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 REPLY 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*

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INTRODUCTION

The one-sided Certificate of Appealability ("COA") requirement of 28 U.S.C. § 2253 and F.R.A.P. 22 (b)(3) violates the Constitution's guarantees of due process and equal protection. Though novel, Mr. Noor's challenge relies on straightforward and well-established legal principles. Respondent attempts to avoid application of these standards by twisting Mr. Noor's legal claims, confusing the applicable legal tests, and mischaracterizing Supreme Court and other precedent.

Well-established due process and equal protection tests require strict scrutiny of the COA requirement. Its classification between habeas petitioners—subject to the COA requirement—and government respondents—who appeal as of right—imposes a substantial burden on habeas petitioners' fundamental constitutional right to access the courts. Respondent does not even attempt to argue that the requirement satisfies the narrow tailoring inquiry that follows. Nor could it. Even under rational-basis review, the COA requirement is unconstitutional because its classification, between unsuccessful habeas petitioners and unsuccessful habeas respondents, does not rationally relate to its stated purpose—to prevent frivolous appeals from delaying

executions, causing lynchings. A rule that only restricts one group's appeals and, ironically, extends litigation also does not rationally further Respondent's newly-conjured purposes of comity and finality.

Respondent neither engages with these legal tests nor the majority of the cases and evidence that Mr. Noor marshals to satisfy them. Instead, Respondent's opposition boils down to repeating an unsupported and conclusory assertion that the COA requirement is "reasonable." This is insufficient to save it.

ARGUMENT

I. Respondent mischaracterizes applicable legal standards and Supreme Court precedent.

A. Respondent confuses and distorts the applicable legal standards.

Under substantive due process, where a law "infringes a 'fundamental' right" strict scrutiny applies, and the law is unconstitutional unless it is "narrowly tailored to serve a compelling state interest." *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 780, 781 (9th Cir. 2014) (citation omitted). Mr. Noor's due process argument applies this familiar standard: the COA requirement infringes on his fundamental right to access the courts, so strict scrutiny applies; the

COA requirement is not narrowly tailored to serve a compelling state interest and violates substantive due process.

Under the applicable standard for Mr. Noor's equal protection claim, where, as here, no protected class is at issue, if a "classification drawn by [a] statute . . . impinges a 'fundamental right,' the ordinance is subject to strict scrutiny," also requiring narrow tailoring to serve a compelling interest. *Nunez by Nunez v. City of San Diego*, 114 F.3d 935, 944, 946 (9th Cir. 1997) (citations omitted). If a statute's classification does not burden a fundamental right, the statute will survive "if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Heller v. Doe by Doe*, 509 U.S. 312, 320 (1993).

The COA requirement creates two classes: unsuccessful habeas petitioners—who must obtain a COA to appeal—and unsuccessful state respondents—who may appeal as of right. Because the classification impinges the unsuccessful habeas petitioners' fundamental right to access the courts, strict scrutiny applies.[1] But, even under rational

[1] Mr. Noor does not, as Respondent suggests, argue that "[h]abeas petitioners are . . . a suspect class." Brief of Respondent-Appellee ("Resp't Br.") 31.

basis review, the statute is unconstitutional because the disparity of treatment is not rationally related to a legitimate purpose. *See infra*.

Respondent tries to evade this straightforward analysis by invoking various inapplicable legal standards that distort the governing law and Mr. Noor's claims.

First, Mr. Noor does not present a "discrete" right of access claim. Resp't Br. 15. Rather, deprivation of his fundamental right to access the courts is a "threshold matter" in his due process and equal protection claims. *Shanks v. Dressel*, 540 F.3d 1082, 1087 (9th Cir. 2008).

Second, contrary to Respondent's assertions, *see* Resp't Br. 12-13, any presumption of validity "gives way . . . when . . . laws impinge on personal rights protected by the Constitution," as Section 2253 does by burdening the fundamental right to access the courts, *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).[2]

Third, Mr. Noor need not show that Congress's enactment of the COA exceeded its authority. *See* Resp't Br. 13. That standard applies to claims, like those in *Morrison* and *Sebelius*, cited by Respondent, that a

[2] Contrary to Respondent's description, *City of Cleburne* neither supports its contention, nor applies heightened scrutiny, nor even upholds the law at issue. *See* Resp't Br. 12.

statute is invalid because Congress lacked the constitutional authority to enact it; *not* challenges, like Mr. Noor's, to statutes that discriminate against a class of individuals or impinge on fundamental rights. *See United States v. Morrison*, 529 U.S. 598, 607 (2000); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 538 (2012).

Fourth, Respondent confusingly argues that Mr. Noor is "unlikely to satisfy" as-applied or facial challenge standards because of Congress's general authority to regulate federal habeas appeals. *See* Resp't Br. 13-14. That is not the test under either standard. Regardless, this one-sided burden on fundamental rights is unconstitutional in all circumstances, as applied to Mr. Noor or any other habeas petitioner. *See Morrison v. Peterson*, 809 F.3d 1059, 1064 (9th Cir. 2015).

Finally, Respondent's "reasonably related to legitimate penological interests" test for adjudicating challenges to prison regulations does not apply. Resp't Br. 26. Mr. Noor challenges a law governing federal judicial procedure, not a prison regulation or rule related to "day-to-day judgments of prison officials." *Turner v. Safley*, 482 U.S. 78, 89 (1987).

