Case No. 23-1736

IN THE UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

ABDULLAHI KHALIF NOOR,

Appellant,

v.

MELISSA ANDREWJESKI,

Appellee.

On Appeal from the United States District Court
for the Western District of Washington

APPELLANT'S OPENING BRIEF

NEIL M. FOX WSBA No. 15277 Law Office of Neil Fox, PLLC 2125 Western Ave., Suite 330 Seattle, WA 98121 (206) 728-5440 nf@neilfoxlaw.com	BRIAN W. STULL AMERICAN CIVIL LIBERTIES UNION FOUNDATION 201 W. Main Street, Suite 402 Durham, NC 27701 (919) 682-9469 bstull@aclu.org
	SCOUT KATOVICH AMERICAN CIVIL LIBERTIES UNION FOUNDATION 125 Broad Street, 18th Floor New York, NY 10004 (212) 549-2500 skatovich@aclu.org Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Supreme Court Cases

Other Federal Cases

State Court Cases

Constitutional Provisions

Court Rules

Statutes

A. INTRODUCTION

This case raises a novel issue: does the one-sided Certificate of Appealability ("COA") requirement of 28 U.S.C. § 2253 and F.R.A.P. 22 (b)(3) violate the Constitution's guarantees of due process and equal protection? The right of habeas petitioners to access the courts, including on appeal, is fundamental. The lopsided requirement impedes that right in violation of due process. Furthermore, to require prisoners to obtain the COA before appealing, but not the government, violates equal protection of the laws. The COA requirement fails under both strict scrutiny and rational basis, in part because of its unique history from the early 20th Century as a purported response to our national crime of lynching. In the name of protecting Black defendants from white mob violence, Congress chose the perverse path of stripping the people they purported to protect of the legal protections enjoyed by every other class of litigant. This is profoundly ironic, misguided, racist, and ultimately unconstitutional.

Appellant Abdullahi Khalif Noor is incarcerated in a Washington State prison, serving an indeterminate life sentence. Mr. Noor maintains his innocence and that his convictions are tainted by

constitutional violations requiring habeas relief. After exhausting his state remedies, he sought relief in federal court, where the district court denied his petition for a writ of habeas corpus and his request for a COA as to the merits of his claims. The court, however, granted his request for a COA on the constitutionality of the COA requirement itself, in light of these due process and equal protection concerns. 1-ER-33-34.

This Court should put an end to this unjust and unconstitutional vestige of America's ugly past. As shown more fully below, section 2253's COA requirement violates Mr. Noor's Fifth-Amendment rights to due process and equal protection and should be invalidated.

B. STATEMENT OF JURISDICTION

1. **Subject Matter Jurisdiction of District Court**

The district court had original jurisdiction over Mr. Noor's habeas corpus petition under 28 U.S.C. §§ 1331, 2241(a) and 2254(a).

2. **Basis of Jurisdiction in this Court**

This Court has jurisdiction to review the district court's order dismissing this case under 28 U.S.C. §§ 1291 and 2253.

3. **Timeliness of Appeal**

The district court entered its order dismissing Mr. Noor's petition on July 21, 2023, and entered judgment on August 4, 2023. 1-ER-3. Mr. Noor filed the notice of appeal on August 4, 2023. 1-ER-108-09. This appeal is timely under F.R.A.P. 4(a).

4. **Appeal From Final Order**

This appeal is from the final order dismissing Mr. Noor's habeas corpus petition.

C. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Where a state prisoner's right to appeal from a district court's denial of habeas relief under 28 U.S.C § 2254 is fundamental, does the requirement of obtaining a COA under 28 U.S.C. § 2253(c)(1) violate the Due Process Clause of the Fifth Amendment because it is not narrowly tailored to meet a compelling governmental interest?
2. Where the purposes of the one-sided COA requirement applying only to prisoners – to prevent frivolous appeals and lynchings – bears no rational relation to either objective, and in fact relates more closely to racial animus, does the requirement

violate the equal protection of the laws, guaranteed by the Fifth Amendment, even under rational-basis review?

Under F.R.A.P. 28(f), the House Report explaining the purpose of the original COA statute – H.R. Rep. No. 23, 60th Cong., 1st Sess. (1908) – is included in the attached addendum to this brief.

D. STATEMENT OF THE CASE

1. Mr. Noor was convicted in state court, unsuccessfully appealed, and sought federal habeas review.

A Washington State jury convicted Mr. Noor of rape and assault, and he was sentenced to life imprisonment. 1-ER-8. Mr. Noor appealed unsuccessfully to the Washington Court of Appeals. *Id.* In 2018, the Washington Supreme Court denied discretionary review. *Id.* In 2019, Mr. Noor filed a timely post-conviction petition in the Washington Court of Appeals, raising *inter alia* a claim under *Brady v. Maryland*, 373 U.S. 83 (1963).

The Washington Court of Appeals rejected the *Brady* claim and other challenges; the Deputy Commissioner of the Washington Supreme Court denied review; and the Washington Supreme Court then denied Mr. Noor's motion to modify the ruling denying review. 1-ER-8-9. The

Washington Court of Appeals issued its certificate of finality in January 2022, and Mr. Noor timely petitioned for a writ of habeas corpus in the District Court for the Western District of Washington. 1-ER-9.

The district court denied the petition. It also denied Mr. Noor a COA on all issues and claims but one – "the constitutionality of the certificate of appealability procedure[.]" 1-ER-34. Although declining to hold a requested evidentiary hearing, 1-ER-11, 34, 107, and never ruling on the merits of this constitutional claim, the district court granted a COA on this claim because the COA requirement "may violate a prisoner's right to due process and equal protection under the Fifth Amendment." *Id.* at 33. The district court explained that evidence showing that the one-sided requirement was designed to prevent lynchings indicated that the COA "may be rooted in racism," which is "not a legitimate government interest under rational basis review." *Id.* at 34. The district court also reasoned that the COA requirement may be constitutionally infirm because it restricts a prisoner's "fundamental" right to appeal. *Id.*

2. Congress began the COA's one-sided, pre-clearance requirement in 1908, based on a stated desire to prevent lynchings.

After the Civil War, Congress endowed federal courts with jurisdiction to entertain habeas corpus petitions from state prisoners. Act of Feb. 5, 1867, 14 Stat. 385*; Ex parte McCardle*, 73 U.S. 318, 325-26 (1867) (finding that 1867 legislation "brings within the habeas corpus jurisdiction of every court and of every judge every possible case of privation of liberty contrary to" federal law).

Two decades later, Congress directed the appeals of district court judgments deciding these petitions to the Supreme Court. *See*, *e.g.*, *Jugiro v. Brush*, 140 U.S. 291, 294 (1891) (finding this right of appeal under Act of March 3, 1885, c.353, and other authorities).

In 1908, Congress first curtailed these appeals. Act of March 10, 1908, c. 76, 35 Stat. 40. The new statute conditioned appeal on either a federal district court or a justice of the Supreme Court issuing a certificate "that there exists probable cause for an appeal." *Id.* The accompanying House Judiciary Report explained that the law would make "groundless" habeas appeals *by prisoners* "impossible," and justified the requirement because "the delay of execution and punishment in criminal cases is the most potent cause in inducing local dissatisfaction, not infrequently developing into lynching[.]" H.R. Rep.

No. 23, 60th Cong., 1st Sess. (1908) (citing *Jugiro*, 140 U.S. at 294, as an example of a groundless appeal of right).[1]

Although Congress has, over the years, made slight amendments to the 1908 statute, the requirement of judicial pre-clearance remains to this day, and is now codified under 28 U.S.C. § 2253(c)(1). In 1925, Congress gave jurisdiction for most federal appeals to the circuit courts, and correspondingly reassigned the authority of issuing certificates of probable cause (CPC) from the Supreme Court to circuit court judges (in addition to the district court judge). *See* 28 U.S.C. § 466; Act of February 13, 1925, c. 229, §§ 6, 13, 43 Stat. 940, 943. In 1948, Congress relocated the provision, with slight changes irrelevant here, to 28 U.S.C. § 2253. *See* Act of June 25, 1948, 62 Stat. 967.

From 1908 until 1968, the statutory language of the CPC requirement appeared, on its face, to apply both to the prisoner and the

---

[1] *See United States ex. rel. Tillery v. Cavell*, 294 F.2d 12, 14-15 (3d Cir. 1961) (quoting extensively from this passage of the report as evidence of statute's intent, and concluding that the certificate requirement applies to prisoners but not the state); *Barefoot v. Estelle*, 463 U.S. 880, 888, 892 & n.3 (1983) (citing this House Judiciary Report); *Jeffries v. Barksdale*, 453 U.S. 914, 916 (1981) (Rehnquist, J., dissenting) (same); *Ex parte Farrell*, 189 F.2d 540, 543 (1st Cir. 1951) (same).

state's representative. But courts interpreted the provision to apply only to prisoners, based on a "legislative history mak[ing] clear that . . . Congress was not concerned with appeals in these cases taken by a state or its representatives." *Tillery*, 294 F.2d at 14-15 (finding no cases suggesting state or its representative must obtain certificate); *see also Buder v. Bell*, 306 F.2d 71, 73–74 (6th Cir. 1962) (finding requirement did not apply to state); *United States ex rel. Calhoun v. Pate*, 341 F.2d 885, 887 (7th Cir. 1965) (same); *Texas v. Graves*, 352 F.2d 514, 514 (5th Cir. 1965) (same).

In 1968, when the Federal Rules of Appellate Procedure took effect, this judicial interpretation was first codified. Fed. Rules of Appellate Pro., 43 F.R.D. 61 (1968). Rule 22(b) clarified that "if an appeal is taken by a state or its representative, a certificate of probable cause is not required." *Id.* at 87. As the Advisory Committee notes on the rule's adoption explained, "[a]lthough 28 U.S.C. § 2253 appears to require a [CPC] even when an appeal is taken by a state or its representative, the legislative history strongly suggests that the intention of Congress was to require a certificate only in the case in which an appeal is taken by an applicant for the writ." Fed. R. App. P.

22 Advisory Committee Notes (1967). The Advisory Committee notes cited to cases including *Tillery*, 294 F.2d at 14-15, explaining that the CPC requirement had never been interpreted as applying to the state.

In 1996, Congress enacted the Anti-Terrorism Effective Death Penalty Act (AEDPA), Pub. L. 104–132, April 24, 1996, 110 Stat. 1214. AEDPA amended § 2253, adding, as relevant here, subsection (c), which provides:

> (1) Unless a circuit justice or judge issues a certificate of *appealability*, an appeal may not be taken to the court of appeals from-
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
> (B) the final order in a proceeding under section 2255.
> (2) A certificate of appealability may issue under paragraph (1) *only if the applicant has made a substantial showing of the denial of a constitutional right*.

Id. (emphasis added). In addition to the nomenclature change – from "probable cause" to "appealability" – the statute added, for the first time, language requiring a substantial showing of the denial of a constitutional right.

Post-AEDPA, consistent with this history, the Supreme Court has stated that "once a State has properly noticed an appeal of the grant of

habeas relief, the court of appeals must hear the case." *Jennings v. Stephens*, 574 U.S. 271, 282 (2015) (citing *Szabo v. Walls*, 313 F.3d 392, 398 (7th Cir. 2002) (Easterbrook, J.) (noting COA requirement does not apply to government)). Citing *Stephens*, the Court of Appeals for the Fifth Circuit recently reasoned that it would "be non-sensical to require a 'substantial showing of the denial of a constitutional right'" by the government, and thus rejected a prisoner's argument that the court lacked jurisdiction to hear the state's appeal without a COA. *Smith v. Davis*, 927 F.3d 313, 319 (5th Cir. 2019). *See also McCullough v. Kane*, 630 F.3d 766, 770 (9th Cir. 2010) (finding requirement does not apply to the state based on Rule 22).

