No.

IN THE

Supreme Court of the United States

HABEAS CORPUS RESOURCE CENTER; OFFICE OF THE FEDERAL PUBLIC DEFENDER FOR THE DISTRICT OF ARIZONA,

Petitioners,

v.

UNITED STATES DEPARTMENT OF JUSTICE; LORETTA E. LYNCH, ATTORNEY GENERAL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

George E. Greer
ORRICK, HERRINGTON & SUTCLIFFE LLP
701 5th Avenue, Ste 5600
Seattle, WA 98104

Darren S. Teshima
ORRICK, HERRINGTON & SUTCLIFFE LLP
405 Howard Street
San Francisco, CA 94105

Marc R. Shapiro
Counsel of Record
Alison M. Kilmartin
Ben Chagnon
Ben Aiken
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
(212) 506-5000
mrshapiro@orrick.com

Counsel for Petitioners

QUESTIONS PRESENTED

Chapter 154 of title 28 of the United States Code provides for expedited federal habeas corpus review of death-penalty cases arising out of States that provide for competent and adequately resourced counsel in state postconviction proceedings. Tasked with deciding whether States qualify for this preferred treatment, the former Attorney General, as mandated by statute, promulgated regulations setting out the standards he would employ in making those determinations. Those regulations are, however, fraught with legal infirmities, most notably a broad catch-all provision for evaluating the efficacy of a State's mechanism for appointing state postconviction counsel that threatens to allow most any State to qualify.

Petitioners are two government entities—with statutory and ethical duties to assist death-sentenced prisoners—who participated in the regulations' notice and comment period. Forced to presume their States will qualify for certification as a result of the ill-defined regulations and confronted by the prospect of immediately restructuring their daily operations to meet the retroactively expedited deadlines and thereby heed their mission of representing and assisting death-sentenced prisoners, Petitioners brought an Administrative Procedure Act challenge to the Attorney General's regulations. The questions presented are:

1. Whether an overhaul of an organization's operations, which includes, *inter alia*, reallocating litigation resources, in response to a

legally infirm regulation constitutes an injury sufficient to confer Article III standing.

2. Whether a purely legal claim that a federal agency's final rule violates the Administrative Procedure Act is presumed fit for judicial resolution.

3. Whether the prudential ripeness doctrine should be abrogated because it violates the principle that federal courts have a "virtually unflagging" obligation to hear cases within their jurisdiction.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provision

Statutes & Regulations

Other Authorities

INTRODUCTION

This Court and the federal courts of appeals have long recognized that organizations have standing to challenge government conduct that threatens their mission and causes them to divert resources in response. Courts also have widely acknowledged that purely legal challenges to final agency action are ripe for review when postponement would work undue hardship on those burdened by the regulations. The Ninth Circuit rejected those principles in a case with life and death consequences for thousands of death-sentenced prisoners across the country.

Pursuant to 28 U.S.C. §§ 2261(b) and 2265, the Attorney General promulgated regulations (the Final Regulations) governing certification for States seeking to qualify for exceptionally expedited federal habeas review in capital cases. The district court found those rules fail to comply with the Administrative Procedure Act (APA), as they are woefully inadequate, hopelessly vague, and lack necessary procedural safeguards. Consequently, public defender organizations such as Petitioners Habeas Corpus Resource Center (HCRC) and the Office of the Federal Public Defender of the District of Arizona (FDO-AZ) (collectively, Petitioners), must scramble to reallocate their limited resources to comply with their statutory and ethical duties to safeguard the constitutional rights of their clients. The Ninth Circuit held that this operational overhaul does not amount to constitutional injury and that, because no State has been certified, any challenge to the Attorney General's regulations is not ripe.

Both holdings conflict with the precedent of this Court and the courts of appeals and warrant review. The standing determination attempts to sidestep precedent by crafting a novel rule that heightens the minimum constitutional injury for legal services providers. The ripeness determination is equally flawed, creating a rule that inverts the presumption in favor of pre-enforcement review of legal challenges to regulations. And the prudential morass typified by this case offers this Court a perfect opportunity to revisit the prudential ripeness doctrine altogether.

OPINIONS AND ORDERS BELOW

The Ninth Circuit's opinion vacating the order enjoining application of the Final Regulations and remanding with instructions to dismiss is reported at 816 F.3d 1241. Pet. App. 1a-28a. A separate unpublished panel opinion ruling against a nonparty movant is reported at 627 F. App'x 662. The order of that court denying Petitioners' request for en banc rehearing after calling for a vote but failing to garner a majority is unpublished. Pet. App. 95a-96a.

The district court's summary judgment order enjoining the Final Regulations is reported at 2014 WL 3908220. Pet. App. 29a-66a. The district court's order granting Petitioners' motion for a preliminary injunction is reported at 2013 WL 6326618. Pet. App. 67a-94a.

JURISDICTION

The court of appeals issued its opinion on March 23, 2016, denied the petition for panel rehearing and

rehearing en banc on November 15, 2016, and denied Petitioners' en banc motion to stay the mandate on December 14, 2016. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Chapter 154 of Title 28 of the United States Code is codified at 28 U.S.C. §§ 2261-66. Pet. App. 97a-109a. Respondents' Final Rule on the Certification Process for State Capital Counsel System is codified at 28 C.F.R. § 26.20-.23. Pet. App. 110a-117a.

STATEMENT OF THE CASE

Background On Chapter 154

Prior to the adoption of the Antiterrorism and Effective Death Penalty Act (AEDPA), legislators lamented the "pressing need for qualified counsel to represent prisoners in collateral review." 135 Cong. Rec. S13471-04, S13482 (1989) (Ad Hoc Comm. Rpt.). Congress accordingly enacted Chapter 154 as part of AEDPA to provide a "quid pro quo arrangement under which states are accorded stronger finality rules on federal habeas review in return for strengthening the right to counsel for indigent capital defendants." H.R. Rep. No. 104-23, at 10 (1995).

Under Chapter 154, if a State demonstrates that it has provided death-sentenced prisoners with competent, adequately compensated, and properly resourced state postconviction counsel, it will be

certified as an "opt-in" State. That certification triggers a host of expedited deadlines and restrictions during federal habeas review:

- The statute of limitations for filing a habeas petition is cut from one year to 180 days, *see* 28 U.S.C. § 2263(a);

- The tolling of the statute of limitations is altered to exclude (1) the time between the finality of direct review in state court to the filing of a petition for writ of certiorari in this Court, and (2) the filing of successive state petitions, *see* 28 U.S.C. § 2263(b);

- A petitioner's ability to amend his petition is restricted, *see* 28 U.S.C. § 2266(b)(3)(B);

- A federal district court must enter final judgment on a habeas petition within 450 days of the filing of the petition, or 60 days after it is submitted for decision—whichever is earlier, *see* 28 U.S.C. § 2266(b)(1)(A); and

- The courts of appeals must hear and render a final determination of any appeal no later than 120 days after the filing date of the reply brief, *see* 28 U.S.C. § 2266(c)(1)(A).

Importantly, the certification determination is retroactive, requiring compliance with Chapter 154 based on the date the State's qualifying mechanism for counsel is found to have been established, *see* 28 U.S.C. § 2265(a)(2).

The Final Regulations

In 2006, Congress shifted responsibility for determining whether state mechanisms qualify for preferred treatment under Chapter 154 from the federal courts to the Attorney General. 28 U.S.C. §§ 2261(b)(1), 2265(a)(1). Congress also charged the Attorney General with "promulgat[ing] regulations to implement the certification procedure under" § 2265(a), § 2265(b). Respondents (collectively, DOJ) published a notice of proposed rulemaking addressing the certification procedure envisioned by § 2265. Notice of Proposed Rulemaking for State Capital Counsel Systems, 76 Fed. Reg. 11,705 (Mar. 3, 2011). During the comment period and without any notice to Petitioners, the States of Arizona and Texas submitted—and DOJ began processing—certification requests. Pet. App. 63a-64a; KER 42-43.[1] DOJ published the Final Regulations in 2013. Pet. App 110a.

Whether a State is certified turns on the efficacy of its appointment mechanism, but the Final Regulations do not require the State to provide any information about its mechanism—neither the basis for asserting it qualifies nor the manner in which the State supposedly adheres to it. All that is required is a "request in writing." Pet. App. 115a. The Regulations also set forth three standards by which States are presumed to have qualifying mechanisms: if they

[1] GER refers to DOJ's Excerpts of Record, SER refers to Petitioners' Supplemental Excerpts of Record, and KER refers to Marc Klaas's Excerpts of Record. All are available on Docket No. 14-16928.

require counsel to (1) have five years' experience and three years' postconviction experience (with good-cause exceptions), (2) meet certain requirements of the Innocence Protection Act, or, if neither of these standards is satisfied, a catch-all exists for (3) States that are "otherwise [deemed to] reasonably assure a level of proficiency appropriate for State postconviction litigation in capital cases." Pet. App. 113a-114a.

Upon the Final Regulations' publication, the Attorney General announced for the first time that he would treat certification decisions as orders rather than rules. 78 Fed. Reg. 58,160, 58,174-75 (Sept. 23, 2013). And, through happenstance of discovering Arizona's certification application and DOJ's response, Petitioners discovered that the certification process would permit ex parte communications.

Petitioners' Missions And Regulatory Challenge

Petitioners are two public defender organizations statutorily charged with representing indigent defendants and prisoners, including those sentenced to death. The Habeas Corpus Resource Center (HCRC) is an entity within the Judicial Branch of the State of California. GER2_19. Although statutorily limited to 34 attorneys, HCRC is legally required to represent death-row prisoners in state and federal postconviction proceedings; recruit members of the private bar to accept death-penalty appointments; maintain rosters of qualified attorneys, experts, and investigators; consult attorneys appointed to take on capital cases; and evaluate death-sentenced prisoners' cases and

provide them necessary assistance. Cal. Gov't Code § 68661.[2]

The Office of the Federal Public Defender for the District of Arizona (FDO-AZ) operates under the Criminal Justice Act of 1964, 18 U.S.C. § 3006A(g). FDO-AZ is responsible for providing legal representation to death-sentenced men and women. Pet. App. 119a. Its mission "includes ensuring, on behalf of those who are unable to afford retained counsel and other necessary defense services, that the right to the effective assistance of counsel guaranteed by the Sixth Amendment and the Criminal Justice Act is enforced within the District of Arizona." Pet. App. 119a-120a. Along with direct representation, FDO-AZ provides "assistance, consultation, information and other related services to eligible persons and appointed attorneys regarding federal habeas corpus litigation." Pet. App. 121a (quotation mark omitted) (quoting United States Dist. Ct. for the Dist. of Ariz., Gen. Order 07-08: Criminal Justice Act Plan, § VII(C) (May 7, 2007)). It also must "(1) track capital cases in Arizona state and federal courts; (2) coordinate with other state and national organizations providing legal assistance to death-sentenced individuals and counsel representing such individuals, and (3) provide training for those attorneys representing clients in federal habeas proceedings." *Id.* (citing § VII(D)).

Petitioners participated in the Final Regulations' rulemaking process. Among the issues they raised

---

[2] Proposition 66 recently amended this statute; however, the Proposition has been stayed. *See* Order, *Briggs v. Brown*, No. S238309 (Cal. S. Ct. Dec. 20, 2016).

were: (1) the catch-all competency standard provides no meaningful criteria for ensuring assignment of competent counsel, (2) States are not required to show they have actually implemented the standards set forth in their proposed mechanism, and (3) the public is unable to participate meaningfully in a challenge to state certification. SER2_52-94.

The District Court Finds Petitioners Have Standing, Their Claims Are Ripe, And The Final Regulations Violate The APA

On September 30, 2013, Petitioners filed suit, alleging DOJ violated the APA by (1) failing to provide notice during the rulemaking process that it believed certification determinations constituted orders instead of rules, (2) failing to respond to public comments during the rulemaking process, (3) codifying a certification process containing multiple procedural deficiencies, and (4) adopting Final Regulations devoid of meaningful substantive criteria for certification determinations, including a vague standard that fails to ensure competency, rendering the other two, more detailed, competency provisions meaningless. GER2_12, 28-32.

The district court (per Judge Claudia Wilken) granted Petitioners' requests for a temporary restraining order, GER2_3-11, preliminary injunction, Pet. App. 67a-94a, and, ultimately, a permanent injunction, Pet. App. 29a-66a. The court first found Petitioners have standing because the retroactive effect of Chapter 154 "forces Plaintiff[s] … to make urgent decisions regarding its litigation, resources, and

strategy." Pet. App. 80a-81a. That Arizona has already applied for certification, the court explained, confirms the threat is "imminent" and "predictable," as a certification determination will "reach back to the date when the mechanism is found to have been established." *Id.*

On summary judgment, the court reaffirmed Petitioners' standing and explained that *Clapper v. Amnesty International USA*, 133 S. Ct. 1138 (2013), does not alter the calculus. The confluence of the expedited timelines, their retroactive application, and the unclear competency provision forces Petitioners "to make urgent decisions regarding their litigation, resources, and strategy." Pet. App. 39a-42a. Making matters even more pressing, the Final Regulations *mandate* certification for States that satisfy its standards, and "Arizona has already applied for certification." Pet. App. 42a.

Likewise, the district court recognized that Petitioners' claims are ripe: Further factual development is unnecessary and the threat of harm if the Final Regulations take effect is "significant and irreparable … based in large part on the retroactive effect of any certification decision." Pet. App. 44a-45a. In turn, the court identified numerous APA violations, including that the catch-all competency provision lacks definitional content, the Final Regulations fail to require a showing that States comply with their proposed qualifying mechanism, certification determinations would be improperly treated as orders, the Final Regulations fail to address the effect of prior Chapter 154 caselaw, and DOJ impermissibly provided for ex parte

communications with applicant States. Pet. App. 50a-63a.

The Ninth Circuit Vacates On Standing And Ripeness Grounds And Concludes Death-Sentenced Prisoners Cannot Intervene On Remand

The Ninth Circuit recognized that Chapter 154 and the Final Regulations cooperate to adversely affect Petitioners by altering their litigation agenda and their "calculation of legal and financial resources available to competently prepare and litigate cases." Pet. App. 15a. But the court concluded this does not constitute an Article III injury. Though Petitioners "may be eminently reasonable" in attempting "to prevent or mitigate the harm their clients may face due to the possible future application of Chapter 154," Pet. App. 20a, whatever impact this has on Petitioners, the court explained, does not constitute an injury because "[a]ssisting and counseling clients in the face of legal uncertainty is the *role* of lawyers." Pet. App. 18a (emphasis in original). "[L]awyers," the panel categorically held, cannot "suffer a legally cognizable injury in fact when they take measures to protect their clients' rights or alter their litigation strategy amid legal uncertainty." *Id.*

The Ninth Circuit then denied Petitioners' request for a limited remand so that their clients—indigent death-row prisoners—could intervene. The panel concluded, "[T]he challenges … that the Defender Organizations raise—and, by extension, those that their clients would raise if they intervened in this case—are not yet ripe." Pet. App. 22a. The court applied

three factors for analyzing ripeness identified in *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998): (1) whether delayed review would cause hardship to Petitioners and their clients; (2) whether review "would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development." Pet. App. 23a-24a. On the first factor, according to the Ninth Circuit, "[d]elayed judicial review of the Final Regulations is unlikely to cause hardship to capital prisoners, even if they might change their strategy for pursuing postconviction relief in light of … the Final Regulations." Pet. App. 25a. On the second and third factors, the court concluded: "Any deficiencies in the certification process and the criteria prescribed by the Final Regulations will become clearer" as the rule is applied and certifications are challenged. Pet. App. 26a.

The Ninth Circuit did not acknowledge that Petitioners raised purely legal challenges to final agency action. Nor did it acknowledge that it was applying prudential rather than constitutional factors in determining whether this case was ripe.

Although an en banc vote was called, the petition for rehearing failed to garner a majority of the active judges. Pet. App. 95a-96a.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's two holdings independently merit certiorari review. First, the court held that Petitioners lack standing to bring an APA challenge to the Final Regulations, despite recognizing "it may be

eminently reasonable" for Petitioners to overhaul their operations. Pet. App. 13-21a. That acknowledgment should have been enough because "there can be no question that [an] organization has suffered injury in fact" when the challenged conduct threatens to impair the organization's mission and "drain [its] … resources." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). The Ninth Circuit's contrary conclusion directly conflicts with this Court's precedent and decisions of nearly every other court of appeals. The lower court justified this departure by manufacturing an unprincipled rule that subjects legal services organizations to a uniquely high standard for establishing standing.

Second, the Ninth Circuit denied on ripeness grounds Petitioners' precautionary request for a limited remand so that their clients—indigent death-sentenced prisoners—could intervene in the action and challenge the Final Regulations under the APA. Pet. App. 22a-27a. Although aware that Arizona had already applied for certification, the Ninth Circuit improperly prevented constitutionally ripe claims from proceeding and split with other courts of appeals that presume, pursuant to the APA, that purely legal challenges to final agency rules are fit for immediate judicial resolution. Additionally, the decision below demonstrates that the prudential ripeness doctrine should be revisited.

I. This Court Should Review The Ninth Circuit's Unprecedented Standing Determination, Which Demands A Heightened Injury Showing For Certain Organizations.

The test for Article III standing is familiar. "[A] plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992)). These requirements apply equally to organizations as they do for individuals. *See Warth v. Seldin*, 422 U.S. 490, 511 (1975).

At issue here is the "injury in fact" prong, which is designed "to distinguish a person with a direct stake in the outcome of a litigation—even though small—from a person with a mere interest in the problem." *United States v. Students Challenging Regulatory Agency Procedures* (*SCRAP*), 412 U.S. 669, 689 n.14 (1973). This Court has "allowed important interests to be vindicated by plaintiffs with no more at stake" than an "identifiable trifle." *Id.* at 689. The requirement does not impose a "minimum quantitative limit." *Saladin v. City of Milledgeville*, 812 F.2d 687, 691 (11th Cir. 1987).

This Court has approved suits raising weighty issues brought by plaintiffs whose "stake in the outcome" was no more "than a fraction of a vote, a $5 fine and costs, and a $1.50 poll tax." *SCRAP*, 412 U.S. at 689 n.14 (citations omitted). And injuries need not even be that direct. In *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 153-55 (2010), for example, this Court found conventional alfalfa farmers had standing to challenge the deregulation of genetically engineered alfalfa because the potential contamination by the latter would require non-genetic growers to test their crops before marketing them as non-genetic. This harm was sufficiently concrete "even if the [conventional] crops are not actually infected." *Id.* at 155.

Nor must injuries be economic in nature. Assertions of diminished "aesthetic and recreational values of [a particular] area" for prospective visitors suffice. *Laidlaw*, 528 U.S. at 183. So too a "person … may have a spiritual stake in First Amendment values sufficient to give standing to raise issues concerning the Establishment Clause and the Free Exercise Clause." *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 154 (1970). And "the violation of a procedural right" may, without "any *additional* harm beyond the one Congress has identified," "be sufficient in some circumstances to constitute injury in fact." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016).

A. The Ninth Circuit's decision contravenes this Court's precedent and conflicts with decisions of the other circuits.

Petitioners have offered undisputed evidence that the Final Regulations threaten them by imposing an

obligation to shift limited time and resources to new activities when they would not otherwise do so. These injuries are precisely the sort this Court has recognized confer standing upon an organization.

In *Havens*, 455 U.S. at 378-79, this Court held that an organization has standing where conduct undermines the organization's mission. *Havens* concerned HOME, which aimed "to make equal opportunity in housing a reality" in Richmond. *Id.* at 368. HOME's "activities included the operation of a housing counseling service, and the investigation and referral of complaints concerning housing discrimination." *Id.* The organization claimed standing because "defendants' racial steering practices" frustrated "its efforts to assist equal access to housing through counseling and other referral services." *Id.* at 379. As a result, HOME "had to devote significant resources to identify and counteract the defendant's [*sic*] racially discriminatory steering practices." *Id.*

This Court held that, because, as alleged, Havens "perceptibly impaired HOME's ability to provide counseling and referral services …, there can be no question that the organization has suffered injury in fact." *Id.* Although a mere "setback to [an] organization's abstract social interests" would not suffice, the Court explained, the injuries to HOME's "organization[al] activities—with the consequent drain on the organization's resources—constitute[d] far more than" that. *Id*; *see also McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 488 n.8 (1991) (recognizing organization's standing to challenge administrative procedures insofar as those procedures "make[ ] [the

Center's] work of assisting the Haitian refugee community more difficult and results in the diversion of … limited resources away from … other urgent needs").

Petitioners undoubtedly meet this test. The Final Regulations' vague competency standard combined with Chapter 154's draconian retroactivity provision[3] dramatically alters "the calculation of legal and financial resources available to competently prepare and litigate cases." Pet. App. 132a. Petitioners and their clients accordingly face "two untenable choices: either proceed as if Chapter 154 does not apply, and thereby risk the forfeiture of potentially meritorious claims against their convictions and death sentences if the time limitations of Chapter 154 are later found to be applicable; or attempt to comply with those stringent limitations, and thereby forego full investigation and adequate factual and legal development of their constitutional claims." Pet. App. 137a-138a.

Petitioners cannot afford to gamble with their clients' lives; indeed, their legal and ethical duties preclude them from doing so. As the district court recognized, Petitioners therefore must proceed as if

---

[3] Below, DOJ asserted the 180-day statute of limitations cannot apply prior to the date the Attorney General certifies a State. DOJ Reply Br. 9th Cir. Dkt. No. 42, at 8. Neither the statute nor the regulations support that contention. More importantly, Arizona—whom FDO-AZ will oppose in federal habeas proceedings (not DOJ)—has taken the opposite position, seeking to apply the 180-day statute of limitations to dismiss a petition on the very day it is deemed certified. *See, e.g.*, State of Arizona Motion to Dismiss, *Spears v. Stewart*, No. 00-cv-1051, (D. Ariz. July 24, 2000), Dkt. No. 14.

they will be subject to the retroactive six-month filing deadline, lest "the deadline for a habeas petitioner's application in the certified state … come and go[ ] without [a prisoner] knowing it." Pet. App. 42a. The procedural flaws codified by the Final Regulations compound this problem. As the district court found, the certification process does not allow for meaningful public comment, does not require States to make any factual showing in their applications, and permits ex parte communications. Pet. App. 54a-58a, 65a. Such infirmities leave Petitioners "without the opportunity to effectively oppose [a State's] certification as an opt-in state and indicate possible bias in the certification process." Pet. App. 123a-124a.

Saddled with this contracted timeline, Petitioners must take immediate and proactive steps to protect as many death-sentenced prisoners as possible. But as it is, "one year is barely sufficient time to file a federal capital habeas corpus petition even when the petitioner is represented by experienced, institutionally-funded, full-time, federal defender staff well versed in capital habeas litigation." *Lugo v. Sec., Fla. Dep't of Corr.*, 750 F.3d 1198, 1219 (11th Cir. 2014) (Martin, J., concurring) (emphasis omitted) (citation omitted). A successful postconviction investigation requires "federal counsel [to] collect and read the record, establish a relationship with the client, assemble a team that includes mitigation experts and fact investigators, and make preliminary evaluations regarding such matters as client competency, mental retardation, and mental health issues, as well as comply with the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases." *Id.* (citation omitted); *see also* Pet. App. 147a-

150a (declaration describing complex process of developing and filing a federal habeas petition).

Now cut the time for doing that in half. Petitioners will be left to triage, diverting resources from current clients to tend to immediate deadlines of other clients and other prisoners whose counsel are advised by Petitioners. For those individuals with fast-approaching deadlines, Petitioners must make "immediate decisions about whether to commit limited attorney time and financial resources, and, in some instances, curtail the development of claims," guessing as to which appear the most promising (or least time-consuming) while sacrificing other potentially fruitful claims (because investigation would be too onerous). Pet. App. 137a. Just as alarming, because "counsel who accept federal appointments currently do so on the basis of [their] ability and willingness to comply with a one-year statute of limitations," many will now be "force[d] … to refuse or withdraw from appointments." Pet. App. 157a. This will "increase the burden on HCRC and other attorneys [like FDO-AZ] currently handling capital post-conviction caseloads, and strain or eliminate resources that—absent the uncertainty caused by a flawed final rule—would be used to ensure qualified post-conviction representation." *Id.*

The uncertainty regarding whether state-post-conviction appointment counsel will qualify as competent without actually being so means Petitioners must "develop[ ] resources—at the expense of other representation and services—to advise and guide death-sentenced individuals in pursuing a variety of remedies to alleviate harm from limitations on their

state counsel at the outset of their cases." Pet. App 155a-156a. They also will have to request, at an earlier stage in numerous cases, "the appointment of federal counsel to seek a ruling from a federal court to prospectively prohibit the applicability of Chapter 154 in their individual case." Pet. App. 155a. And, of course, as Petitioners scramble to do what they can for as many prisoners as possible, their attorneys will have to work longer hours for the same pay.

Accordingly, the Final Regulations simply will throw Petitioners' operations into chaos. The Final Regulations do far more than "perceptibly impair" Petitioners' statutory and ethical obligations to death-sentenced prisoners. And given Petitioners' financial and other constraints (HCRC, for example, is statutorily capped at 34 attorneys), the Regulations will cause a severe "drain on [their] resources." *Havens Realty Corp.,* 455 U.S. at 379. Yet the Ninth Circuit found these undisputed consequences do not suffice to confer standing. Pet. App. 17a.

That conclusion is at sharp odds with the other courts of appeals that have faithfully "applied *Havens Realty* to justify organizational standing in a wide range of circumstances," starting with the D.C. Circuit. *Abigail Alliance for Better Access to Developmental Drugs v. Eschenbach*, 469 F.3d 129, 132-33 (D.C. Cir. 2006). In *Abigail Alliance*, an organization devoted to increasing pharmaceutical access had standing to challenge FDA regulations that "frustrated [its] efforts to assist its members and the public in accessing potentially life-saving drugs and its other activities, including counseling, referral, advocacy, and educational services." *Id.* at 132-33. The regulations

also "caused a drain on [the organization's] resources and time [by] … diverting … from these activities toward helping its members and the public address the [FDA's] unduly burdensome requirements." *Id.*

The Second Circuit similarly holds that an organization need only show "perceptible impairment" to its activities. *Nnebe v. Daus*, 644 F.3d 147, 157 (2d Cir. 2011). In *Nnebe*, NYTWA, which represented taxi drivers had standing to challenge a driver-suspension law because NYTWA "expended resources to assist its members … by providing initial counseling, explaining the suspension rules to drivers, and assisting the drivers in obtaining attorneys." *Id.* Even an interest in sound procedures is enough; although NYTWA represented drivers in the normal course, its interest was particular to the challenged rule: "The Alliance brings this suit so that when it expends resources to assist drivers who face suspension, it can expend those resources on hearings that represent bona fide process." *Id.* at 158.

For similar reasons, the Third Circuit recognized an organization that "devote[d] substantial resources to overcoming what [it] allege[d] are the disparate and inadequate educational programs caused by" the state's funding inequities had standing to sue on its own behalf. *Powell v. Ridge*, 189 F.3d 387, 391 (3d Cir. 1999). This, the court explained, "is consistent with the long line of cases in which organizations have sued to enforce civil rights, civil liberties, environmental interests, etc." *Id.* at 404 (citing cases).

These principles have been embraced by other circuits as well. In these courts, organizations need only

show "opportunity costs" of unlawful actions. *Vill. of Bellwood v. Dwivedi*, 895 F.2d 1521, 1526 (7th Cir. 1990) (fair-housing organization would devote more time and money to counseling and less to legal efforts but for "the defendant's discrimination"); s*ee Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1350 (11th Cir. 2009) ("Because it will divert resources from its regular activities to educate voters about the requirement of a photo identification and assist voters in obtaining free identification cards, the NAACP established an injury sufficient to confer standing to challenge the statute."); *see also, e.g.*, *Miami Valley Fair Hous. Ctr., Inc. v. Connor Grp.*, 725 F.3d 571, 576 (6th Cir. 2013); *Cleburne Living Ctr., Inc. v. City of Cleburne*, 726 F.2d 191, 202-03 (5th Cir. 1984); *Granville House, Inc. v. Dep't of Health & Human Servs.*, 715 F.2d 1292, 1297-98 (8th Cir. 1983).[4] The decision below conflicts sharply with this settled precedent.