B. Respondent misleadingly cites Supreme Court cases addressing the COA or AEDPA in other contexts.

1. The Supreme Court has not "upheld the constitutionality of" the COA.

Respondent repeatedly errs in its description of Supreme Court and other precedents it claims uphold the constitutionality of the COA. The Court has never addressed this question. Mere judicial references to or applications of a statute by no means equate to a ruling on its constitutionality.

Respondent first claims that the Supreme Court "has consistently upheld the constitutionality of" the COA. Resp't Br. 17. It cites the following four decisions for this proposition, *id.* 17-18, all of which apply or clarify the COA rule in some fashion, but none of which consider its constitutionality:

- *Hohn v. United States*, 524 U.S. 236, 253 (1998) (holding that Supreme Court has jurisdiction to review circuit-level denials of applications for COA).
- *Slack v. McDaniel*, 529 U.S. 473, 478 (2000) (holding that COA requirement, recently incorporated into the Antiterrorism and Effective Death Penalty Act of 1997

(AEDPA), applies to appeals of dismissed habeas petitions initiated after AEDPA's effective date, and describing when "a COA should issue").

- *Miller-El v. Cockrell,* 537 U.S. 322, 348 (2003) (explaining that "[t]he COA inquiry asks" whether the district court's habeas denial "was debatable" and concluding "that it was").
- *Gonzales v. Thaler,* 565 U.S. 134, 154 (2012) (finding that because section "2253(c)(3) is a . . . nonjurisdictional rule[,] the Court of Appeals [has] jurisdiction to adjudicate" appeals even where the COA has errantly failed to identify the appealable issue).

Respondent later misleadingly cites *Slack* for the proposition that the Supreme Court "has consistently evaluated the COA provision *based on its rational relationship to legitimate government objectives*." Resp't Br. 40 (emphasis added). Again, *Slack* did not involve a challenge to the validity of the COA requirement, issued no constitutional ruling, and said nothing about whether the COA meets the rational-basis test.

Respondent again inserts the rational-basis test where it does not appear, claiming the Court has "repeated[ly] endorse[d] . . . the [COA] based on its rational relationship to valid government objectives[.]" Resp't Br. 43 (citing *Buck v. Davis*, 580 U.S. 100, 122, 128 (2017) (finding *only* that "the Fifth Circuit erred in denying Buck the COA"); *Medellin v. Dretke*, 544 U.S. 660, 666-67 (2005) (finding COA required for habeas appeal, and dismissing the writ as improvidently granted based on multiple procedural hindrances). Neither decision involved a challenge to the validity of the COA requirement or addressed its constitutionality.

Contrary to Respondent's suggestions, application of a statute does not equate to a constitutional blessing. Federal courts routinely and properly apply federal statutes for years, if not decades, before identifying a constitutional flaw. *Compare Sareang Ye v. I.N.S.*, 214 F.3d 1128, 1134-35 (9th Cir. 2000) and *United States v. Becker*, 919 F.2d 568, 572-73 (9th Cir. 1990) (cases applying residual clauses of "crime of violence" statutes) *with Sessions v. Dimaya*, 584 U.S. 148, 174-75 (2018) and *Johnson v. United States*, 576 U.S. 591, 605-06 (2015) (finding those clauses unconstitutional). Not even the Supreme Court's faithful

application of a federal statute binds the hands of federal courts later presented with a constitutional challenge to that same statute. *See, e.g.*, *Perry v. Perez*, 565 U.S. 388, 390, 399 (2012) (noting "Texas is a 'covered' jurisdiction' under § 5 of the Voting Rights Act of 1965" and directing District Court regarding preclearance proceedings); *but see Shelby County, Ala. v. Holder*, 570 U.S. 529, 557 (2013) (holding § 4(b) of Voting Rights Act, creating coverage formula for § 5 preclearance, unconstitutional).[3]

2. The AEDPA cases cited by Respondent do not "uphold" the COA.

Respondent fares no better in its claims that, in cases addressing various other AEDPA provisions, the Supreme Court has found the COA constitutional. Here, again, Respondent repeatedly claims (and implies) that the Court has issued constitutional rulings when it has not. The cited decisions merely explain or apply AEDPA, and none of

[3] The fact that the Supreme Court has never "hint[ed] that racial bias taint[s] the [COA]'s origins" is of no moment. Resp't Br. 48. The Supreme Court is not expected to rule on a statute's constitutionality (or to speak to its original legislative purpose) unless a party has joined that particular issue and properly presented it to the Court. *See, e.g., Ohio Adjutant General's Dep't v. Federal Labor Relations Auth.*, 598 U.S. 449, 456 n.* (2023).

the provisions involve the COA, resemble the COA, address habeas appeals, or may be accurately described as applying unequally to two similarly-situated litigants. *Compare* Resp't Br. 9 (arguing *Tyler v. Cain*, 533 U.S. 656, 661 (2001) upholds "similar provisions limiting habeas appeals" under AEDPA – the bar on successive habeas applications) *with Tyler,* 533 U.S. at 667 (holding merely that no retroactivity exception to AEDPA's successive-petition bar applied);[4] *compare* Resp't Br. 10 (claiming *Woodford v. Garceau*, 538 U.S. 202 (2003) "affirm[s] Congress's power to impose procedural requirements on federal habeas petitions"); *with Garceau*, 658 F.3d at 1102 (holding merely that habeas application filed "after AEDPA's effective date" is subject to AEDPA).

