United States Court of Appeals for the Ninth Circuit

ABDULLAH KHALIF NOOR,	)	CASE NO. 23-1736
	)	
Appellant,	)	
	)	
vs.	)	
	)	
MELISSA ANDREWJESKI,	)	
	)	
Appellee.	)	
	)	

BRIEF OF AMICI CURIAE IDAHO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (IACDL), CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE (CACJ), MONTANA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (MTACDL), ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE (AACJ), AND NEVADA ATTORNEYS FOR CRIMINAL JUSTICE (NACJ) IN SUPPORT OF APPELLANT AND FOR REVERSAL

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

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I. Statement of Interests of Amici Curiae

Amici represent a consortium of criminal defense organizations from states within the Ninth Circuit. They are: Idaho Association of Criminal Defense Lawyers; California Attorneys for Criminal Justice; Montana Association of Criminal Defense Lawyers; Arizona Attorneys for Criminal Justice; and Nevada Attorneys for Criminal Justice. These organizations include numerous attorneys who represent defendants at every stage of the criminal justice system, from pre-trial proceedings, through direct appeals, and including state post-conviction and federal habeas actions. Consequently, the criminal defense organizations have a deeply informed understanding both of the federal habeas system that is the subject of the brief as well as a keen appreciation for the consequences to individual prisoners when relief is denied or delayed as a result of problems with certificates of appealability (COAs). The criminal defense organizations are particularly attuned to the kinds of pragmatic issues involving COAs on the ground discussed below, as they deal with them every day.[1]

[1] No party's counsel authored this brief in whole or in part. No party's counsel contributed money intended to fund preparing or submitting

II. Argument

Amici offer four points in support of the appellant. First, they will establish that far from simplifying habeas appeals, COAs often prolong cases and make them unnecessarily complicated. Second, amici will explain how there are more effective means of expediting habeas appeals apart from COAs, such as waiving oral argument, issuing summary affirmance orders, and relying upon staff attorneys. Third, amici will demonstrate that the COA standard is unworkable. Fourth and finally, amici will re-enforce the appellant's equal protection challenge by refuting the assumption that only inmates file questionable habeas appeals and not the government.

A. COAs create delay and unwarranted complexity.

In his opening brief, Mr. Noor describes some of the inefficiencies produced by COA litigation. *See* Dkt. 15.1 at 62–66. Mr. Noor focuses on three Supreme Court cases as exemplars of COAs giving rise to protracted litigation. *See id.* There are countless other *sui generis* cases in the same vein from the lower courts that could be added to the

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this brief. No person contributed money intended to fund preparing or submitting this brief. Both parties have consented to the filing of this brief.

list. *See, e.g.*, *Moreland v. Eplett*, 18 F.4th 261, 267 (7th Cir. 2021) (recounting how the district judge granted a COA but failed to specify a particular issue for it, after which the circuit court wrongly completed the certificate itself, leading to "confusion" and "significant litigation costs"); *United States v. Washington*, 619 F.3d 1252, 1256 (10th Cir. 2010) (noting that the circuit court granted a limited COA, held oral argument, expanded the COA, and then called for additional briefing).[2] Because it is impossible to capture the full array of individual proceedings in which the certification process has produced delay for case-specific reasons, amici will concentrate here on how COAs have extended timelines and produced inefficiencies in a more systemic fashion.

The natural place to start is the awkwardness inherent in any practice that uses litigation to determine whether more litigation is warranted. It is an unwieldy approach, regardless of whether a COA has been denied in full by the district court or whether one has been at least partly granted. If it is the former situation, then there is a period

[2] In this brief, all internal quotation marks and citations are omitted and all emphasis is added.

of time in which the circuit court is doing nothing on the case other than assessing whether a COA is appropriate—often on the basis of a filing devoted solely to that issue. In the event a COA issues, there is then the normal appellate litigation that would take place in any case—at least three briefs, oral argument, and a panel decision. The final result is thus deferred by a delay at the outset that added nothing of value to the proceedings. A representative illustration is *Rodney v. Filson*, 9th Cir., No. 17-15438. There, because the district court denied a COA in its entirety, the appeal began with a motion for a COA followed by five months of waiting for it to be granted. *See id.*, Dkts. 1–4. The COA was then granted, three briefs were filed, oral argument was held, and a panel opinion was ultimately issued remanding the matter for further proceedings. *See id.*, Dkts. 11, 23, 30, 37, 39. Those five months of delay at the inception of the appeal contributed little apart from extending an already attenuated timeline—as habeas timelines often are—even further.