B. The Ninth Circuit's new rule imposes upon legal services providers a more onerous burden for demonstrating injury.

The Ninth Circuit sought to justify its departure from settled law by carving out an unprecedented and unprincipled rule that imposes upon legal service providers a more onerous Article III showing. Specifically, it concluded that any "measures [taken by Petitioners] to prevent or mitigate the harm their clients may face due to the possible future application of

[4] Even the Ninth Circuit, until this case, generally adhered to this rule. *Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216, 1219 (9th Cir. 2012).

Chapter 154" do not constitute "an injury of [Petitioners'] own." Pet. App. 20a. The reason being, "[a]ssisting and counseling clients in the face of legal uncertainty is the *role* of lawyers." Pet. App. 18a. "[L]awyers," the court explained, do not "suffer a legally cognizable injury … when they take measures to protect their clients' rights or alter their litigation strategy amid legal uncertainty." *Id*. To hold otherwise, the court concluded, "would permit attorneys to challenge any governmental action or regulation when doing so would make the scope of their clients' rights clearer and their strategies to vindicate those rights more easily selected." Pet. App. 19a.

That conclusion is far too broad. The court failed to account for a distinction aptly captured by traditional standing caselaw. In the normal course of litigation and decisionmaking, an attorney must make strategic judgments with some uncertainty as to the outcome. To what extent a corporate client subject to a Justice Department investigation must identify individual actors following issuance of the Yates Memo falls within this category. *See* Memorandum from Sally Quillian Yates, Deputy Attorney General, U.S. Department of Justice, *Individual Accountability for Corporate Wrongdoing* (Sept. 9, 2015), http://tinyurl.com/znawfcv. But absent some identifiable harm to the attorney or his organization, this sort of uncertainty would not confer standing.

As demonstrated by Petitioners' unrebutted assertions quoted above (at 16-19), what we have here is worlds away from a lawyer's day-to-day decisionmaking, and plainly qualifies as the type of large-scale operational restructuring that suffices for injury

in fact under *Havens*. That these organizations perform their mission through legal work does not justify departing from standing caselaw embraced by this Court and the other circuits. *Cf. N.Y. Civil Liberties Union v. N.Y.C. Transit Authority*, 684 F.3d 286, 296 (2d Cir. 2015) (legal services organization could challenge city board's policy limiting access to proceedings against non-clients when organization "alleged an interest in open access … as a matter of professional responsibility" to prepare for clients' hearings).

C. Any reliance on *Clapper* is misplaced.

Although the Ninth Circuit claimed to rely on *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138 (2013), it gave the case little attention. Pet. App. 19a-20a. Where it did, the panel suggested this Court held that even where plaintiffs take "measures [that are] … 'a reasonable reaction to a risk of harm,'" they may still have "manufacture[d] standing merely by inflicting harm on themselves based on their fears of hypothetical future harm." Pet. App. 20a (quoting *Clapper*, 133 S. Ct. at 1151).

That is not what this Court held. It said, "Respondents' contention that they have standing because they incurred certain costs as a reasonable reaction to a risk of harm is unavailing—because the harm respondents seek to avoid is not certainly impending." *Clapper*, 133 S. Ct. at 1151. In other words, the reaction was not reasonable (at least for Article III purposes)—and the injury was deemed manufactured—because the identified harm was not a realistic threat caused by § 1881. By contrast, the court below acknowledged the measures Petitioners must

take to fulfill their obligations "to prevent or mitigate the harm [to] their clients" in response to the Final Regulations "may be eminently reasonable." Pet. App. 20a. It is thus difficult to understand how they could be considered manufactured or self-inflicted.

They are not. Confronted with an ill-defined competency standard and a retroactively condensed statute of limitations, Petitioners must—in compliance with their statutory and ethical obligations—take affirmative steps to protect their clients' interests once the Final Regulations take effect. That is particularly so given Arizona's pending certification application.

Despite the panel's slight use of *Clapper*, DOJ has continued to claim the case dictates that Petitioners' injuries are not "certainly impending" because they are based on "'speculat[ion] and … assumptions' about whether Chapter 154's procedures will apply to any of their clients." Opp. to Pet. For Reh'g, 9th Cir. Dkt. No. 69, at 10. The panel did not, however, draw that conclusion. In fact, it recognized Petitioners' clients may face a "certainly impending" injury and Petitioners' efforts in response may be reasonable. Pet. App. 20a. But it reasoned that lawyers, unlike other plaintiffs, cannot "suffer a legally cognizable injury in fact when they take measures to protect their clients' rights or alter their litigation strategy amid legal uncertainty." Pet. App. 18a.

Any continued effort by DOJ to make more of *Clapper* is disingenuous and would supply distinct grounds for certiorari review, to resolve (1) whether a showing of future injury may be met by *either* the "substantial risk" of harm *or* "certainly impending"

harm standard, *Susan B. Anthony List v. Driehaus* (*SBAL*), 134 S. Ct. 2334, 2341 (2014) (addressing both); *Clapper*, 133 S. Ct. at 1150 n.5 (noting use of substantial risk standard), and (2) the scope of *Clapper* outside its unique context, *see, e.g.*, *Remijas v. Neiman Marcus Grp.*, 794 F.3d 688, 694 (7th Cir. 2015) ("[I]t is important not to overread *Clapper*."); *McCardell v. HUD*, 794 F.3d 510, 520 (5th Cir. 2015) (limiting *Clapper* to allegations that "depend[ ] on a long and tenuous chain of contingent events").

II. Certiorari Review Is Necessary To Resolve The Ninth Circuit's Unprecedented Presumption Against Review Of Pre-enforcement Challenges

The Ninth Circuit did not end its analysis after issuing its decision on standing; instead, it rejected Petitioners' request for a limited remand to permit death-sentenced prisoners to show why they should be permitted to intervene. The court concluded such action would be unnecessary because any challenge to the Final Regulations is not ripe. Pet. App. 22a.

"The ripeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003) (citation and quotation marks omitted). While courts analyze the plaintiff's identity to determine standing, "ripeness is peculiarly a question of timing." *Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 140 (1974). Constitutionally, all that is required is "the existence of a live Case or Controversy," rather than a future, hypothetical one. *Duke Power Co. v.*

Carolina Envtl. Study Grp., Inc., 438 U.S. 59, 81 (1978). Thus, whether a claim is constitutionally "ripe for review" is nearly identical to the question whether a plaintiff has suffered injury in fact. *See, e.g., SBAL*, 134 S. Ct. at 2341 n.5.

The Ninth Circuit incorrectly surmised that "[d]elayed judicial review of the Final Regulations is unlikely to cause hardship to capital prisoners, even if they might change their strategy for pursuing post-conviction relief in light of … the Final Regulations." Pet. App. 25a. But the consequences of that changed strategy are precisely the concrete and immediate injury capital prisoners suffer. As we have explained, *supra* 16-19, the Final Regulations concretely and immediately burden Petitioners, rendering their challenge a live controversy. It also directly burdens their clients, death-sentenced prisoners.

By thwarting valid APA claims with no jurisdictional defect, the Ninth Circuit established a presumption against review that conflicts with the other federal courts of appeals. Furthermore, the Ninth Circuit's fundamental misunderstanding of the prudential ripeness factors provides this Court an opportunity to reconsider the prudential ripeness doctrine in light of its tension with the "virtually unflagging" obligation of federal courts "to hear and decide cases within [their] jurisdiction." *SBAL*, 134 S. Ct. at 2347 (quotation marks omitted).

A. The decision below conflicts with other circuits by ignoring the presumption in favor of review of purely legal challenges to agency rules that cause parties to alter their conduct.

The "basic rationale" of prudential ripeness "is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967). When confronted with a challenged regulation, federal courts must "evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* at 149; *see In re Coleman*, 560 F.3d 1000, 1006 (9th Cir. 2009) (referring to this Court's "two-part test for determining the prudential component of ripeness in the administrative context").

Both factors weigh in favor of immediate review of challenges to the Final Regulations, whether brought by Petitioners or their clients. In its haste to hold otherwise, the Ninth Circuit broke with other circuits by creating a presumption against review. And it did so without affording Petitioners' clients an opportunity on remand to intervene and make the appropriate showing that their claims would be ripe, even if Petitioners' are not.

1. The key considerations attending the "fitness" prong are whether challenges present "purely legal"

questions and whether "the regulations in issue" qualify as "final agency action" under the APA, 5 U.S.C. § 704. *Abbott*, 387 U.S. at 149-50; *see Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 479 (2001).

The D.C. Circuit *presumes* that "purely legal issues are fit for judicial decision." *Cement Kiln Recycling Coal. v. EPA*, 493 F.3d 207, 215 (D.C. Cir. 2007). And it recognizes that claims like those of Petitioners and their clients—"that an agency's action is arbitrary and capricious or contrary to law" or that "an agency violated the APA by failing to provide notice"—are precisely the type of "purely legal" challenges that qualify for this presumption. *Id.* (quoting *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 417 F.3d 1272, 1282 (D.C. Cir. 2005)); *see also Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023 n.18 (D.C. Cir. 2000).

The Eighth Circuit likewise recognizes "cases presenting purely legal questions are more likely to be fit for judicial review." *Iowa League of Cities v. EPA*, 711 F.3d 844, 867 (8th Cir. 2013). And in the Federal Circuit, a determination that issues "are purely legal" conclusively resolves the fitness analysis. *Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1582 (Fed. Cir. 1993) (agreeing "that the case is ripe because the issues … are purely legal, and *therefore* will not benefit from further factual development" (emphasis added)). *But see Ernst & Young v. Depositors Econ. Protection Corp.*, 45 F.3d 530, 536-37 (1st Cir. 1995) ("The notion that disputes which turn on purely legal questions are always ripe for judicial review is a myth.").

The Ninth Circuit did not once mention that Petitioners' claims are "purely legal," let alone acknowledge any presumption of fitness. Nor did it recognize that Petitioners challenge "unquestionably final" agency action—the promulgation of a final rule pursuant to APA requirements. *Cement Kiln*, 493 F.3d at 215.[5] Instead, focusing on this Court's analysis in *Ohio Forestry Association v. Sierra Club*, 523 U.S. 726 (1998), the Ninth Circuit contended that "the courts would benefit from further factual development of the issues presented" because "[a]ny deficiencies in the certification process and the criteria prescribed by the Final Regulations will become clearer as the Attorney General makes certification decisions." Pet. App. 23a, 26a (quoting *Ohio Forestry*, 523 U.S. at 733). But in *Ohio Forestry*, this Court explained that review of a Forest Service resource-management plan "would require time-consuming judicial consideration of the details of an elaborate, technically based plan, which predicts consequences that may affect many different parcels of land in a variety of ways, and which effects themselves may change over time." 523 U.S. at 736. The district court's efficient treatment of Petitioners' purely legal claims, *see* Pet. App. 43a-66a, belies the suggestion that the challenged rule here is anything like the complicated plan in *Ohio Forestry*.

---

[5] Indeed, the Ninth Circuit itself has recognized that "[j]udicial intervention does not interfere with further administrative action when an agency's decision is at an administrative resting place." *Cottonwood Envtl. Law Ctr. v. USFS*, 789 F.3d 1075, 1084 (9th Cir. 2015) (quotation marks omitted)).

Moreover, in that case, "[t]he possibility that further consideration will actually occur before the Plan is implemented [was] not theoretical, but real." 523 U.S. at 735. Here, pursuant to congressional mandate, 28 U.S.C. § 2265(b), DOJ has codified regulations that "are not subject to refinement on a case-by-case basis," *Kiser v. Reitz*, 765 F.3d 601, 606 n.2 (6th Cir. 2014); the Final Regulations are now the law when it comes to the certification procedure for States. A legal challenge to an agency's final rules is a far cry from the hypothetical and fact-bound question of whether a preliminary plan that "does not itself authorize the cutting of any trees," *Ohio Forestry*, 523 U.S. at 729, "is improperly skewed … toward too many trees being cut," *id.* at 736.

The Ninth Circuit also split with the D.C. Circuit in concluding that "judicial intervention would inappropriately interfere with further administrative action." Pet. App. 23a (quoting *Ohio Forestry*, 523 U.S. at 733). In the panel's view, immediate review prevents the Attorney General from "interpret[ing] and apply[ing] the Final Regulations when evaluating specific state capital-counsel mechanisms." Pet. App. 26a. It shrugged off "complain[ts]" regarding the vagueness of the Final Regulations because "[t]hese issues will sort themselves out as the Attorney General applies the Final Regulations, makes certification decisions, and justifies those decisions in the D.C. Circuit, if indeed challenged." Pet. App. 26a.

There is nothing "inappropriate" about judicial review at this time. As the D.C. Circuit recognizes, the failure to "giv[e] some definitional content" to a key regulatory standard (such as the catch-all provision

here), "is squarely rooted in the prohibition under the APA that an agency not engage in arbitrary and capricious action." *Pearson v. Shalala*, 164 F.3d 650, 660 (D.C. Cir. 1999) (citing 5 U.S.C. § 706(2)(A)). Even when an agency prefers to "proceed case by case … it must be possible for the regulated class to perceive the principles which are guiding agency action." *Id.* at 661. The D.C. Circuit has altogether "debunked" the theory that regulations are not "fit for review because their applicability to a given activity remains within the [agency's] discretion." *Nat'l Ass'n of Home Builders*, 417 F.3d at 1282. That an agency "retains some measure of discretion with respect to" the application of an otherwise final action "does not make [a] purely legal challenge unripe." *Id.*

The decision below contravenes those principles and gives agencies an escape valve. Now, they may simply argue that a regulatory challenge is not ripe because new regulations may later be applied in a more specific manner. Thus, the Ninth Circuit's rule incentivizes agencies to violate the APA and to enact vague regulations so that they may postpone or avoid review.[6]

2. The "hardship" inquiry dovetails with the question whether a claim is ripe as a constitutional matter: Is "the impact of the regulations upon the

[6] By shielding regulations from pre-enforcement APA challenges and insisting they be challenged in an as-applied context, such a regime also affords the agency deference in interpreting its regulations where no such deference would—or should—be afforded in an initial challenge. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997).

petitioners [ ] sufficiently direct and immediate as to render the issue appropriate for judicial review at this stage"? *Abbott*, 387 U.S. at 152. With respect to the prudential ripeness analysis, however, courts may dismiss as unripe actions involving injuries exceeding the constitutional floor if "there is [in]sufficient risk of suffering immediate hardship to warrant prompt adjudication." *Cedars-Sinai*, 11 F.3d at 1580-81. For example, a claim may not be ripe when the challenged action does not "force [the plaintiff] to modify its behavior in order to avoid future adverse consequences." *Ohio Forestry*, 523 U.S. at 734.

The Ninth Circuit dismissed hardship concerns out of hand simply because the Final Regulations do not facially "require anything of capital prisoners—or indeed of their lawyers." Pet. App. 24a-25a. But, as explained, the Final Regulations "require[ ] an immediate and significant change in [Petitioners'] conduct." *Abbott*, 387 U.S. at 153. And they present Petitioners' clients with an impossible choice: Assume Arizona and California will be certified, thereby cutting their limitations periods in half, and sacrifice the investigation of claims that could save their lives, or blindly hope no state will be certified, and risk losing their chance at relief altogether. Pet. App. 137a-138a. This dilemma is particularly harsh given Chapter 154's strict limitation on amending claims once a death-row prisoner's petition is filed. 28 U.S.C. § 2266(b)(2)(B). And because Chapter 154 expedites review once a petition is filed in district court, Petitioners' clients will not be able to abey their attempt to obtain habeas relief while challenging a certification decision in the D.C. Circuit; thus, their sacrificed investigations will likely be lost forever. *See id.*

§ 2266(a). The Eighth Circuit, by contrast, refuses to "require parties to operate beneath the sword of Damocles until the threatened harm actually befalls them." *Iowa League of Cities*, 711 F.3d at 867. The Final Regulations, if left unreviewed, force Petitioners and their clients to "immediately alter their behavior or play an expensive game of Russian roulette." *Id.* at 868.

Furthermore, the Ninth Circuit ignored the fact that "delayed resolution of these issues would foreclose any relief from the p*resent* injury suffered by" Petitioners and their clients. *Duke Power Co.*, 438 U.S. at 82 (emphasis added). Petitioners must make spending and resource-allocation decisions *now*—with taxpayer money, no less—and there is no mechanism for recovering that lost time and money if someone later wages a successful challenge to a certification decision. Postponed judicial review thus imposes severe hardship on Petitioners and their clients, and there is neither "a statutory bar" nor "some other unusual circumstance" blocking review now. *Abbott*, 387 U.S. at 153. "[A]ccess to the courts under the Administrative Procedure Act … must be permitted" in this case. *Id.*

B. This case presents an excellent opportunity for this Court to revisit the prudential ripeness doctrine.

The Ninth Circuit's decision brings another issue to the forefront: whether the time has come to reconsider the doctrine of prudential ripeness. *See SBAL*, 134 S. Ct. at 2347. This case presents the perfect opportunity for this Court to confront that issue.

In *Lexmark International, Inc. v. Static Control Components, Inc.*, this Court confirmed that a federal court's refusal to "adjudicate [a] claim on grounds that are 'prudential' rather than constitutional" would be "in some tension with … the principle that a 'federal court's obligation to hear and decide' cases within its jurisdiction 'is virtually unflagging.'" 134 S. Ct. 1377, 1386 (2014) (quoting *Sprint Comm'ns, Inc. v. Jacobs*, 134 S. Ct. 584, 591 (2013)). The Court thus recharacterized "prudential standing" as a question of statutory interpretation. *Id.* at 1386-87. The question is not whether "Congress *should* have authorized" a particular plaintiff to sue, "but whether Congress in fact did so." *Id.* at 1388. A federal court "cannot limit a cause of action that Congress has created merely because 'prudence' dictates." *Id.*

In *SBAL*, "[r]espondents contend[ed] that … 'prudential ripeness' factors confirm[ed] that the claims at issue [were] nonjusticiable." 134 S. Ct. at 2347. This Court first reiterated "that petitioners [had] alleged a sufficient Article III injury." *Id.* Then, citing *Lexmark*, it noted the inherent tension with dismissing a federal suit on prudential grounds. *Id.* But it did not need not to "resolve the continuing vitality of the prudential ripeness doctrine … because the 'fitness' and 'hardship' factors" were "easily satisfied" in that case. *Id.* The Sixth Circuit has picked up this thread. *Kiser*, 765 F.3d at 606-07 & n.2 (addressing claim, "dismissed as unripe by the district court, using the constitutional standing framework" and considering "[t]he 'prudential' ripeness factors" in a footnote); *see also Kentucky v. U.S. ex rel. Hagel*, 759 F.3d 588, 596 n.3 (6th Cir. 2014).

The Ninth Circuit remarked in passing that standing and ripeness "often boil down to the same question," Pet. App. 22a n.15 (quotation marks omitted), but its analysis was not guided by constitutional requirements. Its hasty and conclusory application of *Ohio Forestry*[7]—and the fact that its reasoning conflicts sharply with that of the D.C. and Eighth Circuits—proves why federal courts cannot "apply [their] independent policy judgment[s]," *Lexmark*, 134 S. Ct. at 1388, to determine whether a case is justiciable.

The doctrine also has become unworkable. Courts of appeals, for example, still struggle with "the relationship between … fitness and hardship." *Ernst & Young*, 45 F.3d at 535. *Compare id.*, *with Gen. Elec. Co. v. EPA*, 290 F.3d 377, 381 (D.C. Cir. 2002). In dealing with the malleable prudential ripeness factors, federal courts must do what the doctrine seeks to avoid: expend scarce judicial resources to deal with hypotheticals and counterfactuals, despite having determined that jurisdiction exists under Article III. There is little need for such a complex inquiry when the straightforward constitutional question—whether a plaintiff's claims "demonstrate sufficient ripeness to establish a concrete case or controversy"—sufficiently guards against advisory decisions. *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 579 (1985).

Here, the APA supplies Petitioners and their clients with a cause of action for challenging final

---

[7] *Ohio Forestry* makes no mention of the Constitution or Article III. 523 U.S. 726.

agency action. 5 U.S.C. § 702. As confirmed by the district court, Chapter 154 in no way limits that right. Pet. App. 43a. One panel's preference not to hear a case cannot overcome Congress's pronouncement that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action … *is entitled* to judicial review thereof." § 702 (emphasis added).

As in *SBAL*, Petitioners (and their clients) have demonstrated an Article III injury and a constitutionally ripe claim. 134 S. Ct. at 2341 n.5 ("[T]he Article III standing and ripeness issues in this case boil down to the same question." (quotation marks omitted)); *supra* 16-19, 26. Additionally, as in *SBAL,* Petitioners (and their clients) easily satisfy the fitness and hardship factors. *Supra* 27-33. But if this Court disagrees with that conclusion, review here provides an opportunity to decide that ripeness can only be a constitutional concern.

III. This Case Is Exceptionally Important And Perfectly Positioned For This Court's Resolution

A. The decision below has profound implications, extending geographically beyond Arizona and California and substantively beyond habeas corpus. Indeed, Texas applied for certification under Chapter 154 even before Arizona did. Pet. App. 89a. Beyond California, Texas, and Arizona, equally burdened are the dozens of organizations in the thirty-one death-penalty states that are home to thousands of death-sentenced prisoners whose habeas claims are placed in

jeopardy. Yet, this is the only case challenging the Final Regulations. Unless this Court grants the petition, three judges will have thwarted judicial review, under the APA, of the merits of a regulation that immediately threatens all of these organizations and their clients. *See* SER2_22-23 (organizations' statement of interest in rulemaking process).

Beyond habeas, the Ninth Circuit's novel approach to standing jeopardizes the ability of organizations operating on shoestring budgets to vindicate their mission when government conduct causes a substantial drain on and reallocation of their resources. *See, e.g.*, *McNary*, 498 U.S. at 488 n.8. The Ninth Circuit's decision poses a broader threat to individuals and organizations who seek to vindicate their constitutional rights without violating the law, as well corporations that wish to avoid paying statutory penalties for violating vague or unlawful regulations.

B. Given "the importance of the issue and the novel view of standing adopted by the Court of Appeals," *Clapper*, 133 S. Ct. at 1146, this Court should grant certiorari. The Ninth Circuit's approach to ripeness fares no better, demonstrating why this Court has called the prudential ripeness doctrine into question altogether. The decision below frustrates "a basic presumption" only enhanced by the APA: "[J]udicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Abbott*, 387 U.S. at 140.

And this case presents an excellent vehicle for addressing the important and life-altering issues raised

here. The factual record was undisputed, leading to resolution at summary judgment of pure legal questions. Moreover, the standing and ripeness questions may be reviewed independently, as resolution of the former would allow Petitioners to proceed to the merits while resolution of the latter would enable death-sentenced prisoners to demonstrate that plausible claims for relief will be sacrificed as their lawyers operate in a world of a potentially artificial *de facto* six-month statute of limitations.

* * *

This Court should take this opportunity to correct the damage to standing and ripeness law worked by the Ninth Circuit, consider the viability of the prudential ripeness doctrine, and restore a measure of predictability to capital habeas proceedings in the process.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

Marc R. Shapiro
Counsel of Record
ORRICK, HERRINGTON &
SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
(212) 506-5000
mrshapiro@orrick.com

Date: January 10, 2017

APPENDIX A

For Publication

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HABEAS CORPUS RESOURCE CENTER; OFFICE OF THE FEDERAL PUBLIC DEFENDER FOR THE DISTRICT OF ARIZONA,

Plaintiffs-Appellees,

v.

UNITED STATES DEPARTMENT OF JUSTICE; LORETTA E. LYNCH, Attorney General,

Defendants-Appellants.

No. 14-16928

D.C. No. 4:13-cv-04517-CW

OPINION

Appeal from the United States District Court
for the Northern District of California
Claudia Wilken, Senior District Judge, Presiding

Argued and Submitted
December 10,2015—San Francisco, California

Filed March 23, 2016

Before: Diamuid F. O'Scannlain, Barry G. Silverman,
and Carlos T. Bea, Circuit Judges.

Opinion by Judge Bea

SUMMARY*

Standing/Ripeness

The panel vacated the district court's decision on summary judgment and remanded with instructions to dismiss an action raising challenges to the Attorney General's 2013 regulations implementing a procedure for certifying a state's capital-counsel mechanisms for the fast-tracking of capital prisoners' federal habeas cases.

The panel held that the plaintiffs, the Habeas Corpus Resource Center and the Office of the Federal Public Defender for the District of Arizona, two governmental organizations that provide legal representation to capital defendants and prisoners, did not have standing to bring this action based on their theory of direct injury. Because the plaintiffs have not suffered a legally cognizable injury as a result of the promulgations of the final regulations, the panel did not need to address further their contentions that they had standing to challenge procedural errors in the notice-and-comment-rulemaking process and third-party standing on behalf of their clients.

The panel declined the plaintiffs' request for a limited remand to allow their clients an opportunity

*This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

to intervene. The panel wrote that the Attorney General has not yet made any certification decisions, and, thus, challenges to the procedures and criteria set forth in the regulations are not ripe for review.

COUNSEL

Samantha Lee Chaifetz (argued), Melissa N. Patterson, and Michael Raab, United States Department of Justice, Civil Division, Washington, D.C., for Defendants-Appellants.

Marc Shapiro (argued), Orrick, Herrington & Sutcliffe LLP, New York, New York; George E. Greer, Orrick, Herrington & Sutcliffe LLP, Seattle, Washington; Shannon Christine Leong, Catherine Y. Lui, and Darren S. Teshima, Orrick, Herrington & Sutcliffe LLP, San Francisco, California, for Plaintiffs-Appellees.

Kent S. Scheidegger, Criminal Legal Foundation, Sacramento, California, for Amici Curiae Marc Klaas and Edward G. Hardesty.

OPINION

BEA, Circuit Judge:

Title 28, chapter 154 of the United States Code ("Chapter 154") permits the "fast-tracking" of federal habeas cases for capital prisoners from states that offer competent counsel to indigent capital prisoners during state postconviction proceedings. *See* 28 U.S.C. §§ 2261-2266. "Fast-tracking" principally affects habeas corpus petitioners because it contracts from one year to six months the period in which petitioners may file a timely federal habeas petition. *See*

id. § 2263(a). Before a state can avail itself of Chapter 154's "fast-tracking" provisions, it must request and receive certification from the Attorney Gerneral[1] that it "has established a mechanism for providing counsel in postconviction proceedings" to indigent capital prisoners. *Id.* §§ 2261(b)(1), 2265(a)(1)(A). In 2013, the Attorney General finalized regulations to implement a certification procedure, pursuant to 28 U.S.C. § 2265(b), and the plaintiffs then brought this action, which raises numerous challenges to the regulations, which challenges are based upon the Administrative Procedure Act ("APA"). On summary judgment, the district court sustained most of the plaintiffs' challenges, found the regulations arbitrary or capricious in several respects, and enjoined the regulations from going into effect. We vacate the district court's decision and remand with instructions to dismiss this case because the plaintiffs, two governmental organizations that provide legal representation to capital defendants and prisoners, did not have standing to bring this action. Furthermore, we decline the plaintiffs' request for a limited remand to allow their clients an opportunity to intervene; the Attorney General has not yet made any certification decisions, and, thus, challenges to the procedures and criteria set forth in the regulations are not yet ripe for review.

---

[1] The United States Department of Justice and the Attorney General are named as defendants in this case. Because the Attorney General is vested with the authority to promulgate the regulations at issue here, *see* 28 U. S.C. § 2265(b), we refer to the Attorney General when discussing the defendants. Loretta E. Lynch was substituted for Eric H. Holder Jr. as Attorney General on April 27, 2015.