The only cases Respondent cites that include constitutional rulings hold that AEDPA's statute of limitations and bar on successive petitions do not violate the Suspension Clause. Resp't Br. 10-11. Mr.

[4] *Compare also* Resp't Br. 9-10 (citing *Panetti v. Quarterman*, 551 U.S. 93 (2007) as a case where the "Supreme Court has upheld similar provisions limiting habeas appeals" by citing to some of AEDPA's purposes) *with Panetti*, 551 U.S. at 947 (explaining, with reference to AEDPA-relevant principles, a situation where AEDPA's bar on "'second or successive' applications" does not apply).

Noor neither attacks these distinct and distinguishable provisions of AEDPA nor relies on the Constitution's Suspension Clause. These decisions are thus irrelevant and offer no support to Respondent's broad claim that the Supreme Court's AEDPA rulings "confirm[] the COA requirements validity." Resp't Br. 9.

II. The COA requirement infringes the fundamental constitutional right to access the courts, requiring strict scrutiny.

The constitutional right to access the courts encompasses the right of federal habeas petitioners to litigate their claims to conclusion, including through appeal. *See Ex parte Hull*, 312 U.S. 546, 642 (1941); *Silva v. Di Vittorio*, 658 F.3d 1090, 1103 (9th Cir. 2011). The COA requirement's one-sided hurdle impermissibly burdens this fundamental right, requiring strict scrutiny under both equal protection and due process. *See Witt v. Dep't of Air Force*, 527 F.3d 806, 817 (9th Cir. 2008). Respondent does not contest the existence of this fundamental right, nor claim that the COA requirement can survive strict scrutiny. Rather, it attempts to dodge heightened review by claiming that because the COA requirement is "reasonable," no fundamental right is implicated. The Court should reject this invented

standard and examine Mr. Noor's equal protection and due process claims under strict scrutiny.

A. The District Court's COA grant permits review of Mr. Noor's due process and equal protection claims.

The District Court granted "a limited certificate of appealability as to Petitioner's constitutional challenge to the certificate of appealability procedure," ER 34, made "on due process and equal protection grounds," ER 33. It made clear that the COA requirement's effect on the fundamental constitutional right to access the courts was an element of this certified challenge. *See* ER 33 ("the Supreme Court and Ninth Circuit have both indicated that the right to appeal is a fundamental right, the restriction of which may violate a prisoner's right to due process and equal protection under the Fifth Amendment"); ER 34 (quoting *Rodriguez v. Cook*, 169 F.3d 1176, 1179 (9th Cir. 1999) ("'[P]risoners have a constitutional right of meaningful access to the courts[.]")).

The significant burden imposed by the COA requirement on the fundamental right to access the courts is integral to Mr. Noor's due process and equal protection claims. As explained, *supra*, whether the COA requirement burdens a fundamental constitutional right is the

threshold issue. If so, strict scrutiny applies. Consideration of the fundamental right to access the courts and the COA requirement's burden on this right thus falls squarely within the COA grant.

Respondent's arguments to the contrary are confused. Asserting that "the District Court judge did not mention or certify any issue regarding an alleged violation of the right of access[,]" Resp't Br. 15, Respondent ignores the District Court's own words. Respondent's contention that Mr. Noor did not "specifically raise" the right of access in his objections, *see id.* (citing ER 107), also ignores the District Court's explicit "exercise[] [of] discretion to consider the issue," to the extent he did not raise it before the Magistrate Judge. ER 31 n.22. Further, as shown *supra*, Respondent's characterization of Mr. Noor's arguments as a "discrete claim that his right of access to the courts has been restricted," Resp't Br. 15, is flawed. The Court should reject this attempt to avoid the heart of Mr. Noor's legal challenge.

Respondent's position is not only incorrect but ironic. It seeks to shield the COA requirement from full constitutional review by wielding it beyond the District Court's intention. In doing so, Respondent only supports Mr. Noor's challenge, demonstrating how the COA

requirement impedes and delays access to meaningful review of serious constitutional claims. Rather than addressing merits arguments, Respondent would have the Court expend resources revisiting the scope of the District Court's COA grant. Respondent thus invites precisely the type of unnecessary complication, delay, and waste of judicial resources that undermines any argument that the COA requirement furthers a legitimate purpose, and that *amici* show is endemic to COA litigation. *See* Br. of Amici Curiae Idaho Ass'n of Criminal Def. Lawyers et al. ("Amici Br.") 2-9.

B. The right to access federal habeas appellate review is fundamental.

Respondent does not contest that prisoners have a fundamental constitutional right of court access to litigate habeas petitions. Nor could it. The Supreme Court has consistently reaffirmed prisoners' "fundamental constitutional right of access to the courts," *Lewis v. Casey*, 518 U.S. 343, 346 (1996). As the Court enunciated over 80 years ago, this right encompasses the right to be free from restrictions that "abridge or impair [a] petitioner's right to apply to a federal court for a writ of habeas corpus." *Hull*, 312 U.S. at 549. Respondent also does not dispute this Court's holding that the fundamental right of access to the

courts protects not only the ability to file federal habeas petitions but also to litigate them to conclusion, including through appeal. *See Silva*, 658 F.3d at 1101.