The problems are far more serious when it comes to the substantial volume of cases in which certified and uncertified issues are simultaneously pursued on appeal. COAs are limited to individual

claims. *See* 28 U.S.C. § 2253(c) (providing that COAs must "indicate which specific issue or issues satisfy the" applicable standard). Almost every habeas petition raises multiple claims, and many of them assert large numbers of them. It is therefore routine for COAs to be granted on some issues and denied on others. Any scheme for processing COAs must consequently deal with partial COAs. This Court's method is to direct petitioners to include both the certified and the uncertified issues in the same brief, under separate headings. *See* 9th Cir. R. 22-1(e). The section on uncertified issues is construed as a motion to expand the COA. *See id.* Importantly, the State is not obligated to respond to the uncertified issues in its initial answering brief, *see* 9th Cir. R. 22-1(f), and, in amici's experience, it never does. After the three standard briefs are filed, the Court determines whether to elicit responsive briefing on any of the uncertified issues, which typically means a supplemental answering brief and a supplemental reply limited to those claims. *See, e.g.*, *Kipp v. Davis*, 971 F.3d 939, 943 n.1 (9th Cir. 2020).

Consider, then, the ordinary case following the path sketched out above. An inmate files a habeas petition setting out multiple claims for relief. The district court denies the petition but certifies certain issues

for appeal and withholds a COA on other claims. On appeal, the petitioner files an opening brief addressing the certified issues and includes a section advancing some of the uncertified claims. The State submits an answering brief limited to the certified claims and the petitioner's reply brief is written in the same manner. After the three briefs are filed, the Court pauses to ponder whether it should receive additional briefing on any of the uncertified issues. It eventually answers in the affirmative, and directs the parties to file supplemental briefs on certain uncertified claims. Following all of that, there is oral argument and a panel opinion.

In the trajectory of a case like this, what has the COA mechanism done for the appeal? It has interposed in the case a delay for the period during which the Court was considering whether or not to call for supplemental briefs. And it has interposed another delay for the period during which the parties were drafting those briefs. What positive impact has the COA mechanism had on the appeal? None—the opinion released at the end would have presumably been identical if no COA had been required and the petitioner had simply been allowed to raise whatever issues he wished on appeal, like every other litigant.

The delays mentioned above are not trivial. Take the case of *Carter v. Davis*, 9th Cir., No. 13-99003. There, the reply brief was filed on September 22, 2014. *See id.*, Dkt. 30. It was four years later, in October 2018, that the Court directed the parties to submit supplemental briefs geared to the uncertified issues. *See id.*, Dkt. 38. And it was February 2019 when the supplemental briefing was complete. *See id.*, Dkt. 49. At the end of all that, the panel issued an opinion granting a COA on the uncertified issues, addressing them on the merits, and denying relief across the board. *See Carter v. Davis*, 946 F.3d 489 (9th Cir. 2019) (per curiam). It is fair to imagine that the opinion would have been exactly the same if the uncertified issues had simply been included in the original three briefs. The only difference is that there would then have been four-and-a-half years less delay and two fewer briefs.

Other circumstances in which COAs bog cases down relate to the requirement that a "district court must issue or deny a [COA] when it enters a final order adverse to the applicant." Rule 11(a) of the Rules Governing 2254 Cases in the United States District Courts; *see* 9th Cir. R. 22-1(a) ("The court of appeals will not act on a request for a COA if

the district court has not ruled first."). There are many cases in which district judges neglect to address the COA question while denying a habeas petition, despite the plain language of Rule 11(a). When they do forget that obligation, and the petitioner appeals, circuit courts often remand cases for the sole purpose of having the district judge rule on a COA in the first instance. *See, e.g.*, *Grizzle v. Lumpkin*, 852 F. App'x 843, 844 (5th Cir. 2021) (per curiam); *McIntosh v. Pruitt*, 832 F. App'x 540, 541 (10th Cir. 2020); *United States v. Guijarro*, 768 F. App'x 867, 868–69 (10th Cir. 2019); *United States v. Thelisma*, 559 F. App'x 898, 901 (11th Cir. 2014) (per curiam); *Jones v. Stephens*, 541 F. App'x 399, 410 (5th Cir. 2013) (per curiam); *Cardenas v. Thaler*, 651 F.3d 442, 444 (5th Cir. 2011). It is difficult to conceive of a less efficient model than one in which there is an appeal, a remand, an additional ruling by the district court, and a second appeal—all in the supposed interest of *speeding up* the proceedings.

