiction. *See Carbo*, 364 U.S. at

615–19 (describing how both Section 2241 and Section 1651(a) originated in Section 14 of the 1789 Judiciary Act). The Court has consistently made clear that "[t]he scope and flexibility of the writ [of habeas corpus]—its capacity to reach all manner of illegal detention—its ability to cut through barriers of form and procedural mazes—have always been emphasized and jealously guarded by courts and lawmakers." *Harris*, 394 U.S. at 291. This understanding of the Great Writ itself as an adaptable remedy dates back to the earliest habeas statutes; as the Court explained in *In re Bonner*, 151 U.S. 242, 261 (1894), "[t]he court is invested with the largest power to control and direct the form of judgment to be entered in cases brought up before it on habeas corpus." *Cf. Hilton v. Braunskill*, 481 U.S. 770, 775 (1987) (Section 2243 recognizes courts' "broad discretion . . . in fashioning the judgment granting relief" in habeas cases).

3. The All Writs Act applies as a grant of supplemental power where some particularized statute fails to address the problem. In this case, the habeas statutes say nothing about obtaining neurological testing, much less state that courts may not use other writs to do so. Section 2241(c), adopted in its current form in 1948, does not address the issue. Act of June 25, 1948, Pub. L. No. 80-773, ch. 646, 62 Stat. 964, 965. That is why this Court recognized in *Harris* that "conducting factual inquiries" in furtherance of the court's habeas jurisdiction is an appropriate use of Section 1651(a). 394 U.S. at 299. The 1996 Antiterrorism and Effective Death Penalty Act ("AEDPA"), which amended the habeas statutes, includes requirements for consideration of evidence by

federal courts in Section 2254 proceedings, *see* 28 U.S.C. § 2254(e)(2), but does not impose specific procedures for factual investigation like the neurological test at issue here. And when Congress authorized funding for fact investigation, it adopted no specific procedures governing what a habeas petitioner and counsel may do to undertake that task, particularly in circumstances that do not involve discovery. *See* 18 U.S.C. § 3599(f) (originally adopted in the Anti-Drug Abuse Act of 1988, Pub. L. No. 100690, § 7001(b), 102 Stat. 4181, 4393–94); *Ayestas v. Davis*, 138 S. Ct. 1080, 1092 (2018). Similarly, the Rules Governing Section 2254 Cases recognize that a petitioner may at some point "'expan[d] . . . the record' through the filing of affidavits or other newly developed or discovered documentary or physical evidence." 1 Federal Habeas Corpus Practice & Procedure § 19.1 (2021) (quoting Rules Governing Section 2254 Cases in the United States District Courts, Rule 7). Yet they provide few details as to *how* such information may be collected. The Rules discuss only information that qualifies as "discovery." And there, the Rules "contain[] very little specificity as to what types and methods of discovery should be made available to the parties in a habeas proceeding, or how, once made available, these discovery procedures should be administered." Rules Governing Section 2254 Cases in the United States District Courts, Rule 6 advisory committee's note. Here, no specific and exclusive statutory process exists to secure the medical-testing order Twyford seeks, so the district court's use of Section 1651(a) was appropriate.

B. Congress Did Not Displace The All Writs Act When It Enacted 28 U.S.C. § 2241(c)(5)

Congress in 28 U.S.C. § 2241(c)(5) did not discuss the All Writs Act. To hold that the provision precludes federal courts' authority under Section 1651(a) would require concluding both that to order medical testing for a prisoner is necessarily a habeas writ, and that Section 2241(c)(5) limits the usage of Section 1651(a) in issuing such a habeas writ. Neither proposition is correct. Moreover, there is no evidence that Congress intended the habeas statutes to displace courts' existing authority under Section 1651(a). Section 1651(a) is one example of the well-accepted principle that Congress may authorize a range of complementary statutory tools.