Unable to quarrel with these first principles, Respondent makes various inapposite assertions, including that "[t]he right to appeal a criminal conviction is not a fundamental right," Resp't Br. 17, that habeas appeals are "governed by statute," *id.*, and that "'[t]here is no constitutional right to an appeal,'" *id.* 31 (citing *Abney*, 431 U.S. at 656)). But the issue here is the right of prisoners to "to litigate claims challenging their sentences or the conditions of their confinement to conclusion without active interference," *Silva*, 658 F.3d at 1101.

The constitutionality of the right to an appeal is also irrelevant, because "it 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." *Rinaldi v. Yeager*, 384 U.S. 305, 310 (1966). *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").

Through 28 U.S.C. § 1291, Congress affords all federal civil litigants, including state habeas respondents, the right to appeal final judgments. The COA requirement creates an unreasoned distinction between habeas petitioners and all other civil litigants that impedes the fundamental right of court access.

Respondent next resorts to a circular reframing of the fundamental right at issue, as the "fundamental right of state prisoners to appeal the denial of federal habeas relief *without reasonable restrictions*." *Id.* 31; *see also id.* 35 (arguing that *Silva* is inapposite because it "did not address reasonable procedural restrictions"). This turns the applicable legal standard on its head. Instead of first asking whether the COA requirement burdens a fundamental constitutional right, and then applying the applicable level of scrutiny, Respondent argues that no fundamental right exists because (in its estimation) the COA requirement is "reasonable." This attempted diversion from strict scrutiny invents a legal standard – that because the COA survives rational basis review (which it does not), it does not implicate a fundamental right.

Employing its invented test, Respondent argues that the access-to-courts cases cited by Mr. Noor are distinguishable because the restrictions invalidated were "arbitrary restrictions" that "did not serve any legitimate penological or judicial interests." Resp't Br. 23, 21. Again, this argument flips the inquiry on its head, relying on Respondent's own perfunctory (and erroneous) conclusion that the COA requirement is reasonable and furthers legitimate (rather than compelling) interests to conclude that no fundamental right is at stake. In *Ex parte Hull*, the sole case cited by Respondent for this proposition, the Supreme Court explained that a regulation requiring habeas petitions to be screened by prison officials before they could be filed in court was prompted by considerations that were "not without merit," but invalidated it nonetheless because it " abridge[d] or impair[ed] petitioner's right to apply to a federal court for a writ of habeas corpus." 312 U.S. at 549.

Even accepting Respondent's invented legal standard, *Hull*'s screening regulation is no more "arbitrary or purposeless" than the COA requirement. Resp't Br. 22. Prison pre-screening would well serve the purposes Respondent has assigned to the COA of saving judicial

resources, promoting comity, and "respecting the finality of state court judgments[,]" Resp't Br. 22: it would reduce "[im]properly drawn," *Hull*, 312 U.S. at 549, habeas petitions that the state must defend and that judges must decide. *See also Johnson v. Avery*, 393 U.S. 483, 488 (1969) (finding it "indisputable that prison 'writ writers'" sometimes "menace . . . prison discipline" and file unskilled and burdensome petitions but invalidating bar on such assistance based on fundamental right of access).

Respondent's few other attempts to distinguish right-of-access cases are equally unavailing. Citing only *Bounds* and *Lewis*, Respondent argues that Mr. Noor's cases are inapposite because they addressed "affirmative obligations of prison officials to facilitate prisoners' access to the courts in the first instance." Resp't Br. 20. Yet, the right of access is not limited to "affirmative obligations." Indeed, *Bounds* expanded that right from being "understood only to guarantee prisoners a right to be free from interference" to also encompassing an "affirmative right to the tools necessary to challenge their sentences or

conditions of confinement." *Silva*, 658 F.3d at 1102–03.[5] Respondent conveniently omits the many cases Mr. Noor cites invalidating regulations, like the COA requirement, that obstruct prisoners' access to the courts. *See, e.g. Hull*, 312 U.S. at 549 (invalidating regulation barring habeas petitions unless investigator finds them "properly drawn"); *Johnson,* 393 U.S. at 490 (invalidating ban on prisoners assisting other inmates with habeas petitions); *Smith v. Bennett*, 365 U.S. 708, 712–14 (1961) (invalidating requirement that indigent prisoners pay habeas filing fee); *see also* Opening Br. 31-35 (citing additional cases).

Contrary to Respondent's assertion, the COA requirement is also not distinguishable from *Hull* and *Bounds* on the basis that it does not "completely deny access to the courts[.]" Resp't Br. 23. First, *Hull* and

[5] To the extent Respondent argues that *Silva* is inapplicable because it "prohibited *active* interference with habeas litigation," Resp't Br. 35 (emphasis added) – apparently meaning the actions of state officials – that argument, too, is unavailing. *Silva* used the term "active *interference"* to distinguish such claims from access-to-court cases "involving prisoners' right to affirmative *assistance*[.]"658 F.3d at 1102 (emphases in original). As did the plaintiff's allegations in *Silva*, Mr. Noor argues that the COA requirement "erect[s] barriers that impede the right of access of incarcerated persons." *Id.* at 1103 (citation omitted).