I

A. Background on Chapter 154 and the Final Regulations

Although the federal Constitution requires that counsel be appointed for indigent criminal defendants when a conviction results in imprisonment, *see Alabama v. Shelton*, 535 U.S. 654, 661-62 (2002), this requirement does not extend, as a federal constitutional matter, to postconviction collateral attacks on a conviction or sentence in state or federal court, *see Pennsylvania v. Finley*, 481 U.S. 551, 555-59 (1987). Chapter 154, which was added by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), provides procedural benefits to states that voluntarily appoint counsel to represent indigent capital prisoners during state postconviction proceedings. *See* 28 U.S.C. §§ 2261-2266.[2]

For a state to "opt in" to Chapter 154, it must request and receive certification from the Attorney General that it "has established a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State postconviction proceedings brought by indigent prisoners who have been sentenced to death." *Id.* § 2265(a)(1)(A); *see id.* § 2261(b)(1). For the state to invoke Chapter 154 in a particular capital prisoner's federal habeas case, it must have appointed counsel to represent the prisoner during state postconviction

[2] Federal law provides for the appointment of counsel to indigent capital prisoners during federal habeas proceedings. *See* 18 U.S.C. § 3599(a)(2).

proceedings pursuant to its capital-counsel mechanism, unless the prisoner validly waived counsel, retained his own counsel, or was found not indigent. *Id.* § 2261(b)(2).[3]

If Chapter 154 applies to a federal habeas case, then, among other things, (1) the capital prisoner can secure an automatic stay from execution while his state postconviction and federal habeas proceedings are ongoing, *see id.* § 2262; (2) the statute of limitations for filing a federal habeas petition is shortened from one year to six months from the date of final judgment of the state courts on direct appeal, *compare id.* § 2244(d) (general rule), *with id.* § 2263(a) (Chapter 154 rule); and (3) the federal courts must give priority status to the habeas case and resolve it within the time periods specified by Chapter 154, *see id.* § 2266.

Chapter 154 requires the Attorney General to certify state capital-counsel mechanisms that comply

---

[3] Federal courts entertaining habeas corpus petitions were previously required to determine whether a state's capital-counsel mechanism qualified the state to receive Chapter 154's benefits. *See* 28 U.S.C. § 2261(b) (Supp. III 1997); *Spears v. Stewart*, 283 F.3d 992, 1008-09 (9th Cir. 2002) (amended opinion). In 2006, Congress amended Chapter 154 to shift responsibility for determining the adequacy of state capital-counsel mechanisms from the federal courts to the Attorney General. *See* USA PATRIOT Improvement & Reauthorization Act of 2005, Pub. L. No. 109-177, § 507, 120 Stat. 192, 250-51 (2006). Under all versions of the statute, such federal habeas courts must still determine whether the state did appoint counsel to represent the capital prisoner during state postconviction proceedings, pursuant to the state's capital-counsel mechanism.

with the requirements of Chapter 154, and such certification decisions are subject to de novo review in the U.S. Court of Appeals for the D.C. Circuit. *Id*. § 2265(a), (c). The Attorney General must also promulgate regulations to implement such certification procedure. *Id*. § 2265(b). After engaging in notice-and-comment rulemaking, the Attorney General finalized such regulations in September 2013 ("Final Regulations"). *See* 78 Fed. Reg. 58,160 (Sept. 23, 2013).[4]

The Final Regulations establish a procedure for certifying whether a state's mechanism is adequate for the appointment of professionally competent counsel to represent indigent capital prisoners during state postconviction proceedings. The Final Regulations require a state to request certification; the Attorney General must post the state's request on the Internet, solicit public comments, and review such comments during the certification process. *See* 28 C.F.R. § 26.23. If the Attorney General certifies that a state's capital-counsel mechanism conforms to the requirements of Chapter 154 and the Final Regulations, she also must determine the date on which the state established its mechanism. *See* 28 C.F.R. § 26.23(c) – (d); *see also*

[4] The Attorney General first issued final regulations under Chapter 154 in 2008. *See* 73 Fed. Reg. 75,327 (Dec. 11, 2008). The district court preliminarily enjoined the Attorney General from putting those regulations into effect, concluding that notice of certain aspects of the final regulations had been inadequate. *Habeas Corpus Res. Ctr. v. U.S. Dep't of Justice*, No. C 08-2649 CW, 2009 WL 185423, at *7-*8, *10 (N.D. Cal. Jan. 20, 2009). The Attorney General subsequently withdrew those regulations. *See* 75 Fed. Reg. 71,353 (Nov. 23, 2010).

28 U.S.C. § 2265(a)(1)(B). The certification is effective as of the date the Attorney General finds the state established its adequate mechanism; as this date can be in the past, a certification decision may apply retroactively. 28 U.S.C. § 2265(a)(2); 28 C.F.R. § 26.23(c).

The Final Regulations also set forth substantive criteria that a state's capital-counsel mechanism must meet to be certified. Consistent with 28 U.S.C. § 2261(c) – (d), a state's mechanism must require a court of record to appoint counsel to represent an indigent capital prisoner in state postconviction proceedings unless the capital prisoner competently rejected the offer of counsel or was not indeed indigent. 28 C.F.R. § 26.22(a). If the court appoints counsel, the attorney must not have represented the prisoner at trial, unless the attorney and prisoner expressly agree otherwise. *See id*. Under the Final Regulations, a state's capital-counsel mechanism must include competency and compensation standards for counsel appointed pursuant to the mechanism. The Final Regulations provide two competency benchmarks, as well as a catchall provision for mechanisms that "otherwise reasonably assure a level of proficiency appropriate for State postconviction litigation in capital cases." *Id*. § 26.22(b)(2). Similarly, the Final Regulations provide four compensation benchmarks, as well as a catchall provision for mechanisms that are "otherwise reasonably designed to ensure the availability for appointment of counsel" satisfying the competency standards. *Id*. § 26.22(c)(2). A state's mechanism must also authorize payment of "the reasonable litigation expenses of appointed counsel." *Id*. § 26.22(d); *accord* 28 U.S.C. § 2265(a)(1)(A).

B. Procedural History

After the Attorney General issued the Final Regulations in 2013, the Habeas Corpus Resource Center ("HCRC") and the Office of the Federal Public Defender for the District of Arizona ("Arizona FPD") (collectively, "Defender Organizations"), commenced this action, in which they sought to block the Final Regulations from taking effect. Their complaint alleged four causes of action under the APA: (1) the Attorney General had failed to give adequate notice regarding certain aspects of the Final Regulations; (2) the Attorney General had failed to respond to significant public comments made about the Final Regulations during notice-and-comment rulemaking; (3) the certification process prescribed by the Final Regulations is arbitrary or capricious because it is exempt from the APA's notice-and-comment-rulemaking requirements and does not allow for meaningful public participation; and (4) the substantive criteria set forth in the Final Regulations are arbitrary or capricious because they do not provide sufficient competency standards and fail to establish the factual bases on which the Attorney General will make certification decisions. [5]

The Defender Organizations are governmental organizations that counsel capital defendants and prisoners and represent capital prisoners in federal

[5] The Defender Organizations voluntarily withdrew a fifth cause of action, which alleged that the Attorney General's "involvement in the rulemaking and certification process violates the Due Process Clause of the United States Constitution."

habeas proceedings.[6] According to declarations submitted by the Defender Organizations to the district court, vagueness in the Final Regulations prevents the Defender Organizations from making reasonable predictions as to whether and how the Attorney General will certify state capital-counsel mechanisms and, thus, whether Chapter 154 may apply to their clients' federal habeas cases. The Defender Organizations declared that, as a result, they must make immediate strategic and resourcing decisions, such as "whether to commit limited attorney time and financial resources," whether to "curtail the development of claims to include in a federal [habeas] petition," and how to advise appellate and postconviction counsel to preserve capital defendants' and prisoners' rights for their eventual federal habeas cases.

The district court agreed that "confusion" caused by the Final Regulations required the Defender Organizations to "make urgent decisions regarding their litigation, resources, and strategy." The district court held that this "confusion" was a legally cognizable injury sufficient to give the Defender Organizations standing to challenge the Final Regulations; it also ruled that the Defender Organizations' challenges to the Final Regulations were ripe for re-

---

[6] The HCRC is an office within the judicial branch of the State of California that represents indigent capital prisoners in state postconviction, federal habeas, and executive clemency proceedings. Similarly, the Arizona FPD is a federal defender organization that represents capital prisoners in federal habeas proceedings, provides legal assistance to capital defendants and prisoners and their counsel, and trains attorneys who represent capital prisoners in federal habeas proceedings.

view. The district court issued a temporary restraining order preventing the Attorney General from applying the Final Regulations. The Defender Organizations then filed a motion for a preliminary injunction, which the district court granted. The Attorney General appealed the district court's order granting a preliminary injunction; while the appeal was pending, the parties cross-moved for summary judgment. On summary judgment, the district court sustained most of the Defender Organizations' challenges to the Final Regulations and found the Final Regulations arbitrary or capricious in several respects. The district court thus ordered that the Attorney General refrain from putting the Final Regulations into effect and held that the Attorney General "must remedy the defects identified in this order in any future efforts to implement the procedure prescribed by chapter 154." The Attorney General appeals this decision.[7]

II

Article III of the Constitution limits the jurisdiction of federal courts to "Cases" and "Controversies." U.S. Const. art. III, § 2. The case-or-controversy requirement ensures that "[f]ederal courts [do] not 'decide questions that cannot affect the rights of litigants in the case before them' or give 'opinion[s] advising what the law would be upon a hypothetical state of facts.'" *Chafin v. Chafin*, 133 S. Ct. 1017, 1023 (2013) (third alteration in original) (quoting *Lewis v.*

[7] The district court's final judgment superseded the preliminary injunction. As a result, we previously granted the Attorney General's unopposed motion to dismiss the appeal of the district court's order granting the preliminary injunction as moot.

Continental Bank Corp., 494 U.S. 472, 477 (1990)). This case involves two components of the Article III case-or-controversy requirement: standing, which concerns *who* may bring suit, and ripeness, which concerns *when* a litigant may bring suit. As noted, the district court found that the Defender Organizations had standing to bring this suit and that their challenges to the Final Regulations were ripe for review. We review the district court's standing and ripeness determinations de novo. *See Colwell v. Dep't of Health & Human Servs.*, 558 F.3d 1112, 1121 (9th Cir. 2009).[8]

---

[8] We note that the Supreme Court previously rejected, on jurisdictional grounds, a challenge arising out of the prior version of Chapter 154. Before the statute was amended in 2006, federal habeas courts—not the Attorney General—determined whether a state's capital-counsel mechanism qualified the state to receive Chapter 154's benefits. *See supra* note 3. In *Calderon v. Ashmus,* 523 U.S. 740, 743 (1998), a class of California capital prisoners brought suit under the Declaratory Judgment Act, 28 U.S.C. § 2201(a), seeking "declaratory and injunctive relief to resolve uncertainty over whether Chapter 154 applied" to them. *Ashmus*, 523 U.S. at 743. The Supreme Court found that this was not a justiciable Article III case or controversy. *Id.* at 749. The Court noted that the suit would not finally determine class members' entitlement to habeas relief; the class sought to resolve only a subsidiary legal issue, to wit, whether Chapter 154 would apply when class members eventually filed federal habeas petitions. *Id.* at 746-48. "Any risk associated with resolving [that] question in habeas, rather than a pre-emptive suit, is no different from risks associated with choices commonly faced by litigants." *Id.* at 748. The Court found that there was no concrete Article III case or controversy even though class members allegedly were forced "to make an unacceptable choice: filing a *pro se* [habeas] petition within 180 days in order to ensure compliance with Chapter 154, which may fail to raise substantial claims, or waiting until counsel is appointed, which may miss the 180-day

A. Standing

At the core of the Article III case-or-controversy requirement is the doctrine of standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). "It requires federal courts to satisfy themselves that the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant *his* invocation of federal-court jurisdiction," so that "there is a real need to exercise the power of judicial review in order to protect the interests of the complaining party." *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009) (emphasis in original) (internal quotation marks and citations omitted).

Case law has "established that the irreducible constitutional minimum of standing contains three elements":

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized; and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal con-

---

filing deadline if Chapter 154 applies." *Id.* at 744,746-48 & n.3. We recognize that there are clear parallels between *Ashmus* and this case. However, the Court focused on whether *Ashmus* presented "a concrete controversy susceptible to conclusive judicial determination," which is a jurisdictional prerequisite for cases arising under the Declaratory Judgment Act; the Court did not discuss the standing and ripeness issues that are present in this case. *Id.* at 748-49. As a result, *Ashmus* does not control our analysis.

> nection between the injury and the conduct complained of—the injury has to be "fairly … trace[able] to the challenged action of the defendant, and not … th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Defenders of Wildlife, 504 U.S. at 560-61 (alterations in original) (citations and footnote omitted). The Defender Organizations "bear[] the burden of establishing these elements." *Id*. at 561. Because this is an appeal from an order granting summary judgment, we accept as true the declarations submitted by the Defender Organizations to the district court. *See id*. We find, however, that these declarations do not demonstrate that the Defender Organizations have suffered a legally cognizable injury in fact. As a result, the Defender Organizations did not have standing to bring this suit.

1. Direct Injury

At the outset, we note that the Final Regulations prescribe procedures and criteria to guide the Attorney General's certification of state capital-counsel mechanisms; the Final Regulations thus directly affect only the Attorney General and, to some degree, states seeking certification under Chapter 154. *See* 28 C.F.R. §§ 26.22-23. "[W]hen the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish."

Defenders of Wildlife, 504 U.S. at 562 (quoting *Allen v. Wright*, 468 U.S. 737, 758 (1984)). The Defender Organizations "can demonstrate standing only if application of the regulations by the Government will affect *them* in the manner described above." *Summers*, 555 U.S. at 494 (emphasis in original).

In their brief, the Defender Organizations set forth a connection between themselves and the Final Regulations which, they argue, establishes that they have suffered a legally cognizable injury due to the issuance of the Final Regulations. We do not disagree with the Defender Organizations on several points. To start, we do not dispute that, if Chapter 154 applies to a capital prisoner's federal habeas case, the prisoner may be adversely affected, particularly because Chapter 154 shortens the statute of limitations for filing a federal habeas petition from one year to six months.[9] *See* 28 U.S.C § 2263(a). We also do not doubt that Chapter 154's shorter statute of limitations may alter the Defender Organizations' "strategic considerations in the development and presentation of appellate and postconviction claims, the calculation of legal and financial resources available to competently prepare and litigate cases, and the advice to counsel and clients who are subject [to] its provisions." (Alteration in original.) And we recognize that the Final Regulations influence whether Chapter 154 will apply to a capital prisoner's federal habeas case, as they guide the Attorney General's certification process under

[9] We do not decide here whether this effect alone constitutes a legally cognizable injury sufficient to confer standing on capital prisoners to challenge the Final Regulations directly.

Chapter 154. Further, a state must request and receive certification from the Attorney General before it may seek to invoke Chapter 154 in a capital prisoner's federal habeas case. *See id.* §§ 2261(a)(1)(A), 2265(b)(1).

The Defender Organizations base their claim of injury on the role the Final Regulations play in the certification process. According to the Defender Organizations, the Final Regulations create "'significant confusion' insofar as [they] provide[] (1) no basis for understanding what evidence or measure of sufficiency the Attorney General will rely upon in making … certification decisions, (2) no procedural safeguards to those directly affected by certification or an opportunity to meaningfully contribute to the certification decision, and (3) no indication whether a certification decision will be guided by the body of law interpreting Chapter 154 prior to its amendment." In light of this "confusion," the Defender Organizations assert that they and their death-sentenced clients "are faced with two untenable choices: either proceed as if Chapter 154 does not apply, and thereby risk the forfeiture of potentially meritorious claims against their convictions and death sentences if the time limitations of Chapter 154 are later found to be applicable; or attempt to comply with those stringent limitations, and thereby forego full investigation and adequate factual and legal development of their constitutional claims."[10] The Defender Organizations assert

[10] This is very similar to the risk that the Supreme Court in *Ashmus* found was insufficient to give rise to a concrete case or controversy under the Declaratory Judgment Act. *See supra* note 8.

that the Final Regulations have injured them because they must "assume the worst and 'immediately make litigation, resource, and advisory decisions' in the dark," such as "whether to commit limited attorney time and financial resources, and, in some instances, curtail the development of claims to include in a federal petition, in order to comply with a six month, rather than one year, statute of limitations."

This is a long-winded explanation of what we think is a relatively simple notion: The Defender Organizations contend that they had standing to challenge the Final Regulations because the Final Regulations are vague, and the Defender Organizations must advise and assist their death-sentenced clients without knowing, in advance, whether the Attorney General will certify state capital-counsel mechanisms and whether Chapter 154 may therefore apply to their clients' federal habeas cases. However, we fail to see how the Defender Organizations have suffered a concrete, particularized[11] injury sufficient to give them standing to challenge the Final Regulations. The Defender Organizations' bare uncertainty regarding the validity of the Final Regulations and the applicability of Chapter 154 to their clients' federal habeas cases, absent "any concrete application that threatens imminent harm to [their] interests," cannot support standing. *Summers*, 555 U.S. at 494; *see Lewis*, 494 U.S. at 477-79; *Nuclear Info. & Res. Serv.*

[11] "Particularized" in this context "mean[s] that the injury must affect the plaintiff in a personal and individual way." *Defenders of Wildlife*, 504 U.S. at 560 n. 1.

v. Nuclear Regulatory Comm'n, 457 F.3d 941, 951-55 (9th Cir. 2006).

Nor is it enough that vagueness in the Final Regulations may cause the Defender Organizations to "assume the worst" and change their litigation strategy to file their clients' federal habeas petitions within the six-month statute-of-limitations period prescribed by Chapter 154 instead of the general one-year statute-of-limitations period. *Cf. Calderon v. Ashmus*, 523 U.S. 740, 748 (1998) ("Any risk associated with resolving the question [whether Chapter 154 applies] in habeas, rather than a pre-emptive suit, is no different from risks associated with choices commonly faced by litigants."). Assisting and counseling clients in the face of legal uncertainty is the *role* of lawyers,[12] and, notably, the Defender Organizations have not cited any authority suggesting that lawyers suffer a legally cognizable injury in fact when they take measures to protect their clients' rights or alter their litigation strategy amid legal uncertainty.[13] Taken to its logical conclusion, this theory of

---

[12] We recognize that the Defender Organizations are in a different position from typical attorneys: They are governmental organizations that have a mandate to represent indigent clients; they cannot recoup the cost of their representation and must make independent resourcing decisions in light of legal uncertainty created by the Final Regulations. However, we think that distinction is unimportant, and the Defender Organizations have cited no authority that would support standing in light of that distinction.

[13] The Defender Organizations emphasize that the district court ruled that they had standing to challenge the Attorney General's Chapter 154 regulations on three separate occasions: twice in this case and once in a prior, related case. *See also supra*

injury would permit attorneys to challenge any governmental action or regulation when doing so would make the scope of their clients' rights clearer and their strategies to vindicate those rights more easily selected. We think the Defender Organizations would be hard-pressed to find authority supporting such an expansion of standing. *Cf. Summers*, 555 U U.S. at 494 (opining that allowing the plaintiff to challenge a "regulation in the abstract … would fly in the face of Article III's injury-in-fact requirement").

Indeed, a recent Supreme Court case undercuts the Defender Organizations' claim of direct injury. In *Clapper v. Amnesty International USA*, 133 S. Ct. 1138, 1142 (2013), lawyers, journalists, and others sought to enjoin the enforcement of 50 U.S.C. § 1881a, a statute authorizing governmen-

---

note 4. However, the decision we here review provides little authoritative support for the rulings in that very decision. Further, we cannot affirm the district court's decision because it made the same analytical mistake three times instead of just once. The closest *relevant* cases the Defender Organizations cite are *Paulsen v. Daniels*, 413 F.3d 999, 1005 (9th Cir. 2005), and *Yesler Terrace Community Council v. Cisneros,* 37 F.3d 442, 445-47 (9th Cir. 1994). But in those cases, the plaintiffs challenged regulations that directly affected their rights, not the rights of any client of theirs. *See Paulsen*, 413 F.3d at 1005 ("The effect of the regulation was to deny [the petitioners] sentence reduction."); *Yesler Terrace*, 37 F.3d at 445-47 ("As a consequence of HUD's decision, [the plaintiffs], personally, now are subject to the threat of eviction for alleged criminal activity without recourse to an informal grievance hearing."). These cases may support the standing of capital prisoners—the Defender Organizations' *clients*—to challenge the Final Regulations, but they do not support the standing of the Defender Organizations themselves.

tal surveillance of communications with foreign persons. The plaintiffs claimed that they had standing because, among other reasons, they were injured by the need to take measures to avoid surveillance when communicating with their foreign contacts. *Id.* at 1150-51. The Supreme Court rejected that argument, holding that the harm the plaintiffs sought to avoid was not "certainly impending," as the plaintiffs could only "speculate and make assumptions about whether their communications with their foreign contacts [would] be acquired under § 1881a." *Id.* at 1148. The plaintiffs could not "manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending," even though the measures they took were "a reasonable reaction to a risk of harm." *Id.* at 1151.

So too here, it may be eminently reasonable for the Defender Organizations to take measures to prevent or mitigate the harm their clients may face due to the possible future application of Chapter 154 to their federal habeas cases. But, the Defender Organizations face no "certainly impending" harm resulting from the issuance and application of the Final Regulations; even if their clients face a "certainly impending" harm from "confusion" caused by the Final Regulations, the Defender Organizations have given us no reason to believe that they can parlay such harm into an injury of their own. We therefore hold that the Defender Organizations did not have standing to bring this suit based on their theory of direct injury,

as propounded in their declarations and accepted by the district court.[14]

2. Third-Party Standing and Procedural Standing

In their brief, the Defender Organizations advance, for the first time, two additional theories of standing. First, they claim that, at a minimum, they had standing to challenge procedural errors in the notice-and-comment-rulemaking process that culminated in the issuance of the Final Regulations, because they participated in that process. Second, the Defender Organizations argue that they had third-party standing to challenge the Final Regulations on behalf of their death-sentenced clients. However, even under these theories, the Defender Organizations must identify a concrete interest of their own that is harmed by the Final Regulations; they cannot circumvent the injury-in-fact requirement of standing. *See*, *e.g., Summers*, 555 U.S. at 496 (procedural standing); *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 623 n.3 (1989) (third-party standing). Because we find that the Defender Organizations have not suffered a legally cognizable injury as a result of the promulgation of the Final Regulations, we need not address these theories further.

---

[14] We also question whether the Defender Organizations' claimed injury is fairly traceable to the Final Regulations or redressable by setting aside the Final Regulations. However, because we find that the Defender Organizations have not suffered a legally cognizable injury in fact, we need not, and do not, analyze the remaining prongs of the standing inquiry.

B. Ripeness

Because we find that the Defender Organizations lacked standing to challenge the substance of the Final Regulations, we decide next whether to grant the Defender Organizations' request for a limited remand to afford their death-sentenced clients an opportunity to intervene. We decline to follow this course of action, because the challenges to the substance of the Final Regulations that the Defender Organizations raise—and, by extension, those that their clients would raise if they intervened in this case—are not yet ripe for review.[15]

Ripeness doctrine seeks "to prevent the courts … from entangling themselves in abstract disagreements over administrative policies, and also to protect [administrative] agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967). In resolving ripeness ques-

[15] We could also conceivably scrutinize the ability of capital prisoners to challenge the Final Regulations in terms of standing, because, "[w]hen addressing the sufficiency of a showing of injury-in-fact grounded in potential future harms, Article III standing and ripeness issues often 'boil down to the same question.'" *Coons v. Lew*, 762 F.3d 891, 897 (9th Cir. 2014) (amended opinion) (quoting *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 n.5 (2014)); *see also Warth v. Seldin*, 422 U.S. 490, 499 n.10 (1975). We think ripeness cases better describe the jurisdictional constraints on capital prisoners who might seek preemptively to challenge the Final Regulations.

tions, courts examine the "fitness of the issues for judicial decision" and the "hardship to the parties of withholding court consideration." *Id*. at 149.

Ripeness issues arise often when a litigant seeks "pre-enforcement review" of an agency's regulations—that is, the litigant challenges regulations anticipating that an administrative agency will, in the near future, apply those regulations in a manner that will harm the litigant's interests. *See, e.g., id*. Courts permit pre-enforcement review of regulations understanding that regulations can immediately affect "primary conduct": Regulated parties may have to choose between complying with the regulations immediately or facing penalties. *See*, *e.g*., *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891-92 (1990). The Final Regulations are of a different sort, because they do not act upon capital prisoners but guide the Attorney General's certification of state capital-counsel mechanisms. *See* 28 C.F.R. §§ 26.22-.23. A capital prisoner's federal habeas rights may be affected indirectly, *if* the sentencing state requests certification and *if* the Attorney General finds that the state's capital-counsel mechanism comports with Chapter 154 and the Final Regulations. *See* 28 U.S.C. §§ 2261(a), 2265(a) – (b); 28 C.F.R. §§ 26.22 – .23.

To determine whether the challenges to the substance of the Final Regulations are ripe, we must consider: "(1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented." *Ohio Forestry Ass'n, Inc. v. Sierra*

Club, 523 U.S. 726, 733 (1998). We think this case is analogous to *Ohio Forestry* and, as in that case, consideration of these factors forecloses review here.

In *Ohio Forestry*, the Forest Service developed a plan, mandated by statute, for managing the natural resources of the Wayne National Forest. *Id.* at 728-29. The plan set logging goals, selected areas of the forest suitable for logging, and determined appropriate methods for timber harvesting. *Id.* at 730. Promulgation of the plan made logging more likely because a plan is a "logging precondition"—"in its absence logging could not take place"—but the plan did not itself authorize the cutting of any trees. *Id.* The Forest Service had to take additional steps to permit logging, and its decisions were subject to an administrative-appeals process and judicial review. *Id.* The Sierra Club challenged the plan as wrongly favoring logging; the Supreme Court ruled that the challenge was not ripe for review. *Id.* at 732-37.

The Court noted first that the Forest Service's plan did not "command anyone to do anything or to refrain from doing anything"; before the Forest Service could permit logging, it had to "focus upon a particular site, propose a specific harvesting method, prepare an environmental review, permit the public an opportunity to be heard, and (if challenged) justify the proposal in court." *Id.* at 733-34. This gave the Sierra Club "ample opportunity later to bring its legal challenge at a time when harm is more imminent and more certain, [which] challenge might also include a challenge to the lawfulness of the present Plan." *Id.* at 734. The same is true here: The Final Regulations

do not require anything of capital prisoners—or indeed of their lawyers—and do not immediately alter their federal habeas rights or procedures. *See* 28 C.F.R. §§ 26.22-23. Before a capital prisoner's rights may be affected, the sentencing state must request certification by the Attorney General, the Attorney General must (under the Final Regulations) allow for public comment on the request, and the Attorney General must then certify that the state's capital-counsel mechanism is compliant with Chapter 154. *See* 28 U.S.C. § 2265; 28 C.F.R. § 26.23. That decision is (under Chapter 154) subject to de novo review in the D.C. Circuit.[16] 28 U.S.C. § 2265(c). Delayed judicial review of the Final Regulations is unlikely to cause hardship to capital prisoners, even if they might change their strategy for pursuing postconviction relief in light of the promulgation of the Final Regulations. *Cf. Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 807-12 (2003) (finding unripe a challenge to regulations exempting concession contracts from the provisions of the Contract Disputes Act of 1978 ("CDA") even though "applicability *vel non* of the CDA is one of the factors a concessioner takes into account when preparing its bid for … concession contracts" and rejecting the argument that "mere uncertainty as to the validity of a legal rule constitutes a hardship for purposes of the ripeness analysis").

---

[16] The D.C. Circuit's de novo review of certification decisions is different from—and less deferential than—typical judicial review of agency action, which is governed by the arbitrary-or-capricious standard. *Compare* 28 U.S.C. § 2265(c)(3) (Chapter 154), *with* 5 U.S.C. § 706(2)(A) (APA).

As to the second *Ohio Forestry* factor, the Supreme Court noted that judicial interference "could hinder agency efforts to refine its policies … through application of the Plan in practice." 523 U.S. at 735-36. Similarly here, the Attorney General must interpret and apply the Final Regulations when evaluating specific state capital-counsel mechanisms, and judicial review of the Final Regulations has prevented the Attorney General from doing so. The Defender Organizations (and, hence, their clients) essentially complain that the Final Regulations do not make clear precisely how the Attorney General will conduct the certification process, how the Attorney General will make certification decisions, and how the Attorney General will apply the catchall provision for competency of counsel. These issues will sort themselves out as the Attorney General applies the Final Regulations, makes certification decisions, and justifies those decisions in the D.C. Circuit, if indeed challenged. *Cf. Toilet Goods Ass'n, Inc. v. Gardner*, 387 U.S. 158, 164-65 (1967).