The widespread district-court habit of disregarding Rule 11(a) and staying silent on COAs while denying habeas petitions generates delay even when the omission is corrected at the trial level before the appeal progresses. What often happens in such cases is that the petitioner files

a separate motion for a COA following the district court's final judgment. *See, e.g.*, *Kinley v. Bradshaw*, No. 3:03-cv-127, 2024 WL 62907, at *1 (S.D. Ohio Jan. 5, 2024); *Anderson v. Janssen*, No. 17-cv-4480, 2019 WL 8407452, at *1 (D. Minn. Mar. 11, 2019), *appeal dismissed*, 2019 WL 4523054 (8th Cir. Aug. 9, 2019) (per curiam); *United States v. Cole*, No. 09-198, 2010 WL 1135734, at *1 (W.D. Pa. Mar. 19, 2010). That means extra litigation directed solely to the COA question, scarce judicial resources spent on a separate order, and more time for all of the above. It is a recipe not for streamlining, but for further delay—the opposite of the COA's asserted purpose.

B. Habeas appeals can be streamlined without COAs.

To further appreciate why COAs are not well-suited to smoothing out the habeas appellate process and reducing the burden imposed on the federal courts, it is worth remembering the tools that do actually accomplish that purpose. Some of these tools are already used in a significant portion of habeas appeals, like the waiver of oral argument and the issuance of summary, unsigned orders of affirmance. That portion can be increased, and those tools can be modified, to the extent further expeditiousness is desired.

One other resource worth more reflection is that of staff attorney offices. This Court already deploys its staff attorneys in the habeas space. *See* Morgan B. Christen, *Why the Ninth Circuit Works: A Tribute to Judge Sydney R. Thomas*, 83 Mont. L. Rev. 229, 252 (2022) (observing how Ninth Circuit "staff attorneys . . . ably present hundreds of . . . habeas cases for resolution by three-judge oral screening panels"). Insofar as this or other circuits would benefit from additional staff-attorney labor expended on habeas matters, the investment would pay off. *See* Jyoti Rani Jindal, Note, *Process Matters: Specialization in Federal Appellate Review of Noncapital Section 2254 Cases*, 65 Duke L.J. 1055, 1058 (2016) (proposing that circuit courts provide "review undertaken by staff attorneys with subject-matter expertise in habeas law" to "ensure that habeas petitions receive the attention, time, and care they deserve without overburdening the appellate court"). Taking advantage of habeas-focused staff attorneys would genuinely accelerate the process, as they would be able to steadily produce well-founded, knowledgeable memoranda and draft orders without needing to reinvent the wheel each time. It is a practical solution, as opposed to

simply adding another layer of litigation in the form of a one-size-fits-all COA.

C. The COA standard is unworkable.

As Mr. Noor outlines in his opening brief, the strict-scrutiny test applies as this Court is weighing the constitutionality of COAs. *See* Dkt. 15.1 at 38–39. Strict scrutiny demands a showing that the challenged law is narrowly tailored to furthering a compelling governmental interest. *See Students for Fair Admissions, Inc. v. Presidents & Fellows of Harv. Coll.*, 600 U.S. 181, 206–07 (2023). The governmental purpose ascribed by courts to the COA requirement has historically been that of "prevent[ing] frivolous appeals from delaying the States' ability to impose sentences." *Barefoot v. Estelle*, 463 U.S. 880, 892 (1983). Amici submit that COAs are not narrowly tailored to fulfilling that goal because the federal courts are in large numbers failing to faithfully adhere to the COA standard and refusing to certify cases where the test is on its face satisfied.

The way in which COAs are supposed to weed out frivolous appeals is by blocking cases from advancing to the circuit courts unless "reasonable jurists could debate whether (or, for that matter, agree

that) the petition should have been resolved in a different manner." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). But two commonly occurring scenarios point to widespread misapplication of that test.