Bounds did not involve complete denials of court access. Under the *Hull* regulation, "properly drawn" petitions could be filed. *Hull*, 312 U.S. at 549. In *Bounds*, there were no filing restrictions, "prison officials in no way interfered with inmates' use of their own resources[,] . . . [p]rison regulations permit[ted] access to inmate 'writ writers' and each prisoner [was] entitled to store reasonable numbers of lawbooks in his cell." *Bounds*, 430 U.S. at 835 n.*(Burger, C.J., dissenting).

Regardless, "[m]eaningful access to the courts is the touchstone" of this fundamental right, *id.* at 823, not whether a regulation enacts an "absolute bar," Resp't Br. 18. *See also Griffin v. Illinois*, 351 U.S. 12, 20 (1956) (requiring "adequate and effective appellate review"); *Johnson*, 393 U.S. at 485 (barring "deni[al] or *obstruct*[ion]" of access to the courts) (emphasis added).

C. The COA significantly burdens the right of access, requiring strict scrutiny.

Respondent attempts to avoid strict scrutiny through conclusory arguments that the COA requirement does not burden the fundamental right of access. In doing so, Respondent simply repeats the standard for obtaining a COA and perfunctorily concludes it is "modest and surmountable," and "not exceedingly demanding." Resp't Br. 19, 25.

Such conclusory assertions do nothing to rebut Mr. Noor's demonstration of the very real burden the COA requirement imposes on habeas petitioners' fundamental right of access.

Obtaining a COA is no "modest" feat. For a COA to issue, the same district court judge who denied the habeas petition must nonetheless find the petitioner has made 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. The plain language of this test, requiring a "substantial showing," *id.* at 484, contradicts Respondent's claim that the burden is "modest." And it defies common sense that convincing a judge that other reasonable jurists would disagree with their decision is not "demanding." If, as is almost sure to be the case, the district court denies the COA, a petitioner can then try again with the Court of Appeals, *see* 9th Cir. R.22-1(a), but, this too will prove difficult. The Court of Appeals must give deference to the district court's ruling denying the COA. *See United States ex rel. Sullivan v. Heinze*,

250 F.2d 427, 428–29 (9th Cir. 1957); *Gonzalez v. Thaler*, 565 U.S. 134, 143 n.5 (2012).

This line of argument also fails to address Mr. Noor and *amici*'s empirical evidence showing that the COA requirement significantly restricts appellate access. In fact, the COA standard is "surmountable" only for a small fraction of habeas petitioners. *See* N. King, *Non-Capital Habeas Cases After Appellate Review: An Empirical Analysis*, 24 Fed. Sentencing Reporter 308, 308 (2012), 2012 WL 2681395 (Vera Inst. Just.) ("More than 92 percent of all COA rulings were denials."). Respondent neither acknowledges this statistic nor argues that all 92% of habeas petitions denied COAs are meritless. Nor could it. As Mr. Noor demonstrates, many habeas petitions initially denied COAs ultimately prove meritorious, even precedent-setting. *See* Opening Br. 61-64.

Furthermore, even when a magistrate judge and district judge disagree on whether to grant a habeas petition, in over one-third of cases, that is insufficient to demonstrate that "jurists of reason could disagree" such that a COA should issue. *See* 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); *see also* Amici Br. 12-13 (citing cases where COA denied after state-court judges had dissented from denial of relief on same federal claims). Respondent can only make its bare assertions about the COA's "reasonableness" by ignoring all this.

Still claiming "reasonableness," Respondent contends that the COA requirement merely "weeds out clearly frivolous appeals without foreclosing appellate review of . . . meritorious claims." Resp't Br. 19; 22 (quoting *Barefoot v. Estelle*, 463 U.S. 880, 892-93 (1983) (identifying the decision to withhold or grant a certificate of probable cause as the "primary means of separating meritorious from frivolous [habeas] appeals"). But this observation ignores the Supreme Court's precise description of the standard in *Barefoot* itself requiring "something more than the absence of frivolity." 463 U.S. at 893. *See also Miller–El,* 537 U.S. at 338 (same). Under this test, the COA requirement forecloses review of frivolous and nonfrivolous appeals alike.[6]

[6] Respondent's dismissal of *Ringgold-Lockhart v. Cnty. of Los Angeles*, 761 F.3d 1057 (9th Cir. 2014), as inapposite because "pre-filing orders on vexatious litigants are far more onerous than the COA's threshold showing" is unsupported and incorrect. Resp't Br. 35. By requiring

Respondent cannot obscure the heavy burden that the COA requirement imposes on the right of access. The requirement forecloses all petitions with good-faith, non-frivolous claims that fall short of the "substantial showing" standard. And even petitioners who ultimately obtain appellate review are subjected to significant additional briefing requirements and delays, including through multiple motions for a COA at the district court and Court of Appeals and supplemental litigation as to the scope of the COA, before they can exercise their right to access the court. *See* Amici Br. 2-9. Like the pre-filing screening for "properly drawn" habeas petitions in *Hull*, the COA requirement is an impermissible burden on the right of access, not a mere "threshold inquiry."

