No. 20-1207

In the Supreme Court of the United States

Alexander Balbuena,

Petitioner,

v.

Brian Cates, Acting Warden,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

Brief of amici curiae Federal Public Defender, District of Nevada, District of Arizona, Central District of California, and Eastern District of California, in support of Petitioner

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STATEMENT OF INTEREST[1]

Amici curiae respectfully submit this brief in support of Petitioner. Amici are the Federal Public Defender, District of Nevada, District of Arizona, Central District of California, and Eastern District of California. Our offices are Federal Public Defender Organizations established under 18 U.S.C. §3006A(g)(2)(A). Our primary role is to provide the highest quality legal representation to indigent federal defendants and federal habeas petitioners in our districts.

Amici have a significant interest in this case. The Ninth Circuit periodically appoints our offices to represent non-capital habeas petitioners on appeal in cases where the petitioners were pro se in the district court below. In the instant case, the Ninth Circuit concluded an attempt to amend a federal habeas petition, made after the district court enters a judgment on the merits but before the court of appeals resolves an appeal, is necessarily a disguised second or successive petition under 28 U.S.C. §2244(b). This ruling restricts our ability to zealously advocate for our appellate court-appointed clients, by precluding us from pursuing necessary remands to the district court even where the client lacked counsel in the district court. We respectfully suggest review is necessary to correct the Ninth Circuit's erroneous ruling.

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[1] Amici affirm no counsel for a party authored this brief in whole or in part and no person other than amici made a monetary contribution to its preparation or submission. Counsel of record for both parties received notice at least 10 days prior to the due date of this brief of amici's intention to file this brief, and both counsel provided written consent to its filing. This Court's April 15, 2020, standing order authorizes formatting under Supreme Court Rule 33.2 for "every document filed in a case prior to a ruling on a petition for a writ of certiorari."

INTRODUCTION AND SUMMARY OF ARGUMENT

This case poses a critically important question about the statutory definition of a "second or successive" federal habeas petition. 28 U.S.C. §2244(b); see also 28 U.S.C. §2255(h). The law is clear that if a petitioner files a federal habeas petition, then seeks leave to amend that petition while it remains pending in the district court, the amended petition is not a second or successive petition within the meaning of Section 2244(b). See *Banister* v. *Davis*, 140 S.Ct. 1698, 1705 (2020) (noting agreement in the courts of appeals). The law is also clear that if a petitioner litigates a federal habeas petition through the entire appellate process, loses on the merits, and then once again attempts to litigate claims for relief on the merits—whether through a brand new petition filed in a new case, or through some vehicle (like a Rule 60(b) motion) tied to the original habeas proceedings—those efforts are a second or successive petition within Section 2244(b)'s meaning. See *Gonzalez* v. *Crosby*, 545 U.S. 524, 530-32 (2005). This case falls between these two guideposts: if a district court has denied an initial habeas petition on the merits, if an appeal is pending, and if a petitioner seeks a remand from the appellate court to litigate merits-related issues in the district court, is a remand subject to the statutory restrictions on second or successive petitions?

The Ninth Circuit in its decision below erroneously concluded a remand in this scenario amounts to a second or successive petition. To the contrary, "appeals from the habeas court's judgment . . . are not second or successive; rather, they are further iterations of the first habeas application." *Banister*, 140 S. Ct. at 1705. Logically, a

remand from an appeal is likewise a "further iteration[] of the first habeas application" (*ibid.*), as other circuits have correctly concluded.

This Court's review is necessary to fix this recurring issue. In amici's experience, the Ninth Circuit commonly appoints counsel on appeal to represent indigent habeas petitioners who were pro se in the district court below. Often, an appellate court-appointed attorney will realize the pro se petitioner failed to litigate the case properly in the district court. For example, as in this case, a petitioner might plead one claim (like a Fifth Amendment self-incrimination clause claim involving the voluntariness of a confession) but fail to plead a separate winning and factually related claim (like a Fifth Amendment self-incrimination clause claim involving a materially incomplete *Miranda* warning). Pro se petitioners frequently make other types of pleading errors. In these circumstances, appellate court-appointed counsel may conclude a remand is necessary to ensure the petitioner receives at least one full and fair opportunity at federal habeas review. But the Ninth Circuit's ruling prevents those remands in numerous instances. This Court should intervene to consider this significant issue.