As was true of the CPC requirement before it, the COA requirement presents a significant barrier to appeal. It requires showing, in an additional filing, "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were "'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463

U.S. 880, 893 (1983)), and explaining that the requirement tracks the original requirement for a certificate of probable cause).

Indeed, one empirical study found that "more than 92 percent of all COA rulings were denials[.]" N. King, *Non-Capital Habeas Cases After Appellate Review: An Empirical Analysis*, 24 Fed. Sent'g Reporter 308, 308 (2012), 2012 WL 2681395 (Vera Inst. Just.) (hereafter *Vera Analysis*) (estimating, in the Ninth Circuit, that district judges granted around 14%, and court of appeals granted around 13% of COAs). *See also* Udell, Julia, *Certificates of Appealability in Habeas Cases in the United States Court of Appeals for the Eleventh Circuit: A Study*, 7 (December 24, 2019), https://ssrn.com/abstract=3506320 or http://dx.doi.org/10.2139/ssrn.3506320 (Table 1 finding approximately 9% of COA applications granted).

Significant implications have ensued for the two classes of litigants the law creates. Representatives of the government regularly appeal habeas grants as of right. *See*, *e.g.*, *Smith*, 927 F.3d at 319; n. 28, *infra* (collecting examples of state appeals). Meanwhile, as explained further *infra*, prisoners face an uphill battle. All, including those who are innocent, or convicted or sentenced in violation of the Constitution,

must battle to obtain a COA, often taking years, with attendant losses of liberty, equal justice, and freedom from unconstitutional sentences. *See*, *e.g.*, *Buck v. Davis*, 580 U.S. 100, 121 (2017); *House v. Bell*, 547 U.S. 518, 555 (2006); *Miller–El v. Cockrell*, 537 U.S. 322, 348 (2003).

3. **Congress enacted the CPC requirement amidst an American-lynching epidemic, fueled by white supremacy, not baseless appeals**.[2]

"*Our country's national crime is lynching*." Ida B. Wells, *Lynch Law in America* (1900).[3]

---

[2] In "determining the legislative purpose of a statute, the [Supreme] Court has [] considered the historical context of the statute, and the specific sequence of events leading to passage of the statute[.]" *Edwards v. Aguillard*, 482 U.S. 578, 595 (1987) (citations omitted and cleaned up). The recitation here places section 2253's COA in its historical context. This Court's decision in *United States v. Carrillo-Lopez*, 68 F.4th 1133 (9th Cir. 2023), *cert pending* No. 23-6221, is not to the contrary. *Carillo-Lopez* addressed whether a facially neutral statute that does not burden fundamental constitutional rights should be subject to heightened scrutiny based on historical evidence of a legislative desire to discriminate by race. In contrast, the historical record here is used *after* a determination that strict scrutiny applies to determine whether a compelling interest exists. See *infra* § E (1)(b). And, unlike the statute in *Carillo-Lopez*, reenactments of the COA requirement never "purged" the original CPC requirement of its racist origins. *See infra* § E (2)(b)(iii).

[3] Https://www.americanyawp.com/reader/18-industrial-america/ida-b-wells-barnett-lynch-law-in-america-1900/.

In parallel with the early history of the COA/CPC, ran the history of our national crime. In the wake of the Thirteenth Amendment, from 1882 to 1908, lynch mobs murdered 3,547 people in America. *See* Tuskegee Univ. Archives, *Lynchings: By Year and Race*, http://archive.tuskegee.edu/repository/wp-content/uploads/2020/11/Lynchings-Stats-Year-Dates-Causes.pdf ("*Tuskegee Lynchings: By Year and Race*").[4] While Black people then made up roughly 11% of the population,[5] they made up two-thirds of these lynching victims. *Id*.

Over the first four decades of the CPC requirement, lynchings continued, now targeting Black Americans almost exclusively. From 1909 to 1948, 1,177 lynchings took place, 91% with Black victims. *See Tuskegee: Lynchings By Year and Race*.

"Lynchings were violent public acts that white people used to terrorize and control Black people in the 19th and 20th centuries,

---

[4] The U.S. government relies on these figures as "conservative estimates." President's Committee on Civil Rights, *To Secure These Rights* 24 (1947).

[5] U.S. Census Bureau, 1910 Census - *Chapter 2. Color or Race, Nativity and Parentage*, https://www2.census.gov/library/publications/decennial/1910/volume-1/volume-1-p4.pdf.

particularly in the South." NAACP, *History of Lynching in America*, https://naacp.org/find-resources/history-explained/history-lynching-america. Indeed, lynchings are widely understood as expressions of racial animus to promote white supremacy.[6] Institutions as varied as the Truman Administration, the U.S. Senate, and the American Civil Liberties Union have acknowledged these shameful truths.[7]

---

[6] *See also* Equal Justice Initiative, *Lynching in America: Confronting the Legacy of Racial Terror* (3d ed. 2017) ("The era of slavery was followed by decades of terrorism and racial subordination most dramatically evidenced by lynching."), https://lynchinginamerica.eji.org/report/; Jacquelyn D. Hall, *Revolt Against Chivalry: Jessie Daniel Ames and The Women's Campaign Against Lynching* 141 (1979) ("*Revolt Against Chivalry*") (describing lynching as tool to maintain white supremacy); Richard Tyler, *120 Lynched*, The Washington Bee, Sat, Oct 31, 1908, at 6 (describing lynchings over past two years in Democratic-led states as "tribute to fealty to that party's belief in the nullification of the Negro's rights").

[7] *To Secure These Rights* 24-25 ("As a terrorist device, it reinforces all the other disabilities placed upon" Black persons; . . . the knowledge that a misinterpreted word or action can lead to his death is a dreadful burden."); Peter Granitz, *Senate passes anti-lynching bill and sends federal hate crime legislation to Biden*, NPR, Mar. 8, 2022, https://www.npr.org/2022/03/08/1085094040/ senate-passes-anti-lynching-bill-and-sends-federal-hate-crimes-legislation-to-bi (quoting a U.S. Senator describing lynching as "a longstanding and uniquely American weapon of racial terror . . . used to maintain the white hierarchy"); William Pickens, *Lynching & Debt Slavery* (American Civil Liberties Union May, 1921), https://findingaids.princeton.edu/catalog/MC001-04_c23936 (similar).

So too did lynching proponents. For example, in 1903, the governor of Mississippi proclaimed: "If it is necessary every Negro in the state will be lynched; it will be done to maintain white supremacy." *Fatal Flood – James K. Vardaman*, American Experience PBS, https://www.pbs.org/wgbh/americanexperience/features/flood-vardaman/.

Some, however, tried to confuse the issue. Influential American leaders spread the pernicious mythology of lynching as a protest against an out-of-control judicial system, bent on saving guilty Black rapists with technical rulings. As shown below, they promoted the idea that subhuman Black men should be deprived of their appellate rights to ensure the state – not enraged lynch mobs – impose punishment on them.

No public figure more loudly championed this view than Supreme Court Justice David Brewer, who "never hesitated to take advantage of the opportunities offered by" his position to speak "on a variety of topics in a wide range of publications." J. Gordon Hylton, *The Perils of Popularity: David Josiah Brewer and the Politics of Judicial Reputation*, 62 Vand. L. Rev. 567, 570-71 (2019) (collecting articles from

the era demonstrating he was the "People's Supreme Court Justice"). His "expertise" included lynchings. *Id.* at 572.

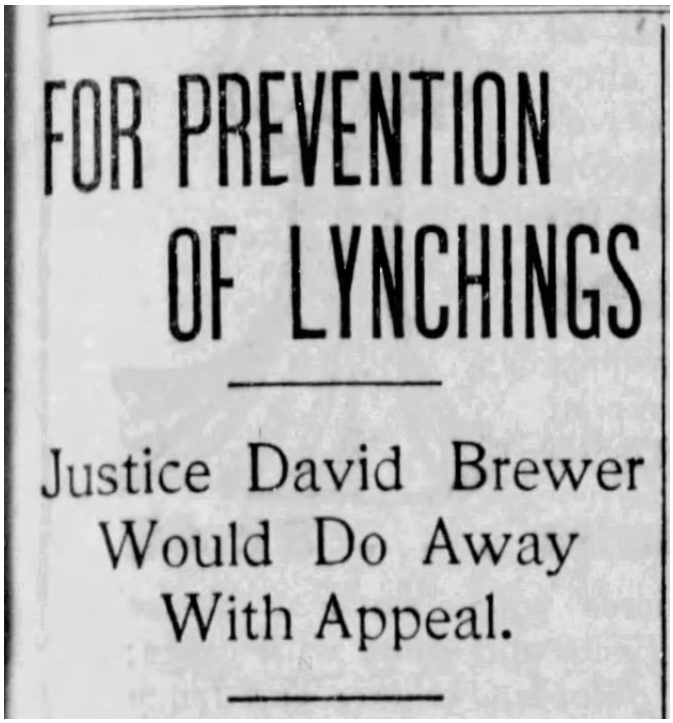
In 1903, Justice Brewer called for the abolition of criminal appeals to reduce lynchings. *See* Justice David J. Brewer, *Plain Words on the Crime of Lynching*, Frank Leslie's Wkly., Aug. 20, 1903 (hereafter *Brewer's Plain Words*), https://archive.org/details/sim_leslies-weekly_1903-08-20_97_2502/page/182/mode/2up?q=Brewer. In this screed, the "People's Justice" claimed that the "chief cause" of lynching was Black men, referred to as "beasts," raping white women. *Id.*[8] He even justified such lynchings: "It is no wonder that the community is excited. Men would disgrace their manhood if they were not." *Id.* He advocated for reducing lynchings not because they were immoral, but because they were *ineffective*. He even proclaimed that if the increasing number of lynchings *had* deterred the "black beast[,]" "society might have condoned such breaches of the law." *Id.*

[8] In fact, Tuskegee Institute, without conceding the guilt of any lynching victim, found that less than 20% of lynchings were prompted by alleged rape. *Tuskegee Lynchings: By State and Race*.

American newspapers celebrated his article, headlining its main points, and/or reprinting it in full.[9]

.

[9] *See Swift Justice for Ravishers*, Atlanta Const., Aug. 17, 1903, at 1 (sub-header: "Brewer Pleads for Swift Enforcement of the Law. Only By Speedy Action on the Part of the Courts Can Lynching Be Lessened – Justice Speaks of the Ravisher as a 'Black Beast.'"); *Brewer on Lynch Law*, N.Y. Times, Aug. 17, 1903, at 7; *No Appeal on Crime that Stirs Lynching – Justice David J. Brewer Revives Suggestion to Prevent Reversal of Verdicts in Criminal Cases*, The Inter Ocean, 17 Aug 1903, at 3; *Opposes Brewer – Lawyers Declare Life and Liberty Endangered by No Review in Capital Cases*, The Cinc. Post, 19 Aug 1903, at 2; *Judge Brewer on Lynching, Should be No Appeal in Criminal Cases*, The Tacoma Daily Ledger, Aug. 17, 1903, at 2; *Three Views of Lynch Law from Three Supreme Benches*, Altoona Times, Aug. 18, 1903, at 2; *Urged in Detroit, Doing Away With Appeals in Criminal Cases*, Det. Free Press, Aug. 17, 1903, at 1 (noting "American Bar Association Disagreed with Him."); *Crime of Lynching*, *Justice David J. Brewer Discusses Question*, The Winona Democrat (Aug. 21, 1903) (Subheading: "Noted Jurist Contends That Fear of Mob Violence Doe Not Deter 'Black Beasts' from Assaulting Women – Recommends Promptness in All Trial Courts and Opposes Appeals in Criminal Cases."). Additional articles like this sampling are available on Newspapers.com.