D. The COA requirement fails strict scrutiny.

Because the COA requirement burdens the fundamental constitutional right of access, strict scrutiny applies, and it can only survive if it is narrowly tailored to serve a compelling state interest. *See*

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something more than an absence of frivolity, the COA requirement is arguably more onerous than *Ringgold-Lockhart*'s unconstitutional pre-filing order, which explicitly permitted filings deemed by the court to be "meritorious, not duplicative, and not frivolous." *Ringgold-Lockhart*, 761 F.3d at 1061.

Witt, 527 F.3d at 817. Respondent does not even attempt to argue that the COA requirement survives this searching inquiry. It does not.

The only "compelling interest" against which the COA requirement can be evaluated is the "legislature's actual purpose." *Shaw v. Hunt*, 517 U.S. 899, 908 n.4 (1996) (cleaned up). Here, importantly *undisputed* by Respondent, the legislative history makes clear that the purpose of the original 1908 statute was to make "groundless" prisoner habeas appeals "impossible" in order to reduce "the delay of execution and punishment in criminal cases," and thus "local dissatisfaction, not infrequently developing into lynching[.]" H.R. Rep. No. 23, 60th Cong., 1st Sess. (1908) ("H.R. Rep. No. 23"). As Mr. Noor has shown, the purported interest in preventing lynchings is rooted in racism, and so cannot be a legitimate, let alone compelling, interest. *See* Opening Br. 6-12, 40-41. Regardless, the COA requirement is neither a logical nor narrowly tailored approach to preventing lynchings. *See id.* 42-44.

The requirement also does not further the purpose of preventing delays, whether intended to prevent lynchings or for any other reason. Far from streamlining and expediting litigation, the COA requirement

results in additional and (otherwise) unnecessary motions, briefing, and remands, often extending litigation by years. *See* Opening Br. 46-47, 62-66; Amici Br. 2-9. *See also*, *e.g.*, *Lee v. Thornell*, __ F.4th__, 2024 WL 2927740, *6 (9th Cir. June 11, 2024) (noting, in procedural history, that petitioner filed his brief, the Court expanded the COA, and the Court ordered the filing of "replacement briefs"); *Martinez v. Ryan*, 926 F.3d 1215, 1223 (9th Cir. Cir. 2019) (describing same sequence of events).

Even evaluated against the purpose of reducing "groundless" or frivolous appeals, the COA requirement fails strict scrutiny because it is "at once too narrow and too broad." *Romer v. Evans*, 517 U.S. 620, 633 (1996). Too narrow because it fails to prevent *any* frivolous appeals by the State. And overbroad because it prevents non-frivolous prisoner appeals that do not reach the higher threshold of a "substantial showing of a denial of a constitutional right." *Slack*, 529 U.S. at 484.

III. The COA requirement violates the Equal Protection Clause, even under rational basis review.

While Mr. Noor has demonstrated that strict scrutiny applies to this case, and Respondent has failed to show that the COA requirement meets this demanding test, even applying the more lenient rational-basis review, the COA statute violates the Equal Protection Clause.

Respondent claims: first, that the two parties are not similarly situated in light of the demanding federal-habeas rules a prisoner must satisfy; second (and replicating its other false representations of precedent), that the Supreme Court has already found this disparate treatment constitutional; and, third, that the COA requirement's disparate treatment is rationally related to Respondent's asserted purposes of the law. Resp't Br. 23-30, 32-34, 40-43. All three arguments are meritless.

A. Unsuccessful habeas petitioners and unsuccessful state respondents are similarly situated.

Respondent does not contest that Congress's one-sided COA requirement treats differently habeas petitioners who lose after full district court review, on the one hand, versus a government representative who loses in the same proceeding. The former must obtain permission to appeal, but the latter, like every other civil litigant, enjoys an appeal as of right. *See generally* 28 U.S.C. § 2253 (c).

Rather, Respondent engages in an extensive but ultimately pointless argument that prisoners and state representatives are not similarly situated because, unlike the state, the prisoner must show entitlement to habeas relief. *See* Resp't Br. 28-30 (relying on habeas

petitioner's burden under AEDPA (or outside of AEDPA) to rebut state court factfinding by clear and convincing evidence, demonstrate that a state-court decision constitutes an unreasonable application of Supreme Court law or the facts, and exhaust state remedies before bringing the claim to federal court).

These distinctions between the litigant bringing a claim and the litigant defending against it, however, are commonsense and ubiquitous. They establish only the obvious: the party challenging a judgment (or anything else) bears the burden of showing its invalidity and must follow applicable procedural and substantive rules to meet that burden. *See, e.g., United States v. Jeremiah*, 493 F.3d 1042, 1046 (9th Cir. 2007) (noting "on appeal 'the burden of affirmatively showing error rests on the appellant'") (quoting 36 C.J.S. Federal Courts § 603 (2007)).

The burdens imposed on habeas petitioners at the district court level have no bearing on whether a prisoner and respondent are similarly situated on appeal. Once judgment is entered – for either party – a district court has necessarily applied all of AEDPA's rules and determined for or against the petitioner. At that point, the same

standard applies to an appealing petitioner or respondent. *See McCoy v. Stewart*, 282 F.3d 626, 629 (9th Cir. 2002) ("We review a district court's decision to grant or deny habeas relief de novo.").