By categorically precluding appellate court-appointed counsel from pursuing remands in these cases, the Ninth Circuit erroneously assumed such remands violate the equitable principles underlying Section 2244(b). Congress enacted and revised that statute against the backdrop of the common law abuse of the writ doctrine, which applied equitable principles to restrict certain categories of abusive serial habeas filings. As an equitable matter, the types of remands at issue in this case are unlike

the types of serial habeas filings the abuse of the writ doctrine restricted. Rather, a remand request is most likely to stem from a good faith pleading mistake by an unsophisticated pro se litigant. Cf. *Erickson* v. *Pardus*, 551 U.S. 89, 94 (2007). It's unlikely an appellate court-appointed attorney would seek a remand for vexatious purposes, especially in a non-capital case, where litigants lack any conceivable incentive to create unnecessary delay. Cf. *Rhines* v. *Weber*, 544 U.S. 269, 277-78 (2005). Rather, an appellate court-appointed attorney will likely pursue a remand only in limited circumstances where a remand is critical.

Of course, there may be specific cases where a court might deny a remand request: perhaps further district court proceedings would be futile, or perhaps other relevant considerations weigh against a remand. But by applying a blanket bar to such requests, the Ninth Circuit misinterpreted Section 2244(b) and misapplied the relevant equitable principles underlying that statute. The Court should grant the petition to address this important and recurring issue.

ARGUMENT

I. This Court's review is necessary because the question presented frequently recurs.

As amici are well aware, the situation in this case—where a petitioner is pro se in the district court, receives appointed counsel for the first time on appeal, and counsel concludes a remand is necessary—is by no means atypical. The Court should grant certiorari to ensure these clients receive "one full opportunity to seek collateral review." *Ching* v. *United States*, 298 F.3d 174, 177 (2d Cir. 2002) (Sotomayor, J.).

The Criminal Justice Act authorizes federal courts to appoint counsel to represent indigent federal habeas petitioners. 18 U.S.C. §3006A(a)(2)(B). A court (or a magistrate judge) may appoint a private attorney, as the court of appeals below did in this case, or a defender organization. *Id.* §3006A(b). Either a district court or a court of appeals may appoint counsel in the first instance. See *Graves* v. *McEwen*, 731 F.3d 876 (9th Cir. 2013). In amici's experience, the district courts within the Ninth Circuit differ as far as how frequently they appoint counsel for a petitioner prior to an appeal. The Ninth Circuit itself has a practice of appointing counsel for the first time on appeal, often when (as in this case) the petitioner was pro se in the district court and the district court or the court of appeals granted a certificate of appealability. See 28 U.S.C. §2253(c)(2). We estimate the Ninth Circuit has issued appointment orders in about 500 such cases from the years 2010 through 2020 (including but not limited to orders involving our offices and/or districts).[2] These appellate court appointments are an important part of our non-capital habeas practices.

When the appellate court appoints our offices for the first time on appeal, we will review the district court record and may spot critical deficiencies in how the pro se petitioner litigated the case below. A remand may be necessary so we can fully

[2] This estimate comes from a LexisNexis docket search for Ninth Circuit orders containing the phrase "3006A(a)(2)(B)," which is the statutory provision authorizing appointment of counsel for petitioners proceeding under Sections 2241, 2254, and 2255. The search is likely to be accurate, although it's potentially underinclusive. The search returns 682 hits from the calendar years 2010 through 2020. Based on a spot-check, we estimate roughly 75 percent of those results are from cases where the Ninth Circuit appointed counsel for a petitioner who was pro se in the district court (as opposed to, for example, cases where the Ninth Circuit authorized existing counsel to withdraw and ordered the appointment of replacement counsel).

and fairly represent our clients. But the Ninth Circuit's erroneous rule bars us from pursuing remands to fix these deficiencies in all manner of circumstances.