First, there are numerous cases where a state-court judge dissents at an earlier stage on a particular issue and yet a COA is later denied on the same claim. *See, e.g.*, *Moore v. Schweitzer*, No. 17-3410, 2017 WL 8948938, at *1–2 (6th Cir. Nov. 8, 2017) (per curiam); *State v. Moore*, 30 N.E.3d 988, 999 (Ohio Ct. App. 2015) (Donovan, J., dissenting); *Jordan v. Epps*, 756 F.3d 395, 411 (5th Cir. 2014) (per curiam); *Jordan v. State*, 786 So. 2d 987, 1031–32 (Miss. 2001) (Banks, P.J., dissenting); *Holiday v. Stephens*, 587 F. App'x 767, 783 (5th Cir. 2014); *Holiday v. State*, No. Ap-74,446, 2006 WL 288661, at *1 (Tex. Crim. App. Feb. 8, 2006) (Womack, J., dissenting); *Nickleberry v. Booher*, No. 00-6226, 2000 WL 1763451, at *2 (10th Cir. Nov. 30, 2000); *Shockley v. Crews*, No. 4:19-cv-2520, 2023 WL 8433163, at *13 (E.D. Mo. Dec. 5, 2023); *Henderson v. Atty. Gen. of Penn.*, No. 17-cv-839, 2023 WL 1444212, at *2 (W.D. Pa. Feb. 1, 2023); *Charleston v. Gilmore*, 305 F. Supp. 3d 612, 656–63 (E.D. Pa. 2018); *Colon v. Paramo*, No. 1:11-cv-1420, 2014 WL 1330562, at *30 (E.D. Cal. Apr. 2, 2014); *People v. Colon*, No. F056334, 2010 WL 612245,

at *26–28 (Cal. Ct. App. Feb. 22, 2010) (Dawson, Acting P.J., dissenting).[3] In every such proceeding, it is by definition true that "reasonable jurists could debate" the proper disposition of the issue. Indeed, reasonable jurists have *already* engaged in such a debate.

The lack of fidelity to the COA standard is particularly striking in this context because it is state courts that "possess primary authority for defining and enforcing the criminal law and for adjudicating constitutional challenges to state convictions." *Shinn v. Ramirez*, 596 U.S. 366, 376 (2022). In other words, state-court judges are presumptively the *most* reasonable jurists, and the short-shrift given to them underscores how the COA test has become little more than an empty catechism used to justify reflexive denials. *See Johnson v. Vandergriff*, 143 S. Ct. 2551, 2552 (2023) (Sotomayor, J., dissenting) (examining how it was error for a COA to be denied below when "reasonable jurists could, did, and still debate whether the District

[3] In the string-cite above, for every federal habeas decision in which the ruling itself reflects the relevant state-court dissent, amici cite only the federal opinion. For those cases where it is necessary, amici follow the federal citation with a reference to the dissenting opinion in state court.

Court should have granted habeas relief," in part because there was a dissent in the state proceedings).

The same dynamic is embodied by a similar category of cases. Specifically, when a federal magistrate judge recommends to the district court that habeas relief be granted, there is again proof that reasonable jurists are capable of disagreement as to the correct outcome. Magistrates are appointed by the very district courts to whom they are offering their recommendations. *See* 28 U.S.C. § 631(a). Surely the district courts would consider their own magistrates to be reasonable jurists? As before, though, the data suggest otherwise. One study evaluated a representative set of forty-seven habeas proceedings spread out over twenty-two districts in eight different circuits where a magistrate recommended relief. *See* Jonah J. Horwitz, *Certifiable: Certificates of Appealability, Habeas Corpus, and the Perils of Self-Judging*, 17 Roger Williams U. L. Rev. 695, 721 (2012). Out of the forty-seven cases, district judges denied COAs in sixteen of them (thirty-four percent). *See id.* There were also a number of cases in which circuit courts likewise denied COAs after magistrates had recommended relief. *See id.* This is another significant body of data

calling attention to the inability of federal courts to meaningfully enforce the reasonable-jurist standard.

Apart from these easily identified cases in which the COA standard is being disregarded, there is another significant corpus of evidence supporting the same conclusion. Namely, the circuit courts have proven that it is too difficult for judges to reasonably police the line between the gatekeeping role assigned to COA determinations and full-fledged merits analysis.

In 2003, the Supreme Court began the project of attempting to educate circuit judges on the distinction between a preliminary assessment as to whether "the issues presented are adequate to deserve encouragement to proceed further" and the subsequent "full consideration of the factual or legal bases adduced in support of the claims." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). "When a court of appeals sidesteps [the COA] process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits," the Court announced, "it is in essence deciding an appeal without jurisdiction." *Id.* at 336–37. Notwithstanding that clear directive, the circuits needed reminding only thirteen years later. *See*

Buck v. Davis, 580 U.S. 100, 116 (2017) (chiding the Fifth Circuit for rejecting a COA based on "ultimate merits determinations the panel should not have reached"). Even now, another six years on, circuit courts continue to struggle with the demarcation. *See Johnson*, 143 S. Ct. at 2554 (Sotomayor, J., dissenting) (criticizing the Eighth Circuit for having "extensively discussed the merits of [the] habeas claim" at the COA stage).