Considering the third *Ohio Forestry* factor, we think that, in the absence of a concrete application of the Final Regulations, the challenges to the substance of the Final Regulations represent "'abstract disagreements over administrative policies,' that the ripeness doctrine seeks to avoid." 523 U.S. at 736 (quoting *Abbott Labs.*, 387 U.S. at 148). Any deficiencies in the certification process and the criteria prescribed by the Final Regulations will become clearer as the Attorney General makes certification decisions and as those decisions undergo de novo review in the D.C. Circuit. *See id.* at 737 ("All this is to say that further factual development would 'significantly advance our ability

to deal with the legal issues presented' and would 'aid us in their resolution.'" (quoting *Duke Power Co. v. Carolina Envt'l Study Grp.*, Inc., 438 U.S. 59, 82 (1978)); *cf. Pearson v. Shalala*, 164 F.3d 650, 661 (D.C. Cir. 1999) ("That is not to say that the agency was necessarily required to define the term in its initial general regulation—or indeed that it is obliged to issue a comprehensive definition all at once. The agency is entitled to proceed case by case ...."). We find the challenges to the substance of the Final Regulations not ripe for review at this time. We therefore decline to remand this case to the district court to allow capital prisoners an opportunity to intervene and interpose these challenges.[17]

---

[17] The Defender Organizations renew their argument that the Attorney General failed to give adequate notice that certification decisions will be treated as orders, not rules, and will not be subject to the dictates of notice-and-comment rulemaking under the APA. Ordinarily, we would agree that such a procedural claim is ripe for review. *See Citizens for Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961, 976-78 (9th Cir. 2003); *Cement Kiln Recycling Coal. v. EPA*, 493 F.3d 207, 216 (D.C. Cir. 2007). We question whether the same ripeness conclusion holds here: The Defender Organizations essentially complain that they did not receive notice that the certification process prescribed by the Final Regulations will not meet certain procedural requirements, but the Attorney General has not yet endeavored to begin the certification process. The Attorney General may very well afford the Defender Organizations all the procedural protections they seek. *Cf. Colwell*, 558 F.3d at 1124-28. In any event, we need not decide this issue, because the Defender Organizations did not have standing to bring that claim. *See supra.* The Defender Organizations do not appear to request that we remand this case to the district court to allow capital prisoners to intervene re-

III

For these reasons, we vacate the decision of the district court and remand with instructions to dismiss this case for lack of jurisdiction. Each party will bear its own costs on appeal.

VACATED and REMANDED with instructions.

---

garding the inadequate-notice claim—perhaps because the district court found in favor of the Attorney General on that claim—and we decline to do so.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

HABEAS CORPUS RESOURCE CENTER and THE OFFICE OF THE FEDERAL PUBLIC DEFENDER FOR THE DISTRICT OF ARIZONA,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF JUSTICE and ERIC H. HOLDER, in his official capacity as United States Attorney General,

Defendants.

_____/

No. C 13-4517 CW

ORDER GRANTING IN PART PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND GRANTING IN PART DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

Plaintiffs Habeas Corpus Resource Center (HCRC)[1] and the Office of the Federal Public Defender for the District of Arizona (FDO-Arizona)[2] have filed a motion for summary judgment.
Defendants United States Department of Justice (DOJ) and United States Attorney General Eric H. Holder oppose the motion and have filed a cross-motion for summary judgment.[3] The motions were heard on July 31, 2014. Having considered oral argument and the papers submitted by the parties, the Court GRANTS Plaintiffs' motion in part (Docket No. 67) and GRANTS Defendants' cross-motion in part (Docket No. 71).

BACKGROUND

I. The 2013 Final Rule

The Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996 added chapter 154 of Title 28 of the United States Code. Chapter 154 provides expedited procedures in federal capital habeas corpus

---

[1] HCRC is an entity in the Judicial Branch of the State of California that, among other things, provides legal representation to men and women under sentence of death in state and federal habeas corpus proceedings. Complaint ¶ 16

[2] FDO-AZ is a Federal Defender organization that operates under the authority of the Criminal Justice Act of 1964, 18 U.S.C. § 3006A(g). Among other things, FDO-AZ provides legal representation to indigent men and women sentenced to death. Complaint ¶ 17.

[3] Marc Klaas has filed an unopposed motion to file a brief as *amicus curiae*. The Court grants the motion. Docket No. 69.

cases when a state is able to establish that it has provided qualified, competent, adequately resourced and adequately compensated counsel to death-sentenced prisoners. Under the AEDPA, federal courts were responsible for determining whether states were eligible for the expedited federal procedures. The USA Patriot Improvement and Reauthorization Act of 2005, Pub. L. No. 109-174, 120 Stat. 192 (2005), amended chapter 154 to shift the eligibility determination from the federal courts to the Attorney General.

In December 2008, the Attorney General published a final rule to implement the procedure prescribed by chapter 154. On January 20, 2009, the Court granted a preliminary injunction, enjoining Defendants from putting the regulation into effect without first providing an additional comment period of at least thirty days and publishing a response to any comments received during such a period. *Habeas Corpus Resource Ctr. v. United States Department of Justice*, 2009 WL 185423, *10 (N.D. Cal.). On February 5, 2009, Defendants solicited further public comment on its proposed certification process. Defendants thereafter proposed to retract the 2008 regulation pending the completion of a new rulemaking process. *See* 75 Fed. Reg. 29,217 (May 25, 2010). On November 23, 2010, Defendants published a final rule retracting the 2008 regulations. *See* 75 Fed. Reg. 71,353 (Nov. 23, 2010).

On March 3, 2011, the DOJ published a notice of proposed rulemaking for a new certification process. 76 Fed. Reg. 11,705. The comment period closed on June 1, 2011. On February 13, 2012, the DOJ then

published a supplemental notice soliciting public comments on five contemplated changes. 77 Fed. Reg. 7559. The comment period closed on March 14, 2012. On September 23, 2013, the Final Rule was published.

Section 26.22 of the Final Rule prescribes the standards a state must meet in order to earn certification under 28 U.S.C. §§ 2261 and 2265. The Final Rule provides:

> § 26.22 Requirements.
>
> The Attorney General will certify that a State meets the requirements for certification under 28 U.S.C. 2261 and 2265 if the Attorney General determines that the State has established a mechanism for the appointment of counsel for indigent prisoners under sentence of death in State postconviction proceedings that satisfies the following standards:
>
> . . .
>
> (b) The mechanism must provide for appointment of competent counsel as defined in State standards of competency for such appointments.
>
> (1) A State's standards of competency are presumptively adequate if they meet or exceed either of the following criteria:

> (i) Appointment of counsel who have been admitted to the bar for at least five years and have at least three years of postconviction litigation experience. But a court, for good cause, may appoint other counsel whose background, knowledge, or experience would otherwise enable them to properly represent the petitioner, with due consideration of the seriousness of the penalty and the unique and complex nature of the litigation; or
>
> (ii) Appointment of counsel meeting qualification standards established in conformity with 42 U.S.C. 14163(e)(1) and (2)(A), if the requirements of 42 U.S.C. 14163(e)(2)(B), (D), and (E) are also satisfied.
>
> (2) Competency standards not satisfying the benchmark criteria in paragraph (b)(1) of this section will be deemed adequate only if they otherwise reasonably assure a level of proficiency appropriate for State postconviction litigation in capital cases.

78 Fed. Reg. at 58,183. The "standards established in conformity with 42 U.S.C § 14163(e)(1) and (2)(A)" referred to in § 26.22(b)(1)(ii) are provisions of the Innocence Protection Act (IPA). They call for maintenance

of a roster of qualified attorneys, specialized training programs for attorneys providing capital case representation, monitoring of the performance of attorneys who are appointed and their attendance at training programs, and removal from the roster of attorneys who fail to deliver effective representation, engage in unethical conduct, or do not participate in required training. 42 U.S.C. §§ 14163(e)(2)(B),(D), and (E).

Section 26.23 of the Final Rule provides the process for a state's certification:

> (a) An appropriate State official may request in writing that the Attorney General determine whether the State meets the requirements for certification under § 26.22 of this subpart.
>
> (b) Upon receipt of a State's request for certification, the Attorney General will make the request publicly available on the Internet (including any supporting materials included in the request) and publish a notice in the Federal Register—
>
> (1) Indicating that the State has requested certification;
>
> (2) Identifying the Internet address at which the public may view the State's request for certification; and

(3) Soliciting public comment on the request.

(c) The State's request will be reviewed by the Attorney General. The review will include consideration of timely public comments received in response to the Federal Register notice under paragraph (b) of this section, or any subsequent notice the Attorney General may publish providing a further opportunity for comment. The certification will be published in the Federal Register if certification is granted. The certification will include a determination of the date the capital counsel mechanism qualifying the State for certification was established.

(d) A certification by the Attorney General reflects the Attorney General's determination that the State capital counsel mechanism reviewed under paragraph (c) of this section satisfies chapter 154's requirements. A State may request a new certification by the Attorney General to ensure the continued applicability of chapter 154 to cases in which State postconviction proceedings occur after a change or alleged change in the State's certified capital counsel mechanism. Changes in a State's capital counsel mechanism do not affect the applicability of chapter

> 154 in any case in which a mechanism certified by the Attorney General existed throughout State postconviction proceedings in the case.
>
> (e) A certification remains effective for a period of five years after the completion of the certification process by the Attorney General and any related judicial review. If a State requests re-certification at or before the end of that five-year period, the certification remains effective for an additional period extending until the completion of the re-certification process by the Attorney General and any related judicial review.

78 Fed. Reg. at 58,184.

II. The Impact of the 2013 Final Rule

Once a state is certified, the statute of limitations for federal habeas corpus proceedings is "fast-tracked." First, the statute of limitations for filing a habeas petition in federal court is shortened from one year to 180 days. 28 U.S.C. § 2263(a). Second, tolling of the statute of limitations is altered to exclude from tolling (1) the period of time between the finality of direct review in state court to the filing of a petition for writ of certiorari in the United States Supreme Court and (2) the filing of exhaustion or successive state habeas petitions. 28 U.S.C. § 2263(b). Third, a petitioner's ability to amend a petition is limited. 28

U.S.C. § 2266(b)(3)(B). Fourth, a federal district court must enter final judgment on a habeas petition within 450 days of the filing of the petition, or sixty days after it is submitted for decision—whichever is earlier. 28 U.S.C. § 2266(b). Finally, the certification is retroactive, reaching back to the date the qualifying mechanism is found to have been established. 28 U.S.C. § 2265(a)(2) ("The date the mechanism described in paragraph 1(A) was established shall be the effective date of the certification under this subsection.").

III. Procedural History

Plaintiffs filed their complaint in this case on September 30, 2013. On October 18, 2013, the Court granted Plaintiffs' motion for a temporary restraining order and, on December 4, 2013, the Court granted Plaintiffs a preliminary injunction. On March 6, 2014, the Court granted the parties' stipulation that Plaintiffs could voluntarily dismiss their fifth cause of action without prejudice. The remaining four causes of action are (1) violation of the Administrative Procedure Act (APA) for failure to provide adequate notice; (2) violation of the APA for failure to respond to significant public comment; (3) violation of the APA by a procedurally deficient certification process; and (4) violation of the APA by a substantively deficient certification process.

LEGAL STANDARD

Summary judgment is properly granted when no genuine and disputed issues of material fact remain, and when, viewing the evidence most favorably to the non-moving party, the movant is clearly entitled to prevail as a matter of law. Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Eisenberg v. Ins. Co. of N. Am.*, 815 F.2d 1285, 1288-89 (9th Cir. 1987).

The moving party bears the burden of showing that there is no material factual dispute. Therefore, the court must regard as true the opposing party's evidence, if it is supported by affidavits or other evidentiary material. *Celotex*, 477 U.S. at 324; *Eisenberg*, 815 F.2d at 1289. The court must draw all reasonable inferences in favor of the party against whom summary judgment is sought. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986); *Intel Corp. v. Hartford Accident & Indem. Co.*, 952 F.2d 1551, 1558 (9th Cir. 1991).

DISCUSSION

I. Procedural Barriers to Plaintiffs' Claims

A. Standing

Defendants first argue that Plaintiffs lack standing to challenge the Final Rule because they cannot satisfy Article III's "case or controversy requirement." A plaintiff "has the burden of establishing the three elements of Article III standing: (1) he

or she has suffered an injury in fact that is concrete and particularized, and actual or imminent; (2) the injury is fairly traceable to the challenged conduct; and (3) the injury is likely to be redressed by a favorable court decision." *Salmon Spawning & Recovery Alliance v. Gutierrez*, 545 F.3d 1220, 1225 (9th Cir. 2008). "Article III standing requires an injury that is actual or imminent, not conjectural or hypothetical." *Cole v. Oroville Union High School Dist.*, 228 F.3d 1092, 1100 (9th Cir. 2000) (internal quotation marks omitted).

> "A plaintiff may allege a future injury in order to comply with this requirement, but only if he or she 'is immediately in danger of sustaining some direct injury as the result of the challenged official conduct and the injury or threat of injury is both real and immediate, not conjectural or hypothetical.'"

Scott v. Pasadena Unified School Dist., 306 F.3d 646, 656 (9th Cir. 2002) (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983)).

As Plaintiffs note, when the Court granted their motion for a preliminary injunction, it found that they had standing to pursue this challenge. To the extent that Defendants raise arguments addressed in the order granting Plaintiffs' motion for preliminary injunction, the Court will not revisit those arguments. Recognizing the Court's earlier finding that Plaintiffs have standing, Defendants argue that "the Court did not expressly consider the impact of the Supreme Court's most recent standing

analysis in [*Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138 (2013)], which is instructive and undercuts Plaintiffs' claim of a cognizable injury." Defendants' Cross-Motion at 6. However, *Clapper* is distinguishable from the instant case.

In *Clapper*, the Supreme Court found that "United States persons" who alleged that they engaged in "sensitive international communications with individuals who they believe are likely targets of surveillance" under 50 U.S.C. § 1881a, lacked standing to challenge the constitutionality of that provision. 133 S. Ct. at 1142. "Section 1881a provides that upon the issuance of an order from the Foreign Intelligence Surveillance Court," the government may authorize surveillance of "'persons reasonably believed to be located outside the United States to acquire foreign intelligence information.'" *Id.* at 1144 (quoting 50 U.S.C. § 1881a(a)). The statute prohibits the government from intentionally targeting surveillance at any person known to be in the United States or any "United States person." 50 U.S.C. § 1881a(b). The *Clapper* plaintiffs were "attorneys and human rights, labor, legal, and media organizations" who alleged that "some of the people with whom they exchange foreign intelligence information are likely targets of surveillance under § 1881a." 133 S. Ct. at 1145. The *Clapper* plaintiffs further alleged that there was "an objectively reasonable likelihood that their communications [would] be acquired under § 1881a at some point in the future, thus causing them injury" and that the risk of surveillance was "so substantial" that they were "forced to take costly and burdensome

measures to protect the confidentiality of their international communications." *Id.* at 1146.

The Supreme Court rejected both theories of standing, finding that the first failed because the argument rested on Defendants'

> highly speculative fear that: (1) the Government will decide to target the communications of non-U.S. persons with whom they communicate; (2) in doing so, the Government will choose to invoke its authority under § 1881a rather than utilizing another method of surveillance; (3) the Article III judges who serve on the Foreign Intelligence Surveillance Court will conclude that the Government's proposed surveillance procedures satisfy § 1881a's many safeguards and are consistent with the Fourth Amendment; (4) the Government will succeed in intercepting the communications of respondents' contacts; and (5) respondents will be parties to the particular communications that the Government intercepts.

Id. at 1148. The Supreme Court found that this "highly attenuated chain of possibilities does not satisfy the requirement that threatened injury must certainly be impending." *Id.* The Court specifically noted that the government could authorize the same surveillance the plaintiffs feared based on other author-

ity. The Court further noted that § 1881a "at most *authorizes*—but does not *mandate* or *direct*—the surveillance that respondents fear." *Id.* at 1149 (emphasis in original).

In contrast, there is no method, other than the procedures set out in the challenged rule, by which a state can seek to have habeas corpus proceedings "fast-tracked." Moreover, under the challenged rule, "[t]he Attorney General *will* certify that a State meets the requirements for certification … if the Attorney General determines that the State has established a mechanism for the appointment of counsel" that satisfies the standards set out in the rule. Administrative Record (AR) 1134. Arizona has already applied for certification. Accordingly, the contingencies that precluded a finding of standing in *Clapper* do not exist in this case.

The fact that the retroactive effect of the Final Rule reaches back to the date at which the state mechanism went into effect means that, upon certification, the deadline for a habeas petitioner's application in the certified state may have come and gone without his knowing it. The confusion caused by the retroactive effect, particularly when combined with the lack of clear certification standards discussed below, forces Plaintiffs to make urgent decisions regarding their litigation, resources, and strategy. Defendants argue that this fear is unreasonable in light of the Ninth Circuit's holding in *Calderon v. United States District Court*, 128 F.3d 1283 (9th Cir. 1997). The panel in *Calderon* held that AEDPA's one-year statute of limitation "did not begin to run against any state prisoner

prior to the statute's date of enactment." 128 F.3d at 1287. Although the circumstances here are analogous, Defendants cannot guarantee that the Ninth Circuit would come to the same conclusion if faced with a petitioner whose statute of limitations had expired due to a certification under the challenged rule.

The Court again concludes that Plaintiffs have standing to challenge the substance of the Final Rule. First, they have alleged harm with sufficient detail to state a "concrete and particularized" injury. Second, the injury can be traced to the proposed implementation of the Final Rule. Third, Plaintiffs have alleged injury that can be redressed by a decision blocking implementation of the Final Rule as written.

B. Other Adequate Remedy

Defendants next argue that Plaintiffs' claims fail because the statute provides for judicial review of certification decisions by the D.C. Circuit. *See* 28 U.S.C. § 2265(c). Accordingly, Defendants argue that Plaintiffs have another adequate remedy in court that forecloses them from bringing suit pursuant to the APA. *See* 5 U.S.C. § 704 (APA provides for judicial review where there is "final agency action for which there is no other adequate remedy in a court.")

However, as Plaintiffs point out, the review provided for by the statute is a review of individual certification decisions, not review of the regulations themselves. Accordingly, the review of certification decisions does not provide an adequate remedy in this case.

C. Ripeness

Defendants' final procedural argument is that Plaintiffs' claims are not ripe for review. Defendants argue that "the Final Rule establishes only the process by which state requests for certification will be adjudicated in the future." Cross-Motion at 12. Accordingly, they argue that any harm "would flow only from the ultimate certification decisions, which have yet to be made, and which will be subject to judicial review in the D.C. Circuit." *Id.* Defendants cite *National Park Hospitality Association v. Department of Interior*, 538 U.S. 803 (2003), in support of the proposition that a challenge to a regulation is not ordinarily ripe for APA review until the regulation has been applied to a claimant's situation by some concrete action.

However, the *National Park Hospitality Association* Court held, "Determining whether administrative action is ripe for judicial review requires us to evaluate (1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration." *Id.* at 808. Here, the questions raised by Plaintiffs are fit for judicial decision. The Court is able to determine whether the certification procedure as described in the Final Rule provides adequate notice and opportunity for comment and whether that procedure is based on sufficiently defined criteria. Moreover, as discussed extensively in the Court's order granting Plaintiffs' motion for a preliminary injunction, there is a likelihood of significant and irreparable harm to Plaintiffs if the Final Rule

goes into effect, based in large part on the retroactive effect of any certification decision.

II. Notice

The APA "requires an agency conducting notice and comment rulemaking to publish in its notice of rulemaking 'either the terms or substance of the proposed rule or a description of the subjects and issues involved.'" *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2001) (quoting 5 U.S.C. § 553(b)(3)). Because the Attorney General's promulgation of the Final Rule constitutes administrative rulemaking, it must comply with the rulemaking provisions of the APA. *See* 5 U.S.C. § 553. To determine compliance, courts inquire whether "the notice fairly apprise[s] the interested persons of the subjects and issues before the Agency.'" *Louis v. DOL*, 419 F.3d 970, 975 (9th Cir. 2005).

Plaintiffs claim that the Attorney General failed to provide adequate notice under the APA because he stated, for the first time in the Final Rule, that the certification decisions are not subject to the rulemaking provisions of the APA. AR 1125 ("[T]he Attorney General's certifications under chapter 154 are orders rather than rules for purposes of the Administrative Procedure Act (APA). They are accordingly not subject to the APA's rulemaking provisions, *see* 5 U.S.C. § 553[.]"). When an agency fails to notify interested parties of its position, its notice of proposed rulemaking has not "provide[d] sufficient factual detail and rationale for the rule to permit interested parties to comment meaningfully." *Honeywell Int'l.,*

Inc. v. EPA, 372 F.3d 441, 445 (D.C. Cir. 2004) (citation omitted).

However, Defendants counter that Plaintiffs were given sufficient notice of the Attorney General's position that certification decisions are orders not subject to the rulemaking provisions of the APA.[4] First, Defendants argue that the mechanics of the certification process as set out in the Notice of Proposed Rulemaking and adopted in the Final Rule made clear that the Attorney General did not intend to publish proposed decisions granting or rejecting applications for certification or to accept public comment on those decisions. The Notice of Proposed Rulemaking sets out the following steps: (1) a state requests a determination of whether it meets the criteria for certification; (2) the Attorney General publishes the request

[4] Defendants also renew their argument that the retracted 2008 rule provided sufficient notice under the APA because the current Attorney General adhered to the position of his predecessor. Defendants' argument is unpersuasive. The Attorney General published a notice of a new proposed rule that resembled the 2008 rule, but omitted its characterization of certification decisions as adjudications, not rules. However, as the Court found in its order granting the preliminary injunction, far from alerting the public to the fact that the Attorney General adhered to this position taken by his predecessor, it is more likely that the notice of the new rule led interested parties to presume that the Attorney General intentionally removed this characterization. *See*, *e.g.*, *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) ("Where Congress includes particular language in one section of a statute but omits it in another …, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (citation and internal quotation marks omitted).

and solicits public comment on the request; (3) the Attorney General will review the request and any timely public comment; and (4) if certification is granted, the Attorney General will publish the certification, including "a determination of the date the capital counsel mechanism qualifying the State for certification was established." 76 Fed. Reg. 11,713 (March 3, 2011). Defendants argue that these procedures make clear that the Attorney General did not intend for certification decisions to be subject to the notice and comment requirements of rulemaking. Accordingly, Defendants argue that the inclusion of the procedures provided sufficient notice because they included the "substance of the proposed rule." *Environmental Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 851 (9th Cir. 2003).

Moreover, Defendants argue that any error was harmless, because Plaintiffs were not deprived of an opportunity to comment on the proposed procedure. Indeed, Plaintiffs submitted comments criticizing the procedure's "failure to require any information upon which the certification determination will be made" and stating that such failure "denies the public notice of and deprives interested persons the opportunity to participate in the certification determination in a meaningful and informed manner and violates due process." AR 169. *See also* AR 570 ("the Attorney General's proposed rule does not create a process that will provide adequate notice of the information to be considered in the certification determination"); AR 572 ("Full justification for granting or denying a request for certification must be made public, as well as all information relied upon by the Attorney General in doing so"). Plaintiffs respond that the

Attorney General's failure explicitly to state his position that certification decisions were orders meant that they "and others had no opportunity to comment on Defendants' stance specifically, and to explain why it is both erroneous and inequitable." Plaintiffs' Opposition at 3. However, Plaintiffs did challenge the lack of full rule-making procedures, stating that the proposed procedures violated due process and recommending modifications to the procedure.

Accordingly, the Court denies Plaintiffs' motion for summary judgment and grants Defendants' cross-motion on the first cause of action.

III. Failure to Respond to Public Comments

Plaintiffs argue that Defendants failed to respond to public comments when they promulgated the final rule, in violation of the requirement that an agency "must give reasoned responses to all significant comments in a rulemaking proceeding." *Int'l Fabricare Inst. v. EPA*, 972 F.2d 384, 389 (D.C. Cir. 1992). "An agency need only respond to significant comments, those which, if adopted, would require a change in the agency's proposed rule. *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1404 (9th Cir. 1995). However, "a court should not infer that an agency considered an issue merely because it was raised, where there is no indication that the agency or other proponents refuted the issue." *Beno v. Shalala*, 30 F.3d 1057, 1074-75 (9th Cir. 1994).

Specifically, Plaintiffs assert that Defendants failed to respond to their comment that, under chapter 154 and prior court decisions, states applying for certification must bear the burden of demonstrating existence of and compliance with specific standards. Plaintiffs argue that the Final Rule "allows state applicants to be presumptively certified on the basis of minimal facial showings." AR 812. Plaintiffs further assert that the procedure adopted by the Final Rule improperly shifts the burden to those challenging the certification and that Defendants nowhere responded to their comment. However, the preamble to the final rule clearly states, "The Department does not believe, as some commenters urged, that it is necessary to specify detailed information concerning State capital collateral review systems that States must include in their request for chapter 154 certification." AR 1125. Plaintiffs' burden-shifting argument is based, in large part, on their contention that states should be required to provide more information. The Court finds that Defendants' response is sufficient to indicate that Defendants considered arguments regarding burden-shifting.

Next, Plaintiffs argue that Defendants failed to respond to their comment that the failure to publish denials of certifications is contrary to 5 U.S.C. § 555(e). However, the preamble to the Final Rule acknowledges that "[s]ome commenters urged that denials of certification also be published in the Federal Register" and states that "the Attorney General has the option of giving notice by service to the State official who requested certification regarding

the denial of the certification and is not legally required to publish the denial." AR 1125-26. Accordingly, Defendants addressed Plaintiffs' concern with respect to the legal requirement that denials of certification be published. Although Defendants did not specifically cite § 555(e), the Court finds that this is sufficient to indicate that Defendants considered arguments that they were required to publish denials of certifications.

Finally, Plaintiffs argue that Defendants did not respond to their concerns that the proposed rule did not identify any "criteria to indicate what type of information will be considered in granting or denying the application." AR 570. However, the preamble to the Final Rule explains Defendants' reasoning and continues, "States will be free to present any and all information they consider relevant or useful to explain how the mechanism for which they seek certification satisfies" chapter 154's requirements. AR 1125. Moreover, the preamble indicates that Defendants found "no persuasive reason for an across-the-board imposition of more definite informational requirements beyond that." *Id.*

Accordingly, the Court denies Plaintiffs' motion for summary judgment and grants Defendants' cross-motion on the second cause of action.

III. Procedural Challenges to the Final Rule

Under § 706(2)(A) of the APA, a reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary,

capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). Plaintiffs argue that the certification process set out in the Final Rule is procedurally deficient in violation of the APA.

A. Certification Decisions as Orders

Plaintiffs first argue that Defendants' determination that certification decisions are orders or adjudications instead of rulemaking violates the APA. The Ninth Circuit has held that adjudications "resolve disputes among specific individuals in specific cases whereas rulemaking affects the rights of broad classes of unspecified individuals." *Yesler Terrace Cmty. Council v. Cisneros*, 37 F.3d 442, 448 (9th Cir. 1994). A determination resulting from rulemaking is the "whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." *Id.*

Defendants counter that certification decisions are resolutions of factual questions related to a particular state and whether it is eligible to seek application of the chapter 154 proceedings in individual habeas corpus cases. Accordingly, Defendants argue that certification decisions do not affect the rights of broad classes of individuals. However, each certification will create a presumption that Chapter 154 applies to the habeas proceedings of every condemned prisoner in the relevant state and accordingly affects the litigation strategy of each of those individuals.

Moreover, the fact that the certification decision can be based only on the procedures adopted as policy by a state, rather than the way in which those procedures have been applied in specific cases, undercuts a finding that the certification decisions are fact-based. Finally, as Plaintiffs point out, the fact that individual habeas petitioners will be able to challenge the applicability of chapter 154 in their particular cases only underscores the fact that the Attorney General's certification decisions are rule-making actions that affect the rights of broad classes of individuals.