Petitioner's case falls into one category. In this case, Petitioner was pro se in the district court; the district court denied his petition on the merits; he appealed; and the Ninth Circuit appointed counsel for the first time on appeal. Counsel reviewed the record and concluded that while Petitioner had pled and argued a Fifth Amendment self-incrimination clause claim challenging the voluntariness of his confession, he had neglected to raise a factually related and meritorious claim under *Miranda* v. *Arizona*, 384 U.S. 436 (1966). Appellate court-appointed counsel concluded it was necessary to pursue a remand to raise and litigate the *Miranda* claim in the district court. The Ninth Circuit's erroneous interpretation of Section 2244(b) ultimately precluded counsel from doing so.

In our experience, Petitioner isn't the only pro se litigant who has made this mistake. It's not uncommon for pro se litigants to raise claims relying on important facts, but to inadvertently omit a meritorious legal theory tied to those facts. Alternatively, even if the pro se litigant has relied on a proper legal theory in the district court, the State may nonetheless argue on appeal the pro se petitioner relied on the wrong legal theory and therefore forfeited a meritorious argument.

The State made just such an argument in one of our recent appellate court-appointed cases. See *Anderson* v. *Neven*, 797 F. App'x 293 (9th Cir. 2019) (unpublished), *rehearing denied*, 974 F.3d 1119 (2020). In that case, Mr. Anderson was allegedly driving with marijuana in his system; he accidentally ran a stop sign and

caused a fatal crash. The State prosecuted him for a misdemeanor traffic offense. After his conviction in that case, the State charged him separately with DUI causing death. His attorney filed a pre-trial motion raising a double jeopardy issue. The trial court denied the motion as premature, but it instructed the parties the issue would likely become ripe once it empaneled a jury, and it would likely grant the motion at that time. Nonetheless, Mr. Anderson's attorney advised him to accept a conditional guilty plea that gave him the right to raise the premature double jeopardy issue on appeal. Mr. Anderson did so, but the Nevada Supreme Court rejected his appeal.

In his federal habeas proceedings, Mr. Anderson raised a trial-counsel-ineffectiveness claim under *Hill* v. *Lockhart*, 474 U.S. 52 (1985), alleging his attorney incompetently advised him to accept the conditional plea when the trial court had telegraphed it would grant the double jeopardy motion once it empaneled a jury. The district court granted the pro se petition, and the State appealed. The Ninth Circuit appointed the Federal Public Defender, District of Nevada, to represent Mr. Anderson. On appeal, the State claimed Mr. Anderson had erred in raising this issue as an ineffectiveness claim under *Hill*; rather, the State argued, Mr. Anderson should've raised the issue as a standalone double jeopardy claim attacking the Nevada Supreme Court's direct appeal decision, not as an ineffectiveness claim.

The Ninth Circuit correctly rejected this argument and affirmed the district court's decision. The State pursued rehearing, which the court denied. Judge VanDyke dissented from the denial of rehearing en banc and credited the State's argument; in his view, the panel had "reach[ed] an issue"—i.e., the standalone double

jeopardy claim—"never raised by Anderson's federal habeas petition." *Anderson*, 974 F.3d at 1134 (VanDyke, J., dissenting from denial of rehearing en banc).

Although Judge VanDyke and the State's position was wrong—Mr. Anderson properly relied on an ineffectiveness theory—this case nonetheless illustrates the larger point: when a petitioner was pro se in the district court, issues may arise on appeal about whether the petitioner pled the relevant facts (in Mr. Anderson's case, the facts relevant to the double jeopardy issue) under all the available legal theories (in Mr. Anderson's case, as an ineffectiveness claim, as well as a standalone double jeopardy claim). But in cases such as this, if we conclude the petitioner *did* invoke the wrong legal theory (or omitted a meritorious theory) in the district court, we're nonetheless unable to pursue a remand to amend the petition and raise the proper legal theory. The Ninth Circuit's erroneous interpretation of Section 2244(b) therefore materially limits our ability to fix these pro se pleading mistakes in appellate court-appointed cases.