The experience of the last twenty years is that circuit courts cannot reliably confine themselves to the task of glancing at a constitutional claim and figuring out only whether the issue warrants a full appeal. It is an understandable weakness—federal judges are trained to interpret the Constitution with finality, not tentatively. No matter the cause, the consequence is that the COA standard is falling short of the screening purpose for which it was designed, and it accordingly flunks strict scrutiny.

D. States pursue dubious habeas appeals too.

Mr. Noor contends that the COA requirement violates equal protection principles because it is based on the false assumption that only prisoners, and not state actors, file insubstantial habeas appeals.

See Dkt. 15.1 at 55. Amici will give real-world context to the point with some examples of weak appeals litigated by respondents in habeas proceedings, which highlight how frivolity is far from one-sided.

There is perhaps no better evidence than the plethora of cases in which circuit courts have rebuffed state appeals in habeas matters via short, per curiam, unpublished orders issued without oral argument. *See, e.g.*, *Agavo v. Johnson*, No. 21-16908, 2023 WL 109724 (9th Cir. Jan. 5, 2023) (per curiam); *Kon v. Gamboa*, No. 21-55430, 2022 WL 457945 (9th Cir. Feb. 15, 2022) (per curiam); *Rodriguez v. Heath*, 648 F. App'x 136 (2d Cir. 2016) (per curiam); *Howard v. Biter*, 474 F. App'x 631 (9th Cir. July 19, 2012) (per curiam); *Ramjit v. Moore*, 243 F. App'x 103 (6th Cir. 2007) (per curiam).

In addition to these mine-run cases, there are also notable individual instances of wardens taking improvident appeals from habeas losses. Take the Rauland Grube case. There, the federal district court in Idaho granted habeas relief to a state inmate in an exhaustively reasoned order on a claim that prosecutors violated the petitioner's due process rights by suppressing evidence suggesting that a police officer committed the murder in question. *See generally Grube*

v. Blades, No. CV-01-357, 2006 WL 297203, at *7–22 (D. Idaho Feb. 6, 2006). The withheld material included evidence that state actors altered a police log book to make it look as though the suspected officer had driven ten more miles than he actually had on the night of the crime, so as to substantiate his false alibi. *See id.* at *4.

Nevertheless, the State appealed. At oral argument, Judge Kosinski pressed the State on why it was intent on reinstating a conviction that was "incredibly thin on facts" and that was "undermined by unspeakable misconduct" by law enforcement officers who withheld and altered evidence in a murder case. *AG intends to retry Grube*, Idaho State Journal, Apr. 19, 2007, available at https://www.idahostatejournal.com/news/breaking/ag-intends-to-retry-grube/article_340265b9-71e8-5a84-a396-9f8c6d07423b.html. Judge Kozinski further mused that the deputy before him and his "boss the Attorney General must know in their hearts that" if the suppressed evidence had been presented to the jury "it is highly unlikely that Mr. Grube would be convicted." *Grube v. Blades*, 9th Cir., No. 06-35132, Apr. 12, 2007, Oral Arg. at 16:15–16:28, available at https://www.ca9.uscourts.gov/media/audio/?20070412/06-35132/. In

light of the district court's ruling, Judge Kozinski continued, he "would have thought that the Attorney General would simply accept that and move on" rather than taking the case on appeal. *Id.* at 18:11–39. Judge Kozinski advised the State that the Court would defer submission of the case for a week "to give the Attorney General a chance to do the right thing" and dismiss the appeal. *Id.* at 21:48–26:24. Six days after oral argument, the State moved to dismiss its own appeal. *See Grube v. Blades*, 9th Cir., No. 06-35132, Dkt. 35.