Defendants further argue that "it is sufficient that the Attorney General had a reasoned basis for [ ] concluding" that certification decisions are orders rather than rules. Cross-Motion at 18. Defendants rely on the D.C. Circuit's decision in *Teva Pharmaceuticals, USA, Inc. v. FDA*, 182 F.3d 1003 (D.C. Cir. 1999). However, in *Teva*, the D.C. Circuit was addressing the FDA's decision to answer a key question, necessary to the resolution of a drug company's application to market a drug, as part of its future rule-making rather than making a case-by-case order allowing it to determine the outcome of the application. The *Teva* panel held that, while an agency "generally has discretion to determine whether to proceed by adjudication or rulemaking, litigants also have a right to adjudication of their claims." *Id.* at 1010. This is not the same discretion exercised by Defendants in this case to classify a set of all certification decisions as orders. The cases relied upon by the *Teva* panel make this distinction clear. For example, in *SEC v. Chenery Corp*., the Su-

preme Court held that "the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency." 332 U.S. 194, 203 (1947). The *Chenery* Court based this holding on an agency's need to address areas in which it "may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule." *Id.* Here, Defendants are not declining to exercise their authority to make a rule. Instead, they are electing to characterize any decision under the Final Rule as an order rather than a rule.

Because certification decisions will "affect[ ] the rights of broad classes" of individuals and impact such persons "after the [decision] is applied," the Court finds that they are more properly characterized as rules rather than orders. *Yesler Terrace*, 37 F.3d at 448. Accordingly, certification decisions must comply with all procedural requirements of the APA, including notice regarding the decisions. The Final Rule, as promulgated, does not "provide sufficient factual detail and rationale" such that interested parties have an opportunity to "comment meaningfully." *Honeywell Int'l Inc. v. EPA*, 372 F.3d 441, 445 (D.C. Cir. 2004). In addition, the public is entitled to notice of an agency's proposed actions. 5 U.S.C. § 553(b)(3). However, the Final Rule only requires that "the Attorney General will make [a state's] request available on the Internet and solicit public comment on the request by publishing a notice in the Federal Register." AR 1131. The Final Rule further provides that the Attorney General will consider the state's request and any

timely public comment and then publish the certification in the Federal Register if granted. This falls short of the requirement that the public be given an opportunity to comment on the Attorney General's proposed decision-making. Moreover, because the state need not provide any specific information in its request, there is no guarantee that the public will have sufficient information to make meaningful commentary on the request.

B. Application Process

Plaintiffs also argue that the Final Rule is arbitrary and capricious because a state seeking certification need only submit a "request in writing that the Attorney General determine whether the State meets the requirements for chapter 154 certification." AR 1131. Plaintiffs contend that this undefined "request in writing" does not require states seeking certification to provide the relevant information necessary to make a reasoned decision. Accordingly, Plaintiffs argue that the certification process itself is "arbitrary and capricious because it fails to consider and address relevant factors about a state's eligibility for certification and is unrelated to the requirements of Chapter 154." Motion for Summary Judgment at 13. The promulgation of a final rule is arbitrary and capricious when an agency "entirely fail[s] to consider an important aspect of the problem." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

Plaintiffs further argue that the lack of specificity required by the application process improperly

shifts the burden to the public to prove that the state applying for certification does not comply with chapter 154. Chapter 154 itself requires that a state take affirmative steps to prove its eligibility. One court has explained:

> If Congress had intended to afford the States the very significant benefits conferred by Chapter 154 on the basis of a finding of substantial compliance based on past performance, it could have done so. However, it elected not to do so; and instead, Congress chose to confer those benefits only if the State made an affirmative, institutionalized, formal commitment to provide a post-conviction review system which Congress considered to be "crucial to ensuring fairness and protecting the constitutional rights of capital litigants."

Powell Committee Report at 3240.

Ashmus v. Calderon, 31 F. Supp. 2d 1175, 1183 (N.D. Cal. 1998), *aff'd sub nom. Ashmus v. Woodford*, 202 F.3d 1160 (9th Cir. 2000) (quoting *Satcher v. Netherland*, 944 F. Supp. 1222, 1243 (E.D. Va. 1996)). The *Ashmus* court found that "a state must establish a system reflecting 'an affirmative, institutionalized, formal commitment' to habeas representation," and that Congress did not intend to permit procedures that "suffer from incoherence or incompleteness." 31 F. Supp. 2d at 1183.

Defendants respond that the Final Rule is not arbitrary and capricious because it "requires demonstration that the requesting state has an established, compliant capital counsel mechanism and subjects that demonstration to public scrutiny." Cross-Motion at 20. However, the rule as written requires only a bare-bones request. Once a state has made its request, the burden shifts to the public to demonstrate that the state does not comply. Moreover, a state applicant need not submit data demonstrating its record of compliance with its mechanism. *See* 78 Fed. Reg. 78,174 (stating that certification decision "need not be supported by a data-intensive examination of the State's record of compliance with the established mechanism in all or some significant subset of post-conviction cases."). Nor must a state demonstrate that its procedures are adequate.

Plaintiffs also challenge the fact that the Final Rule does not require a state to show that it has actually complied with the terms of its submitted mechanism. The mere existence of state requirements for the appointment, compensation and expenses of competent counsel does not ensure that such requirements are applied and enforced in practice. Indeed, as Plaintiff FDO–Arizona notes, capital prisoners in Arizona generally wait more than a year and a half after state court affirmance of their convictions and sentences before state post-conviction counsel is appointed. Public Comment of Federal Public Defender—District of Arizona (June 1, 2011), AR 583-84.

Defendants counter that they need not examine whether the state has complied with its own mechanism in any given case because chapter 154's requirement of an "established" mechanism "presupposes that the State has adopted and implemented standards consistent with the chapter's requirements." AR 1113. The Final Rule goes on to state that it "allows for the possibility that the Attorney General will need to address situations in which there has been a wholesale failure to implement one or more material elements of a mechanism described in a State's certification submission." AR 1113. However, if states are not required to produce data regarding compliance, the burden will necessarily fall on the public's comments to point out such "wholesale failure."

Common sense requires that a state must actually comply with its own mechanism, and the history, purpose and exhaustive judicial interpretation of chapter 154 also support this view. The Fourth Circuit put it most plainly in *Tucker v. Catoe*, 221 F.3d 600, 604-05 (4th Cir. 2000):

> We accordingly conclude that a state must not only enact a "mechanism" and standards for post-conviction review counsel, but those mechanisms and standards must in fact be complied with before the state may invoke the time limitations of [chapter 154]. Not only is this conclusion consistent with our precedent, but it is also consistent with common sense: It would be an

> astounding proposition if a state could benefit from the capital-specific provisions of AEDPA by enacting, but not following, procedures promulgated [to meet chapter 154 requirements].

The Supreme Court noted that AEDPA "creates an entirely new chapter 154 with special rules favorable to the state party, but applicable *only if* the State meets certain conditions." *Lindh v. Murphy*, 521 U.S. 320, 326 (1997) (emphasis added). In other words, a state may reap procedural benefits only if it has "done its part to promote sound resolution of prisoners' petitions." *Id.* at 330. *See also Baker v. Corcoran*, 220 F.3d 276, 286 (4th Cir. 2000) (Maryland did not qualify for chapter 154 provisions because the state's competency of counsel standards were not applied in the appointment process and the "[c]ompetency standards are meaningless unless they are actually applied in the appointment process"); *Ashmus*, 202 F.3d at 1168 (stating that California must abide by its competency standards when appointing counsel and concluding that "a state's competency standards must be mandatory and binding if the state is to avail itself of Chapter 154"); *Mata v. Johnson*, 99 F.3d 1261, 1267 (5th Cir. 1996), *vacated in part on other grounds* in 105 F. 3d 209 (5th Cir. 1997) (stating that competency standards must be "specific" and "mandatory" in order to satisfy the opt-in requirements).

Accordingly, the Court finds that the certification procedure set out in the Final Rule is procedurally deficient and therefore arbitrary and capricious under the APA. The Court grants Plaintiffs' motion

for summary judgment and denies Defendants' cross-motion with respect to the third cause of action.

IV. Substantive Challenges to the Final Rule

Final regulations are arbitrary and capricious when they fail to provide "definitional content" for terms guiding agency action implementing a statute. *Pearson v. Shalala*, 164 F.3d 650, 660 (D.C. Cir. 1999). An agency is "obliged under the APA" to give content to statutory standards it is tasked with implementing. *Id.* at 661. An agency cannot leave a prospective applicant "utterly without guidance as to what he must prove, and how." *S. Terminal Corp. v. EPA*, 504 F.2d 646, 670 (1st Cir. 1974). "When an agency utterly fails to provide a standard for its decision, it runs afoul of more than one provision of the Administrative Procedure Act … An agency's failure to state its reasoning or to adopt an intelligible decisional standard is so glaring that we can declare with confidence that the agency action was arbitrary and capricious." *Checkosky v. SEC*, 139 F.3d 221, 226 (D.C. Cir. 1998) (citation omitted).

Plaintiffs argue that the certification process is substantively arbitrary and capricious in several respects.

A. Criteria

Plaintiffs first argue that the Final Rule is arbitrary and capricious because it provides no substantive criteria as to how a state may satisfy the requirements of chapter 154. Section 26.22(b) allows a state

to be certified if its competency standards "reasonably assure a level of proficiency appropriate for State post-conviction litigation in capital cases." AR 1113. Plaintiffs argue that this "catch-all" provision is broad and vague. In response, Defendants point to other specific provisions in § 26.22, which Plaintiffs concede are based on specific criteria and therefore contain definitional content, and argue that those sections provide "benchmark" competency standards "that serve as a point of reference in judging the adequacy of other counsel qualification standards that States may establish and offer for certification." AR 1123.

Defendants state that "the suggestion that the catch-all provision negates the more specific provisions is unsupported." Cross-Motion at 22. Defendants also note that the Final Rule enumerates "[m]easures that will be deemed relevant[, including] standards of experience, knowledge, skills, training, education, or combinations of these considerations that a State requires attorneys to meet in order to be eligible for appointment in State capital postconviction proceedings." AR 1130. Nevertheless, Defendants do not and cannot deny that the Attorney General can base his certification decision on § 26.22(b) alone.

Defendants also argue that the catch-all provision gives effect to congressional intent. According to Defendants, Congress intended that states be given "wide latitude to establish a mechanism that complies with [the statutory requirements.]" AR 1113. But latitude should not be conflated with free rein. *See Bd. of Educ. v. Rowley*, 458 U.S. 76, 183 (1982) (noting that although the Education of the Handicapped Act

gives states the "primary responsibility for developing and executing programs, it imposes significant requirements to be followed in the discharge of that responsibility.").

In June 1988, a committee, chaired by retired Supreme Court Justice Lewis Powell, was commissioned by then Chief Justice William Rehnquist to assess the delay and lack of finality in capital cases. 135 Cong. Rec. 24694 (1989), Ad Hoc Committee on Federal Habeas Corpus in Capital Cases Committee Report (Powell Committee Report). The Powell Committee, whose proposal chapter 154 is intended to codify, explained that the "provision of competent counsel for prisoners under capital sentence throughout both state and federal collateral review is crucial to ensuring fairness and protecting the constitutional rights of capital litigants." 135 Cong. Rec. S13471-04, S13481, S13482, Powell Committee Report. In chapter 154, Congress provided a quid pro quo design: a state receives expedited federal review in exchange for its guarantee of adequate representation in state habeas corpus proceedings. *See Ashmus*, 31 F. Supp. 2d at 1180 ("As courts have uniformly held, chapter 154 explicitly contemplates a quid pro quo relationship."). The legislative history of chapter 154 supports the principle that a regulation effectuating it must require that a state actually uphold its end of the bargain—to provide competent representation.

B. Effect of Common Law

Plaintiffs next argue that the Final Rule is arbitrary and capricious because it does not address the effect of judicial interpretation. The Final Rule states that "prior judicial interpretation of chapter 154, much of which remains generally informative, supports many features of this rule … To the extent the rule approaches certain matters differently from some past judicial decisions, there are reasons for the differences." AR 1115. The Final Rule goes on to state that it is impossible consistently to follow judicial decisions because different courts reached conflicting conclusions on some matters and legislative amendments to chapter 154 preclude the Attorney General from relying on certain case law.

Plaintiffs do not dispute that the Attorney General cannot follow every existing case interpreting chapter 154. Nonetheless, they argue that the concerns raised in the Final Rule "do not render all previous judicial interpretations irrelevant to evaluating an application for certification." Motion for Summary Judgment at 22. Although the Final Rule recognizes that existing case law "remains generally informative" and states that the body of law "supports many features of this rule," it does not in any way address how prior judicial decisions will inform individual certification decisions. Defendants simply state that they were not required to address prior judicial interpretation in the Final Rule, but provide no support for this contention. Cross-Motion at 24. As Plaintiffs noted in their comments during the rulemaking, traditional tools of statutory construction dictate that judicial

precedent is a source for giving content to federal standards. *See* AR 157 (citing *INS v. Cardoza–Fonseca*, 480 U.S. 421, 448 (1987).

Plaintiffs point to the example of Texas's application, submitted on March 11, 2013. Texas seeks certification based on a state mechanism established in 1995. However, the Fifth Circuit had already held that the mechanism in place at that time did not comply with chapter 154. *Mata*, 99 F.3d at 1267. The Final Rule does not explain whether the Attorney General will incorporate the standards and apply the rulings of the courts to a state's application.

Defendants also argue that Plaintiffs failed to raise this issue in their comments submitted during the rulemaking. However, Plaintiffs' comments stated, among other things, that "Congress's decision not to overturn [prior] judicial interpretations or change the terms of the requirements demonstrates congressional acceptance of them." AR 156. Plaintiffs further opined, "These interpretations should be reflected in the minimum federal standards included in the Attorney General's regulations." *Id.* Plaintiffs clearly raised the issue of prior judicial interpretation of chapter 154 in their comments.

C. Ex Parte Communication

Finally, Plaintiffs argue that the Final Rule is arbitrary and capricious because it fails to address the nature and effect of ex parte communications between the Attorney General and state officials. Defendants counter that Plaintiffs failed to address the issue of ex

parte communications in their public comment. However, the public comment period closed on June 1, 2011 and Plaintiffs did not discover the ex parte communications until April 2013. *See* Baich Dec. ¶ 7.

Even before the Final Rule went into effect, Attorney General Holder and Arizona Attorney General Tom Horne commenced a process of certification without notifying interested parties. Baich Dec., Exs. E, F. On April 18, 2013, Attorney General Horne sent a letter to Attorney General Holder requesting certification of Arizona as an "opt-in" state. Baich Dec., Ex. E. Plaintiff FDO-Arizona learned of this letter only through a press release issued by the Arizona Attorney General's Office. On June 4, 2013, Plaintiff FDO-Arizona wrote a letter to Attorney General Holder, referring to Attorney General Horne's letter and formally requesting notification of any correspondence or communication between the DOJ and the Arizona Attorney General's Office. Baich Dec., Ex. F. On July 16, 2012 more than two months prior to the publication of the Final Rule—the DOJ informed Arizona that it would review the state's application immediately. In a letter to the Arizona Attorney General, the DOJ stated that it would begin reviewing Arizona's application to "help speed up the ultimate determination of the certification." Baich Dec., Ex. G. Plaintiff FDO-Arizona was not copied on the DOJ's response to Arizona and did not receive an acknowledgment of or a response to its letter. Baich Dec. ¶¶ 7-8.

In response, Defendants simply note that the APA does not prohibit ex parte communications. However, in light of the certification procedure set out in

the Final Rule, specifically the bare requirement of a "written request" and a single opportunity for public comment based on that potentially bare-bones request, ex parte communications severely interfere with the public's ability to make informed comment on any application for certification. Defendants argue that the Final Rule provides that the Attorney General may publish subsequent notices providing a further opportunity for comment, but there is no requirement that the Attorney General publish anything but the initial written application. *See Erringer v. Thompson*, 371 F.3d 625, 629 (9th Cir. 2004) (holding that the APA's notice requirements exist to afford interested parties a meaningful opportunity to respond to agency action). Ex parte communication excludes interested parties from offering input regarding the validity and accuracy of such undisclosed communications and documents.

Accordingly, the Court grants Plaintiffs' motion for summary judgment and denies Defendants' motion for summary judgment on the fourth cause of action.

CONCLUSION

For the foregoing reasons, the Court GRANTS in part Plaintiffs' motion for summary judgment and GRANTS in part Defendants' cross-motion for summary judgment. Defendants may not put into effect the rule entitled, "Certification Process for State Capital Counsel Systems," published at 78 Fed. Reg. 58,160 (Sept. 23, 2013). Defendants must remedy the defects identified in this order in any future efforts to

implement the procedure prescribed by chapter 154. This order disposes of all of the causes of action. The Clerk of the Court shall enter judgment and close the case. All parties shall bear their own costs.

IT IS SO ORDERED.

/s/ Claudia Wilken
Dated: 8/7/2014 CLAUDIA WILKEN
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

HABEAS CORPUS RESOURCE CENTER and THE OFFICE OF THE FEDERAL PUBLIC DEFENDER FOR THE DISTRICT OF ARIZONA,	No. C 13-4517 CW ORDER GRANTING PRELIMINARY INJUNCTION

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF JUSTICE and ERIC H. HOLDER, in his official capacity as United States Attorney General,

Defendants.
_____/

On October 18, 2013, the Court issued an order to show cause why a preliminary injunction should not issue and a temporary restraining order enjoining Defendants until November 1, 2013 from putting into effect the rule entitled, "Certification Process for State Capital Counsel Systems," published at 78 Fed. Reg. 58,160 (Sept. 23, 2013). The order was issued ex

parte. Due to the lapse in appropriations, Defendants had filed a request for a stay and had not yet filed an opposition. On October 23, 2013, the parties submitted a stipulation for an extended briefing schedule in which they agreed to extend the temporary restraining order for an additional fourteen days. Plaintiffs Habeas Corpus Resource Center (HCRC)[1] and the Office of the Federal Public Defender for the District of Arizona (FDO-Arizona)[2] seek a preliminary injunction. Defendants United States Department of Justice (DOJ) and United States Attorney General Eric H. Holder oppose the motion.[3] The motion was heard on November 14, 2013. Having considered oral argument and the papers submitted by the parties, the Court GRANTS Plaintiffs' motion.

BACKGROUND

I. The 2013 Final Rule

---

[1] HCRC is an entity in the Judicial Branch of the State of California that, among other things, provides legal representation to men and women under sentence of death in state and federal habeas corpus proceedings. Complaint ¶ 16

[2] FDO-AZ is a Federal Defender organization that operates under the authority of the Criminal Justice Act of 1964, 18 U.S.C. § 3006A(g). Among other things, FDO-AZ provides legal representation to indigent men and women sentenced to death. Complaint ¶ 17.

[3] On November 22, 2013, the Court granted Marc Klaas's motion to file a brief as amicus curiae. The Court has reviewed the brief, Plaintiffs' response to it and amicus's reply. The Court finds that the amicus brief does not alter the Court's assessment of the motion.

The Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996 added chapter 154 of Title 28 of the United States Code. Chapter 154 provides expedited procedures in federal capital habeas corpus cases when a state is able to establish that it has provided qualified, competent, adequately resourced and adequately compensated counsel to death-sentenced prisoners. Under the AEDPA, federal courts were responsible for determining whether states were eligible for the expedited federal procedures. The USA Patriot Improvement and Reauthorization Act of 2005, Pub. L. No. 109-174, 120 Stat. 192 (2005), amended chapter 154 to shift the eligibility determination from the federal courts to the Attorney General.

In December 2008, the Attorney General published a final rule to implement the procedure prescribed by chapter 154. On January 20, 2009, the Court granted a preliminary injunction, enjoining Defendants from putting the regulation into effect without first providing an additional comment period of at least thirty days and publishing a response to any comments received during such a period. *Habeas Corpus Resource Ctr. v. United States Department of Justice*, 2009 WL 185423, *10 (N.D. Cal.). On February 5, 2009, Defendants solicited further public comment on its proposed certification process. Defendants thereafter proposed to retract the 2008 regulation pending the completion of a new rulemaking process. *See* 75 Fed. Reg. 29,217 (May 25, 2010). On November 23, 2010, the Defendants published a final rule retracting the 2008 regulations. *See* 75 Fed. Reg. 71,353 (Nov. 23, 2010).

On March 3, 2011, the DOJ published a notice of proposed rulemaking for a new certification process. 76 Fed. Reg. 11,705. The comment period closed on June 1, 2011. On February 13, 2012, the DOJ then published a supplemental notice soliciting public comments on five contemplated changes. 77 Fed. Reg. 7559. The comment period closed on March 14, 2012. On September 2013, the Final Rule was published.

Section 26.22 of the Final Rule prescribes the standards a state must meet in order to earn certification under 28 U.S.C. §§ 2261 and 2265. The Final Rule provides:

> § 26.22 Requirements.
>
> The Attorney General will certify that a State meets the requirements for certification under 28 U.S.C. 2261 and 2265 if the Attorney General determines that the State has established a mechanism for the appointment of counsel for indigent prisoners under sentence of death in State postconviction proceedings that satisfies the following standards:
> …
>
> (b) The mechanism must provide for appointment of competent counsel as defined in State standards of competency for such appointments.

(1) A State's standards of competency are presumptively adequate if they meet or exceed either of the following criteria:

> (i) Appointment of counsel who have been admitted to the bar for at least five years and have at least three years of postconviction litigation experience. But a court, for good cause, may appoint other counsel whose background, knowledge, or experience would otherwise enable them to properly represent the petitioner, with due consideration of the seriousness of the penalty and the unique and complex nature of the litigation; or
>
> (ii) Appointment of counsel meeting qualification standards established in conformity with 42 U.S.C. 14163(e)(1) and (2)(A), if the requirements of 42 U.S.C. 14163(e)(2)(B), (D), and (E) are also satisfied.

(2) Competency standards not satisfying the benchmark criteria in paragraph (b)(1) of this section will be deemed adequate only if they otherwise reasonably assure a level of proficiency

> appropriate for State postconviction litigation in capital cases.

78 Fed. Reg. at 58,183. The "standards established in conformity with 42 U.S.C § 14163(e)(1) and (2)(A)" referred to in § 26.22(b)(1)(ii) are provisions of the Innocence Protection Act (IPA). They call for maintenance of a roster of qualified attorneys, specialized training programs for attorneys providing capital case representation, monitoring of the performance of attorneys who are appointed and their attendance at training programs, and removal from the roster of attorneys who fail to deliver effective representation, engage in unethical conduct, or do not participate in required training. 42 U.S.C. §§ 14163(e)(2)(B),(D), and (E).

Section 26.23 of the Final Rule provides the process for a state's certification:

> (a) An appropriate State official may request in writing that the Attorney General determine whether the State meets the requirements for certification under § 26.22 of this subpart.
>
> (b) Upon receipt of a State's request for certification, the Attorney General will make the request publicly available on the Internet (including any supporting materials included in the request) and publish a notice in the Federal Register—

(1) Indicating that the State has requested certification;

(2) Identifying the Internet address at which the public may view the State's request for certification; and

(3) Soliciting public comment on the request.

(c) The State's request will be reviewed by the Attorney General. The review will include consideration of timely public comments received in response to the Federal Register notice under paragraph (b) of this section, or any subsequent notice the Attorney General may publish providing a further opportunity for comment. The certification will be published in the Federal Register if certification is granted. The certification will include a determination of the date the capital counsel mechanism qualifying the State for certification was established.

(d) A certification by the Attorney General reflects the Attorney General's determination that the State capital counsel mechanism reviewed under paragraph (c) of this section satisfies chapter 154's requirements. A State may request a new certification

> by the Attorney General to ensure the continued applicability of chapter 154 to cases in which State postconviction proceedings occur after a change or alleged change in the State's certified capital counsel mechanism. Changes in a State's capital counsel mechanism do not affect the applicability of chapter 154 in any case in which a mechanism certified by the Attorney General existed throughout State postconviction proceedings in the case.
>
> (e) A certification remains effective for a period of five years after the completion of the certification process by the Attorney General and any related judicial review. If a State requests re-certification at or before the end of that five-year period, the certification remains effective for an additional period extending until the completion of the re-certification process by the Attorney General and any related judicial review.

78 Fed. Reg. at 58,184.

II. The Impact of the 2013 Final Rule

Once a state is certified, the statute of limitations for federal habeas corpus proceedings is "fast-tracked." First, the statute of limitations for filing a habeas petition in federal court is shortened from one

year to 180 days. 28 U.S.C. § 2263(a). Second, tolling of the statute of limitations is altered to exclude (1) the period of time between the finality of direct review in state court to the filing of a petition for writ of certiorari in the United States Supreme Court and (2) the filing of exhaustion or successive state habeas petitions. 28 U.S.C. § 2263(b). Third, a petitioner's ability to amend a petition is limited. 28 U.S.C. § 2266(b)(3)(B). Fourth, a federal district court must enter final judgment on a habeas petition within 450 days of the filing of the petition, or sixty days after it is submitted for decision–whichever is earlier. 28 U.S.C. § 2266(b) Finally, the certification is retroactive, reaching back to the date the qualifying mechanism is found to have been established. 28 U.S.C. § 2265(a)(2) ("The date the mechanism described in paragraph 1(A) was established shall be the effective date of the certification under this subsection.").

LEGAL STANDARD

It is appropriate to issue a preliminary injunction if the moving party establishes either (1) a combination of probable success on the merits and the possibility of irreparable injury, or (2) that serious questions are raised and the balance of hardships tips sharply in favor of the moving party. *Stuhlbarg Intern. Sales Co. v. John D. Brush and Co.*, 240 F.3d 832, 839-840 (9th Cir. 2001). "These formulations are not different tests, but represent two points on a sliding scale in which the degree of irreparable harm increases as likelihood of success on the merits de-

creases." *Associated Gen. Contractors of Calif. v. Coalition for Economic Equity*, 950 F.2d 1401, 1410 (9th Cir. 1991) (citations omitted). Under either formulation of the test, a party seeking a preliminary injunction always must show that a significant threat of irreparable harm exists. *American Passage Media Corp. v. Cass Communications, Inc.*, 750 F.2d 1470, 1473 (9th Cir. 1985). In addition, in the Ninth Circuit, the Court must also consider the public interest when it assesses the propriety of issuing an injunction. *Sammartano v. First Judicial District Cour*t, 303 F.3d 959, 973 (9th Cir. 2002).

DISCUSSION

I. Likelihood of Success on Procedural Issues

The APA "requires an agency conducting notice-and-comment rulemaking to publish in its notice of rulemaking 'either the terms or substance of the proposed rule or a description of the subjects and issues involved.'" *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2001) (quoting 5 U.S.C. § 553(b)(3)). Because the Attorney General's promulgation of the Final Rule constitutes administrative rulemaking, it must comply with the rulemaking provisions of the APA. *See* 5 U.S.C. § 553. To determine compliance, courts inquire whether "the notice fairly apprise[s] the interested persons of the subjects and issues before the Agency.'" *Louis v. U.S. Dep't of Labor*, 419 F.3d 970, 975 (9th Cir. 2005).

The Court finds that Plaintiffs are likely to succeed on their claim that the Attorney General failed

to provide adequate notice under the APA because he stated, for the first time in the Final Rule, that the certification decisions are not subject to the rulemaking provisions of the APA. 78 Fed. Reg. 58,174 ("[T]he Attorney General's certifications under chapter 154 are orders rather than rules for purposes of the Administrative Procedure Act (APA). They are accordingly not subject to the APA's rulemaking provisions, *see* 5 U.S.C. § 553[.]"). Interested parties may have been denied an opportunity to comment on the Attorney General's view. When an agency fails to notify interested parties of its position, its notice of proposed rulemaking has not "provide[d] sufficient factual detail and rationale for the rule to permit interested parties to comment meaningfully." *Honeywell Int'l., Inc. v. EPA*, 372 F.3d 441, 445 (D.C. Cir. 2004) (citation omitted).

Defendants respond that the retracted 2008 rule provided sufficient notice under the APA because the current Attorney General adhered to the position of his predecessor. Defendants' argument is unpersuasive. The Attorney General published a notice of a new proposed rule that resembled the 2008 rule, but omitted its characterization of certification decisions as adjudications, not rules. Far from alerting the public to the fact that the Attorney General adhered to this position taken by his predecessor, it is more likely that the notice of the new rule led interested parties to presume that the Attorney General intentionally removed this characterization. *See*, *e.g.*, *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) ("Where Congress includes particular language in one section of a statute but omits it in another…, it is generally

presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (citation and internal quotation marks omitted).