There are additional categories of pro se petitioners whom the Ninth Circuit's rule harms. For example, the State may argue on appeal that even if the appellate court certified a correct legal theory for appeal, the petitioner failed to specifically plead that claim in the district court proceedings. The State made this type of argument in another of our recent appellate court-appointed cases. See *LaPena* v. *Grigas*, 736 F. App'x 651 (9th Cir. 2018) (unpublished). There, Mr. LaPena proceeded pro se in the district court and litigated a claim of actual innocence under *Herrera* v. *Collins*, 506 U.S. 390 (1993). The Ninth Circuit granted a certificate of appealability on that

claim and appointed the Federal Public Defender, District of Nevada. On appeal, the State argued Mr. LaPena had failed to plead this innocence claim in his pro se petition. In the State's view, while he had raised a pro se sufficiency claim under *Jackson* v. *Virginia*, 443 U.S. 307 (1979), he hadn't specifically preserved a factual innocence theory under *Herrera*. Thus, the State asked the court not to consider this claim, even though the court had certified the claim for appeal. See *Cacoperdo* v. *Demosthenes*, 37 F.3d 504, 507 (9th Cir. 1994) (explaining the appellate court won't consider a claim if it wasn't properly pled in the district court).

Although the State's position was wrong—Mr. LaPena's petition sufficiently placed the State on notice he was raising a separate innocence claim—this case presents another category of pleading error the State might invoke on appeal: even if the appellate court has certified the correct legal theory, the State may nonetheless argue the petitioner failed to preserve that specific legal theory below. Once again, in cases such as this, if we conclude the pro se petitioner failed to adequately plead the claim for relief at issue in the appeal, we remain unable under the Ninth Circuit's rule to pursue a remand to fix the error.

Mr. LaPena's case illustrates another potential scenario the Ninth Circuit's rule affects. While Mr. LaPena was litigating his case pro se in the federal district court, he was simultaneously pursuing relevant DNA testing through state procedures. (Perhaps if Mr. LaPena had counsel in the district court, counsel would've requested a stay.) After the federal district court entered its judgment, the state crime lab issued its final report regarding the DNA testing, and the results were

exculpatory. We filed a motion to expand the record on appeal to include those exculpatory results; the court granted the motion. However, motions to expand are generally disfavored. See *United States* v. *W.R. Grace*, 504 F.3d 745, 766 (9th Cir. 2007); cf. *Winston* v. *Neven*, 545 F. App'x 684, 686 (9th Cir. 2013) (denying a motion to expand the record on appeal where appellate court-appointed counsel discovered critical evidence the pro se petitioner had neglected to include with the petition). Had we sought a remand so the district court could consider the DNA evidence in the first instance, the Ninth Circuit's precedent likely would've precluded us from doing so, because the bar on second or successive petitions restricts petitioners from relitigating previously presented claims. 28 U.S.C. §2244(b)(1); see *Babbitt* v. *Woodford*, 177 F.3d 744, 746 (9th Cir. 1999) ("[W]e will not consider new factual grounds in support of the same legal claim that was previously presented."). In cases like this, where new evidence comes to light on appeal, and where the new evidence would otherwise be admissible in federal court under the federal habeas framework, the Ninth Circuit's precedent may nonetheless hamstring appellate court-appointed counsel from bringing that evidence to the federal courts' attention.