FOR PREVENTION OF LYNCHINGS

Justice David Brewer Would Do Away With Appeal.

For Prevention of Lynchings, *Justice David Brewer Would Do Away With Appeal*, Spokesman-Rev., Aug. 17, 1903, at 1.

Justice Brewer's recommendation relied on his authority as an "eminent jurist[.]" *Justice Brewer on Lynch Law*, Minneapolis Daily Times, Aug. 17, 1903, at 4. He claimed that appellate courts "often" reversed convictions based on "technical rules[,]" irrespective of guilt. *The Crime of Lynching,* N.Y. Trib., 7 (Aug. 17, 1903) (excerpting entire article). *Compare with Jugiro*, 140 U.S. at 294 (rejecting habeas claim of

prisoner who claimed all citizens of color, and of his race, excluded from jury).[10]

Justice Brewer even argued that if eliminating appeals resulted in the conviction of more innocents, such lesser justice was preferable to lynchings. *Brewer's Plain Words.* In sum, after dehumanizing Black men, this Supreme Court justice argued that the American justice system should forfeit procedural protections for the accused in exchange for supposed "protection" against lynchings.

He was not alone. In the years leading up to the 1908 statute, powerful American leaders, including the President, promoted this offensive mythology. *See President Denounces Mob Lawlessness*, N.Y. Times, Aug. 10, 1903, at 1, https://timesmachine.nytimes.com/timesmachine/1903/08/10/issue.html (reprinting President's letter claiming Black rapists cause lynching and calling on Black community to prevent rapes); *Letter from Gov. Durbin: Thanks President Roosevelt for Words Against Lynching*, Wash. Post, Aug 11, 1903, at 3 (recounting responses of various governors to this

[10] Justice Brewer served on the Court for this 1891 decision. *See Supreme Court of the United States, Justices from 1789 to Present*, https://www.supremecourt.gov/about/members_text.aspx.

letter, including the governor of Louisiana, who claimed the "law should be relieved of its technicalities" because rape is "limited almost exclusively to the colored race").

Indeed, in December of 1906, roughly fifteen months before signing the one-sided CPC requirement into law, Act of March 10, 1908, c. 76, 35 Stat. 40, President Roosevelt delivered the state-of-the-union address our Constitution requires. *See* U.S. Const. art II, § 3. In it, he again claimed that Black men's rapes (and the Black community's protection of rapists) caused lynchings, and that courts regularly reversed convictions based on "technicalities unconnected to the merits of the case." *Sixth Annual Message to Congress*, Dec. 3, 1906, https://millercenter.org/the-presidency/presidential-speeches/december-3-1906-sixth-annual-message; *To Congress – Lynching and Negroes Discussed by Roosevelt*, Atlanta Const., Dec. 5, 1906, at 1.

Members of Congress echoed the President and Justice Brewer. *See Senator Tilman's Speech, a Fitting Finale to the Brownsville Affair*, Gaffney Ledger, Feb. 1, 1907, at 1 (reprinting Senate speech of U.S. Senator Benjamin Tilman, including remarks justifying lynchings by dehumanizing Black men and touting the rape myth). His fellow

senators applauded him. *See Tilman Raised Storm in the Senate in Defense of Woman*, El Paso Daily Times, Jan. 22, 1907, at 1 (sub-header: "And justified lynching for the one crime . . .").

Even then, fearless Black leaders attempted to correct the record. First, they pointed to an undisputed history of white men raping Black women with impunity (and without lynchings). *See* Editorial, *Mrs. Felton's Speech, the Daily Record*, Aug. 18, 1898 (Black newspaper editorial responding to *Wants More Lynchings*, Record Journal, Aug 17, 1897, at 7 (recounting infamous speech of Rebecca Latimer Felton, calling for the lynching of 1,000 Black men per week to protect women from "human beasts")).

Second, they demonstrated that the supposed plague of Black men raping white women was itself, as Ida B. Wells wrote, "the old thread-bare lie." Jacquelyn D. Hall, *Revolt Against Chivalry*, 79 (1993). They were of course correct. *Id.* at 149 ("Every study of the crime has underlined the fact that despite the persistent mythology . . . rape has remained an overwhelmingly intra-racial event, and the victims have been predominantly black women.").

The myth of the frivolous appeals of Black rapists meanwhile fueled yet more violence. A lynch mob in 1906 justified its murder of a Black man with his appeal to the Supreme Court from a federal district court's denial of his habeas petition, after he was condemned (likely falsely) in a Tennessee court for raping a white woman. *United States v. Shipp*, 203 U.S. 563, 571 (1906). The prisoner, Ed Johnson, won a stay of execution so the Court could review the appeal. *Id.* Later that same evening, a mob "broke into the jail, took Johnson out and hanged him, the sheriff and [jailer] pretending to do their duty, but really sympathizing with and abetting the mob." *Id.* at 572.

Johnson had sought habeas relief because all Black persons were excluded from the petit and grand jury, his counsel was barred from challenging the arrays on these grounds, and he was prevented from seeking a change of venue or continuance to remove the case from the passions then brewing in the community. *Id.* at 571. One Justice described Mr. Johnson's trial to the *New York Times* as a trial by mob, replete with witness intimidation and a juror threatening to cut out Johnson's heart, all despite "reason to believe the man was innocent."

Lynching Mob to Feel Supreme Court's Anger, *N.Y. Times*, Mar. 21, 1906, at 1, https://nyti.ms/4793HcF.

All of this was happening when Congress enacted the then-CPC requirement in the name of stopping lynchings. Congress could have reduced lynchings through direct legislation, but it failed to muster the moral fortitude to do so.[11] Indeed, in the years surrounding the passage of the challenged legislation, every branch of government similarly

[11] Congressional members introduced 200 anti-lynching bills during the first half of the twentieth century. Senator Maria Cantwell, *Release - Senate Apologizes for Failure to Pass Anti-Lynching Legislation in Early-1900s* (June 13, 2005), https://www.cantwell.senate.gov/news/press-releases/senate-apologizes-for-failure-to-pass-anti-lynching-legislation-in-early-1900s. Just three of these proposals passed through the House, one each in 1922 (Dyer Anti-lynching Act), 1937 (Gavagan-Wagner Act), and 1940 – each thwarted by the filibuster. Barbara Holden Smith, *Lynching, Federalism, and the Intersection of Race and Gender in the Progressive Era,* 8 Yale J.L. & Feminism 31, 44 (1996). Ultimately, Congress did not pass an anti-lynching bill until 2022. *See* Emmett Till Ant-Lynching Act, Pub. L. 117–107.

failed to take action to end lynchings, including the courts,[12] and the executive branch.[13]

E. SUMMARY OF ARGUMENT

The COA requirement imposes an additional hurdle that habeas petitioners, like Mr. Noor, must surpass to access their right to appeal. By limiting this imposition to prisoners, not government respondents, Congress has created two categories of similarly situated litigants treated disparately by federal law. As such, the COA requirement violates the Constitution's due process and equal protection guarantees.

---

[12] *See United States v. Cruikshank*, 92 U.S. 542 (1876) (rejecting prosecution under the Ku Klux Klan Act of white perpetrators of the infamous Colfax Massacre); *United States v. Harris*, 106 U.S. 629 (1883) (dismissing indictments under the Ku Klux Klan Act against members of a lynch mob of 20 who dragged four accused men from a jail, beating all, killing one); *Hodges v. United States*, 203 U.S. 1, 19-20 (1906) (Brewer, J.) (rejecting similar prosecution under Ku Klux Klan Act). *But see Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 443 n.78 (1968) (repudiating *Hodges*); *United States v. Hougen*, 76 F.4th 805, 814 (9th Cir. 2023) (upholding such prosecutions and "concluding that violence . . . perpetrated against victims on account of the victims' race is a badge or incident of slavery is well established"); *United States v. Allen*, 341 F.3d 870, 884 (9th Cir. 2003) (similar).

[13] As a compromise to the Tilden-Hayes election dispute of 1876, Republicans agreed to the withdrawal of federal troops from the south in exchange for Democrats' agreement to seat President Rutherford B. Hayes. *See* Jill Lepore, *THESE TRUTHS* 329 (2018). Once they withdrew, the Ku Klux Klan "terrorized the countryside, burning homes, and hunting, torturing, and killing people." *Id.*

The COA requirement infringes habeas petitioners' "fundamental constitutional right of access to the courts." *Lewis v. Casey*, 518 U.S. 343, 346 (1996). This right is paramount to our constitutional scheme. Access to courts for the purpose of pursuing habeas relief – "[c]onsidered by the Founders as the highest safeguard of liberty," *Smith v. Bennett*, 365 U.S. 708, 712 (1961) – is all the more sacred. Access to the courts includes the right of prisoners "to litigate claims challenging their sentences . . . to conclusion," *Silva v. Di Vittorio*, 658 F.3d 1090, 1103 (9th Cir. 2011), regardless of the merit of their claims, *see Ex parte Hull*, 312 U.S. 546 (1941).

Section 2253's COA requirement substantially burdens this fundamental right. Because it is not narrowly tailored to serve a compelling government interest, it violates Due Process. *See Witt v. Dep't of Air Force*, 527 F.3d 806, 817 (9th Cir. 2008). Its lopsided application only to unsuccessful habeas prisoners, but not to unsuccessful government respondents, also violates Equal Protection, even under rational basis review. *See Lindsey v. Normet*, 405 U.S. 56, 79 (1972).

In conducting this inquiry, the "plain meaning of the statute's words, enlightened by their context and the contemporaneous legislative history, can control the determination of legislative purpose." *Edwards*, 482 U.S. at 595; *see also Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 461 (1981); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.,* 429 U.S. 252, 267 (1977) (prescribing consideration of "specific sequence of events leading" to passage of the statute). The two recognized purposes for the COA requirement – reducing delays caused by frivolous appeals and preventing lynchings, *see Tillery*, 294 F.2d at 14-15 – cannot justify its arbitrary curtailment of prisoners' appeal rights under any standard. *See also* H.R. Rep. No. 23, 60th Cong., 1st Sess. (1908) (setting out this purpose).

Speeding habeas appeals to keep American lynch mobs at bay cannot be considered a legitimate or compelling interest because this idea is born of racism and white supremacy. The decision to address America's national crime of lynching by curtailing potential lynching victims' rights is neither a narrowly tailored, nor rational, choice. Its motivating mythology and attenuation from its stated goal suggests that racial animus and lack of respect for the humanity and rights of

Black persons (the overwhelming majority of lynching victims) was its true motivator. The nexus between habeas appeals and reducing lynchings is not rational. It is racist, and it cannot continue to justify shielding the claims of prisoners like Mr. Noor from appellate review.