Defendants additionally contend that certification decisions are self-evidently adjudications, and thus that they were not required to provide notice of their view. Scarce authority exists for such a contention. As Plaintiffs note, the Attorney General's certification determinations are unlike typical APA adjudications that are individualized, including Social Security and Medicare benefits claims. Rather, this particular certification decision "affects the rights of broad classes" of individuals and impacts such persons "after the [decision] is applied." *Yesler Terrace Cmty. Council v. Cisneros*, 37 F.3d 442, 448 (9th Cir. 1994). Further, the 2011 Proposed Rule and 2012 Supplemental Notice included indicia of rulemaking, e.g. publication and a notice and comment period. Defendants thus have not provided authority for their claim that certification is self-evidently an adjudication.

Accordingly, Plaintiffs are likely to succeed in demonstrating that Defendants were obliged to provide notice of their view that rulemaking procedures would not apply to the certification decision. *See Louis*, 419 F.3d at 976 (finding notice that omitted "potentially controversial subject matter" insufficient); *Habeas Corpus Res. Ctr. v. U.S. Dept. of Justice*, 2009 WL 185423, at *8 (N.D. Cal.) (holding that notice was inadequate when public commenters did not reflect any understanding of DOJ's controversial

interpretation and likely would have disputed it had they been provided notice).

The Court concludes that the Final Rule likely did not give adequate notice of the Attorney General's view of the certification process. Accordingly, Plaintiffs are likely to succeed on the merits of this claim.

II. Likelihood of Success on the Challenges to the Final Rule

A. Standing

Defendants assert Plaintiffs lack standing to pursue their challenge to the substance of the Final Rule and thus cannot satisfy Article III's "case or controversy requirement." A plaintiff "has the burden of establishing the three elements of Article III standing: (1) he or she has suffered an injury in fact that is concrete and particularized, and actual or imminent; (2) the injury is fairly traceable to the challenged conduct; and (3) the injury is likely to be redressed by a favorable court decision." *Salmon Spawning & Recovery Alliance v. Gutierrez*, 545 F.3d 1220, 1225 (9th Cir. 2008). "Article III standing requires an injury that is actual or imminent, not conjectural or hypothetical." *Cole v. Oroville Union High School Dist.*, 228 F.3d 1092, 1100 (9th Cir. 2000) (internal quotation marks omitted). "A plaintiff may allege a future injury in order to comply with this requirement, but only if he or she 'is immediately in danger of sustaining some direct injury as the result of the challenged official conduct and the injury or threat of injury is both real and immediate, not conjectural or hypothetical.'" *Scott v.*

Pasadena Unified School Dist., 306 F.3d 646, 656 (9th Cir. 2002) (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983)).

Defendants first incorrectly state that the Court has found that Plaintiffs lack standing with regard to substantive claims. Defs.' Resp. at 14-15. In the prior litigation, substantive standing issues were not before this Court, because Plaintiff HCRC raised only procedural deficiencies. *See* HCRC's Reply Br. to Opp. to Mot. for Preliminary Inj., Docket No. 71, Case No. 08-cv-02649, at 6. Accordingly, in the prior case the Court made no finding as to substantive standing issues and found that HCRC had standing to challenge procedural defects. *Habeas Corpus Res. Ctr.*, 2009 WL 185423, at *5.

Defendants contend that Plaintiffs lack standing because their injuries are speculative and not imminent. According to Defendants, Plaintiffs' injuries will occur only if California or Arizona are certified. Plaintiffs respond that "the harmful consequences of permitting the flawed rule to go into effect are not contingent on whether California will be certified, but rather upon the inability to predict whether California qualifies for chapter 154's benefits[.]" Supplemental Declaration of Michael Laurence ¶ 3. It is Defendants' position that the retroactive effect of the Final Rule reaches back to the date at which the state mechanism went into effect. In other words, were the DOJ to certify a state and deem a state's mechanism to have gone into effect at a prior date, the deadline for a habeas petitioner's application may have come and gone without his knowing it. The confusion

caused by the claimed retroactive effect forces Plaintiff HCRC to make urgent decisions regarding its litigation, resources, and strategy.

Arizona has already applied for certification. If Arizona is certified, under Defendants' interpretation of the Final Rule, Arizona's certification will reach back to the date when the mechanism is found to have been established. The uncertainty caused by the retroactive effect of the Final Rule curtails and disrupts FDO-Arizona's capacity to counsel its clients meaningfully. Declaration of Dale Baich ¶¶ 10-12. Accordingly, the present injury alleged by Plaintiffs is actual and particularized, and the future injury predictable and imminent. As the Court has found previously, there can be little doubt that the legal uncertainty of the retroactive effect of the new limitations period will severely harm Plaintiffs, leaving them in protracted legal limbo. Docket No. 26, TRO Order at 8. Defendants have articulated no persuasive response to suggest otherwise.

Defendants argue next that Plaintiffs lack standing to raise substantive claims because they do not meet the second and third elements of Article III standing. Defendants' argument fails. Plaintiffs can trace their actual or future injuries to the implementation of the Final Rule. The implementation "will result in known, predictable consequences" that constitute concrete injury. *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1199 (9th Cir. 2004) (finding that plaintiff's harm was traceable to the implementation of defendant's proposed plan, and "because Sausalito's as-

serted injuries will not occur if the Plan is not implemented, Sausalito has alleged injury that can be redressed by a decision blocking implementation of the Plan."). Because Plaintiffs' injuries will not occur if the Final Rule is not implemented, Plaintiffs have alleged injury that can be redressed by a decision blocking implementation of the Final Rule as written. *Id.*

The Court concludes that Plaintiffs have standing to challenge the substance of the Final Rule. First, they have alleged harm with sufficient detail to state a "concrete and particularized" injury. Second, the injury can be traced to the proposed implementation of the Final Rule. Third, Plaintiffs have alleged injury that can be redressed by a decision blocking implementation of the Final Rule as written.

B. Deficient Certification Process

Under § 706(2)(A) of the APA, a reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). Final regulations are arbitrary and capricious when they fail to provide "definitional content" for terms guiding agency action implementing a statute. *Pearson v. Shalala*, 164 F.3d 650, 660 (D.C. Cir. 1999). An agency is "obliged under the APA" to give content to statutory standards it is tasked with implementing. *Id.* at 661. An agency cannot leave a prospective applicant "utterly without guidance as to what he must prove, and how." *S. Terminal Corp. v. EPA*, 504 F.2d 646, 670 (1st Cir. 1974). "When an agency utterly fails

to provide a standard for its decision, it runs afoul of more than one provision of the Administrative Procedure Act …. An agency's failure to state its reasoning or to adopt an intelligible decisional standard is so glaring that we can declare with confidence that the agency action was arbitrary and capricious." *Checkosky v. SEC*, 139 F.3d 221, 226 (D.C. Cir. 1998) (citation omitted).

The Court finds that Plaintiffs are likely to succeed in demonstrating that the certification process is arbitrary and capricious in one or more of the multiple ways they posit.

1. Substantive Criteria

Plaintiffs may succeed in showing that the Final Rule is arbitrary and capricious in that it provides no substantive criteria as to how a state may satisfy the requirements of chapter 154. Section 26.22(b) allows a state to be certified if its competency standards "reasonably assure a level of proficiency appropriate for State post-conviction litigation in capital cases." 78 Fed. Reg. 58,162. Plaintiffs argue that this "catch-all" provision is broad and vague. In response, Defendants point to other provisions in § 26.22 and argue that § 26.22(b) should not be read "in isolation." But Defendants do not dispute that the Attorney General can base his certification decision on § 26.22(b) alone. Section 26.22(b)'s vague language does not offer meaningful notice as to how certification decisions will be made pursuant to it.

Defendants also argue that the catch-all provision gives effect to congressional intent. According to Defendants, Congress intended that states be given "wide latitude to establish a mechanism that complies with [the statutory requirements.]" 78 Fed. Reg. 58, 162. But latitude should not be conflated with free rein. *See Bd. of Educ. v. Rowley*, 458 U.S. 76, 183 (1982) (noting that although the Education of the Handicapped Act gives states the "primary responsibility for developing and executing programs, it imposes significant requirements to be followed in the discharge of that responsibility.").

In June 1988, a committee, chaired by retired Supreme Court Justice Lewis Powell, was commissioned by Chief Justice Rehnquist to assess the delay and lack of finality in capital cases. 135 Cong. Rec. 24694 (1989), Ad Hoc Committee on Federal Habeas Corpus in Capital Cases Committee Report (Powell Committee Report). The Powell Committee, whose proposal chapter 154 essentially codifies, explained that the "provision of competent counsel for prisoners under capital sentence throughout both state and federal collateral review is crucial to ensuring fairness and protecting the constitutional rights of capital litigants." 135 Cong. Rec. S13471-04, S13481, S13482, Powell Committee Report. In chapter 154, Congress provided a quid pro quo design: a state receives expedited federal review in exchange for its guarantee of adequate representation in state habeas corpus proceedings. *See Ashmus v. Calderon*, 31 F. Supp. 2d 1175, 1180 (N.D. Cal. 1998) *aff'd sub nom. Ashmus v. Woodford,* 202 F.3d 1160 (9th Cir. 2000) ("As courts

have uniformly held, chapter 154 explicitly contemplates a quid pro quo relationship."). The legislative history of chapter 154 supports the principle that a regulation pursuant to it must require that a state actually uphold its end of the bargain—to provide competent representation. The states could be afforded wide latitude in providing for competent representation in a number of specified, equivalent ways, without the latitude of specifying no requirements at all.

2. State's Obligation to Take Affirmative Steps

Plaintiffs may also succeed in showing that the Final Rule is arbitrary and capricious because it departs from chapter 154's requirement that a state take affirmative steps to prove its eligibility. One court has explained:

> "If Congress had intended to afford the States the very significant benefits conferred by Chapter 154 on the basis of a finding of substantial compliance based on past performance, it could have done so. However, it elected not to do so; and instead, Congress chose to confer those benefits only if the State made an affirmative, institutionalized, formal commitment to provide a post-conviction review system which Congress considered to be 'crucial to ensuring fairness and protecting the constitutional rights of capital litigants.' Powell Committee Report at 3240."

Ashmus, 31 F. Supp. 2d at 1183 (quoting *Satcher v. Netherland*, 944 F. Supp. 1222, 1243 (E.D. Va. 1996)). *Ashmus* found that "a state must establish a system reflecting 'an affirmative, institutionalized, formal commitment' to habeas representation," and Congress did not intend to permit procedures that "suffer from incoherence or incompleteness." *Ashmus*, 31 F. Supp. 2d at 1183.

Defendants respond that the Final Rule is not arbitrary and capricious because it properly places the burden on states "to demonstrate that they have established a compliant capital counsel appointment mechanism, and subjects that demonstration to public scrutiny." Defs.' Resp. at 20. Contrary to Defendants' assertion, the rule as written requires only a bare-bones request. Pursuant to the Final Rule, a state desiring certification must submit a "request in writing that the Attorney General determine whether the State meets the requirements for certification under § 26.22 of this subpart." 78 Fed. Reg. 58,184. At that point, the burden shifts to the public–more precisely, to indigent death-sentenced prisoners–to demonstrate that the state does not comply. A state applicant need not submit data demonstrating its record of compliance with its mechanism. *See* 78 Fed. Reg. 78,174 (stating that certification decision "need not be supported by a data-intensive examination of the State's record of compliance with the established mechanism in all or some significant subset of post-conviction cases."). Nor must a state demonstrate that its procedures are adequate. By severely lessening a state's burden to explain how its mechanism qualifies

under chapter 154, the Final Rule may depart from chapter 154's requirement that the state take affirmative steps to qualify. *See Judulang v. Holder*, 132 S. Ct. 476 (2011) (finding that the agency's regulation was arbitrary and capricious because it bore little relation to the purpose of the law).

3. Actual Compliance with Terms of Submitted Mechanism

The Final Rule does not require a state to show that it has actually complied with the terms of its submitted mechanism. The mere existence of state requirements for the appointment, compensation and expenses of competent counsel does not ensure that such requirements are applied and enforced in practice. Indeed, as FDO-Arizona notes, capital prisoners generally wait more than a year and a half after state court affirmance of their convictions and sentences before state post-conviction counsel is appointed. Public Comment of Federal Public Defender–District of Arizona (June 1, 2011), AR 583-84.

It is common sense that a state must actually comply with its own mechanism, but the history, purpose and exhaustive judicial interpretation of chapter 154 also support this view. The Fourth Circuit put it most plainly in *Tucker v. Catoe*, 221 F.3d 600, 604-05 (4th Cir. 2000):

> We accordingly conclude that a state must not only enact a "mechanism" and standards for post-conviction review counsel, but those mechanisms and standards must in fact be complied

> with before the state may invoke the time limitations of [chapter 154]. Not only is this conclusion consistent with our precedent, but it is also consistent with common sense: It would be an astounding proposition if a state could benefit from the capital-specific provisions of AEDPA by enacting, but not following, procedures promulgated [to meet chapter 154 requirements].

The Supreme Court noted that AEDPA "creates an entirely new chapter 154 with special rules favorable to the state party, but applicable *only if* the State meets certain conditions." *Lindh v. Murphy*, 521 U.S. 320, 326 (1997) (emphasis added). In other words, a state may reap procedural benefits only if it has "done its part to promote sound resolution of prisoners' petitions." *Id.* at 330. *See also Baker v. Corcoran*, 220 F.3d 276, 286 (4th Cir. 2000) (Maryland did not qualify for chapter 154 provisions because the state's competency standards were not applied in the appointment process and the "[c]ompetency standards are meaningless unless they are actually applied in the appointment process"); *Ashmus*, 202 F.3d at 1168 (stating that California must abide by its competency standards when appointing counsel and concluding that "a state's competency standards must be mandatory and binding if the state is to avail itself of Chapter 154"); *Mata v. Johnson*, 99 F.3d 1261, 1267 (5th Cir. 1996), *vacated in part on other grounds* in 105 F.3d 209 (5th Cir. 1997) (stating that competency standards must be "specific" and "mandatory" in order to satisfy the opt-in requirements). Plaintiffs may

succeed in showing that the Final Rule is arbitrary and capricious for this reason.

4. Effect of Common Law

Plaintiffs may succeed in demonstrating that the Final Rule is arbitrary and capricious because it does not address the effect of judicial interpretation. In spite of the considerable and thoughtful body of law addressing chapter 154, Defendants fail to show with any specificity how the Attorney General's certification decision will be guided by it. For instance, the Texas Attorney General submitted an application on March 11, 2013, seeking certification based on a state mechanism established in 1995. Declaration of Michael Laurence ¶ 12, Ex. B. Yet, the Court of Appeals for the Fifth Circuit in *Mata*, 99 F.3d at 1267, has held that the mechanism in place at that time did not comply with chapter 154. The Final Rule does not explain whether it will incorporate the standards and rulings of the courts to a state's application.

Defendants represent in a footnote in their response brief that the Final Rule will not invalidate prior case law. Defs.' Resp. at 9, n.8. In support of this contention, Defendants cite the Final Rule: "[P]rior judicial interpretation of chapter 154, much of which remains generally informative, supports many features of this rule, as th[e] preamble documents. To the extent the rule approaches certain matters differently from some past judicial interpretations, there are reasons for the differences." *Id.* (citing 78 Fed. Reg. 58,164). The Final Rule's language addressing judicial interpretation does not provide assurance that

the Attorney General will be guided by the case law addressing chapter 154 in making his certification decisions.

5. Ex Parte Communication

Finally, Plaintiffs may succeed in demonstrating that the Final Rule is arbitrary and capricious because it fails to address the nature and effect of ex parte communication between the United States Attorney General and state officials. Even before the Final Rule went into effect, Attorney General Holder and the Arizona Attorney General commenced a process of certification without notifying interested parties. Baich Dec., Exs. E, F. On April 18, 2013, Arizona Attorney General Tom Horne sent a letter to Attorney General Holder requesting certification of Arizona as an "opt-in" state. Baich Dec., Ex. E. FDO-Arizona learned of this letter only through a press release issued by the Arizona Attorney General's Office. On June 4, 2013, FDO-Arizona wrote a letter to Attorney General Holder, referring to Horne's letter and formally requesting notification of any correspondence or communication between the DOJ and the Arizona Attorney General's Office. Baich Dec., Ex. F. On July 16, 2012–more than two months prior to the publication of the Final Rule–the DOJ informed Arizona that it would review the state's application immediately. In its letter to the Arizona Attorney General, the DOJ stated that it would begin reviewing Arizona's application to "help speed up the ultimate determination of the certification." Baich Dec., Ex. G. Plaintiff FDO-

Arizona was not copied on the DOJ's response to Arizona and did not receive an acknowledgment of or a response to its letter and. Baich Dec. ¶¶ 7-8.

In their brief Defendants appear to contend that their private communications with state attorneys general will be merely "ministerial communications." Defs.' Resp. at 12-13. At oral argument Defendants were asked to explain the meaning of this evidently subjective term. Rather than define "ministerial," Defendants expanded their position to argue that nothing in the Final Rule prohibits Defendants from engaging in ex parte communication, ministerial or not, with state attorneys general. However, the APA's notice requirements exist to afford interested parties a meaningful opportunity to respond to agency action. *Erringer v. Thompson*, 371 F.3d 625, 629 (9th Cir. 2004). The Final Rule itself states that all requests will be made publicly available, making no allowance for ex parte communication. 78 Fed. Reg. 58,184. Ex parte communication excludes interested parties from offering input regarding the validity and accuracy of the undisclosed documents.

Accordingly, Plaintiffs may succeed in demonstrating that the Final Rule is arbitrary and capricious because it lacks specific guidelines addressing the DOJ's disclosure of ex parte communication with state officials. The Final Rule's failure to articulate transparent and specific parameters governing the Attorney General's ex parte communication with state officials leaves Plaintiffs and the public in the dark, depriving them of the opportunity to offer meaningful opposition.

In sum, Plaintiffs may prevail on their claims that the Final Rule does not provide substantive criteria as to how a state may satisfy the requirements of chapter 154; shifts the burden of proof from the state to the condemned to demonstrate that the state mechanism does not qualify under chapter 154; does not require the state to show that it actually complies with the terms of its submitted mechanism; does not show with any specificity how the considerable body of law addressing chapter 154 will guide the Attorney General's certification decision; and does not address the nature and effect of ex parte communication between the Attorney General and state officials. The Court finds that Plaintiffs are likely to succeed on the merits of their claim that the Final Rule is arbitrary and capricious under the APA.

III. Irreparable Harm, Balance of Equities, and the Public Interest

Plaintiffs have demonstrated a likelihood of irreparable harm sufficient to warrant granting a preliminary injunction. Were the Final Rule to go into effect, the possibility that California could apply for certification at any time or that Arizona, which has already applied for certification, could be certified at any time will "thrust Plaintiffs into uncertainty over the legal framework that applies to state and federal post-conviction remedies already being pursued on behalf of its clients." *Habeas Corpus Res. Ctr.*, 2009 WL 185423, at *9.

Defendants' primary argument is that Plaintiffs will not suffer irreparable harm because any harm is "contingent on Arizona or California being certified under the Final Rule." As noted in connection with Plaintiffs' standing argument above, HCRC has explained that "the harmful consequences of permitting the flawed rule to go into effect are not contingent on whether California will be certified, but rather upon the inability to predict whether California qualifies for chapter 154's benefits[.]" Supplemental Laurence Dec. ¶ 3. Because the Final Rule offers few substantive criteria that illuminate whether California will be certified, HCRC is forced to revise its strategy and management of resources in anticipation of potential certification. Similarly, given the fact that Arizona has already applied for certification, FDO-Arizona is forced to prepare for the possibility of drastically expedited federal review procedures. Baich Dec. ¶¶ 10-12.

Title 28 U.S.C. § 2265(a)(2) provides that a state's certification is retroactive to the date on which its mechanism for appointing counsel was established. As discussed in the Temporary Restraining Order, the legal uncertainty of the retroactive effect of the new limitations period combined with the possibility that California could apply for certification at any time or that Arizona's pending application for certification could be approved would create serious uncertainty with respect to "the legal framework that applies to state and federal post-conviction remedies already being pursued." *Habeas Corpus Res. Ctr.*, 2009 WL 185423 at *9.

Compared to the harm faced by Plaintiffs, Defendants stand to face little, if any, harm if the Final Rule does not go into effect immediately. The Patriot Act amendments were passed in 2005. After retracting their 2008 proposed rule in 2010, Defendants only recently attempted to revive it. An additional delay pending resolution of this lawsuit will not prejudice them. Public interest likewise favors maintaining the status quo while the legality of Defendants' rule is determined.

CONCLUSION

For the foregoing reasons, the Court GRANTS Plaintiffs' motion for a preliminary injunction. During the pendency of this litigation, Defendants are enjoined from putting into effect the rule entitled, "Certification Process for State Capital Counsel Systems," published at 78 Fed. Reg. 58,160 (Sept. 23, 2013).

IT IS SO ORDERED.

/s/ Claudia Wilken
CLAUDIA WILKEN
United States District Judge

Dated: 12/4/2013

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

HABEAS CORPUS RESOURCE CENTER; OFFICE OF THE FEDERAL PUBLIC DEFENDER FOR THE DISTRICT OF ARIZONA,	No. 14-16928 D.C. No 4:13-cv-04517-CW Northern District of California, Oakland
Plaintiffs-Appellees,	
v.	ORDER
UNITED STATES DEPARTMENT OF JUSTICE; LORETTA E. LYNCH, Attorney General,	FILED Nov 15 2016 MOLLY C. DWYER, CLERK U.S. COURT OF APPEALS
Defendants-Appellants.	

Before: O'SCANNLAIN, SILVERMAN, and BEA, Circuit Judges.

The panel unanimously voted to deny the petition for panel rehearing and rehearing en banc.

The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are **DENIED**.

APPENDIX E

28 U.S.C. § 2261. Prisoners in State custody subject to capital sentence; appointment of counsel; requirement of rule of court or statute; procedures for appointment

(a) This chapter shall apply to cases arising under § 2254 brought by prisoners in State custody who are subject to a capital sentence. It shall apply only if the provisions of subsections (b) and (c) are satisfied.

(b) COUNSEL.—This chapter is applicable if—

(1) the Attorney General of the United States certifies that a State has established a mechanism for providing counsel in postconviction proceedings as provided in § 2265; and

(2) counsel was appointed pursuant to that mechanism, petitioner validly waived counsel, petitioner retained counsel, or petitioner was found not to be indigent.

(c) Any mechanism for the appointment, compensation, and reimbursement of counsel as provided in subsection (b) must offer counsel to all State prisoners under capital sentence and must provide for the entry of an order by a court of record—

(1) appointing one or more counsels to represent the prisoner upon a finding that the prisoner is indigent and accepted the offer or is unable competently to decide whether to accept or reject the offer;

(2) finding, after a hearing if necessary, that the prisoner rejected the offer of counsel and made the decision with an understanding of its legal consequences; or

(3) denying the appointment of counsel upon a finding that the prisoner is not indigent.

(d) No counsel appointed pursuant to subsections (b) and (c) to represent a State prisoner under capital sentence shall have previously represented the prisoner at trial in the case for which the appointment is made unless the prisoner and counsel expressly request continued representation.

(e) The ineffectiveness or incompetence of counsel during State or Federal post-conviction proceedings in a capital case shall not be a ground for relief in a proceeding arising under § 2254. This limitation shall not preclude the appointment of different counsel, on the court's own motion or at the request of the prisoner, at any phase of State or Federal post-conviction proceedings on the basis of the ineffectiveness or incompetence of counsel in such proceedings.

APPENDIX F

28 U.S.C. § 2262. Mandatory stay of execution; duration; limits on stays of execution; successive petitions

(a) Upon the entry in the appropriate State court of record of an order under § 2261(c), a warrant or order setting an execution date for a State prisoner shall be stayed upon application to any court that would have jurisdiction over any proceedings filed under § 2254. The application shall recite that the State has invoked the post-conviction review procedures of this chapter and that the scheduled execution is subject to stay.

(b) A stay of execution granted pursuant to subsection (a) shall expire if—

(1) a State prisoner fails to file a habeas corpus application under § 2254 within the time required in § 2263;

(2) before a court of competent jurisdiction, in the presence of counsel, unless the prisoner has competently and knowingly waived such counsel, and after having been advised of the consequences, a State prisoner under capital sentence waives the right to pursue habeas corpus review under § 2254; or

(3) a State prisoner files a habeas corpus petition under § 2254 within the time required by § 2263 and fails to make a substantial showing of the denial of a Federal right or is denied relief in the district court or at any subsequent stage of review.

(c) If one of the conditions in subsection (b) has occurred, no Federal court thereafter shall have the authority to enter a stay of execution in the case, unless the court of appeals approves the filing of a second or successive application under § 2244(b).

APPENDIX G

28 U.S.C. § 2263. Filing of habeas corpus application; time requirements; tolling rules

(a) Any application under this chapter for habeas corpus relief under § 2254 must be filed in the appropriate district court not later than 180 days after final State court affirmance of the conviction and sentence on direct review or the expiration of the time for seeking such review.

(b) The time requirements established by subsection (a) shall be tolled—

(1) from the date that a petition for certiorari is filed in the Supreme Court until the date of final disposition of the petition if a State prisoner files the petition to secure review by the Supreme Court of the affirmance of a capital sentence on direct review by the court of last resort of the State or other final State court decision on direct review;

(2) from the date on which the first petition for post-conviction review or other collateral relief is filed until the final State court disposition of such petition; and

(3) during an additional period not to exceed 30 days, if—

(A) a motion for an extension of time is filed in the Federal district court that would have jurisdiction over the case upon the filing of a habeas corpus application under § 2254; and

(B) a showing of good cause is made for the failure to file the habeas corpus application within the time period established by this section.

APPENDIX H

28 U.S.C. § 2264. Scope of Federal review; district court adjudications

(a) Whenever a State prisoner under capital sentence files a petition for habeas corpus relief to which this chapter applies, the district court shall only consider a claim or claims that have been raised and decided on the merits in the State courts, unless the failure to raise the claim properly is—

(1) the result of State action in violation of the Constitution or laws of the United States;

(2) the result of the Supreme Court's recognition of a new Federal right that is made retroactively applicable; or

(3) based on a factual predicate that could not have been discovered through the exercise of due diligence in time to present the claim for State or Federal post-conviction review.

(b) Following review subject to subsections (a), (d), and (e) of § 2254, the court shall rule on the claims properly before it.

APPENDIX I

28 U.S.C. § 2265. Certification and judicial review

(a) CERTIFICATION.—

(1) IN GENERAL.—If requested by an appropriate State official, the Attorney General of the United States shall determine—

(A) whether the State has established a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings brought by indigent prisoners who have been sentenced to death;

(B) the date on which the mechanism described in subparagraph (A) was established; and

(C) whether the State provides standards of competency for the appointment of counsel in proceedings described in subparagraph (A).

(2) EFFECTIVE DATE.—The date the mechanism described in paragraph (1)(A) was established shall be the effective date of the certification under this subsection.

(3) ONLY EXPRESS REQUIREMENTS.—There are no requirements for certification or for application of this chapter other than those expressly stated in this chapter.

(b) REGULATIONS.—The Attorney General shall promulgate regulations to implement the certification procedure under subsection (a).

(c) REVIEW OF CERTIFICATION.—

(1) IN GENERAL.—The determination by the Attorney General regarding whether to certify a State under this section is subject to review exclusively as provided under chapter 158 of this title.

(2) VENUE.—The Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction over matters under paragraph (1), subject to review by the Supreme Court under § 2350 of this title.

(3) STANDARD OF REVIEW.—The determination by the Attorney General regarding whether to certify a State under this section shall be subject to de novo review.

APPENDIX J

28 U.S.C. § 2266. Limitation periods for determining applications and motions

(a) The adjudication of any application under section 2254 that is subject to this chapter, and the adjudication of any motion under § 2255 by a person under sentence of death, shall be given priority by the district court and by the court of appeals over all noncapital matters.

(b)(1)(A) A district court shall render a final determination and enter a final judgment on any application for a writ of habeas corpus brought under this chapter in a capital case not later than 450 days after the date on which the application is filed, or 60 days after the date on which the case is submitted for decision, whichever is earlier.

(B) A district court shall afford the parties at least 120 days in which to complete all actions, including the preparation of all pleadings and briefs, and if necessary, a hearing, prior to the submission of the case for decision.