This type of situation can also occur with claims under *Brady* v. *Maryland*, 373 U.S. 83 (1963). In some cases, the pro se petitioner may allege the State withheld material exculpatory evidence, but the petitioner may have lacked access to the withheld evidence in the district court proceedings, perhaps because the State continued to withhold it. If the allegedly withheld evidence comes to light for the first time on appeal—because of a late disclosure by the State, or because appellate court-

appointed counsel finds the evidence through an investigation—the Ninth Circuit's rule would nonetheless appear to preclude appellate court-appointed counsel from seeking a remand for further merits proceedings in light of the newly found *Brady* evidence. But see *Quezada* v. *Scribner*, 611 F.3d 1165, 1167 (9th Cir. 2010) (remanding for a hearing based on newly discovered evidence in support of a *Brady* claim, and summarily rejecting an argument the petitioner "must seek leave to file a successive habeas petition"); accord *Douglas* v. *Workman*, 560 F.3d 1156, 1189 (10th Cir. 2009) (distinguishing prior case law regarding second or successive petitions and declining to apply Section 2244(b) to a new petition, filed while an appeal was pending, that added new evidence to a previously pled prosecutorial misconduct claim).

Another category involves arguments about the standard of review under Section 2254(d): an appellate court-appointed attorney may conclude the pro se petitioner pled the proper claim for relief but nonetheless made incomplete arguments about why the state court's decision failed to qualify for deference under Section 2254(d). In *Hernandez* v. *Holland*, 750 F.3d 843 (9th Cir. 2014), the pro se petitioner raised a *Miranda* claim the state court had rejected on the merits; the petitioner made relatively cursory arguments about Section 2254(d). The Ninth Circuit appointed the Federal Public Defender, Central District of California, on appeal, and the appellate court-appointed attorney made new and more detailed arguments under Section 2254(d)(2). The Ninth Circuit concluded one of those arguments was "an entirely new theory in this appeal" and was therefore outside the scope of the district court and state court litigation. *Id.* at 858. Had the attorney concluded a remand was necessary

to present additional Section 2254(d)(2) merits arguments in the district court, the Ninth Circuit's rule likely would've barred that procedure.

None of this is to say appellate courts should be *bound* to authorize remands in every case that falls within these or other relevant categories. As Petitioner explains, even if merits-related remands are permissible as a *general* matter, it's conceivable appellate courts would nonetheless refuse *specific* remand requests in *specific* cases. See Fed. R. App. P. 12.1(b) (stating the appellate court "*may*" order the case remanded) (emphasis added). For example, the appellate court might conclude a remand would be futile, perhaps because appellate court-appointed counsel proposes to litigate a new claim that would be untimely under the federal statute of limitations. 28 U.S.C. §2244(d); see *Mayle* v. *Felix*, 545 U.S. 644 (2005) (restricting the circumstances when a new claim in an untimely amended petition will relate back to the filing date of a timely initial petition). An appellate court might conclude a remand would be futile for other procedural or merits-based reasons. An appellate court might find equitable reasons to deny a remand—for example, perhaps the petitioner explicitly waived counsel below. The district court gets a say, too, and could refuse to reopen proceedings on similar grounds. But the Ninth Circuit's rule categorically forbids merits remands in *all* federal habeas proceedings—including when appellate court-appointed counsel discovers a timely new claim for the first time in a federal appeal—no matter the validity of any specific request.

To summarize, the question presented has implications beyond just Petitioner's case. To the contrary, the Ninth Circuit's erroneous rule impairs us from ensuring our clients receive "one full opportunity to seek collateral review" when they were pro se in the district court. *Ching*, 298 F.3d at 177 (Sotomayor, J.). And as Petitioner ably demonstrates in his petition, the question presented has divided at least seven regional circuit courts of appeals since Congress last amended Section 2244(b) in 1996; the scope of the circuit split further illustrates the issue's significance for pro se petitioners throughout the Nation. The question presented deserves this Court's attention.

II. The Ninth Circuit's rule is unnecessary to curb abusive litigation.

Congress enacted and revised Section 2244(b) under the backdrop of the federal courts' common law abuse of the writ doctrine, which considered equitable principles in determining whether a type of proposed later-in-time pleading was abusive. Applying equitable principles here, it would be improper to impose a blanket rule preventing appellate court-appointed counsel from pursuing merits-related remands. By adopting such a rule, the Ninth Circuit ignored these equitable considerations.