The other articulated state interest – reducing frivolous appeals – equally fails. Even assuming this is a legitimate or compelling interest, the COA requirement is not a rational – let alone narrowly tailored – response. First, the standard applied to determine whether an appeal may proceed – a substantial showing of the denial of a constitutional right – is not appropriately tailored to this purpose: it is far more onerous than needed to identify frivolous litigation. *See Barefoot*, 463 U.S. at 893. The COA requirement thus screens out non-frivolous appeals that fall short of that substantial showing.

Second, its lopsided application is both under- and over-inclusive. It permits frivolous appeals by the government (and all other classes of litigants) by right, but requires all prisoner appeals, whether frivolous or not, to run the gantlet of judicial pre-clearance. *See Rinaldi v. Yeager*, 384 U.S. 305, 308 (1966). This arbitrary classification rests on two baseless assumptions: that all prisoner habeas appeals are

frivolous, and that the COA process streamlines and shortens litigation. Neither is true, as shown by the many examples of protracted habeas cases where a prisoner is originally denied a COA, that COA denial is subsequently overturned, and, many years later, the habeas petition ultimately succeeds. *See, e.g., Buck*, 580 U.S. at 121. The unequal burden imposed by the COA requirement cannot be justified by such unsubstantiated and obviously illogical premises. *See U.S. Dep't of Agric. v. Moreno*, 431 U.S. 528, 535-36 (1973).

F. ARGUMENT

1. The COA requirement interferes with Mr. Noor's fundamental constitutional right to access the courts in violation of Due Process. [14]

The Fifth Amendment's Due Process Clause "forbid[s] the government to infringe certain 'fundamental' liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest[.]" *Reno v. Flores*, 507 U.S. 292, 302 (1993); *see also Washington v. Glucksberg*, 521 U.S. 702, 719–20 (1997) (Due Process Clause "provides heightened protection against

[14] **Standard of review**: "The only issues before the court are questions of law that are to be reviewed de novo." *Ness v. C.I.R.*, 954 F.2d 1495, 1497 (9th Cir. 1992).

government interference with certain fundamental rights and liberty interests").[15] Because the COA requirement interferes with the fundamental constitutional right of access to the courts, strict scrutiny applies. This infringement is not narrowly tailored to any compelling state interest and therefore violates due process.

a. **The COA requirement infringes the fundamental right to access the courts.**

The COA requirement violates Mr. Noor's fundamental constitutional right of access to the courts by curtailing his access to appellate habeas review. This is a matter of first impression. While courts have addressed the COA requirement in other contexts,[16] no known decision has yet addressed this due-process question.

---

[15] Courts interpret the Due Process Clauses in the Fifth and Fourteenth Amendment as substantively identical. *See Oldfield v. Pueblo De Bahia Lora, S.A.*, 558 F.3d 1210, 1220 n.25 (11th Cir. 2009); *Bowles v. Willingham,* 321 U.S. 503, 518 (1944).

[16] *See, e.g., Smith v. Davis*, 927 F.3d 313, 319 (5th Cir. 2019) (rejecting challenge to jurisdiction for state's appeal of habeas grant without COA); *Jennings*, 574 U.S. at 291–92 (addressing whether a prisoner must obtain a COA to assert defense of judgment on alternative grounds); *see also Garcia v. Dretke*, 388 F.3d 496, 499–500 (5th Cir. 2004) (discussed in further depth, *infra*, rejecting equal protection challenge to COA requirement without reference to historical context or discussion of fundamental right of access).

Nevertheless, the claim's building blocks are solid: prisoners enjoy a fundamental right to access the courts without government interference; that right protects the ability to litigate habeas claims to conclusion, including through appeal; and barriers to court access, including pre-filing screenings, burden that fundamental right, regardless of the merits of the claim.

The Supreme Court has consistently held that prisoners have a "fundamental constitutional right of access to the courts." *Lewis*, 518 U.S. at 346 (citing but abrogating *Bounds v. Smith*, 430 U.S. 817, 828 (1977)); *see also Tennessee v. Lane*, 541 U.S. 509, 533-34 (2004) (describing the "fundamental right of access to the courts").[17] This "right to sue and defend in the courts . . . is the right conservative of all other rights, and lies at the foundation of orderly government." *Chambers v. Baltimore & O.R. Co.*, 207 U.S. 142, 148 (1907). Indeed, its

[17] While this Court typically locates this right in the First and Fourteenth Amendments, *see Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010), the Supreme Court has variously relied on rationales "from the Equal Protection Clause of the Fourteenth Amendment, and . . . the Due Process Clause of that Amendment." *Ross v. Moffitt*, 417 U.S. 600, 608–09 (1974); *see also Christopher v. Harbury*, 536 U.S. 403, 415 n.12 (2002) (citing U.S. Const. Article IV (Privileges and Immunities Clause); amends. I (Petition Clause), V (Due Process), XIV (Equal Protection and Due Process)).

origins can be traced to the Magna Carta's pronouncement "'To no one will we sell, to no one will we refuse, or delay, right or justice.'" *Griffin v. Illinois*, 351 U.S. 12, 17 (1956).

Prisoners' "access to the courts" must be "adequate, effective, and meaningful." *Bounds*, 430 U.S. at 822. The Supreme Court has thus struck down regulations that interfere with prisoners' ability to litigate direct appeals of their convictions, *see Griffin*, 351 U.S. at 19-20, habeas petitions, *see Johnson v. Avery*, 393 U.S. 483 (1969), and civil rights actions, *Wolff v. McDonnell*, 418 U.S. 539 (1974). It has similarly invalidated regulations barring state prisoners from filing federal habeas corpus petitions unless found "properly drawn" by the "legal investigator" for the parole board, *Ex parte Hull,* 312 U.S. at 549, "financial barriers restricting the availability of appellate review for indigent criminal defendants[,]" *Burns v. Ohio,* 360 U.S. 252, 257 (1959), and financial barriers to litigating state habeas corpus petitions, *Bennett*, 365 U.S. at 713-14.

The right of access to the courts encompasses the right to be free from government rules that "abridge or impair [a] petitioner's right to apply to a federal court for a writ of habeas corpus." *Ex parte Hull*, 312

U.S. at 549; *see also Lewis*, 518 U.S. at 346, 353 (tracing the "fundamental constitutional right of access to the courts" to *Ex parte Hull*). And Ninth Circuit precedent makes clear that this right protects not only the ability to *file* habeas petitions in federal court but also to litigate them to conclusion, including through appeal.

In *Silva v. Di Vittorio*, this Court rejected the district court's conclusion that "allegations related to [a prisoner's] ability to effectively litigate his cases beyond the pleading stage," failed to state an access-to-the-courts claim. 658 F.3d 1090, 1101 (9th Cir. 2011), *overruled on other grounds by Richey v. Dahne*, 807 F.3d 1202, 1209 n.6 (9th Cir. 2015). The Court explained, "the Supreme Court has not limited a prisoner's right of access to the courts to the pleading stage[.]" *Id.* Rather, prisoners are entitled "to litigate claims challenging their sentences or the conditions of their confinement *to conclusion* without active interference." *Id.* (emphasis supplied) (citing *inter alia Hatfield v. Bailleaux*, 290 F.2d 632, 636 (9th Cir. 1961) (describing the right of access as encompassing "the right to commence, prosecute, defend *or appeal* in any court proceeding involving personal liberty" without being "substantially delayed in obtaining a judicial determination") (emphasis supplied)).

This Court subsequently applied *Silva*'s holding explicitly to habeas *appeals*, rejecting the district court's conclusion that "'an inmate does not have a constitutional right of access to the courts to appeal a denial of a *habeas* petition.'" *Proctor v. Sparke*, 472 F. App'x 430, 431 (9th Cir. 2012) (unpublished); *see also Penton v. Pool*, 724 F. App'x 546, 548–50 (9th Cir. 2018) (unpublished) (finding prison's interference with mail including decision denying prisoner's federal habeas petition "frustrated his ability to . . . timely appeal" and thus "'hindered his ability to access the courts to pursue his habeas petition").

This fundamental right is not contingent on the merits of the claim. *See Douglas v. People of State of Cal.*, 372 U.S. 353, 357 (1963) ("When an indigent is forced to run this gantlet of a preliminary showing of merit, the right to appeal does not comport with fair procedure."); *Lewis*, 518 U.S. at 400 (describing "a right of access for those who seek adjudication, not just for sure winners or likely winners or possible winners.") (Souter, J. concurring in part); *Ex parte Hull*, 312 U.S. at 549-51 (affirming right to file habeas petitions even if prison officials deem them meritless, in case of meritless petition).

Thus, in *Draper v. State of Washington*, 372 U.S. 487 (1963), the Supreme Court addressed pre-appeal frivolity screenings, holding that access to transcripts necessary for adequate appellate review could not be conditioned for one class of litigants on "'[t]he conclusion of the trial judge that that there was no reversible error,'" nor their conclusion that "an indigent's appeal is frivolous." 372 U.S. at 499 (quoting *Eskridge v. Washington State Bd. of Prison Terms & Paroles*, 357 U.S. 214, 216 (1958)). The Court explained that summary appellate review of the trial court's "predictable finding of frivolity . . . without any direct scrutiny of the relevant aspects of what actually occurred at the trial" was an "inadequate substitute for the full appellate review available to nonindigents." *Id.* at 498, 499.

Because due process requires "fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated[,]" *Ross v. Moffitt*, 417 U.S. 600, 608–09 (1974), these same precedents forbid the COA's one-sided pre-appeal screening for prisoners. Indeed, the case upon which this access-to-the-courts precedent rests, *Ex parte Hull*, invalidated a requirement, applicable to all prisoners, that habeas petitions may only be filed if a

parole board investigator determines they are "properly drawn." 312 U.S. at 549. Despite this rule's focus on the merits of a claim (rather than a factor like wealth unrelated to the merits), the Court nevertheless concluded that it impermissibly "abridge[d] or impair[ed] petitioner's right to apply to a federal court for a writ of habeas corpus." *Id.* at 549. *See also Evitts v. Lucey*, 469 U.S. 387, 405 (1985) ("due process concerns" arise where government offers "system of appeals as of right" without "each defendant [enjoying] a fair opportunity to obtain an adjudication on the merits of his appeal"); *Rinaldi*, 384 U.S. at 310 ("[I]t is now fundamental that once established, . . . avenues [of appellate review] must be kept free of unreasoned distinctions that can only impede open and equal access to the courts.").

Taken together, these cases show that Mr. Noor holds a fundamental right to appeal the denial of his habeas petition without government interference. Moreover, the COA requirement is such an impermissible interference. By barring Mr. Noor from appealing the denial of his habeas petition without first obtaining court approval, the COA requirement interferes with his right "to litigate claims challenging [his] sentence[] . . . to conclusion." *Silva*, 658 F.3d at 1103.

It impermissibly conditions this fundamental right on a purported frivolity screening, which is not an adequate substitute for the full appellate review available to the State and all other civil litigants. *See Draper*, 372 U.S. at 499. The COA requirement therefore may only be upheld if it survives strict scrutiny.