1. English courts issued a variety of orders addressing the appearance of bodies, and those orders were not limited to the Great Writ or the other habeas writs. Halliday, *supra*, at 40. This history means that when enacting the 1789 Judiciary Act—the precursor to both Section 1651(a) and Section 2241(c)—Congress had no basis to presume that only habeas writs could be used to order movement of bodies. Accordingly, the Court has long recognized that Congress has authorized federal courts to issue auxiliary orders governing the transport or release of prisoners, and that such orders need not conform to pre-1789 history. *See Price*, 334 U.S. at 278–79. Modern-day practice supports this conclusion as well; district courts order the transfer of prisoners in diverse contexts unrelated to habeas corpus petitions. *See, e.g.*, *Reaves v. Dep't of Corr.*, 392 F. Supp. 3d 195, 209 (D. Mass. 2019) (ordering transport for

medical care in Eighth Amendment case); *United States v. Wallen*, 177 F. Supp. 2d 455, 458–59 (D. Md. 2001) (ordering transfer of prisoner to different facility and noting "this is not . . . a habeas corpus petition"); *Johnson v. Harris*, 479 F. Supp. 333, 338 (S.D.N.Y 1979) (court-ordered transfer of prisoner could be appropriate for his medical needs); *Patterson v. Walters*, 363 F. Supp. 486, 487 (W.D. Pa. 1973) (prisoner transferred for psychiatric evaluation).

Another example is post-conviction cases, in which courts may issue orders under the All Writs Act involving the movement of prisoners that are not "habeas writs." This Court's decision in *Hayman v. United States*, 342 U.S. 205 (1951), underscored that Congress in adopting 28 U.S.C. § 2255 created post-conviction relief for federal prisoners within sentencing jurisdiction—rather than in the jurisdiction of confinement, which would be the site of a formal habeas proceeding. *See id.* at 213–19. In *Hayman*, a federal district court exercising sentencing jurisdiction needed the prisoner produced from custody in another jurisdiction. The appeals court held that the court deciding the Section 2255 motion lacked power to order the prisoner's appearance because such an order would require a habeas writ to be sent outside the sentencing court's territorial jurisdiction, and that a prohibition on extra-territorial habeas jurisdiction barred such an order. *See id.* at 220. This Court rejected that logic on the grounds that the order was not an "original writ of habeas corpus to secure respondent's presence from another district." *Id.* Instead, the Court explained, the transfer order was "auxiliary to the jurisdiction of the trial court over respondent granted in Section 2255[.]" *Id.* at

220. The power to order the physical transfer came from the All Writs Act: the district court was not "impotent" because it could "invoke the statutory authority of federal courts to issue 'all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.'" *Id.* at 220–21 (citing 28 U.S.C. § 1651(a)). That authority had "ample precedent in the common law." *Id.* at 221.

2. The structure and meaning of Section 2241(c) also demonstrate that it does not preclude the use of the All Writs Act here. Congress did not, in Section 2241(c), impose a general limit on auxiliary remedies. Rather, that provision sets forth five grounds, listed in the disjunctive, upon which a federal court may exercise subject-matter jurisdiction over a federal habeas petition. One of those grounds is a claim that a writ "is necessary to bring [a prisoner] into court to testify or for trial." 28 U.S.C. § 2241(c)(5). But the applicable subsection of Section 2241(c) in this case is not Section 2241(c)(5); it is Section 2241(c)(3), because Twyford alleged that he "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3); *see* Pet. App. 23a. That the All-Writs order at issue here falls outside the limited habeas writs recognized in Section 2241(c)(5) does not affect the court's power to decide whether Twyford satisfies Section 2241(c)(3). And the text does not indicate that, once the court establishes habeas jurisdiction, Section 2241(c)(5) imposes a global limitation on All-Writs authority necessary to effectuate that existing jurisdiction.

This Court has made clear that Section 1651(a) authorizes use of all other writs necessary to effectuate existing habeas jurisdiction. In *Carbo v. United States*, the Court held that the geographic restriction in Section 2241(a) did not constrain habeas corpus *ad prosequendum*—even though Section 2241(c)(5) expressly mentions that particular habeas writ—because Congress intended that restriction to apply only to the Great Writ. 364 U.S. at 617–19. "The other species of the writ [beyond the Great Writ] . . . continued to derive authority for their issuance from what had been the first sentence of § 14 of the First Judiciary Act"—the All Writs Act. *Id.* at 617. That is because, as the Court explained, the original Section 14 of the 1789 Judiciary Act granted federal courts both the "all writs" power and "the general power of courts to issue writs of habeas corpus." *Id.* at 615–16. Congress later split the two into separate statutes: the "all writs" language became Section 1651(a), while the habeas-specific provisions evolved into Section 2241. *Id.* By splitting the statute into two parts, Congress specifically intended Section 2241 to apply "almost exclusively" to the Great Writ, "in spite of its authorization of writs *ad testificandum* and *ad prosequendum*." *Id.* at 617–19.