The statutory phrase "second or successive" in Section 2244(b) is a "term of art, which is not self-defining." *Banister*, 140 S. Ct. at 1705 (cleaned up). When interpreting the term, the Court looks to various sources for "guidance." *Ibid.* For example, the Court considers previous cases involving the "abuse of the writ" doctrine—a common law precursor to Section 2244(b)—and it attempts to determine "whether a

type of later-in-time filing would have constituted an abuse of the writ" under the common law. *Id.* at 1706 (cleaned up). The abuse of the writ doctrine involved "a complex and evolving body of equitable principles" (*Felker* v. *Turpin*, 518 U.S. 651, 664 (1996)), a key purpose of which was to weed out litigation "whose only purpose is to vex, harass, or delay" (*Sanders* v. *United States*, 373 U.S. 1, 18 (1963)). Along with the abuse of the writ doctrine, the Court also considers the broader "implications for habeas practice" when determining whether a certain filing category amounts to a second or successive filing. *Banister*, 140 S. Ct. at 1706 (cleaned up). In sum, "[c]ases in which numerically second petitions have not been treated as 'second or successive' can be understood as describing factual scenarios in which the application of a modified res judicata rule would not make sense." *United States* v. *Barrett*, 178 F.3d 34, 44 (1st Cir. 1999).

The Ninth Circuit's decision in this case is inconsistent with this framework, as Petitioner ably demonstrates in his petition. Additional equitable considerations support the conclusion that an appellate court-appointed attorney who seeks a remand to pursue merits litigation in the district court is engaging in a proper, non-abusive practice, of the sort the abuse of the writ doctrine would've authorized.

First, the law generally takes a sympathetic approach toward pro se litigants. "A document filed pro se is to be liberally construed." *Erickson*, 551 U.S. at 94 (cleaned up). A pro se pleading, "however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." *Ibid.* (cleaned up). Pro se petitioners should receive "the benefit of any doubt." *Hebbe* v. *Pliler*, 627 F.3d

338, 342 (9th Cir. 2010) (cleaned up). A court must "ensure that pro se litigants do not lose their right to a hearing on the merits of their claim due to ignorance of technical procedural requirements." *Balistreri* v. *Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988). The duty applies with "special force to filings from pro se inmates." *United States* v. *Qazi*, 975 F.3d 989, 993 (9th Cir. 2020). As with other pro se parties, "[*p*]*ro se* habeas petitioners may not be held to the same technical standards as litigants represented by counsel." *Corjasso* v. *Ayers*, 278 F.3d 874, 878 (9th Cir. 2002). Incarcerated pro se habeas litigants face substantial restrictions that impair their ability to investigate, hire experts, and otherwise adequately present certain types of claims. See *Martinez* v. *Ryan*, 566 U.S. 1, 11-12 (2012).

These doctrines reflect the reality that unsophisticated pro se litigants are likely to make mistakes that impair their ability to secure a full and fair adjudication of the merits. Courts should therefore be understanding of pro se mistakes and shouldn't let such errors bar review of meritorious claims. Likewise, if an appellate court-appointed attorney reads the petitioner's pro se filings in the district court and concludes a remand is necessary to fix material errors or omissions in the pleadings, then the request is unlikely to be vexatious. Rather, as federal courts fully understand, petitioners often make mistakes despite their best efforts. In turn, if a petitioner has made a mistake in good faith, there's nothing abusive about an attorney pursuing a remand to correct the mistake and ensure the petitioner receives adequate merits review. These equitable principles should inform a proper interpretation of Section 2244(b).