In *Ringgold-Lockhart v. Cnty. of Los Angeles*, 761 F.3d 1057, 1061 (9th Cir. 2014), this Court found that similar requirements for judicial pre-approval "impose[] a substantial burden on the free-access guarantee." There, the district court declared certain plaintiffs "vexatious litigants" and imposed a "pre-filing condition" requiring that they receive court approval before they file any action related to the subject of their prior litigation. *Id.* On appeal, this Court vacated the pre-filing condition, reasoning that because they burden "the right to court access, 'pre filing orders should rarely be filed,' and only if courts comply with certain procedural and substantive requirements," which had not been met. *Id.* Notably these include individualized findings of frivolousness or harassment and narrowly tailored orders so as "to closely fit the specific vice encountered." *Id.*

The COA requirement erects a similar "substantial burden" on the fundamental right to access the courts. To appeal a district court's final judgment, which all other unsuccessful federal litigants (including the state in the very same proceeding) can as of right, 28 U.S.C. § 1291, unsuccessful habeas petitioners must make a "substantial showing of a denial of a constitutional right includ[ing] showing . . . that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack*, 529 U.S. at 484. This is onerous, preventing almost all habeas petitioners from accessing appellate review. *See* N. King, *Non-Capital Habeas Cases, supra,* at 308 (estimating less than 10 percent of COA applications are granted). The many examples of habeas petitioners initially denied a COA who ultimately prevail on their claims, but only after years of first litigating the COA denial as discussed in more detail *infra*, demonstrate that these low numbers are not explained by merits alone. *See, e.g., Buck*, 580 U.S. at 121; *House v. Bell*, 547 U.S. 518, 555 (2008); *Miller–El*, 537 U.S. at 348.

The COA requirement's infringement on the fundamental constitutional right of access to the courts is compounded by its additional burden on the writ of habeas corpus, which the Supreme Court has "constantly emphasized" is of "fundamental importance . . . in our constitutional scheme." *Johnson*, 393 U.S. at 485 (invalidating ban on prisoner assistance to others with *habeas corpus* petitions). *See also Bowen v. Johnston*, 306 U.S. 19, 26 (1939) ("[T]here is no higher duty than to maintain [the writ of habeas corpus] unimpaired."); *Bennett*, 365 U.S. at 712 (habeas proceedings were "[c]onsidered by the Founders as the highest safeguard of liberty"). Because the writ "enable[s] those unlawfully incarcerated to obtain their freedom, it is fundamental that access of prisoners to the courts for the purpose of presenting their complaints may not be denied or obstructed." *Johnson*, 393 U.S. at 485. Yet, the COA requirement creates just such an obstruction to review of prisoners' habeas denials.

b. The COA requirement's interference with the fundamental right of access to the courts cannot survive strict scrutiny.

"When a fundamental right is recognized, substantive due process forbids the infringement of that right 'at all, no matter what process is

provided, unless the infringement is narrowly tailored to serve a compelling state interest.'" *Witt v. Dep't of Air Force*, 527 F.3d 806, 817 (9th Cir. 2008) (citing *Reno*, 507 U.S. at 301–02). Here, as shown, the COA infringes "the fundamental constitutional right of access to the courts" and so is subject to strict scrutiny. *Lewis*, 518 U.S. at 346; *see also Tennessee*, 541 U.S. at 523 ("right of access to courts" is one of "a variety of other basic constitutional guarantees, infringements of which are subject to more searching judicial" scrutiny); *Taylor v. McDonough*, 71 F.4th 909, 932–34 (Fed. Cir. 2023) (applying strict scrutiny to infringement of "fundamental constitutional right" of access to the courts and collecting like cases); *Ryland v. Shapiro*, 708 F.2d 967, 972 (5th Cir. 1983) (similar).

"To be a compelling interest, the State must show that the alleged objective was the legislature's 'actual purpose.'" *Shaw v. Hunt*, 517 U.S. 899, 908 n.4 (1996) (applying strict scrutiny to a racial classification). "The justification must be genuine, not hypothesized or invented post hoc in response to litigation." *United States v. Virginia*, 518 U.S. 515, 533 (1996) (applying intermediate scrutiny to sex classification); *see also Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 n.16 (1975) ("This Court

need not . . . accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation.").

Here, the legislative history discloses that the purpose of the original 1908 statute was to prevent delays in executions "inducing local dissatisfaction, not infrequently developing into lynching[.]" H.R. Rep. No. 23, 60th Cong., 1st Sess. (1908). *See also Tillery*, 294 F.2d at 14-15 (quoting House Report at length, including this portion); *Jennings*, 574 U.S. at 291–92 (Thomas, J., dissenting) (citing same House Report); *Barefoot*, 463 U.S. 892 (citing same and noting purpose of requirement "to prevent frivolous appeals from delaying the States' ability to impose sentences, including death sentences"); *Ex parte Farrell*, 189 F.2d 540, 543 (1st Cir. 1951) (same).

The asserted interest in preventing lynchings cannot serve as a compelling interest for curtailing prisoners' fundamental right of access to the courts. As the extensive factual discussion above illustrates, *see* Statement § (D) *supra*, this curtailment is grounded ultimately in racism – resistance if not refusal to acknowledge the rights of Black

defendants – anathema to the Constitution.[18] The purported interest in reducing lynchings is inextricably tied up with racist rhetoric portraying Black men as rapists shielded by Black sympathizers and freed on "technicalities." *See* § D (3), *supra.* As Justice Brewer made clear, the dominant concern with lynchings was that they were ineffective at deterring "Black beasts" from raping white women. *See Brewer's Plain Words*. The purported interest in preventing lynchings relies on this racist and dehumanizing premise, and so cannot be a legitimate, let alone compelling, interest. *See Loving v. Virginia*, 388 U.S. 1, 11 (1967) (implicitly rejecting the maintenance of white supremacy as a legitimate governmental interest).

Even if this asserted purpose of preventing lynching could serve as a compelling interest, the COA requirement fails strict scrutiny

---

[18] The Supreme Court has made clear that courts must examine the "racially discriminatory *reasons*" for the adoption of laws. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1401 (2020) (emphasis in original); *see also id.* at 1418 (Kavanaugh, J., concurring) ("The Jim Crow origins and racially discriminatory effects (and the perception thereof) of non-unanimous juries in Louisiana and Oregon should matter and should count heavily in favor of overruling,). Even where a law is "readopted . . .for benign reasons. . . . [its] 'uncomfortable past' must still be '[e]xamined.'" *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246, 2273 (2020) (Alito, concurring) (citing *Ramos,* 140 S. Ct. at 1401).

because curtailing the right to appeal is neither a logical nor narrowly tailored approach to preventing lynchings. First, "[i]t is at once too narrow and too broad." *Romer v. Evans*, 517 U.S. 620, 633 (1996); *see also Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993) (in free exercise case, finding ordinances are not narrowly tailored because they "are overbroad or underinclusive in substantial respects"). The COA requirement applies to all prisoner habeas appeals, regardless of whether a threat of lynching existed as to a particular petitioner (and regardless of the current absence of such threat altogether) while, at the same time, failing to prevent lynchings due to any other cause, including the predominant cause of maintaining white supremacy and causing racial terror.

Regardless of exactly "how closely the means . . . must serve the end (the justification or compelling interest)," in order for a statute to be narrowly tailored, the Supreme Court "ha[s] always expected that the legislative action would substantially address, if not achieve, the avowed purpose." *Shaw*, 517 U.S. at 915 (applying strict scrutiny in the Equal Protection context). Here, the COA requirement is far too attenuated from the goal of preventing lynchings to satisfy this test.

As shown, the role of lynchings in maintaining white supremacy and Black subordination is well established. That overpowering motivation, by a population unwilling to accept emancipation and the new rights of Black citizens under the Reconstruction Amendments, had next to nothing to do with federal habeas appeals. It would have existed, independently, regardless of such appeals, particularly given the flames of passion President Roosevelt, Justice Brewer, and others in power fanned with their rhetoric.

The federal government had options to curtail lynchings that do not infringe prisoners' fundamental right of access to the courts. To stop lynchings, the United States had at its disposal federal troops, federal law, federal courts, and federal law enforcement. Not one met the moment. The 1908 (then) CPC's restriction on federal habeas appeals could not and ultimately did not stop or even slow lynchings. See *Tuskegee Lynchings: By Year and Race*. Under strict scrutiny, this is not nearly good enough. *Taylor*, 71 F.4th at 939–40 (quoting *Fulton v. City of Philadelphia, Pennsylvania*, 141 S. Ct. 1868, 1881 (2021)) ("[S]o long as the government can achieve its interests in a manner that does not burden [the fundamental right at issue], it must do so.'")).

Far from a close fit, the only nexus between the reduction of lynchings and habeas appeals was itself race-based and offensive: Black men were "beasts," *Brewer's Plain Words*, by definition without "rights which the white man was bound to respect." *Dred Scott v. Sandford*, 60 U.S. 393, 407 (1856). The CPC requirement mirrored a widely-trafficked mythology – perhaps then viewed as less pernicious than the raw goal of maintaining white supremacy – that lynching was due to frivolous and time-consuming appeals by guilty Black rapists. *See* § (D)(3), supra. "The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

Even if the COA requirement could be divorced from this sordid history, leaving a standalone goal of reducing frivolous appeals, it would still fail. Assuming, *arguendo*, that reducing frivolous appeals is a compelling interest, the COA requirement is not narrowly tailored to that end because, here as well, it is "at once too narrow and too broad." *Romer*, 517 U.S. at 633. The COA requirement is overbroad because obtaining a COA requires more than demonstrating non-frivolity. *See*

Barefoot, 463 U.S. at 893 (requiring "something more than the absence of frivolity" and noting that "the standard is a higher one than the 'good faith' requirement of Sec. 1915" (citation omitted) (reviewing predecessor CPC requirement, later equated to the COA requirement). Good-faith prisoners who seek to access the courts to pursue non-frivolous appeals will be denied that right if they do not make a "substantial showing of a denial of a constitutional right includ[ing] showing . . . that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack*, 529 U.S. at 484 (cleaned up).[19]

At the same time, it is underinclusive in relation to its goal of preventing frivolous appeals because it does not apply at all to

[19] Similarly concerning, one review of a representative sample of cases where a magistrate judge recommended granting habeas relief and a district court declined to do so, found that in 34% of cases, the district court then denied a COA, despite the fact that a "'reasonable jurist' had in fact disagreed." Jonah J. Horwitz, *Certifiable: Certificates of Appealability, Habeas Corpus, and the Perils of Self-Judging*, 17 Roger Williams U. L. Rev. 695, 715–16, 721 (2012). In practice, the COA burden may be even harder to overcome than the standard suggests.

government appeals. It also leaves untouched the right to appeal frivolous claims in all other contexts. Even prisoners whose civil rights claims have been dismissed *sua sponte* as "frivolous or malicious," under 28 U.S.C. § 1915A, may appeal that dismissal as of right. *See Byrd v. Phoenix Police Dep't*, 885 F.3d 639, 640 (9th Cir. 2018) (asserting jurisdiction under 28 U.S.C. § 1291 to review dismissal of prisoner's civil rights claim under 28 U.S.C. § 1915A).

By imposing the COA requirement only on prisoner habeas appeals "the statute inevitably burdens many whose appeals, though unsuccessful, were not frivolous, and leaves untouched many whose appeals may have been frivolous indeed." *Rinaldi*, 384 U.S. at 308. This combination dooms the COA requirement under strict scrutiny. *IMDB.com, Inc. v. Becerra*, 962 F.3d 1111, 1125 (9th Cir. 2020) ("[A] statute is not narrowly tailored if it is either underinclusive or overinclusive in scope.").