Moreover, even if the district court's order here were deemed a form of habeas writ, Congress neither stated nor intended that Section 2241(c)(5) would preclude the use of all auxiliary habeas writs under Section 1651(a). In addition to the Great Writ and the writs of habeas corpus *prosequendum* and habeas corpus *ad testificandum*—which are habeas writs mentioned in Section 2241(c)(5)—auxiliary habeas writs historically included habeas corpus *ad de-*

liberandum (issued to a producing custodian when custody changes), habeas corpus *et recipiendum* (issued to the receiving custodian), the "day writ" (to allow a prisoner to attend to business), habeas corpus *ad faciendum* (moving the prisoner from one court to another in a private cause), and habeas corpus *cum causa* (a chancery writ to gather information necessary to resolve facts in a habeas case). *See Ex parte Bollman*, 8 U.S. at 97–98; Halliday, *supra*, at 40–41. Section 2241(c) mentions none of these writs, and it did not extinguish courts' authority to issue them under Section 1651(a). Indeed, *Carbo* makes clear that Section 1651(a) continues to provide such authority. 364 U.S. at 617.

This Court's "original" habeas power to bring cases up for its appellate review is additional evidence that all habeas power is not exclusively governed by Section 2241 *et seq*. Power to issue original habeas writs stems not from those statutes, but from the original form of the All Writs Act. *See, e.g.*, *In re Davis*, 557 U.S. 952 (2009) (citing Section 2241(b) and "our original habeas jurisdiction") (Stevens, J., concurring); *Felker v. Turpin*, 518 U.S. 651 (1996); *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 98 (1868) (1789 Judiciary Act gives habeas corpus jurisdiction); *Ex parte Bollman*, 8 U.S. at 99–100; Dallin H. Oaks, *The "Original" Writ of Habeas Corpus in the Supreme Court*, 1962 Sup. Ct. Rev. 153, 159–63, 173–76 (1962). This Court used original habeas review in conjunction with the common-law writ of certiorari to hear appeals from federal criminal convictions for the first 100 years of the American republic. *See* Oaks, *supra*, at 179–82.

In addition, 28 U.S.C. § 2243 recognizes that federal courts may "summarily hear and determine the facts, and dispose of the matter as law and justice require." As this Court recognized in *Harris*, Section 2243 and the All Writs Act provide complementary authority to allow district courts to issue such orders as may be necessary and appropriate in aid of their habeas jurisdiction, including to develop facts. *See* 394 U.S. at 300. Congress did not recognize that power in one section of the habeas statutes while also eliminating it in another.

3. The presumption against implied repeal also supports the conclusion that courts' authority to issue auxiliary writs under Section 1651(a) remains undisturbed by Section 2241(c). A determination that Section 2241(c) eliminated the courts' broad power under Section 1651(a) requires Congress's intent to do so be "clear and manifest," *Posadas v. Nat'l City Bank of N.Y.*, 296 U.S. 497, 503 (1936), such as "when the earlier and later statutes are irreconcilable," *Morton v. Mancari*, 417 U.S. 535, 550 (1974). As explained, rather than irreconcilable, these provisions are complementary.

This Court has recognized that Congress's limitation of the courts' power in other statutes "should not be taken as an implicit denial of" existing powers under Section 1651(a). *Nken v. Holder*, 556 U.S. 418, 426 (2009). In *Nken*, the Court held that when amending the Immigration and Nationality Act to limit courts' power to "enjoin the removal of any alien," Congress did not by implication eliminate the courts' existing authority under Section 1651(a) to stay orders pending appeal. *Id.* at 425–33. *Felker v. Turpin*, 518 U.S. 651, also demonstrates the pre-

sumption against implied repeals of Section 1651(a) authority. *Felker* held that a provision of AEDPA preventing the Court from reviewing an order denying leave to file a second habeas petition by appeal or by writ of certiorari did not impliedly repeal this Court's authority to entertain original habeas petitions because Congress had made no mention of such authority. *Id.* at 658–61. These cases are in accord with this Court's statement in *New York Telephone* that under Section 1651(a), a federal court, "[u]nless appropriately confined by Congress," "may avail itself of all auxiliary writs as aids in the performance of its duties, when the use of such historic aids is calculated in its sound judgment to achieve the ends of justice entrusted to it." 434 U.S. at 173 (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 273 (1942)).