A state's interest in finality also does not render it dissimilar to a habeas petitioner on appeal. The interest is not unique to the government. Rather, "[p]rompt acquittal of a person wrongly accused . . . is as important as prompt conviction and sentence of a person rightly accused." *Flanagan v. United States*, 465 U.S. 259, 265 (1984). Finally, as shown further *infra*, the several AEDPA and judge-made barriers to relief at the district court level, *see* Resp't Br. 45, make it all the more likely that an appeal of a habeas grant would be frivolous and needlessly consume additional resources. If anything, then, any differences between the government and the prisoner in habeas litigation weigh in favor of limiting the appeals of the former.

B. The COA's one-sided classification does not rationally relate to any conceivable legislative purpose.

In addition to falsely claiming that the Supreme Court has already found the COA requirement satisfies the rational-basis test, *supra* at 7-9, Respondent misconstrues the test. It incorrectly collapses it into a single inapt inquiry – whether there is a rational basis for

requiring a COA *before any party may appeal*. *See*, *e.g.*, Resp't Br. 40 ("Preserving judicial resources and maintaining the finality of state court judgments are compelling justifications for the COA requirement.").[7]

The required equal protection analysis, however, proceeds in three steps: first, identifying the law's legislative purpose; second, determining the legitimacy of that purpose; and, third, if a legitimate interest exists, determining whether the law's disparate classification rationally serves it. Importantly, the inquiry does not focus on justifications for the law generally, but, rather, asks "if there is a rational relationship between the *disparity of treatment* and some legitimate governmental purpose." *Doe by Doe*, 509 U.S. at 320 (emphasis added). *See, e.g.*, *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 461-63 (1981) (asking whether "the legislative classification . . . is rationally related to achievement of the [legitimate] statutory purposes" identified).

Applying this test, the questions are:

[7] Here, again, Respondent appears to invoke not equal protection standards but the test for evaluating prison regulations impinging on constitutional rights. *See Turner*, 482 U.S. at 89; *supra* at 5.

- What are the legislative purpose(s) of the COA?
- Are they legitimate?
- Does the disparate treatment of habeas petitioners and respondents rationally relate to any legitimate interests?

As to the first question, courts accept the objectives stated by the legislature "unless an examination of the circumstances forces [the] conclu[sion] that they 'could not have been a goal of the legislation.'" *Clover Leaf Creamery Co.*, 449 U.S. at 464 n.7 (quoting *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648, n.16 (1975)). Moreover, "in determining [] legislative purpose . . . , the Court has also considered the historical context of the statute . . . and the specific sequence of events leading to [its] passage[.]" *Edwards v. Aguillard*, 482 U.S. 578, 594–95 (1987) (citations omitted).

Applying these inquiries, the COA requirement's legislative purpose was to prevent lynching.[8] That purpose, and the racist ideology

[8] Contrary to Respondent's claims, Resp't Br. 46, *McCleskey v. Kemp*, 481 U.S. 279, 298 n.20 (1987) and *Magwood v. Patters*, 561 U.S. 320, 342 (2010) say nothing about the legislative intent of a statute or whether that intent is legitimate. *McCleskey* rejected equal protection and Eighth Amendment claims against the death penalty, based on

that prompted it, is not legitimate and cannot justify the COA's disparate treatment. Despite repeated, sheer claims that this legislative history is "speculative," Resp't Br. 7, 42, 44, 46, 48, 49, and other contradictory claims that Congress's purpose retroactively "evolved" through decisions by the courts, *id.* 41-42, the bottom line is that Respondent does not defend Congress's anti-lynching purpose as a legitimate basis for the classification. The Court should accept this as a concession. Such an illegitimate purpose cannot justify the COA's differential treatment.

Assuming, arguendo, that the remaining articulated legislative purpose of preventing frivolous appeals remains legitimate (when untethered from lynching), and that Respondent's repeatedly invoked goals of comity, finality, conserving judicial resources, and preventing delay are also legitimate interests, *see, e.g.*, Resp't Br. 50,[9] the next step

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statistical evidence showing its discriminatory *application*. 481 U.S. at 299, 319-20. *Magwood* applies the rules of statutory construction to determine the meaning of AEDPA's bar on successive habeas petitions. 561 U.S. at 342.

[9] Citing *Miller-El*, 537 U.S. at 337, Respondent contends that "Congress erected the COA requirement to promote finality, comity, and conservation of judicial resources" and "enacted the COA requirement to curb the interminable delays caused by repeated petitions and

is to determine whether the COA requirement's one-sided application rationally relates to this set of goals. The answer is no.

To begin, Respondent's assertions that the one-sided COA requirement rationally screens out "clearly deficient claims" prevents delay, and conserves judicial resources are unsupported and ignore Mr. Noor and *amici*'s evidence to the contrary. *Compare* Resp't Br. 33, 40-41, 45 *with* Opening Br. 63-66 (describing extensive delay and barriers to meritorious claims created by complex COA litigation) and Amici Br. 2-9 (cataloguing delay and complexity created by COA litigation); *see also supra* at 22-23. Neither of the two decisions cited for this proposition contain anything like a finding that the COA requirement promotes these goals. *See* Resp't Br. 40-41 (citing *McQuiggin v. Perkins*, 569 U.S. 383, 400-01 (2013) (assessing procedurally-defaulted habeas claim, but nothing about COA); *Slack*, 529 U.S. at 483-84 (merely interpreting the COA statute).