Second, a rule preventing appellate court-appointed counsel from pursuing remands is inconsistent with the purpose of appointing counsel in the first place. The Criminal Justice Act allows a court to appoint counsel for an indigent habeas petitioner in its discretion when "the interests of justice so require." 18 U.S.C. §3006A(a)(2) & (2)(B); see, e.g., *Weygandt* v. *Look*, 718 F.2d 952, 954 (9th Cir. 1983) (per curiam). The appellate courts' appointment power performs an important function: if an appellate court appoints counsel for the first time on appeal, perhaps the court is concerned about the lack of counsel below, or perhaps the court believes an attorney is necessary on appeal to ensure the client receives full and fair review. If (as here) the newly appointed appellate attorney immediately requests a merits-related remand, it's likely because the attorney believes the pro se proceedings in the district court were materially incomplete. But under the Ninth Circuit's rule, these remands are per se abusive under Section 2244(b). That rule misunderstands the purposes of appointing counsel on appeal and strips much of the value from the appellate court appointment itself.

Third, it's unlikely an appellate court-appointed attorney would pursue a remand solely to create unnecessary delay. Rightly or wrongly, the Court has occasionally expressed concerns about capital habeas petitioners "deliberately engag[ing] in dilatory tactics to prolong their incarceration and avoid execution of the sentence of death." *Rhines*, 544 U.S. at 277-78. By contrast, *non*-capital habeas petitioners lack any conceivable strategic incentive to prolong their incarceration; rather, their interest is to get a final decision as quickly as possible, to *reduce* their time in custody.

See *Valdovinos* v. *McGrath*, 598 F.3d 568, 574 (9th Cir. 2010), *vacated on other grounds*, 562 U.S. 1196 (2011).

The situation at issue in this case—where a petitioner was pro se in the district court and receives counsel for the first time on appeal—is highly unlikely to occur in capital cases, because indigent capital petitioners are automatically entitled to appointed counsel in the district court. 18 U.S.C. §3599(a)(2). Rather, the situation should arise only in non-capital proceedings, where it's more likely a petitioner will have proceeded pro se in the district court. Because non-capital petitioners have no interest in inviting unnecessary delay, an appellate court-appointed attorney in a non-capital habeas case is unlikely to seek a remand for insubstantial, much less abusive, reasons; rather, an attorney is likely to pursue a remand only when further district court proceedings are essential.

Even assuming an appellate court-appointed attorney in a non-capital case might conceivably pursue a remand for improper reasons, or in circumstances where a remand would be futile (for example, because the attorney proposes to amend the petition on remand to raise a claim otherwise barred by the statute of limitations), in those rare situations the federal courts retain ample tools to address the problem. For example, as Petitioner explains in his petition, and as amici further describe above, the appellate court may simply deny a remand, or the district court may refuse to reopen the case. But a categorical bar on all such requests is inconsistent with the equitable principles that animate a proper understanding of Section 2244(b).

Fourth, the Ninth Circuit's rule creates substantial inequities. Imagine two similarly situated clients with identical claims for relief. Both clients file identical pro se federal habeas petitions in the district court. The court assigns the petitions to two different district court judges. One judge appoints counsel for the first petitioner; counsel immediately amends the petition to invoke a proper legal theory; and the first petitioner ultimately secures relief in the district court. The other judge declines to appoint counsel for the second petitioner; the petitioner loses in the district court and appeals; and the appellate court appoints counsel for the first time. By preventing appellate court-appointed counsel for the second petitioner from pursuing a remand to amend the petition, the Ninth Circuit provides inequitable and disparate treatment to otherwise identically situated petitioners.

For these reasons, and for the additional reasons discussed in the petition, a merits-related remand request doesn't qualify as a vexatious litigation tactic that would've been proscribed by the common law abuse of the writ doctrine and, in turn, is now proscribed by Section 2244(b). Rather, an appellate court-appointed attorney is likely to seek a remand only for good faith reasons consistent with equity. The Court should grant review so appellate court-appointed attorneys can ensure their clients receive a full and fair round of federal habeas review.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Dated April 1, 2021.

Respectfully submitted,

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