As discussed in greater detail, *infra*, the procedural history of high-profile habeas cases bears this out: meritorious habeas petitions involving serious constitutional error are often initially denied COAs. These same procedural histories also show that the COA requirement

does not, in fact, shorten or streamline litigation, further underlining that it is not well tailored to the goal of reducing the burdens of litigation, whether frivolous or not. To take just one example, in *Tennard v. Dretke*, 542 U.S. 274, 276 (2004), a Texas prisoner challenged his death sentence in federal habeas on the grounds that he was denied the opportunity to adequately present mitigating evidence of his low intelligence, as required under *Penry v. Lynaugh*, 492 U.S. 302 (1989). After the district court denied his petition and his request for a COA, Tennard applied to the Fifth Circuit, where, after full briefing and oral argument, the court denied the COA because his *Penry* claim was not debatable among jurists of reason. *Id.* at 281. The Supreme Court then granted certiorari, vacated, and remanded for further consideration. *Id.* at 282. The Fifth Circuit again denied Tennard's COA and the Supreme Court again granted certiorari, held that the Fifth Circuit's interpretation of *Penry* was incorrect, and that Tennard was entitled to a COA. Finally, six years after the district court initially denied the COA, the Fifth Circuit found that Tennard was entitled to habeas relief. *Tennard v. Dretke*, 442 F.3d 240, 257 (5th Cir. 2006).

2. The COA requirement violates Mr. Noor's Equal Protection rights.[20]

"Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance." *Romer*, 517 U.S. at 633. Section 2253's lopsided COA requirement violates this principle by creating a scheme where the government may seek the assistance of appellate courts as of right, while the same courts are presumptively closed to prisoners. This violates the "the Due Process Clause of the Fifth Amendment['s] . . . equal protection component prohibiting the United States from invidiously discriminating between individuals or groups." *Washington v. Davis*, 426 U.S. 229, 239 (1976).[21]

The COA requirement treats two similarly situated groups—habeas petitioners and state representatives against whom judgment has been entered—disparately by requiring one, but not the other, to

---

[20] **Standard of review**: Here, too, the only question is one of law, thus reviewed de novo. *Ness*, 954 F.2d at 1497.

[21] The Supreme Court's "approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." *Weinberger*, 420 U.S. at 638 n.2. *See also Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

apply for and receive judicial permission to appeal. Because, as discussed *supra*, it also interferes with petitioners' fundamental constitutional right to access the courts, strict scrutiny applies. *See Nunez by Nunez v. City of San Diego*, 114 F.3d 935, 944 (9th Cir. 1997). For the same reasons the COA requirement fails this test under Due Process, it also violates Equal Protection.

But, even under the more lenient rational basis review, this classification serves no legitimate government purpose and thus fails. Neither of the two purported bases for the one-sided rule – to prevent frivolous appeals, *Barefoot*, 463 U.S. at 892, or to prevent lynchings. H.R. Rep. No. 23, 60th Cong., 1st Sess. (1908) – is rationally related to the statute's differential treatment of prisoners and governments. As shown below, the classification is irrational with respect to the first because the rule prevents non-frivolous prisoner appeals while permitting frivolous appeals as of right by the state or federal government. This illogical approach rests on impermissible and unsubstantiated assumptions about the frivolity of prisoner appeals. In practice, the rule also extends and complicates – rather than reduces – appellate litigation. And it is irrational with respect to the second

because curtailing appeal rights of prisoners is far too attenuated from the goal of preventing lynching. Passion-inflamed lynchings persisted in American society to maintain white supremacy, not due to habeas-corpus appeals. These two irrational bases of course connect: the denigration of the rights of Black defendants that motivated the CPC requirement in 1908 is precisely why the requirement applies only to habeas petitioners and not to the government.

This is the first time an equal protection challenge to the COA requirement is before this Court. The Fifth Circuit – the only other circuit court to address this question – held, under rational basis review, that "[b]ecause Congress's interest in preserving State resources is legitimate, the COA requirement does not violate the Equal Protection Clause." *Garcia v. Dretke*, 388 F.3d 496, 499–500 (5th Cir. 2004). This decision is not binding, and this Court should decline to follow it. It was reached without consideration of the burden imposed on the fundamental right of access to the courts, nor with the benefit of the historical record surrounding the enactment of the CPC. *See Ramos*, 140 S. Ct. at 1405 (declining to follow prior decision that "spent almost no time grappling with . . .the racist origins of" challenged jury

nonunanimity rules and employed an "incomplete functionalist analysis of its own creation for which it spared one paragraph"). The record also doesn't support the Fifth Circuit's conclusion that the COA's purpose is to "preserve[s] resources of states in defending appeals." *Id.*[22] Regardless, as the procedural histories detailed below demonstrate, the COA accomplishes no such thing.

a. **The COA requirement arbitrarily treats similarly-situated litigants differently.**

Section 2253's COA requirement applies to prisoners seeking to appeal an adverse habeas decision, but not to a government defendant in the same situation. This one-sided requirement arbitrarily treats similarly-situated litigants dissimilarly, *Reed v. Reed*, 404 U.S. 71, 76 (1971), creating a fixed, permanent, and arbitrary class of litigants who must obtain pre-clearance to appeal.

This classification strips prisoners alone of their right to appeal under 28 U.S.C. § 1291. That statute provides that courts of appeal

[22] Notably, neither party argued this was the law's purpose, instead agreeing that preventing frivolous appeals was the government interest. *See* Brief of Petitioner-Appellee, 2003 WL 25953462; Reply Brief of Respondent-Appellant, 2003 WL 24841338.

"have jurisdiction of appeals from all final decisions of the district court." 28 U.S.C. § 1291. The state, in habeas proceedings, is entitled to this jurisdictional right. *See Jennings*, 574 U.S. at 282 ("[O]nce a State has properly noticed an appeal of the grant of habeas relief, the court of appeals must hear the case[.]"). In contrast, "until a COA has been issued federal courts of appeals lack jurisdiction to rule on the merits of appeals from habeas petitioners." *Miller-El*, 537 U.S. at 336. This "discriminatory denial of the statutory right of appeal is a violation of the Equal Protection Clause." *Dowd v. United States ex rel. Cook*, 340 U.S. 206, 208 (1951).

While similarly-situated groups need not "be similar in all respects . . . they must be similar in those respects that are relevant to [the government's] interests and its policy." *Arizona Dream Act Coal. v. Brewer*, 855 F.3d 957, 966 (9th Cir. 2017). A state defendant who loses and a habeas petitioner who loses do not differ in any relevant manner. Both face a final judgment adverse to their interests. But, while the government can appeal as of right, the petitioner may only seek appellate review by convincing the very judge who ruled against him, or

the Court of Appeals,[23] that his case meets the high burden of making a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). In light of the goals of preventing frivolous appeals and speeding up habeas proceedings in order to preempt lynchings, the two groups also do not differ. An appeal by either party could be frivolous, and would equally delay final resolution of the case.

Further damning, habeas petitioners are not only treated differently from the other party to the same litigation, but also from all other civil litigants in federal court who have obtained a final judgment in the district court and enjoy a full and unfettered right of appeal under 28 U.S.C. § 1291.[24] The habeas petitioner thus "cannot appeal to the courts, as other litigants, under like conditions, and with like protection." *Gulf, C. & S.F. Ry. Co. v. Ellis*, 165 U.S. 150, 153 (1897)

---

[23] Where an appeals court reviews a request already denied by the district court, it is "duty bound to give" the district court's decision "weighty consideration." *United States ex rel. Sullivan v. Heinze*, 250 F.2d 427, 428–29 (9th Cir. 1957) (denying request for CPC).

[24] The habeas context also does not justify treating habeas prisoner appellants differently from all other civil appellants. *See Wolff v. McDonnell*, 418 U.S. 539, 580 (1974) ("[f]inding no reasonable distinction between" habeas and civil rights actions in constitutional right of access to courts claim); *see also Jennings*, 574 U.S. at 280 ("[T]he reality that *some things* about habeas are different does not mean that *everything* about habeas is different.").

(holding that statute requiring railroad companies, but not other litigants, to pay attorney fees violated equal protection). "[T]his type of singling out, in connection with a rationale so weak that it undercuts the principle of non-contradiction, fails to meet the relatively easy standard of rational basis review." *Merrifield v. Lockyer*, 547 F.3d 978, 991 (9th Cir. 2008). *See also Lindsey*, 405 U.S. at 79 (noting the double-bond appellate requirement was a barrier "faced by no other civil litigant in Oregon").

b. The COA requirement fails rational basis review.

Section 2253's arbitrary classification cannot withstand even rational-basis review. *See Lindsey*, 405 U.S. at 79 (invalidating one-sided appeal bond, under rational basis review).

To survive rational basis review, the classification "must rationally further some legitimate governmental interest." *Moreno*, 413 U.S. at 534. The government "may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446–47 (1985). Nor will "some objectives—such as a

bare . . . desire to harm a politically unpopular group" qualify as legitimate state interests. *Id.*

Here, as discussed *supra*, the two stated purposes behind the COA requirement are to reduce frivolous appeals and prevent lynchings. As explained below, neither purpose is rationally related to the statute's one-sided curtailment of habeas appeals.

i. The one-sided COA requirement does not reduce frivolous appeals.

The Supreme Court has described the purpose of the COA requirement as "prevent[ing] frivolous appeals from delaying the States' ability to impose sentences[.]" *Barefoot*, 463 U.S. at 892; *see also Jennings*, 574 U.S. at 279. Assuming, *arguendo*, that this is a legitimate government purpose, it still fails because the COA requirement is not rationally related to this goal: it neither reduces litigation delays nor prevents frivolous appeals.

First, it is irrational to address frivolous appeals by requiring *all* petitioners but *none* of the respondents who lose in the district court to obtain a COA. The law presumes prisoners' appellate claims frivolous, and government claims not. The presumption smacks more of prejudice than of fact. *See Cleburne Living Ctr.*, 473 U.S. at 448 ("mere negative

attitudes, or [unsubstantiated] fear . . . are not permissible bases" for differential treatment).[25] These kinds of "wholly unsubstantiated assumptions concerning the differences" between two classes cannot justify such disparate treatment. *Moreno*, 413 U.S. at 535–36 (rejecting Food Stamp Act's exclusion of households with unrelated members as rationally related to government interest in preventing fraud).[26]

The Supreme Court has previously condemned regulations, like the COA requirement, that arbitrarily target one group of litigants in the name of reducing frivolous appeals. In *Rinaldi*, 384 U.S. at 308-10, the Court examined a statute that required reimbursement of transcript costs by indigents unsuccessful on appeal who were incarcerated, but not on those unsuccessful indigent litigants on probation or whose sentences involved only a fine. *Id.* at 308. The Court found this distinction bore no relationship to the statute's purpose of

---

[25] In reality, data indicate that states appeal adverse habeas petitions at slightly higher rates than petitioners. *See Vera Analysis*, 24 Fed. Sent. R. at 308.

[26] *See Thompson v. Bond,* 421 F. Supp. 878, 884–85 (W.D. Mo. 1976) ("Defendants have submitted no empirical data or documentary evidence to show that prisoners are inherently inclined to file spurious lawsuits. Even if it could be established that many prisoner suits are frivolous, a statute foreclosing the filing of all prisoner suits, regardless of their merit, would be overbroad.").

deterring frivolous appeals. *Id.* at 309–10. It explained that "the statute inevitably burdens many whose appeals, though unsuccessful, were not frivolous, and leaves untouched many whose appeals may have been frivolous indeed." *Id.* at 310.