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appeals." Resp't Br. 50. But *Miller-El* cites only to Congress's intent "in 1908" to address the "'increasing number of frivolous habeas corpus petitions challenging capital sentences which delayed execution pending completion of the appellate process . . . .'" 537 U.S. at 337 (quoting *Barefoot*, 463 U.S. at 892 n.3).

As explained *supra*, Respondent nowhere acknowledges that its asserted goals, including most prominently the goal of screening out frivolous appeals, are not rationally pursued by demanding more than the absence of frivolity. Congress's standard bars not only frivolous prisoner appeals, but also non-frivolous appeals judicially-deemed short of the "substantial showing" standard. *Slack*, 529 U.S. at 484.

Moreover, and also unaddressed by Respondent, Respondent's identified goals are not rationally pursued by screening out only prisoner appeals – but not the government's frivolous appeals. Indeed, Respondent does not dispute that the government files frivolous appeals. *Compare* Amici Br. 16-22 (cataloguing frivolous government appeals); Opening Br. 59 n.28 (same) *with* Resp't Br. 52 (acknowledging frivolous government appeals).

These problems span beyond an "imperfect fit." *Doe by Doe*, 509 U.S. at 321. According to Respondent, this law is meant to prevent frivolous appeals, promote comity and finality, conserve judicial resources, and reduce delays. But it bars *non*frivolous appeals as well. And it prolongs and complicates litigation – while applying only to one group of similarly-situated appellants. It thus fails even the lenient

rational basis test. *See*, *e.g.*, *Gulf, C. & S.F. Ry. Co. v. Ellis*, 165 U.S. 150, 153 (1897) (invalidating provision preventing one class of litigants from "appeal[ing] to the courts, as other litigants, under like conditions, and with like protection"); *cf. Draper v. State of Wash.*, 372 U.S. 487, 494–95, 499 (1963) (invalidating rule requiring frivolity screening of indigent, but not non-indigent, appeals and contrasting it with "operatively nondiscriminatory rules [applying] to both indigents and nonindigents").

Respondent's claim that denying access to appellate review promotes comity by preventing relitigation of fully adjudicated claims is nonsensical. Resp't Br. 41, 44. A petitioner's habeas appeal concerns only whether the federal district court correctly evaluated the petition. It constitutes appellate review of an already limited federal review of a state court judgment, not relitigation of state proceedings. Curtailing this review does not rationally relate to the asserted need to defer to state courts on matters of federal law.

As to finality, Resp't Br. 48, the one-sided COA requirement does not rationally promote it. If it did, it would bar government appeals to hasten the case back to state court.

The one-sided version of finality that Respondent claims the COA furthers does not save it. The State holds no legitimate finality interest in a judgment obtained in violation of federal law and typically the U.S. Constitution, much less an interest in protecting a state-court decision "'so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" Resp't Br. 38-39 (quoting *Harrington v. Ritcher*, 562 U.S. 86, 103 (2011)). Rather, "[c]onventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged." *Sanders v. United States*, 373 U.S. 1, 8 (1963).

Regardless, the protracted COA litigation, which Respondent acknowledges, Resp't Br. 50, promotes, if anything, the opposite of finality. *See* U.S. Judicial Conference, *Ad Hoc Comm. on Fed. Habeas Corpus in Capital Cases*, Comm. Rep. and Proposal 23 (1989) (recommending abandonment of COA for capital cases); Amici Br. 2-9. *Cf. Banister v. Davis*, 590 U.S. 504, 514-17 (2020) (permitting Rule 59(e) motions for reconsideration of district court habeas denials as

consistent with the goals of reducing delay, conserving judicial resources, and promoting finality).

Similarly unavailing are Respondent's claims that Mr. Noor's plea for equal treatment on appeal disregards AEDPA and judge-made procedural rules favoring finality and deference to state judgments. Resp't Br. 37-40. Mr. Noor fully acknowledges these strict rules. But they have nothing to do with whether, once the rules have been applied by the district court, he may have equal access to an appeal considering whether the *federal* district court—not the state court—got it right.

On the other hand, given the stringent rules protecting state judgments on which Respondent so heavily relies, *see* Resp't Br. 37-40, it fails to acknowledge the ease with which a circuit court may dispense with frivolous appeals by habeas petitioners who have not run the gauntlet.

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.

Respectfully submitted,

/s/ Brian W. Stull
BRIAN W. STULL
bstull@aclu.org

/s/ Scout Katovich
SCOUT KATOVICH
skatovich@aclu.org

/s/ Neil M. Fox
NEIL M. FOX, WSBA No. 15277
nf@neilfoxlaw.com

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 Reply Brief of Appellant (excluding the cover pages, table of contents, table of citations, signature blocks, 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 6,999 words (using the Microsoft Word Count tool).

Dated this 18th day of June, 2024.

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

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of June 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 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 18th day of June 2024, at Durham, NC.

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