The Court's refusal to view subsequent statutes as eliminating federal courts' authority under Section 1651(a) is consistent with its treatment of jurisdictional grants. One illustration is *Mims v. Arrow Financial Services, LLC*, 565 U.S. 368 (2012), where this Court held that the Telephone Consumer Protection Act's private right of action, authorizing consumers to bring state-court actions to enforce the statute, did not strip federal courts of their federal-question jurisdiction. As the Court explained, federal question jurisdiction "endures unless Congress divests federal courts of their § 1331 adjudicatory authority," and the TCPA did "not state that a private plaintiff may bring an action under the TCPA 'only' in state court, or 'exclusively' in state court." *Id.* at 378–80. Similarly, the Court assumes state courts retain concurrent jurisdiction over federal questions,

rebuttable only if "Congress affirmatively ousts the state courts of jurisdiction over a particular federal claim." *Tafflin v. Levitt*, 493 U.S. 455, 458–60 (1990) (quoting *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981)). Both *Mims* and *Tafflin* illustrate the "general rule that the grant of jurisdiction to one court does not, of itself, imply that the jurisdiction is to be exclusive." *United States v. Bank of N.Y. & Tr. Co.*, 296 U.S. 463, 479 (1936). And here, Congress has not chosen to eliminate federal courts' preexisting Section 1651(a) authority when exercising habeas jurisdiction.

4. If this Court were to hold that Congress—without ever mentioning the All Writs Act or its power—precluded its use by granting courts other statutory authority, it could disrupt ongoing practices that Congress authorized to enable the regular operation of the federal courts. Congress's authorization of discretion to the federal courts to craft appropriate writs means that courts use the All Writs Act as an important tool across the federal docket, including law enforcement, bankruptcy, habeas, class actions, military tribunals and corporate mergers. *See, e.g.*, *New York Telephone*, 434 U.S. 159 (relying on the All Writs Act to uphold order assisting FBI investigation); *FTC v. Dean Foods*, 384 U.S. 597 (1966) (affirming use of the All Writs Act to enjoin a company merger); *United States v. Blake*, 868 F.3d 960, 970–73 (11th Cir. 2017) (affirming All Writs order requiring Apple to access iPad data); *Green v. Warden*, 699 F.2d 364, 367–68 (7th Cir. 1983) (All Writs Act injunction prohibiting vexatious litigation); *Matter of Macon Uplands Venture*, 624 F.2d 26 (5th Cir. 1980) (using All Writs Act in bank-

ruptcy proceedings). That usage fits with the nature of Section 1651(a), which is a tool allowing courts to issue auxiliary orders in aid of jurisdiction granted by the Constitution or some other statute.

The All Writs Act continues to enable the efficacious functioning of the federal courts. Concluding that Congress implicitly eliminated this power would be contrary to the "congressional acquiescence and tacit approval" of the courts' approach to and use of the All Writs Act. Brian M. Hoffstadt, *Common-Law Writs and Federal Common Lawmaking on Collateral Review*, 96 Nw. U.L. Rev. 1413, 1467 (2002). Congress has chosen to leave the statute in essentially the same form for two centuries.

C. In The All Writs Act, Congress Authorized the District Court to Determine Whether An Order Is Necessary Or Appropriate In Aid Of The Court's Habeas Jurisdiction

A writ issued under the All Writs Act must also be "necessary or appropriate in aid of [the court's] jurisdiction." 28 U.S.C. § 1651(a). It is within the "sound judgment" of the court to determine what is "necessary or appropriate" "to achieve the ends of justice entrusted to it" under the facts of the case. *New York Telephone*, 434 U.S. at 173 (quoting *Adams*, 317 U.S. at 273). District courts' authority to determine what is necessary and appropriate reflects their institutional competence: they are on the front lines and steeped in the record of a specific case.

This Court has repeatedly reaffirmed that All Writs orders are a viable tool in aid of habeas jurisdiction, including factual investigations, subject to

the issuing court's sound discretion. For instance, in *Harris v. Nelson*, this Court explained that "courts may fashion appropriate modes of procedure" in habeas cases, using the All Writs Act for "securing facts where necessary to accomplish the objective of the proceedings." 394 U.S. at 299. This conclusion, the Court reasoned, followed from the fact that "the courts may rely upon [the All Writs Act] in issuing orders appropriate to assist them in conducting factual inquiries" more generally. *Id.* (citing *Am. Lithographic Co. v. Werckmeister*, 221 U.S. 603, 609 (1911)). The Court "assume[d]" that the district courts would exercise their discretion responsibly, and refused to "substitute the judgment of this remote Court for that of the District Court as to the need for authorizing discovery in this case." *Id.* at 300 & n.7. Far from adopting a restrictive application of Section 1651(a) in habeas cases, the Court recognized that such orders may be *particularly* appropriate in those cases, where "the petitioner, being in custody, is usually handicapped in developing the evidence needed to support in necessary detail the facts alleged in his petition." *Id.* at 291.