Likewise, in *Lindsey,* the Court struck down a requirement that tenants who lost in the lower court pay a double bond to appeal because it "imposes additional requirements that in our judgment bear no reasonable relationship to any valid state objective and that arbitrarily discriminate against tenants appealing from adverse decisions." 405 U.S. at 76-77. The Court found the "claim that the double-bond requirement operates to screen out frivolous appeals is unpersuasive, for it not only bars nonfrivolous appeals by those who are unable to post the bond but also allows meritless appeals by others who can afford the bond." *Id.* at 78. The Court noted that, even for nonindigent appellants, the statute was arbitrary and irrational because it created "a substantial barrier to appeal faced by no other civil litigant in Oregon." *Id.* at 79.[27] The Court did not question "reasonable procedural

[27] Multiple courts have applied *Lindsey* to find arbitrary classifications curtailing appellate rights do not pass rational-basis muster. *See M.L.B.*

provisions" to discourage "patently insubstantial appeals, if these rules are reasonably tailored to achieve these ends and if they are uniformly and nondiscriminatorily applied." *Id.* at 78. The COA requirement is neither.

While unlike *Lindsey* and *Rinaldi* the COA requirement imposes no financial burdens, its requirement that all prisoners — but not state or other civil litigants — seek and obtain judicial pre-clearance under a stringent standard similarly discriminates. *Id.* at 78-79. *See also Rinaldi*, 384 U.S. at 308 ("The Equal Protection Clause requires more of a state law than nondiscriminatory application within the class it establishes."). As with the regulations in *Lindsey and Rinaldi*, the result is not a reduction in *frivolous* appeals. The COA reduces *all* appeals from one group, while frivolous appeals from others remain unburdened.

---

v. S.L.J., 519 U.S. 102, 127 (1996); *O'Day v. George Arakelian Farms, Inc.*, 536 F.2d 856, 899-900 (9th Cir. 1976); *Klamath Falls v. Winters*, 600 P.2d 478, 480 (Or. Ct. App. 1979). *See also Death Row Prisoners v. Ridge*, 948 F. Supp. 1258, 1274-75 (E.D. Pa. 1996) (in context of rules concerning the right to pursue federal habeas).

The presumption that prisoner habeas appeals are frivolous is also incorrect. The House Judiciary Report accompanying the original 1908 statute includes no factual basis for this presumption: it says nothing about the number or frequency of frivolous habeas appeals, instead asserting generally that appeals cause delays of several years, even "where there is absolutely no merit in their contention." H.R. Rep. No. 23, 60th Cong., 1st Sess. (1908). Nor does any subsequent legislative history (when the law was relocated and later renamed). *See*, *e.g.*, Larry W. Yackle, *State Convicts and Federal Courts: Reopening the Habeas Corpus Debate*, 91 Cornell L. Rev. 541, 546 (2006) (describing AEDPA's sparse legislative history). In practice, individual members of either group may file a frivolous appeal of a district court's habeas ruling,[28] or

[28] *Williams v. Pliler,* 616 Fed. App'x. 864, 867 (9th Cir. 2015*)* (rejecting state's appeal of habeas grant under *Batson v. Kentucky*, 476 U.S. 79 (1986): "The state is wrong."); *Jones v. Stephens,* 541 Fed. App'x. 399, 408 (5th Cir. 2013) (rejecting state's appeal "as foreclosed" by Supreme Court precedent); *Wilson v. Beard*, 589 F.3d 651, 658, 663 (3d Cir. 2009) (rejecting commonwealth's precedent-foreclosed appeal, and "misapprehend[sion] of the state of the law as it relates to the prosecution's disclosure requirements"); *Sharp v. Blodgett*, 110 Fed. App'x. 812, 816 (9th Cir. 2004) (rejecting state's frivolous appeal of grant due to ineffective assistance of counsel); *Woods v. Cavell*, 254 F.2d 816, 816 (3d Cir. 1958) (summarily rejecting state's arguments appealing grant of relief); *Ellis v. Ellisor*, 239 F.2d 175, 176 (5th Cir.

a meritorious one. *See*, *infra*, at 63-65 (discussing various meritorious appeals to Supreme Court).

Further, federal district courts' respect for coordinate state-court proceedings have long made them hesitate to grant the writ. *See, e.g.*, *Robbins v. Green*, 218 F.2d 192, 195 (1st Cir. 1954) (stating that granting habeas relief to a prisoner is a "statutory duty" "delicate and distasteful"). *Cf. Jennings*, 574 U.S. at 279 (acknowledging that when the government appeals, the prisoner's underlying claims are "by-definition-nonfrivolous"); Judge Diane P. Wood, *The Enduring Challenges for Habeas Corpus*, 95 Notre Dame L. Rev. 1809, 1822 n.85 (2020) (citing studies showing the "success rates of habeas petitions have been persistently low"). As a result, any habeas decision adverse to the state is likely to be carefully and conservatively reasoned, increasing, if anything, the likelihood that the *state's appeal* will be frivolous.

1956) (affirming grant for glaring deprivation of counsel); *United States ex rel. Almeida v. Baldi*, 195 F.2d 815, 816 (3d Cir. 1952) (rejecting commonwealth's arguments against grant due to "deliberate suppression . . . of evidence vital to the defense in the trial of a capital case"); *Bovey v. Grandsinger*, 253 F.2d 917, 922 (8th Cir. 1958) (rejecting state's arguments against grant for glaring due-process violation).

The lopsided requirement creates grave risks for prisoners by foreclosing claims that, on further review, prove not only meritorious but key to development of the law. For example, Thomas Miller-El's habeas claim under *Batson* was initially deemed unworthy of a COA, but later created the opportunity for the Supreme Court to grant *Batson* relief for the first time, and to reinforce the decision. *See Flowers v. Mississippi*, 588 U.S. __, 139 S. Ct. 2228, 2243 (2019) (citing *Miller-El v. Dretke*, 545 U.S. 231 (2005) as chronologically-first example of Court enforcing *Batson*). The one-sided COA classification makes it less likely for such important claims by prisoners to be heard, and risks convictions and/or sentences in violation of the Constitution.

Flowers coincidentally described the Court's decades-long struggle to eradicate racial discrimination from jury selection, whether through the initial selection of venire members or through peremptory strikes. *Id.* at 2238-39. Yet House Report Number 23, when justifying the original CPC requirement, cited as its sole case example of "groundless" habeas appeals that of a Japanese prisoner condemned to death who argued unsuccessfully to the Supreme Court that people of his race and other people of color, who were naturalized citizens, had been excluded

from his jury and grand jury. *Jugiro*, 140 U.S. at 293. Rejecting the claim, the Court held that if New York's laws "discriminate[d] against [petitioner] because of his race, the remedy for the wrong done to him was not by a writ of habeas corpus from a court of the United States." *Id.* at 298.[29] *Miller-El*, among other precedent, disproves this conclusion, and places Congress's paradigmatic groundless habeas claim in new light. *Cf. Shipp*, 203 U.S. at 571 (recounting grant of stay to review habeas denial of Black prisoner tried by jury from which Black jurors had been excluded).

Second, the premise that the COA requirement will "eliminate delays in the federal habeas review process," *Holland v. Florida*, 560 U.S. 631, 648 (2010), is undermined by the reality of the COA process, as described by the Supreme Court in *Jennings*, 574 U.S. at 279–80. There, in rejecting expansion of the COA requirement, the Court explained its inefficiencies.

> We doubt that any more judicial time will be wasted in rejection of frivolous claims made in defense of judgment on an appeal already taken

[29] Less than two months later, New York executed Mr. Jugiro, making him the second to die in the electric chair. *Executions in the U.S. 1608-2002: The ESPY File – Executions by Date* 177, https://dpic-cdn.org/production/legacy/ESPYyear.pdf.

> than would be wasted in rejection of similar claims made in (what the State and dissent would require) a separate proceeding for a certificate of appealability. To be sure, as the dissent points out, ... the certificate ruling will be made by just one judge rather than three; but that judge will always be required to consider and rule on the alternative grounds, whereas the three-judge court entertaining the government's habeas appeal will not reach the alternative grounds unless it rejects the ground relied on by the lower court.

Id. (noting "the certificate process requires the opening and disposition of a separate proceeding"). This admission that a COA burdens judicial resources as much, if not more, than an appeal itself, lays bare the irrationality of imposing the COA requirement to streamline litigation. Frivolous claims can be more efficiently disposed of through an appeal itself.

The procedural histories of cases involving denial of COAs demonstrate that, far from reducing delays, the COA requirement protracts litigation. Moreover, far from being frivolous, appeals involving COA denials often reveal serious constitutional error and result in significant relief. For example, Texas sentenced Duane Buck to death based on expert testimony that he would pose a future danger because he was Black. *Buck*, 580 U.S. at 121. He was denied federal

habeas relief in 2014, *id.* at 114, the Fifth Circuit declined to issue a COA in 2015, *id.* at 115, and the Supreme Court reversed that determination in 2017. *Id.* at 128. The case then proceeded back down the ladder, first to the Fifth Circuit, which granted the COA, and finally to the District Court, which granted relief on the merits. *Buck v. Davis*, No. H-04-3965, 2017 WL 9535215, at *1 (S.D. Tex. April 19, 2017) ("This case has a long and tortured history."). After having spent nearly twenty years on death row, *id.,* due to a death sentence based on race, Mr. Buck was resentenced to life imprisonment. Death Penalty Info. Ctr., *Duane Buck, Whose Death Sentence Was Tainted by Racial Bias, Is Resentenced to Life* (Oct. 4, 2017), https://deathpenaltyinfo.org/news/duane-buck-whose-death-sentence-was-tainted-by-racial-bias-is-resentenced-to-life.

Thomas Miller-El's protracted litigation too included a long delay for COA litigation, *Miller–El,* 537 U.S. at 348 (reversing Fifth Circuit's denial of COA), before he was ultimately granted federal habeas relief, *Miller-El*, 545 U.S. at 266, and resentenced to life. Death Penalty Info. Ctr., *After Two Supreme Court Reversals, Texas Man Sentenced to Life Imprisonment* (March 24, 2008),

https://deathpenaltyinfo.org/news/after-two-supreme-court-reversals-texas-man-sentenced-to-life.

As a third Supreme Court example, Paul House spent two decades on Tennessee's death row before the Supreme Court decided he had met the "actual" innocence exception to an earlier state procedural default. *House v. Bell*, 547 U.S. 518, 555 (2008). One of the many hoops he had to jump through was obtaining a COA, after having failed in the district court to obtain habeas relief. On remand, the district court granted habeas relief, the charges were ultimately dropped, and Mr. House was released, after having spent more than 22 years incarcerated, including two decades on death row. Death Penalty Info. Ctr., *Description of Innocence Cases*, https://deathpenaltyinfo.org/policy-issues/innocence/description-of-innocence-cases. Although the Circuit Court ultimately granted a COA, *House*, 547 U.S. at 535, the District Court had initially denied it. *House v. Bell*, No. 3:96-cv-00883, Dkt. No. 286 (E.D. Tenn). *Cf. Hohn v. United States*, 524 U.S. 236, 240-42, 250-51 (1998) (describing protracted litigation over COA, and collecting similar examples reaching the Supreme Court); *Tennard*, 442 F.3d at 257 (similar, described *supra* at 47).