Another illuminating data point is reflected by the manner in which the State of California has handled capital habeas appeals in the last several years. During that time, the California Attorney General's Office continues to file appeals from district court judgments granting sentencing relief, even though executions have become impossible in the state. On March 13, 2019, Governor Newsom declared a moratorium on executions, repealed the state's lethal injection protocol, and shut down the death chamber. *See* Executive Order N-09-19, available at https://www.gov.ca.gov/wp-content/uploads/2019/03/3.13.19-EO-N-09-19.pdf. California's current Attorney General, for his part, previously proposed a bill abolishing capital punishment while in the legislature

and at that time declared: "I believe the death penalty is wrong for California and I oppose it," adding that it was "inhumane and uncivilized, it is broken." *Newsom Appoints Legislator Who Co-Authored Constitutional Amendment Against Death Penalty to be California's Attorney General*, Death Penalty Information Center, Apr. 1, 2021, available at https://deathpenaltyinfo.org/news/newsom-appoints-legislator-who-co-authored-constitutional-amendment-against-death-penalty-to-be-californias-attorney-general. Put another way, the State of California is affirmatively bringing appeals of district court decisions granting capital penalty-phase relief under a Governor that has frozen executions and an Attorney General who adamantly opposes them.

Panels of this Court have repeatedly questioned why the State of California is initiating these entirely symbolic appeals. In one recent oral argument, all three judges expressed skepticism of the practice. *See generally Kimble v. Davis*, No. 17-99002, Dec. 12, 2022, Oral Arg., available at https://www.ca9.uscourts.gov/media/video/?20221212/17-99002/. Judge Hurwitz at that argument spoke out of "frustration" with the idea that the state was "asking [the Court] to take on" the

constitutionality of a capital sentence in a complicated proceeding when "realistically there's never going to be an execution in this case." *Id.* at 22:44–24:15. Echoing his colleague's thoughts, Judge Owens remarked that the state was "actively appealing [and] asking [the Court] to give it permission to do something the Governor says the State of California will not do." *Id.* at 24:35–46. Judge Bennett agreed and commented that California's advocacy for a meaningless appeal was "worth a discussion" within the Attorney General's Office. *Id.* at 26:09–26:21.

It is logical that state attorneys would consistently prosecute meritless habeas appeals. States are represented in habeas proceedings by either Attorneys General or by local prosecutors. Both are generally elected officials. *See* Note, *Appointing State Attorneys General: Evaluating the Unbundled State Executive*, 127 Harv. L. Rev. 973, 974 (2014) ("In forty-three states the attorney general is directly elected."); Daniel S. Medwed, *The Prosecutor as Minister of Justice: Preaching to the Unconverted From the Post-Conviction Pulpit*, 84 Wash. L. Rev. 35, 45 (2009) ("[N]early all state and local district attorneys gain their positions through public elections."). Prosecutorial officials who are elected face powerful political incentives to obtain and defend

convictions. *See, e.g.*, Lara Bazelon, *Ending Innocence Denying*, 47 Hofstra L. Rev. 393, 431 (2018) (exploring "the intense pressure prosecutors feel to 'win,' which has traditionally been defined as accumulating a long track record of convictions" and as a result how "prosecutors strive to appear 'tough on crime'"). A prosecutorial decision to forego an available appeal from an adverse habeas ruling exposes the elected office-holder to potentially damaging criticisms from political opponents, victims' rights advocates, and others. From their perspective, the prison gates are opening for someone convicted many years earlier of a crime that had theretofore been upheld by the courts. It is hardly surprising, given that environment, that many prosecutorial offices would rather keep fighting on appeal and elicit a negative decision it can blame on the courts, as opposed to acquiescing in a grant of relief at the district court level.

In any event, whatever the reasons, the reality is that prosecutorial offices do bring weak habeas appeals, and that is why the COA's one-sided requirement violates the Equal Protection Clause.

III. Conclusion

In light of the above, amici respectfully asks the Court to rule in favor of Mr. Noor and declare COAs unconstitutional.

Respectfully submitted this 26th day of January 2024.

/s/ Jonah Horwitz
Jonah Horwitz

CERTIFICATE OF COMPLIANCE

I hereby certify that under Fed. R. App. P. 29(a)(5), 32(a)(5) and (a)(7), as well as Circuit Rule 32-1, this brief complies with the type-volume limitations, is proportionally spaced, has a typeface of 14 points, and contains **4,297** words after the appropriate exclusions.

Dated this 26th day of January 2024.

/s/ Jonah Horwitz
Jonah Horwitz

CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of January 2024, I electronically filed the foregoing brief with the Clerk of Court using the CM/ECF system, which will send notification of such filing to attorneys of record for the Appellant and the Appellee.

/s/ Jonah Horwitz
Jonah Horwitz