Price is yet another example in which this Court expressly approved the use of a Section 1651(a) order—there, a prisoner transfer order—when the issuing court found the auxiliary order appropriate to effectuate habeas jurisdiction. *Price* recognized that Section 1651(a) authorized an auxiliary writ permitting a prisoner to travel to personally argue his appeal. 334 U.S. at 279. The Court emphasized that, in deciding whether such an order was necessary or appropriate, a federal court could consider factors such as whether the prisoner "is capable of conducting an intelligent and responsible argument, and

[whether] his presence in the courtroom may be secured without undue inconvenience or danger." *Id.* at 284–85. The Court recognized that Congress had authorized the issuing court to weigh individual circumstances in determining whether to issue an order under the All Writs Act.

This aspect of the All Writs Act is not unusual in the federal court system. In many contexts, this Court has expressed that, "[f]amiliar with the issues and litigants, the district court is better situated than the court of appeals to marshal the pertinent facts and apply [a] fact-dependent legal standard," subject to "correction of a district court's legal errors" on appellate review. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 402 (1990). District courts routinely rule on discovery disputes, case management, remedies, and other issues similar to the ambit of the Act. This "considerable experience" making "similar" decisions "in other contexts" is precisely where this Court has repeatedly declined to restrict standard abuse-of-discretion review. *McLane Co. v. E.E.O.C.*, 137 S. Ct. 1159, 1168 (2017); *see also Koon v. United States*, 518 U.S. 81, 82 (1996) (adopting abuse-of-discretion standard). The All Writs Act deserves no different treatment in this case.

CONCLUSION

For the foregoing reasons, the Court should remand to the Sixth Circuit with instructions to vacate its opinion for lack of jurisdiction. If the Court reaches the merits, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

JONATHAN P. SCHNELLER
(*Counsel of Record*)
DIMITRI D. PORTNOI
HEATHER WELLES
KATIE E. SINCLAIR
NICOLE A. MEIER
O'MELVENY & MYERS LLP
400 South Hope Street
18th Floor
Los Angeles, CA 90071
(213) 430-6000
jschneller@omm.com

JILLIAN T. GOODMAN
O'MELVENY & MYERS LLP
1999 Avenue of the Stars
8th Floor
Los Angeles, CA 90067

Attorneys for Amici Curiae

April 4, 2022

APPENDIX

APPENDIX A
LIST OF *AMICI CURIAE*[1]

Erwin Chemerinsky
Dean and Jesse H. Choper Distinguished Professor of Law
University of California, Berkeley School of Law

Alan K. Chen
Thompson G. Marsh Law Alumni Professor
University of Denver Sturm College of Law

Michael C. Dorf
Robert S. Stevens Professor of Law
Cornell Law School

Eric M. Freedman
Siggi B. Wilzig Distinguished Professor of Constitutional Rights
Maurice A. Deane School of Law at Hofstra University

Helen Hershkoff
Herbert M. and Svetlana Wachtell Professor of Constitutional Law and Civil Liberties
New York University School of Law

Lee B. Kovarsky
Bryant Smith Chair in Law and Co-Director of the Capital Punishment Center
University of Texas School of Law

---

[1] Institutional affiliations are provided for identification purposes only. The views expressed in this brief do not reflect the views of the institutions with which *amici* are affiliated.

Leah M. Litman
Assistant Professor of Law
University of Michigan Law School

Rory K. Little
Cotchett Professor of Law
UC Hastings College of the Law

James E. Pfander
Owen L. Coon Professor
Northwestern Pritzker School of Law

Robert J. Pushaw
James Wilson Endowed Professor
Pepperdine/Caruso School of Law

Doug Rendleman
Huntley Professor Emeritus
Washington & Lee University School of Law

Judith Resnik
Arthur Liman Professor of Law
Yale Law School

Lauren Robel
Val Nolan Professor of Law
Indiana University Maurer School of Law

Maxwell Stearns
Venable, Baetjer & Howard Professor of Law
University of Maryland Carey School of Law

Laurence H. Tribe
Carl M. Loeb University Professor Emeritus
Harvard University

Steven L. Winter
Walter S. Gibbs Distinguished Professor of Constitutional Law
Wayne State University Law School