The COA requirement thus does not reduce delays but instead prolongs litigation, often to the detriment of life and liberty. And this has long been clear to the government. Indeed, in 1989, the Powell Committee recommended abandoning the (then) CPC requirement for capital cases because it only occasions further delays. *See* U.S. Judicial Conference, *Ad Hoc Comm. on Fed. Habeas Corpus in Capital Cases, Comm. Rep. and Proposal* 23 (1989).

ii. The COA requirement is not rationally-related to preventing lynching.

At its inception, the explicit rationale for the COA (then CPC) requirement was to prevent delays in executions "inducing local dissatisfaction, not infrequently developing into lynching[.]" H.R. Rep. No. 23, 60th Cong., 1st Sess. (1908). Mr. Noor would make no quarrel with the laudable goal of stopping lynching. The issue here is whether the curtailment of prisoner's rights to appeal habeas petitions bears any rational relationship to that goal. The answer is no. The one-sided COA requirement simply does not "constitute[] a rational effort to deal with" lynchings. *Moreno*, 431 U.S. at 536. As shown *supra*, the only conceivable nexus between lynchings and appeals – a desire to deprive Black citizens of their rights – is racially discriminatory and cannot

serve as a rational basis. S*ee Loving*, 388 U.S. at 11; *Moreno*, 413 U.S. at 534-35 (holding desire to harm unpopular group cannot serve as rational basis); *Romer*, 517 U.S. at 634 ("If the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." (cleaned up; emphasis in original)).

Moreover, in choosing to address lynchings by curtailing the rights of the individual at risk of being lynched rather than focusing on the actions of the lynch mob, this regulation appears "inexplicable by anything but animus." *Romer*, 517 U.S. at 632; *see also Arizona Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1067 (9th Cir. 2014) ("[A]nimus toward DACA recipients . . . is not a legitimate state interest."). As described more fully above, it was irrational for the federal government to pretend the COA requirement could reduce lynchings while members of all three branches were simultaneously fanning the flames of racial-terror lynchings and incapable, if not unwilling to wield government levers of power to directly confront our national crime.

In sum, curtailing habeas appellate rights bore no rational relationship to the harm; it could be no substitute for the fearless, sturdy, and resolute federal efforts needed to face down America's lynching mobs. A water pistol would do no better in extinguishing a house fire.

History reveals that in enacting the COA requirement, Congress sought to ensure that the state – not the mob – inflicted swift punishment on a reviled group, and that it was willing to eschew bedrock safeguards against unjust convictions to do so. Rather than rational, the whole project was steeped in animus. The classification cannot stand. *See Moreno*, 413 U.S. at 534-35.

iii. This Court's Recent Decision in *Carillo-Lopez* does not control.

This Court's recent decision in *United States v. Carrillo-Lopez*, 68 F.4th 1133 (9th Cir. 2023), petition for cert. docketed, (U.S. Dec. 11, 2023) (No. 23-6221), does not control Mr. Noor's Equal Protection Claim. There, this Court rejected arguments that the alien reentry statute, 8 U.S.C. §§ 1326(a) and (b), violated the Equal Protection Clause because, while facially neutral, it was adopted with discriminatory intent against Mexican and other Latino immigrants.

The Court found a lack of historical evidence that the 1952 statute was motivated by discriminatory intent. *Carrillo-Lopez,* at 1147-50. It also held that although a 1929 version of the statute in fact had discriminatory intent, the later broad reformulation of a comprehensive immigration law "purged" the law of the earlier intent. *Id*. at 1150-51 (citing *Abbott v. Perez*, 138 S. Ct. 2305, 2325-26 (2018)). Mr. Noor's case differs from *Carrillo-Lopez* both substantively and procedurally.

First, Mr. Noor's case challenges the constitutionality of a law that burdens the fundamental right of access to the courts, requiring heightened scrutiny under both due process and equal protection. The equal protection challenge to the alien reentry statute implicated no fundamental right.

Second, unlike *Carillo-Lopez*, Mr. Noor does not bring a claim under *Arlington Heights*, 429 U.S. at 265-66, that the COA requirement, while facially neutral, was enacted with a racially discriminatory purpose. Rather, Mr. Noor demonstrates that the original purpose of the law – preventing lynchings – cannot justify the COA's infringement on a fundamental right, under strict scrutiny, or its unequal deprivation of appellate rights, under rational basis.

Third, the original purpose of the then-CPC requirement was not "purged" through subsequent enactments. The legislative reenactments here were never part of the type of comprehensive changes in the law as occurred in the 1952 immigration context. *See Carrillo-Lopez*, 68 F.4th at 1143-47 (noting extensive legislative history and 925-page Senate Report). If anything, as noted above, the later changes were made with reference to the 1908 law. *See* Fed. R. App. P. 22 Advisory Committee Notes (1967) (citing, *inter alia*, *Tillery*, 294 F.2d at 14-15).

Finally, *Carrillo-Lopez* was decided after a full evidentiary hearing in the district court, with expert testimony. *See United States v. Carrillo-Lopez*, 555 F. Supp. 3d 996, 1000 n.2 (D. Nev. 2021), *rev'd*, 68 F.4th 1163 (9th Cir. 2023). Here, the district court denied Mr. Noor's request for an evidentiary hearing. 1-ER-11, 34, 107. If there is any doubt about the racist origins of the COA requirement, this Court should remand to the district court for an evidentiary hearing.

G. Conclusion

For these reasons, this Court should reverse the District Court, declare that the COA requirement violates the Fifth Amendment, and permit Mr. Noor's appeal as of right.

A. Related Cases

Appellant is unaware of any cases in this Court related to this one.

DATED this 19th day of January, 2024.

Respectfully submitted,

/s/ Brian W. Stull	/s/ Scout Katovich	/s/ Neil M. Fox
Brian W. Stull	Scout Katovich	Neil M. Fox

Attorneys for Appellant

CERTIFICATE OF COMPLIANCE

I hereby certify that under Fed. R. App. P. 32(a)(5) & (a)(7) and Circuit Rule 32-1, this Opening Brief of Appellant (excluding the table of contents, table of citations, addendum containing statutes, certificate of related cases, certificate of service, and this certificate) complies with the type-volume limitation and that it is proportionately spaced, has a typeface of 14 points or more and contains 13,996 words (13,984 using the Microsoft Word Count tool, plus 12 words in the image on page 18).

Dated this 19th day of January, 2024.

/s/ Brian W. Stull
Brian W. Stull
Attorney for Appellant

ADDENDUM

Table of Contents

28 U.S. Code § 2253 provides:

> (a)In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.
>
> (b)There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.
>
> (c)
>
> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

Federal Rule of Appellate Procedure 22 Provides:

> (a) Application for the Original Writ. An application for a writ of habeas corpus must be made to the appropriate district court. If made to a circuit judge, the application must be transferred to the appropriate district court. If a district court denies an application made or transferred to it, renewal of the application before a circuit judge is not permitted. The applicant may, under 28 U.S.C. § 2253, appeal to the court of appeals from the district court's order denying the application.
>
> (b) Certificate of Appealability.
>
> (1) In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c). If an applicant files a notice of appeal, the district clerk must send to the court of appeals the certificate (if any) and the statement described in Rule 11(a) of the Rules Governing Proceedings Under 28 U.S.C. § 2254 or § 2255 (if any), along with the notice of appeal and the file of the district-court proceedings. If the district judge has denied the certificate, the applicant may request a circuit judge to issue it.
> (2) A request addressed to the court of appeals may be considered by a circuit judge or judges, as the court prescribes. If no express request for a certificate is filed, the notice of appeal constitutes a request addressed to the judges of the court of appeals.
> (3) A certificate of appealability is not required when a state or its representative or the United States or its representative appeals.

U.S. Const. amend. V provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. XIV, Section 1 provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

60TH CONGRESS, 1st Session. } HOUSE OF REPRESENTATIVES. { REPORT No. 23.

RESTRICTION OF RIGHT OF APPEAL IN HABEAS CORPUS PROCEEDINGS.

JANUARY 8, 1908.—Referred to the House Calendar and ordered to be printed.

Mr. LITTLEFIELD, from the Committee on the Judiciary, submitted the following

REPORT.

[To accompany H. R. 4777.]

The Committee on the Judiciary, to whom was referred the bill (H. R. 4777) restricting in certain cases the right of appeal to the Supreme Court in habeas corpus proceedings, report the same with a favorable recommendation.

The purpose of this bill is to correct a very vicious practice of delaying the execution of criminals by groundless habeas corpus proceedings and appeals therein taken just before the day set for execution, which now obtains under the following sections of the Revised Statues of the United States:

SEC. 763. From the final decision of any court, justice, or judge inferior to the circuit court, upon an application for a writ of habeas corpus or upon such writ when issued, an appeal may be taken to the circuit court for the district in which the cause is heard:

1. In the case of any person alleged to be restrained of his liberty in violation of the Constitution or of any law or treaty of the United States.

2. In the case of any prisoner who, being a subject or citizen of a foreign state and domiciled therein, is committed or confined or in custody, by or under the authority or law of the United States or of any State, or process founded thereon, for or on account of any act done or omitted under any alleged right, title, authority, privilege, protection, or exemption, set up or claimed under the commission, order, or sanction of any foreign state or sovereignty, the validity and effect whereof depend upon the law of nations or under color thereof.

SEC. 764. From the final decision of such circuit court an appeal may be taken to the Supreme Court in the cases described in the preceding section. (As amended by chap. 353, Supp. Rev. Stat. U. S., vol. 1, 1874–1891.)

Under these sections the respondents in capital cases have been in the habit of prosecuting an appeal from adverse decisions in habeas corpus cases to the Supreme Court. The prosecution of an appeal under these circumstances results in a delay of anything like a year or two years. The appeals are prosecuted without reference to the question as to whether there is any merit to the appeal, and as the statues now stand the right of appeal is absolute.

Mr. Justice Harlan, delivering the opinion of the court in the case of In re Shilreyo Jugiro, said:

As Jugiro's first written application for a writ of habeas corpus alleged that he was restrained of his liberty in violation of the Constitution of the United States, no question is made, as indeed none could be made, as to his right under the existing statutes of the United States relating to habeas corpus to have prosecuted an appeal to this court from the order of the circuit court denying that application. (Rev. Stat., pars. 751, 752, 753, 761, 762, 763, 764, 765; act of March 3, 1885, chap. 353, 23 Stat., 437.)

By this it will be seen that, as above suggested, the right of appeal is absolute, and it furnishes persistent and litigous defendants with an opportunity to get the delay of from one to two years where there is absolutely no merit in their contention. The attention of the committee was called to a condition existing in one of our States where petition for habeas corpus after petition and successive appeals from adverse decisions thereon in the same case had been prosecuted, involving a purely factious delay of three or four or more years. This statute makes it impossible to continue this vicious practice, as under it no appeal can be prosecuted unless either the United States court making the final decision or a justice of the Supreme Court shall be of the opinion that there exists probable cause for such appeal. That the delay of execution and punishment in criminal cases is the most potent cause in inducing local dissatisfaction, not infrequently developing into lynching, is obvious, and it is certainly the duty of Congress to eliminate so far as possible all unnecessary and factious delay, and this will be accomplished by the passage of this bill.

O

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of January 2024, I electronically filed the foregoing brief along with one volume of Excerpts of Record with the Clerk of Court using the CM/ECF system which will send notification of such filing to attorney of record for the Appellee and all other parties.

I certify or declare under penalty of perjury that the foregoing is true and correct, this 19th day of January 2024, at Durham, NC.

/s/ Brian W. Stull

Brian W. Stull
Attorney for Appellant