(C)(i) A district court may delay for not more than one additional 30-day period beyond the period specified in subparagraph (A), the rendering of a determination of an application for a writ of habeas corpus if the court issues a written order making a finding, and stating the reasons for the finding, that the ends of justice that would be served by allowing the delay outweigh the best interests of the public and the applicant in a speedy disposition of the application.

(ii) The factors, among others, that a court shall consider in determining whether a delay in the disposition of an application is warranted are as follows:

(I) Whether the failure to allow the delay would be likely to result in a miscarriage of justice.

(II) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate briefing within the time limitations established by subparagraph (A).

(III) Whether the failure to allow a delay in a case that, taken as a whole, is not so unusual or so complex as described in subclause (II), but would otherwise deny the applicant reasonable time to obtain counsel, would unreasonably deny the applicant or the government continuity of counsel, or would deny counsel for the applicant or the government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

(iii) No delay in disposition shall be permissible because of general congestion of the court's calendar.

(iv) The court shall transmit a copy of any order issued under clause (i) to the Director of the Administrative Office of the United States Courts for inclusion in the report under paragraph (5).

(2) The time limitations under paragraph (1) shall apply to—

(A) an initial application for a writ of habeas corpus;

(B) any second or successive application for a writ of habeas corpus; and

(C) any redetermination of an application for a writ of habeas corpus following a remand by the court of appeals or the Supreme Court for further proceedings, in which case the limitation period shall run from the date the remand is ordered.

(3)(A) The time limitations under this section shall not be construed to entitle an applicant to a stay of execution, to which the applicant would otherwise not be entitled, for the purpose of litigating any application or appeal.

(B) No amendment to an application for a writ of habeas corpus under this chapter shall be permitted after the filing of the answer to the application, except on the grounds specified in § 2244(b).

(4)(A) The failure of a court to meet or comply with a time limitation under this section shall not be a ground for granting relief from a judgment of conviction or sentence.

(B) The State may enforce a time limitation under this section by petitioning for a writ of mandamus to the court of appeals. The court of appeals shall act on the petition for a writ of mandamus not later than 30 days after the filing of the petition.

(5)(A) The Administrative Office of the United States Courts shall submit to Congress an annual report on the compliance by the district courts with the time limitations under this section.

(B) The report described in subparagraph (A) shall include copies of the orders submitted by the district courts under paragraph (1)(B)(iv).

(c)(1)(A) A court of appeals shall hear and render a final determination of any appeal of an order granting or denying, in whole or in part, an application brought under this chapter in a capital case not later than 120

days after the date on which the reply brief is filed, or if no reply brief is filed, not later than 120 days after the date on which the answering brief is filed.

(B)(i) A court of appeals shall decide whether to grant a petition for rehearing or other request for rehearing en banc not later than 30 days after the date on which the petition for rehearing is filed unless a responsive pleading is required, in which case the court shall decide whether to grant the petition not later than 30 days after the date on which the responsive pleading is filed.

(ii) If a petition for rehearing or rehearing en banc is granted, the court of appeals shall hear and render a final determination of the appeal not later than 120 days after the date on which the order granting rehearing or rehearing en banc is entered.

(2) The time limitations under paragraph (1) shall apply to—

(A) an initial application for a writ of habeas corpus;

(B) any second or successive application for a writ of habeas corpus; and

(C) any redetermination of an application for a writ of habeas corpus or related appeal following a remand by the court of appeals en banc or the Supreme Court for further proceedings, in which case the limitation period shall run from the date the remand is ordered.

(3) The time limitations under this section shall not be construed to entitle an applicant to a stay of execution, to which the applicant would otherwise not be entitled, for the purpose of litigating any application or appeal.

(4)(A) The failure of a court to meet or comply with a time limitation under this section shall not be a ground for granting relief from a judgment of conviction or sentence.

(B) The State may enforce a time limitation under this section by applying for a writ of mandamus to the Supreme Court.

(5) The Administrative Office of the United States Courts shall submit to Congress an annual report on the compliance by the courts of appeals with the time limitations under this section.

APPENDIX K

78 FR 58160-01, 2013 WL 5297004 (F.R.)
RULES AND REGULATIONS
DEPARTMENT OF JUSTICE
28 CFR Part 26
[Docket No. 1540; AG Order No. 3399-2013]
RIN 1121-AA77

Certification Process for State Capital Counsel System

Monday, September 23, 2013

***

PART 26—DEATH SENTENCES PROCEDURES

1. The authority citation for part 26 continues to read as follows:

Authority: 5 U.S.C. 301; 18 U.S.C. 4001(b), 4002; 28 U.S.C. 509, 510, 2261, 2265.

2. A new Subpart B is added to part 26 to read as follows:

Subpart B—Certification Process for State Capital Counsel Systems

Sec.

Subpart B—Certification Process for State Capital Counsel Systems
28 CFR § 26.20

§ 26.20 Purpose.
Sections 2261(b)(1) and 2265(a) of title 28 of the United States Code require the Attorney General to certify whether a State has a mechanism for providing legal representation to indigent prisoners in State postconviction proceedings in capital cases that satisfies the requirements of chapter 154 of title 28. If the Attorney General certifies that a State has established such a mechanism, §§ 2262, 2263, 2264, and 2266 of chapter 154 of title 28 apply in relation to Federal habeas corpus review of State capital cases in which counsel was appointed pursuant to that mechanism. These sections will also apply in Federal habeas corpus review of capital cases from a State with a mechanism certified by the Attorney General in which petitioner validly waived counsel, petitioner retained counsel, or petitioner was found not to be indigent, as provided in § 2261(b) of title 28. Subsection (b) of 28 U.S.C. 2265 directs the Attorney General to promulgate regulations to implement the certification procedure under subsection (a) of that section.
28 CFR § 26.21

§ 26.21 Definitions.
For purposes of this part, the term—

Appointment means provision of counsel in a manner that is reasonably timely in light of the time limitations for seeking State and Federal postconviction review and the time required for developing and presenting claims in the postconviction proceedings.

Appropriate State official means the State attorney general, except that, in a State in which the State attorney general does not have responsibility for Federal habeas corpus litigation, it means the chief executive of the State.

Indigent prisoners means persons whose net financial resources and income are insufficient to obtain qualified counsel.

State postconviction proceedings means collateral proceedings in State court, regardless of whether the State conducts such proceedings after or concurrently with direct State review.
28 CFR § 26.22

§ 26.22 Requirements.
The Attorney General will certify that a State meets the requirements for certification under 28 U.S.C. 2261 and 2265 if the Attorney General determines that the State has established a mechanism for the appointment of counsel for indigent prisoners under sentence of death in State postconviction proceedings that satisfies the following standards:
(a) As provided in 28 U.S.C. 2261(c) and (d), the mechanism must offer to all such prisoners postconviction counsel, who may not be counsel who previously represented the prisoner at trial unless the prisoner and

counsel expressly requested continued representation, and the mechanism must provide for the entry of an order by a court of record—

(1) Appointing one or more attorneys as counsel to represent the prisoner upon a finding that the prisoner is indigent and accepted the offer or is unable competently to decide whether to accept or reject the offer;

(2) Finding, after a hearing if necessary, that the prisoner rejected the offer of counsel and made the decision with an understanding of its legal consequences; or

(3) Denying the appointment of counsel, upon a finding that the prisoner is not indigent.

(b) The mechanism must provide for appointment of competent counsel as defined in State standards of competency for such appointments.

(1) A State's standards of competency are presumptively adequate if they meet or exceed either of the following criteria:

(i) Appointment of counsel who have been admitted to the bar for at least five years and have at least three years of postconviction litigation experience. But a court, for good cause, may appoint other counsel whose background, knowledge, or experience would otherwise enable them to properly represent the petitioner, with due consideration of the seriousness of the penalty and the unique and complex nature of the litigation; or

(ii) Appointment of counsel meeting qualification standards established in conformity with 42 U.S.C. 14163(e)(1) and (2)(A), if the requirements of 42 U.S.C. 14163(e)(2)(B), (D), and (E) are also satisfied.

(2) Competency standards not satisfying the benchmark criteria in paragraph (b)(1) of this section will be deemed adequate only if they otherwise reasonably assure a level of proficiency appropriate for State postconviction litigation in capital cases.

(c) The mechanism must provide for compensation of appointed counsel.

(1) A State's provision for compensation is presumptively adequate if the authorized compensation is comparable to or exceeds—

(i) The compensation of counsel appointed pursuant to 18 U.S.C. 3599 in Federal habeas corpus proceedings reviewing capital cases from the State;

(ii) The compensation of retained counsel in State postconviction proceedings in capital cases who meet State standards of competency sufficient under paragraph (b);

(iii) The compensation of appointed counsel in State appellate or trial proceedings in capital cases; or

(iv) The compensation of attorneys representing the State in State postconviction proceedings in capital cases, subject to adjustment for private counsel to take account of overhead costs not otherwise payable as reasonable litigation expenses.

(2) Provisions for compensation not satisfying the benchmark criteria in paragraph (c)(1) of this section will be deemed adequate only if the State mechanism is otherwise reasonably designed to ensure the availability for appointment of counsel who meet State standards of competency sufficient under paragraph (b) of this section.

(d) The mechanism must provide for payment of reasonable litigation expenses of appointed counsel. Such expenses may include, but are not limited to, payment for investigators, mitigation specialists, mental health and forensic science experts, and support personnel. Provision for reasonable litigation expenses may incorporate presumptive limits on payment only if means are authorized for payment of necessary expenses above such limits. 28 CFR § 26.23

§ 26.23 Certification process.

(a) An appropriate State official may request in writing that the Attorney General determine whether the State meets the requirements for certification under § 26.22 of this subpart.

(b) Upon receipt of a State's request for certification, the Attorney General will make the request publicly available on the Internet (including any supporting materials included in the request) and publish a notice in the Federal Register—

(1) Indicating that the State has requested certification;

(2) Identifying the Internet address at which the public may view the State's request for certification; and

(3) Soliciting public comment on the request.

(c) The State's request will be reviewed by the Attorney General. The review will include consideration of timely public comments received in response to the Federal Register notice under paragraph (b) of this section, or any subsequent notice the Attorney General may publish providing a further opportunity for comment. The certification will be published in the Federal Register if certification is granted. The certification will include a determination of the date the capital counsel mechanism qualifying the State for certification was established.

(d) A certification by the Attorney General reflects the Attorney General's determination that the State capital counsel mechanism reviewed under paragraph (c) of this section satisfies chapter 154's requirements. A State may request a new certification by the Attorney General to ensure the continued applicability of chapter 154 to cases in which State postconviction proceedings occur after a change or alleged change in the State's certified capital counsel mechanism. Changes in a State's capital counsel mechanism do not affect the applicability of chapter 154 in any case in which a mechanism certified by the Attorney General existed throughout State postconviction proceedings in the case.

(e) A certification remains effective for a period of five years after the completion of the certification process by the Attorney General and any related judicial review. If a State requests re-certification at or before the end of that five-year period, the certification re-

mains effective for an additional period extending until the completion of the re-certification process by the Attorney General and any related judicial review.

Dated: September 11, 2013.

Eric H. Holder, Jr.,

Attorney General.

APPENDIX L

GEORGE E. GREER (STATE BAR NO. 11050)
ggreer@orrick.com
CATHERINE Y. LUI (STATE BAR NO. 239648)
clui@orrick.com
DARREN S. TESHIMA (STATE BAR NO. 238875)
dteshima@orrick.com
SHANNON C. LEONG (STATE BAR NO. 268612)
sleong@orrick.com

ORRICK, HERRINGTON & SUTCLIFFE LLP
The Orrick Building
405 Howard Street
San Francisco California 94105-2669
Telephone: +1-415-773-5700
Facsimile: +1-415-773-5759

Attorneys for Plaintiffs
Habeas Corpus Resource Center and the Office of the Federal Public Defender for the District of Arizona

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Habeas Corpus Resource Center and the Office of the Federal Public Defender for the District of Arizona, Plaintiffs, v. United States Department of Justice and Eric H. Holder, in his official capacity as United States Attorney General, Defendants.	Case No. 13-CV-4517-JCS **DECLARATION OF DALE A. BAICH IN SUPPORT OF PLAINTIFFS' *EX PARTE* MOTION FOR (1) TEMPORARY RESTRAINING ORDER; AND (2) ORDER TO SHOW CAUSE FOR PRELIMINARY INJUNCTION** Date: TBD Time: TBD Dept: TBD Judge: TBD

I, Dale A. Baich, hereby declare that the following information is true to the best of my knowledge and belief:

1. The Office of the Federal Public Defender for the District of Arizona ("FDO-AZ") is a Federal Defender organization that operates under the authority of the Criminal Justice Act of 1964, 18 U.S.C. § 3006A(g). FDO-AZ provides legal representation to indigent men and women, including those individuals sentenced to death. The mission of FDO-AZ

includes ensuring, on behalf of those who are unable to afford retained counsel and other necessary defense services, that the right to the effective assistance of counsel guaranteed by the Sixth Amendment and the Criminal Justice Act is enforced within the District of Arizona.

2. I am the supervisor of the Capital Habeas Unit of FDO-AZ. I was also lead counsel for FDO-AZ in representing the petitioner in *Spears v. Stewart*, 283 F.3d 992, 1018 (9th Cir. 2002), in which the United States Court of Appeals for the Ninth Circuit held that Arizona's mechanism met the standards set out in Chapter 154, but that the opt-in provisions could not be applied in that particular case because Mr. Spears did not receive the benefit of the mechanism during his state post-conviction proceedings.

3. FDO-AZ has also been involved in the process by which the Department of Justice ("DOJ") has promulgated the Final Rule: FDO-AZ submitted comments on both the proposed rule and the supplemental notice of proposed rulemaking. Letter from Jon Sands, Federal Public Defender, to DOJ Regulations Docket Clerk (June 1, 2011), attached hereto as Exhibit A; Letter from Jon Sands, Federal Public Defender, to DOJ Regulations Docket Clerk (March 14, 2012), attached hereto as Exhibit B. In addition, FDO-AZ both coordinated and joined with the comments submitted by all Federal Public and Community Defenders. Federal Public Defenders' Comments on Proposed Rule (May 31, 2011), attached hereto as Exhibit C; Comments by Federal Public Defenders and Community Defenders re: Supplemental Notice of Proposed Rulemaking (March 14, 2012), attached

hereto as Exhibit D. I have reviewed the Final Rule as published by DOJ on September 23, 2013, and it will cause irreparable harm to FDO-AZ and our clients if allowed to go into effect in its current form.

4. FDO-AZ currently represents fifty-eight death-sentenced state prisoners in their federal habeas corpus proceedings pursuant to 28 U.S.C. § 2254, including forty-three petitioners from the District of Arizona—nearly eighty percent of the Arizona petitioners in federal court. The office also represents four death-sentenced state prisoners in the Northern District of California, two in the District of Nevada, two in the Northern District of Ohio, one in the Western District of Oklahoma, and five in the District of Utah, in addition to three prisoners under federal death sentences and several prisoners with non-capital sentences.

5. Along with the direct representation of clients, the United States District Court for the District of Arizona has authorized FDO-AZ "to provide assistance, consultation, information and other related services to eligible persons and appointed attorneys" regarding federal habeas corpus litigation. United States Dist. Ct. for the Dist. of Ariz., Gen. Order 07-08: Criminal Justice Act Plan, § VII(C) (May 7, 2007). The court also requires FDO-AZ to: 1) track capital cases in Arizona state and federal courts; 2) "coordinate with other state and national organizations providing legal assistance to death-sentenced individuals and counsel representing such individuals," and 3) provide training for those attorneys representing clients in federal habeas proceedings. *Id.* § VII(D).

6. The version of the Final Rule published by Defendants on September 23, 2013, will cause irreparable harm to FDO-AZ and our clients if it is allowed to go into effect on October 23, 2013. For FDO-AZ's current clients, the problems with Arizona's mechanism will cause uncertainty about the application of the opt-in provisions to individual cases and result in extensive litigation in each of the office's forty-three Arizona cases.[1]

7. The Final Rule as written fails to provide notice to affected and interested parties, and fails to provide an adequate method for opposition to a state's application for certification under the Final Rule. Recent events in Arizona illustrate the problems with the rule in its current form. On April 18, 2013, Arizona Attorney General Tom Horne sent a letter to United States Attorney General Eric Holder regarding the pending regulations and requesting certification of Arizona as an "opt-in" state. Letter to United States Attorney General Eric Holder from Arizona Attorney General Thomas Horne (April 18, 2013), attached hereto as Exhibit E. FDO-AZ learned of this letter from a press release issued by the Arizona Attorney General's Office. Lindsey Collum, *Horne May Sue over Habeas Corpus*, Ariz. Republic, Apr. 19, 2013. On June 4, 2013, FDO-AZ wrote its own letter to Attorney General Holder, acknowledging

[1] As to FDO-AZ's four clients in the Northern District of California, FDO-AZ joins in and incorporates the declaration of Michael Laurence regarding the irreparable harm to California prisoners.

Horne's letter and formally requesting notification of any correspondence or communication between the Department of Justice ("DOJ") and the Arizona Attorney General's Office. Letter to United States Attorney General Eric Holder from Dale A. Baich (June 4, 2013), attached hereto as Exhibit F. On July 16, 2012, DOJ responded to Horne, stating that the regulation process was underway and that it would begin reviewing Arizona's application for certification immediately to "help speed up the ultimate determination of the certification" despite the fact that the Final Rule had not yet issued and that DOJ had not complied with even the proposed rule's requirements upon application of a state. Letter to Thomas Horne, Arizona Attorney General, from Alexa Chappell, Intergovernmental Liaison (July 16, 2003). Attached hereto as Exhibit G.

8. Despite these actions by DOJ, FDO-AZ has not received a response to or acknowledgement of its letter to Attorney General Holder, was not copied on the DOJ's response to Horne, and has not had the opportunity to be heard regarding Arizona's application prior to its consideration by DOJ. It is unclear at this time how DOJ intends to proceed with Arizona's pending application at the time the Final Rule goes into effect, whether they intend to disclose this and any other ex parte communication, and how they intend to belatedly consider any opposition to the application already under review. These issues, coupled with the lack of specificity in the Final Rule regarding DOJ's determination of opt-in certification and DOJ's failure to respond to comments asking for a meaningful process to oppose a certification application, leave FDO-AZ without the opportunity to effectively oppose

Arizona's certification as an opt-in state and indicate possible bias in the certification process.

9. In addition, Arizona's alleged "mechanism" for the appointment and compensation of counsel in state capital post-conviction cases suffers from significant problems in practice. For example, the vast majority of cases have not received timely appointment of post-conviction counsel, with an average wait time of more than eighteen months before counsel is located and appointed. The quality of representation varies widely, especially since the Arizona Supreme Court relaxed the standards for appointment of counsel in these cases, and no system is in place to review counsel's performance or ongoing compliance with the standards. These problems, in addition to numerous others with the mechanism, mean that nearly every case will be required to litigate the application of Arizona's mechanism to that case to determine if the opt-in provisions will apply. The Final Rule's failure to provide meaningful standards for DOJ's determination of opt-in certification leave FDO-AZ without an adequate opportunity to illustrate these significant problems with the mechanism, and DOJ's decision to leave the determinations regarding compliance with the mechanism to the district court in individual cases places a tremendous burden on FDO-AZ and its clients.

10. Because FDO-AZ will be required to litigate each case as a potential opt-in case until the federal courts have decided the issues, it is nearly impossible for counsel to adequately represent and advise their clients as to the proper course of action. For example, the shortened statute of limitations will have

an especially adverse effect on Arizona prisoners due to the fact that the statute of limitations will start running when the direct appeal opinion is issued, and will not be tolled until a petition for certiorari is filed in the United States Supreme Court. Because petitioners have ninety days after the direct appeal opinion in which to file a certiorari petition, exactly half of the revised limitations period will have run before certiorari is denied. Arizona Rule of Criminal Procedure 32.4, a part of the "mechanism" that allegedly qualifies Arizona for opt-in status, requires that post-conviction counsel be appointed upon affirmance of the conviction and sentence by the Arizona Supreme Court. In reality, only eight of the last ninety-three prisoners to enter state capital post-conviction proceedings in Arizona have had post-conviction counsel appointed before the ninety-day period for filing a certiorari petition has expired. Because half the statutory time will have elapsed prior to the conclusion of the state post-conviction cases, federal habeas counsel may be left with just ninety days in which to file a federal habeas petition raising all known claims for relief, even if ultimately the district court decides that the opt-in provisions do not apply to that case due to the failure to appoint counsel in a timely manner. In addition, FDO-AZ may need to file protective petitions in each of the sixty-six capital cases currently on direct appeal and in post-conviction proceedings, adding to the burden of litigation caused by the Final Rule's failure to provide a meaningful review of a state's mechanism in practice.

11. The burden of this additional and unnecessary litigation will be exacerbated by recent events. FDO-AZ has suffered a twenty percent budget cut in

recent months due to federal budgeting issues and sequestration, and has been forced to lay off staff members. The compressed schedule for these cases and the additional litigation regarding opt-in status, coupled with the reduced workforce and budget, will put FDO-AZ in a position to decline appointments in incoming cases. This will increase the burden on the similarly-situated federal courts and on counsel then appointed to these cases pursuant to the Criminal Justice Act.

12. The Final Rule's retroactivity provisions may also mean that clients that recently entered federal court could have the truncated statute of limitations in 28 U.S.C. § 2263(a) applied to them when filing a petition, lose their ability to litigate procedurally defaulted claims pursuant to 28 U.S.C. § 2264(a), and be denied the ability to amend their petitions pursuant to 28 U.S.C. § 2266(b)(3)(B). This risk is especially problematic because these clients will not have had notice that these provisions could apply to them, and FDO-AZ cannot make informed decisions about litigation of cases because it is not clear whether the provisions will apply to a particular case until after the issues are litigated in federal court. This presents problems as to the time for filing petitions, the practice of raising unexhausted and/or procedurally defaulted claims, the need to conduct investigation of guilt- and penalty-phase issues, and the time available for researching and drafting claims.

13. In addition to the cases currently in federal habeas corpus proceedings, as noted above Arizona has sixty-six death-sentenced prisoners making their way through the state court process: forty-seven

cases pending in state capital post-conviction proceedings, and another nineteen capital cases on direct appeal before the Arizona Supreme Court. Pursuant to the dictates of the Criminal Justice Plan in the District of Arizona, FDO-AZ tracks these cases in state and federal court, consults with counsel representing clients on direct appeal and in state post-conviction proceedings on issues relating to future federal habeas corpus proceedings, and provides training on these topics as well. The same uncertainty regarding the opt-in status of each case applies to these cases, and makes it impossible for FDO-AZ to provide adequate guidance and training to counsel in these cases. As in FDO-AZ's own cases, the office will have to advise counsel to treat each case as on opt-in case until a federal court rules otherwise. This likely will result in a rush to file protective petitions in the district court, and rampant confusion about how counsel can best represent their clients. The Final Rule's abdication of DOJ's responsibilities pursuant to the Patriot Act revisions will result in a flood of litigation in federal courts, and place an enormous burden on FDO-AZ and its clients.

I declare under penalty of perjury under the laws of the United States of America and California that the foregoing is true and correct and that I have signed this declaration on October 3, 2013.

/s/ Dale A. Baich
Dale A. Baich

APPENDIX M

GEORGE E. GREER (STATE BAR NO. 11050)
ggreer@orrick.com
CATHERINE Y. LUI (STATE BAR NO. 239648)
clui@orrick.com
DARREN S. TESHIMA (STATE BAR NO. 238875)
dteshima@orrick.com
SHANNON C. LEONG (STATE BAR NO. 268612)
sleong@orrick.com

ORRICK, HERRINGTON & SUTCLIFFE LLP
The Orrick Building
405 Howard Street
San Francisco California 94105-2669
Telephone: +1-415-773-5700
Facsimile: +1-415-773-5759

Attorneys for Plaintiffs
Habeas Corpus Resource Center and the Office of the Federal Public Defender for the District of Arizona

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Habeas Corpus Resource Center and the Office of the Federal Public Defender for the District of Arizona, Plaintiffs, v. United States Department of Justice and Eric H. Holder, in his official capacity as United States Attorney General, Defendants.	Case No. 13-CV-4517-JCS **DECLARATION OF MICHAEL LAURENCE IN SUPPORT OF PLAINTIFFS' *EX PARTE* MOTION FOR (1) TEMPORARY RESTRAINING ORDER; AND (2) ORDER TO SHOW CAUSE FOR PRELIMINARY INJUNCTION** Date: TBD Time: TBD Dept: TBD Judge: TBD

I, Michael Laurence, hereby declare that the following information is true to the best of my knowledge and belief:

1. I am an attorney licensed to practice by the State of California and admitted to practice before this Court. I currently am the Executive Director of the Habeas Corpus Resource Center (HCRC), which is the Plaintiff in this matter, challenging the September 23, 2013 Final Rule regarding Certification of State Capital Counsel Systems, 78 Fed. Reg. 58,160

(Sept. 23, 2013) (Final Rule), issued by the United States Attorney General and the Department of Justice.

2. The HCRC is an office of the Judicial Branch of the State of California created by Senate Bill 513 (Ch. 869, 1998 Stats.). HCRC lawyers represent indigent men and women under sentence of death in state and federal habeas corpus proceedings and in executive clemency proceedings. The HCRC has been appointed to represented death-row inmates in over one hundred state and federal proceedings arising from cases throughout the State of California. The HCRC also is charged with recruiting and advising capital habeas counsel and developing statewide resources on significant, recurring issues for use by appointed counsel in capital post-conviction proceedings.

3. Since 1996, I have been involved in analyzing and litigating the application of Chapter 154, which was added to Title 28 of the United States Code by the Antiterrorism and Effective Death Penalty Act of 1996. In 1996-1998, I was counsel of record in a class action lawsuit brought on behalf of California death-row inmates attempting to enjoin the California Attorney General's Office from seeking to apply Chapter 154, a case that culminated in the United States Supreme Court's decision in *Calderon v. Ashmus*, 523 U.S. 740 (1998). Subsequently, I was counsel of record in *Ashmus v. Woodford*, 202 F.3d 1160 (9th Cir. 2000), which held that California did not qualify for Chapter 154's benefits. Following the enactment of the USA Patriot Improvement and Reauthorization Act (Patriot Act amendments), which

authorized the United States Attorney General to determine whether a state has established the high quality counsel systems necessary to qualify for expedited review procedures, 28 U.S.C. §§ 2261, 2265, I submitted several comments to the Attorney General's proposed rules to govern certification decisions. In 2008-2009, I was counsel of record for the HCRC in a civil action that, *inter alia*, challenged the Final Rule governing certification of state systems published by the Attorney General on December 11, 2008. On January 20, 2009, this Court issued a preliminary injunction enjoining the effective date of the 2008 Final Rule. *Habeas Corpus Resource Ctr. v. U.S. Dep't of Justice*, Case No. 08-cv-02649, 2009 WL 185423, at *10 (N.D. Cal. Jan. 20, 2009).

4. Capital litigators, and particularly the HCRC, have strong interests in clear and fair regulations to govern certification proceedings because of the considerable effects of Chapter 154 on capital post-conviction litigation and the constitutional rights of death-sentenced individuals. Chapter 154 shortens the statute of limitations for filing a habeas corpus petition in federal court from one year to 180 days. Other provisions alter tolling of the statute of limitations to exclude the time between the finality of direct review in state court to the filing of a petition for writ of certiorari in the United States Supreme Court, and to exclude the time for filing exhaustion or successive state habeas corpus petitions. Chapter 154 also limits amendments to a habeas corpus petition after an answer has been filed and greatly accelerates adjudication, limiting the time for issuing final judgment to 450 days from the filing of the petition, or 60

days after it is submitted for decision, whichever is earlier.

5. Particularly because it applies retroactively, Chapter 154 dramatically alters strategic considerations in the development and presentation of appellate and post-conviction claims, the calculation of legal and financial resources available to competently prepare and litigate cases, and the advice to counsel and clients who are subject its provisions. Knowing whether Chapter 154 will apply to current or pending litigation, therefore, was and is a fundamental and crucial aspect of capital post-conviction litigation.

6. Prior to the Patriot Act amendments, death-row inmates were able to litigate in federal habeas proceedings the issue of whether a state qualified for Chapter 154. Thus, cases such as *Ashmus v. Woodford*, 202 F.3d 1160 (9th Cir. 2000), provided clear guidance that California did not comply with the requirements of Chapter 154. To the extent that death-row inmates in state proceedings were uncertain about the continuing application of *Ashmus* or whether changed circumstances affected their rights for federal review under Chapter 153 of Title 28, they were able to initiate federal habeas corpus proceedings for such a determination, pursuant to the Supreme Court's decision in *Calderon v. Ashmus*, 523 U.S. 740 (1998), and 28 U.S.C. § 2262. The body of law interpreting Chapter 154 and the adequacy of state mechanisms, and the availability of the federal judiciary to resolve the application of Chapter 154 well before cases entered federal court, created certainty about whether California cases could be subject to its

provisions. In such a legal environment, I was able to make litigation decisions and recommend strategies to counsel with a reasonable degree of professional confidence.

7. The pending implementation of Chapter 154's certification procedure through the Attorney General's Final Rule brings significant and unnecessary uncertainty. Because of the serious flaws in the Final Rule, I and other attorneys are unable to reasonably predict whether the Attorney General would conclude that Chapter 154 applies to California cases once the Final Rule goes into effect, including, therefore, whether it is likely that the California Attorney General will seek certification. As a result of this uncertainty, I and other attorneys will be unable to make informed decisions about critical litigation strategies.

8. There are a number of ways in which the Final Rule causes significant confusion. First, the Final Rule does not provide any framework for understanding what evidence or measure of sufficiency the Attorney General will rely upon in making certification decisions. The text accompanying the Final Rule provides seemingly inconsistent explanations about the Attorney General's approach to certification. On the one hand, the text states that the Attorney General believes that his review does not require "a data-intensive examination of the State's record of compliance with the established mechanism in all or some significant subset of post-conviction cases." Final Rule at 58,174. On the other hand, the text also states that the Attorney General will "consider State-specific circumstances that may establish … that standards

generally expected to be sufficient in most instances are for some reason not reasonably likely to lead to the timely provision and adequate compensation of competent counsel." *Id.* at 58,168-69.

9. These conflicting descriptions lead to tremendous uncertainty about what factual showing will be necessary to demonstrate eligibility for Chapter 154's benefits, or successfully contest it. This uncertainty is exacerbated by the fact that the Final Rule does not provide a process in which the public and interested parties can learn the evidentiary bases and considerations that go into certification—the Attorney General will not publish and explain certification denials or make public the information he considers in making certification decisions. In an effort to gain some understanding of the Attorney General's approach to certification, on July 10, 2013, the HCRC submitted a Freedom of Information Act request to the Department of Justice for its communications with states about currently pending applications for certification. Although the statutory deadlines for a response have passed, no information from the Department of Justice has been forthcoming[1]

10. Second, the certification process in the Final Rule does not contain standard procedural features such as notice to those directly affected by certification, including notice of the bases for certification, and an opportunity to meaningfully contribute to the certification decision. The Attorney General's apparent decision to base a certification decision on ex parte

[1] The HCRC FOIA request and DOJ responses are attached to this declaration as Exhibit A.

communications with the state attorney general, and leave death-row inmates to guess at what showing would rebut certification, gives me little understanding of what evidence the Attorney General believes is sufficient to demonstrate that California's mechanism fails to satisfy Chapter 154's requirements. The lack of procedural regularity in the Final Rule also significantly impairs the opportunity to perfect the record for an appeal to the Court of Appeal, creating additional uncertainty about the ability of California inmates and their counsel to prevent the inappropriate application of Chapter 154 to California cases.

11. Third, the Final Rule does not provide any substantive guidance for evaluating whether the California mechanism qualifies for certification. In California, counsel competency standards generally require four years of legal practice and a variety of training, experience, and other skills. Counsel in California also may be appointed under a broadly defined set of "alternative qualifications." The timing of the appointment of counsel in California varies significantly, and, although California provides some compensation and limited litigation expenses, the funds are insufficient to develop all potentially meritorious claims in state post-conviction proceedings. Because I cannot determine what standard the Attorney General will use to evaluate California's counsel competency requirements, how the Attorney General will measure the sufficiency of California's mechanism, what type of evidence he will consider in making the certification decision, and whether interested parties will have a reasonable opportunity to contest California's eligibility, I cannot anticipate with any confidence whether California would be certified.

12. Finally, the Final Rule fails to give any indication whether the Attorney General's certification decision will be guided by the body of law interpreting the requirements of Chapter 154 prior to its amendment, and the applicable standards established by the United States Supreme Court. For example, the Texas Attorney General submitted an application on March 11, 2013, seeking certification based on a state mechanism established in 1995,[2] even though the Court of Appeals for the Fifth Circuit, in *Mata v. Johnson*, 99 F.3d 1261 (5th Cir. 1996), held that the mechanism in place at that time did not comply with Chapter 154. There is nothing in the Final Rule that expresses the Attorney General's intention to honor such prior holdings; indeed, the failure to reference and rely on such case law in the standards governing the Attorney General's certification decision suggests the opposite. Consequently, I do not have any way of knowing whether this Court's prior ruling in *Ashmus* and affirmed by the Ninth Circuit will apply to the question of California's compliance with Chapter 154. Similarly, the Supreme Court recently has addressed the competency of counsel in capital post-conviction proceedings in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013). Though the opinions post-dated the public comment period for the certification regulations, the HCRC nonetheless asked the Attorney General to consider their relevance to and impact on counsel

[2] The Texas application is attached as Exhibit B to this declaration. Notably, although I requested that the Department of Justice provide information that would include the Texas application, I learned of its existence purely by happenstance, and obtained a copy of it independently from Texas counsel.

competency standards;[3] however, the Attorney General makes no mention of guidance those cases provide in the Final Rule.

13. For these reasons, the HCRC and its clients, and the counsel HCRC advises and their clients, are irreparably harmed as soon as the Final Rule goes into effect on October 23, 2013. Because California may apply for certification before the current litigation is resolved, I and other attorneys must immediately make litigation, resource, and advisory decisions based on a flawed Final Rule that prevents us from making reasonable predictions about whether Chapter 154 will, or will not, apply. Making such life-and-death decisions without a fair understanding of the applicable legal and decisional standards, leads to unnecessary risks that carry grave consequences.

14. For example, the uncertain retroactive application of Chapter 154's shortened statute of limitations period requires immediate decisions about whether to commit limited attorney time and financial resources, and, in some instances, curtail the development of claims to include in a federal petition, in order to comply with a six month, rather than one year, statute of limitations. Absent a reasonable understanding as to whether California could qualify for certification or not, capitally-sentenced inmates are faced with two untenable choices: either proceed as if Chapter 154 does not apply, and thereby risk the forfeiture of potentially meritorious claims against their

[3] A copy of the HCRC's letter to the Department of Justice regarding these cases is attached as Exhibit C.

convictions and death sentences if the time limitations of Chapter 154 are later found to be applicable; or attempt to comply with those stringent limitations, and thereby forego full investigation and adequate factual and legal development of their constitutional claims. The problems are greatly amplified for the many cases in which new federal counsel must navigate these issues in the context of the significant time it takes to obtain state post-conviction counsel's files, evaluate state post-conviction representation, and sufficiently master the case issues in order to present a professionally adequate federal petition. For institutions, such as the HCRC, these decisions affect not only our clients entering federal court or with ongoing federal cases, but also the resources that the HCRC can direct to clients whose cases are in state proceedings.

15. Similarly, the uncertainty about how the Attorney General will apply Chapter 154 critically affects litigation decisions in state habeas corpus proceedings. It has been a regular feature of capital post-conviction practice in California that inadequate funding in state court has been remedied once federal counsel are appointed, and federal resources are provided to develop potentially meritorious claims. With access to reasonable funding of litigation expenses, petitioners frequently discover and develop unexhausted claims that must be presented to the state court before a federal court considers them. This process has often entailed the filing of a federal petition, which then is amended once additional claims are exhausted. Because Chapter 154 limits amendments to a federal petition, counsel and their clients must consider seeking federal appointment and resources

much earlier in the process—before state post-conviction proceedings are completed—in order to assure the fair development of claims before the federal petition is filed. Taking these steps is time consuming not only for state counsel, and involves potential procedural difficulties in state court, but also for federal counsel and the federal courts. Given the number of cases in this position, the consequences of these decisions place an additional, substantial strain on an already overburdened federal system, possibly to the detriment of existing, federal clients.

16. These are just a few of the intricately related and critically important decisions that must be made once the Final Rule goes into effect. To make them without understanding the likelihood that Chapter 154 will apply to California cases creates an unconscionable gamble. Correcting the flaws in the Final Rule before it goes into effect, and creating greater certainty about the certification process, is necessary for responsible and reasonably informed decision making regarding the application of Chapter 154 to California cases and the use of limited resources and the difficult balancing of critical and competing interests.

I declare under penalty of perjury under the laws of the United States of America and California that the foregoing is true and correct and that I have signed this declaration on October 3, 2013.

/s/ Michael Laurence
Michael Laurence

APPENDIX N

GEORGE E. GREER (admitted pro hac vice)
ggreer@orrick.com
CATHERINE Y. LUI (STATE BAR NO. 239648)
clui@orrick.com
DARREN S. TESHIMA (STATE BAR NO. 238875)
dteshima@orrick.com
MARC R. SHAPIRO (admitted pro hac vice)
mshapiro@orrick.com
SHANNON C. LEONG (STATE BAR NO. 268612)
sleong@orrick.com

ORRICK, HERRINGTON & SUTCLIFFE LLP
The Orrick Building
405 Howard Street
San Francisco California 94105-2669
Telephone: +1-415-773-5700
Facsimile: +1-415-773-5759

Attorneys for Plaintiffs
Habeas Corpus Resource Center and the Office of the Federal Public Defender for the District of Arizona

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Habeas Corpus Resource Center and the Office of the Federal Public Defender for the District of Arizona, Plaintiffs, v. United States Department of Justice and Eric H. Holder, in his official capacity as United States Attorney General, Defendants.	Case No. 13-CV-4517-CW **SUPPLEMENTAL DECLARATION OF DALE A. BAICH IN SUPPORT OF PLAINTIFFS' REPLY IN SUPPORT OF ORDER TO SHOW CAUSE FOR PRELIMINARY INJUNCTION** Date: Nov. 14, 2013 Time: 2:00 p.m. Dept: 2 Judge: Hon. Claudia Wilken

I, Dale A. Baich, hereby declare under penalty of perjury that the following information is true to the best of my knowledge and belief:

1. In their response to the show cause order, Defendants allege that "[i]n federal habeas corpus proceedings, capital defendants are limited to theories and allegations presented in state courts." (ECF No. 30 at 23.) I am supplementing my first declaration to address this allegation.

2. Federal habeas corpus litigation has long included provisions for claims that were not first presented in state court. While these claims initially may be found procedurally defaulted due to the lack of exhaustion, there are a variety of methods for overcoming procedural deficiencies to allow a federal court to decide the claim on its merits. For example, an application for writ of habeas corpus can be granted on a claim that was not exhausted in state court if "there is an absence of available State corrective process" or if "circumstances exist that render such process ineffective to protect the rights of the applicant." 28 U.S.C. § 2254(b)(1)(B). This language, in addition to the well-established exceptions to the procedural default doctrine, *see*, *e.g.*, *Murray v. Carrier*, 477 U.S. 478. 485 (1986) (discussing the cause and prejudice exception) and *Schlup v. Delo*, 513 U.S. 298, 314-15 (1995) (discussing the miscarriage of justice exception), provides ample support for counsel's inclusion of claims in the federal habeas petition that were not exhausted in state court.

3. Accordingly, because such claims can be considered by the federal courts if a petitioner meets the necessary standards, federal habeas counsel have a duty to ensure that all possible claims are raised in the federal habeas petition. In fact, the United States District Court for the District of Arizona orders counsel to do so in its General Procedures Order issued at the beginning of each federal habeas case. For example, as far back as 1999, the court instructed counsel as follows:

> The Amended Petition shall include all known claims of constitutional error or

> deprivation entitling Petitioner to habeas relief. *See* Rule 2(c), 28 U.S.C. § 2254. Petitioner is advised that he may be presumed to have deliberately waived his right to complain of any constitutional error or deprivation not raised in the Amended Petition. *See* Rule 9(b), 28 U.S.C. § 2254; *see also McCleskey v. Zant*, 499 U.S. 467, 498 (1991) (abuse of the writ doctrine bars review of claims that could have been raised in a previous habeas petition absent a showing of cause and prejudice or a fundamental miscarriage of justice). Petitioner is further advised that pursuant to 28 U.S.C. § 2244, he may not file a second or successive petition in this Court without prior authorization from the Ninth Circuit. Under § 2244(b)(3)(C), the grounds for obtaining such authorization are extremely limited. Consequently, it is incumbent upon Petitioner to raise all known claims in the Amended Petition.

Murray v. Stewart, No. CV 99-1812-PHX-SMM (D. Ariz. Oct. 13, 1999) (order appointing counsel and setting requirements for the federal habeas corpus proceedings). To this day, the Court has continued to issue this or similar orders in each case that has entered federal habeas proceedings. *See*, *e.g.*, *McGill v. Ryan*, No. CV 12-1149-PHX-CKJ, ECF No. 9 at 2-3 (D. Ariz. June 1, 2012) ("[I]t is incumbent upon Petitioner to raise in his first petition all known claims of constitutional error or deprivation, setting forth 'the facts supporting each ground' for habeas relief.").

4. In addition, for claims that were precluded by a state court and thus not decided on the merits in that forum, in some circumstances a petitioner can overcome that procedural bar to have the federal courts consider the claim on its merits. For example, a federal court can consider the merits of a claim precluded by the state courts if the state court did not "clearly and expressly" rely solely on procedural default in ruling on the claim. *See Belmontes v. Ayers*, 529 F.3d 834, 855 (9th Cir. 2008). And, if the record is not clear as to which procedural bar the state court was invoking, a federal court can reach the merits of the claim. *See Valerio v. Crawford*, 306 F.3d 742, 774-75 (9th Cir. 2002) (holding that district court erred in finding claims procedurally defaulted when the state court did not "specify which claims were barred for which reasons"). In another example, "a state rule must be clear, consistently applied, and well-established at the time of petitioner's purported default." *Scott v. Schriro*, 567 F.3d 573, 580 (9th Cir. 2009) (quoting *Lambright v. Stewart*, 241 F.3d 1201, 1203 (9th Cir. 2001)). If the state cannot meet its burden as to the elements of this test, the federal court will review the relevant claims de novo. *See*, *e.g.*, *Scott*, 567 F.3d at 586 (remanding petitioner's case to the district court for an evidentiary hearing on claims precluded by an inconsistently-applied procedural rule).

5. In addition to these well-established exceptions to the exhaustion requirement, the United States Supreme Court's recent decision in an Arizona case recognized an additional vehicle for showing cause and prejudice necessary to overcome default of a claim. In *Martinez v. Ryan*, 132 S. Ct. 1309, 1315

(2012), the Supreme Court held that ineffective assistance of post-conviction counsel can constitute "cause" to overcome procedural default when counsel failed to raise an ineffective assistance of trial counsel claim and state post-conviction proceedings provided the first opportunity to litigate such a claim. To demonstrate "cause" for a default, *Martinez* requires a petitioner to establish (1) that his initial review post-conviction lawyer was ineffective under the standard of *Strickland v. Washington*, 466 U.S. 668 (1984), and (2) that "the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." *Id.* at 1318. To meet this burden, federal habeas counsel must necessarily conduct their own review and investigation of the trial proceedings and post-conviction proceedings in the event that post-conviction counsel failed to raise a potentially meritorious claim. This decision has already resulted in additional litigation in several Arizona cases. For example, in *Runningeagle v. Ryan*, No. 07-99026, ECF No. 59 (9th Cir. July 18, 2012), the United States Court of Appeals for the Ninth Circuit remanded the case to the district court for reconsideration of twelve of its procedural default rulings in light of *Martinez*. The same is true of *Lopez v. Ryan*, No. 09-99028, ECF No. 56 (9th Cir. Apr. 26, 2012), which was remanded for reconsideration of its procedural default rulings on Lopez's ineffective-assistance-of-counsel claims. Motions or proceedings related to *Martinez* also are pending in numerous other Arizona cases, indicating the numerous problems with post-conviction counsel's performance in these cases.

6. There is much more to federal habeas counsel's duties than simply repeating the claims as raised in state court, especially because counsel often discovers potentially meritorious claims that have not been raised previously. When a case enters federal court in Arizona, it has been through a minimum of three sets of attorneys, and in many cases more than that. Counsel must gather the court record and files from every attorney, paralegal, investigator, and expert witness that worked or consulted on a case to properly evaluate the state and counsels' actions and strategies during the state court proceedings. These case files are generally voluminous, usually comprising anywhere between ten and fifty boxes of materials depending on the complexity of the case. The file must be organized, missing portions of the record or files must be obtained, client records and law enforcement files must be requested, and the team must review the legal files, court exhibits, and law enforcement evidentiary files in their entirety to understand and evaluate the proceedings below. The team must then locate and interview a large variety of witnesses, including all prior counsel and defense team members, client friends and family members, other fact witnesses, expert witnesses, and any other relevant individuals. During this process, the team must also decide if additional expert witnesses are necessary for reviewing the proceedings below or evaluating the client. If so, counsel must locate and retain appropriate experts, provide them with relevant materials, and consult with them regarding their opinions. As noted above, counsel must use this time to reinvestigate the entirety of the trial and post-conviction proceedings to

evaluate the performance of defense counsel and determine if potentially meritorious claims exist that were not raised in the state court.

7. As this work takes place, counsel must begin evaluating the state court rulings on the claims raised below in several ways. First, counsel must determine if there are grounds for federal habeas relief pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Under AEDPA, a federal court may only grant relief if a state court decision unreasonably applies clearly-established federal law, or constitutes an unreasonable determination of the facts. 28 U.S.C. § 2254(d). Counsel must thoroughly review and research those rulings to see if the state court was unreasonable in its actions. Counsel must also review all state court preclusion rulings to see if those rulings fall into any of the categories described above in ¶¶ 2, 4, and 5, allowing federal court merits review. And, if the federal habeas investigation has revealed additional claims, those must be evaluated for grounds to overcome any procedural default, including whether the client received ineffective assistance of post-conviction counsel pursuant to *Martinez v. Ryan* as described in ¶ 5, above. In each of these scenarios, counsel must transform the claim, whether new or raised below, into a federal habeas claim applying relevant case law and complying with the strictures of AEDPA. These claims are then included in a federal habeas petition, which must also include a statement of the facts and a complete procedural history. These petitions generally include anywhere from ten to fifty claims, and comprise several hundred pages.

8. The work described above must take place while counsel and the team are also trying to communicate and build a relationship of trust with their new client. This is often difficult due to a client's mental illnesses, learning disabilities, or brain damage, and can be complicated if a client has had difficult or distrustful relationships with prior counsel or team members. A client's cooperation is crucial to the habeas investigation and claim development, and is also necessary for any expert evaluations, so time must be spent establishing a solid relationship between the client and the legal team. The relationship with the client is extraordinarily important in federal capital habeas cases, because a habeas attorney will usually remain on the client's case until it ends, either when relief is granted or a client is executed. This effort, combined with the other duties described above, requires an incredible time commitment from the entire habeas team and does not occur in a vacuum– counsel must also continue to manage their other cases and responsibilities while undertaking this enormous task.

9. Filing a federal habeas petition is no small undertaking. To properly preserve a client's rights and ensure meaningful review in federal court, an enormous amount of resources must be marshaled. Because each case is a significant undertaking, shortening the statute of limitations would have a significant impact on FDO-AZ. Confronted by expedited deadlines, it would be left in the untenable position of deciding between two unappealing options: (1) file as many petitions as possible in cases that have not been adequately investigated or researched (and risk forfeiting meritorious claims), or (2) limit the number of

individuals it represents as each case demands an even larger portion of FDO-AZ's resources. In addition, there are two other possibilities. First, unrepresented prisoners may miss their deadlines, or second, if FDO-AZ cannot take the case, the judiciary would have to appoint counsel from the CJA panel. Because certification determinations are retroactively applicable and there is exceptional uncertainty regarding which states will qualify (and serious concerns as to whether they should), the moment the Final Rule becomes effective, AZ-FDO will have to begin making these tough choices.

I declare under penalty of perjury under the laws of the United States of America and California that the foregoing is true and correct and that I have signed this declaration on November 10, 2013.

/s/ Dale A. Baich
Dale A. Baich

GEORGE E. GREER (admitted pro hac vice)
ggreer@orrick.com
CATHERINE Y. LUI (STATE BAR NO. 239648)
clui@orrick.com
DARREN S. TESHIMA (STATE BAR NO. 238875)
dteshima@orrick.com
MARC R. SHAPIRO (admitted pro hac vice)
mshapiro@orrick.com
SHANNON C. LEONG (STATE BAR NO. 268612)
sleong@orrick.com

ORRICK, HERRINGTON & SUTCLIFFE LLP
The Orrick Building
405 Howard Street
San Francisco California 94105-2669
Telephone: +1-415-773-5700
Facsimile: +1-415-773-5759

Attorneys for Plaintiffs
Habeas Corpus Resource Center and the Office of the Federal Public Defender for the District of Arizona

APPENDIX O

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Habeas Corpus Resource Center and the Office of the Federal Public Defender for the District of Arizona, Plaintiffs, v. United States Department of Justice and Eric H. Holder, in his official capacity as United States Attorney General, Defendants.	Case No. 13-CV-4517-CW **SUPPLEMENTAL DECLARATION OF MICHAEL LAURENCE IN SUPPORT OF PLAINTIFFS' REPLY IN SUPPORT OF ORDER TO SHOW CAUSE FOR PRELIMINARY INJUNCTION** Date: Nov. 14, 2013 Time: 2:00 p.m. Dept: 2 Judge: Hon. Claudia Wilken

I, Michael Laurence, hereby declare that the following information is true to the best of my knowledge and belief:

1. I am the Executive Director of the Habeas Corpus Resource Center (HCRC), which is a Plaintiff in this matter, *Habeas Corpus Resource Center and the Office of the Federal Public Defender for the District of Arizona v. United States Department of*

Justice, Case No. CV 13 4517. On October 3, 2013, I executed a declaration detailing some of the ways that deficiencies in the Attorney General's final rule to implement a certification process critically undermine the ability of capital habeas lawyers and capitally convicted inmates to make crucial litigation decisions in California. This declaration provides additional information about these burdens and their detrimental effects.

2. As I previously described, the deficiencies in the Attorney General's final rule result in a certification process that fails to provide clear measures for compliance with Chapter 154 requirements, guidelines for understanding what evidence is relevant to the Attorney General's certification decision, and procedures for interested persons to participate meaningfully in the certification decision. The absence of a comprehensible regulatory process makes it impossible to predict with any reasonable certainty the likelihood that California could be certified under Chapter 154. Consequently, if the Attorney General's flawed final rule goes into effect, I and other attorneys immediately are forced to make critical litigation decisions about the potential retroactive application of Chapter 154 to capital cases without any reasonable bases, and our current and future clients are forced to suffer the consequences of those uninformed decisions.

3. As I set forth in my previous declaration and this declaration, the harmful consequences of permitting the flawed rule to go into effect are not contingent on whether California will be certified, but

rather upon the inability to predict whether California qualifies for Chapter 154's benefits because of the absence of clear standards and fair procedures in the final rule. Given the retroactive nature of Chapter 154's provisions, serious litigation decisions are immediately affected by this uncertainty.

4. Among other things, Chapter 154 seeks to limit significantly the tolling of the statute of limitations period and the ability to amend federal petitions after an answer has been filed. As a result, for cases subject to Chapter 154's provisions, state post-conviction counsel must attempt to fully develop and present all potentially meritorious constitutional claims in the first state habeas corpus petition. In my October 3, 2013 declaration, I discussed some of the critical predicaments that counsel and their clients will face if the flawed final rule becomes effective and they are unable to determine whether these Chapter 154 provisions will or will not apply at some future date. What defendants fail to appreciate is that uncertainty about the application of Chapter 154 caused by the flawed final rule detrimentally affects death-sentenced inmates' cases at every stage of the legal process in state and federal court proceedings. The strategic considerations that must be addressed as soon as the final rule goes into effect include the appropriate advice and strategies for counsel and their clients in the process of developing and presenting post-conviction claims in state court as well as for capitally convicted individuals for whom post-conviction counsel has not yet been appointed; decisions for counsel who are considering accepting appointments or who recently did so; and actions by counsel and cli-

ents for whom the federal statute of limitations is running or who already have a petition pending in federal court.

5. For example, California Supreme Court policies limit capital post-conviction counsel to pursuing and developing only those claims of constitutional error that appear from reviewing the appellate record and consulting a limited number of other sources, and do not authorize or fund investigation and development of all potential claims of constitutional violations. Supreme Court Policies Regarding Cases Arising from Judgments of Death, Policy 3, 1-1 (2005). As a result, in the vast majority of California cases, the death-sentenced inmate obtains additional funding in federal court and develops new claims that require a return to state court to comply with the exhaustion doctrine. If California were certified under a flawed certification process that does not evaluate such practical limitations on the appointment of counsel, death sentenced individuals who lack the resources to develop all potential claims nonetheless may face the limitations of Chapter 154 in their federal court proceedings. To avoid this result, the HCRC and other counsel would have to consider developing resources—at the expense of other representation and services—to advise and guide death-sentenced individuals in pursuing a variety of remedies to alleviate harm from limitations on their state counsel at the outset of their cases, including requesting (1) the appointment of federal counsel to seek a ruling from a federal court to prospectively prohibit the applicability of Chapter 154 in their individual case or make available necessary resources in state court, (2) the

appointment of federal counsel to ensure the development and presentation of all potential claims while the state court proceedings are pending; and (3) the removal of state counsel who is not able or willing to fully develop potentially meritorious claims.

6. The legal uncertainty created by the flawed rule creates additional problems for the approximately 349 individuals on death row in California who do not have counsel to prosecute state habeas corpus proceedings. For these individuals, decisions must be made as to whether to seek immediate appointment of federal counsel or institute other proceedings to ensure that the limitations on the appointment of state habeas corpus counsel by the California Supreme Court does not affect their rights to federal judicial review of their judgments.

7. The disparity in California between the availability of post-conviction counsel and direct appeal counsel—of the 349 individuals who do not have post-conviction counsel, approximately 266 have appointed counsel for the direct appeal—also causes significant problems in coordinating key litigation decisions that must be made if Chapter 154 applies to California cases. Appellate lawyers routinely file petitions for certiorari in the United States Supreme Court, and the time permitted to draft those petitions (a minimum of 90 days) tolls the federal statute of limitations. Under Chapter 154, however, the time period needed to draft the certiorari petition does not toll the federal statute of limitations and instead counts against the 180 days that an individual has to file a federal petition. Because a significant number of direct appeal lawyers do not handle post-conviction

cases, and post-conviction counsel are not appointed in many cases prior to the decision to file a petition for certiorari, there is a substantial risk that appellate counsel will use 90 days to file a petition for certiorari without recognizing the effect that time has on their client's ability to present claims in federal court. It will take significant time and resources to advise and monitor appellate counsel—particularly in the absence of appointed post-conviction counsel, to ensure consideration of this time period.

8. These and other problems I previously described also affect the availability of post-conviction counsel to accept appointments in state and federal court. The uncertain legal terrain, in light of the potentially serious consequences of limited state resources on federal proceedings, will diminish an already depleted pool of qualified counsel able and willing to accept appointments. Similarly, counsel who accept federal appointments currently do so on the basis of counsel's ability and willingness to comply with a one-year statute of limitations. The possibility of a 180-day limitations period under Chapter 154 will force attorneys to refuse or withdraw from appointments. These effects only exacerbate the problems I already have described, increase the burden on HCRC and other attorneys currently handling capital post-conviction caseloads, and strain or eliminate resources that—absent the uncertainty caused by a flawed final rule—would be used to ensure qualified post-conviction representation.

I declare under penalty of perjury under the laws of the United States of America and California that the foregoing is true and correct and that I have signed this declaration on November 10, 2013.

/s/ Michael Laurence
Michael Laurence