No. 14-16928

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HABEAS CORPUS RESOURCE CENTER, et al.,

Plaintiffs-Appellees,

vs.

UNITED STATES DEPARTMENT OF JUSTICE, et al.,

Defendants-Appellants.

On Appeal from the United States District Court for the Northern District of California, Case No. 13-4517

BRIEF AMICI CURIAE OF MARC KLAAS AND EDWARD G. HARDESTY IN SUPPORT OF APPELLANTS AND SUPPORTING REVERSAL

KENT S. SCHEIDEGGER
Criminal Justice Legal Foundation
2131 L Street
Sacramento, California 95816
(916) 446-0345

Attorney for Amici Curiae Marc Klaas and Edward G. Hardesty

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IDENTITY AND INTEREST OF AMICI CURIAE

Marc Klaas is the father of Polly Klaas. At the age of 12, Polly was kidnapped out of her own home in Petaluma, California, by Richard Allen Davis and murdered by him. Davis was sentenced to death, and his conviction and sentence have been upheld on direct appeal and state habeas corpus. A federal habeas petition was filed on January 23, 2014, in *Davis v. Chappell*, U.S. Dist. Ct., N.D. Cal. No. 3:13-cv-00408. If Chapter 154 of title 28, United States Code had been implemented and California had been certified, the District Court would be required by law to complete these proceedings by April 20, 2015. Instead, they have barely begun.

Edward G. Hardesty is the brother of Tucson Police Officer Patrick Hardesty, who was murdered in the line of duty by John Montenegro Cruz. Cruz was sentenced to death, and his conviction and sentence have been upheld on direct appeal and state postconviction review. The Federal District Court for the District of Arizona stayed his execution and appointed counsel on May 30, 2013, in *Cruz v. Ryan*, No. 4:13-cv-00389. A petition for writ of habeas corpus was filed on May 1, 2014. If Chapter 154 had been implemented and Arizona's pending application approved, the District Court would be required by law to complete the proceedings by July 27, 2015. Instead, only the basic pleadings and early motions have been filed to date.

Amici are authorized to assert the interests of deceased victims under 18 U.S.C. § 3771(e). They have a "right to proceedings free from unreasonable delay," § 3771(a)(7), a right which extends to the federal habeas proceedings noted above. *See* § 3771(b)(2)(A). Unreasonable delay in violation of victims' rights is presently the norm in capital habeas cases in both Arizona and California, with cases typically taking over four years for district court resolution alone. *See* N. King, F. Cheesman, & B. Ostrom, Final Technical Report: Habeas Litigation in U.S. District Courts: An Empirical Study of Habeas Corpus Cases Filed by State Prisoners Under the Antiterrorism and Effective Death Penalty Act of 1996, Figure 15, p. 42 & App. D (2007). Chapter 154, if implemented, would require resolution by the district court in one year and three months. *See* 28 U.S.C. § 2266(b)(1)(A). Amici therefore have a strong interest in this case.

This brief was written entirely by counsel for amici and not by counsel for any party. No party or party's counsel contributed money to prepare or submit this brief. No other person contributed money to prepare or submit this brief. The Criminal Justice Legal Foundation provided representation and covered incidental expenses.

SUMMARY OF FACTS AND CASE

A detailed statement of the facts and case is given in the Brief for Appellants (AOB) 2-14. We briefly summarize them here to frame the issues in this brief.

In 1996, Congress passed a landmark reform of habeas corpus law for the specific purpose of reducing the extreme delay in the execution of capital judgments, as reflected in the title of the act: the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). This act added Chapter 154 to Title 28 of the United States Code, providing expedited processing of capital cases in federal habeas corpus if states had or adopted mechanisms to provide qualified and adequately funded representation in state postconviction proceedings. *See Calderon v. Ashmus*, 523 U.S. 740, 742-743 (1998).

In 2006, Congress amended AEDPA to provide that the determination of whether a state had established a qualifying mechanism would be made initially by the Attorney General of the United States with *de novo* review by the Court of Appeals for the D.C. Circuit. *See* 28 U.S.C. § 2265(a)(1) & (c).[1]

1. Unless otherwise specified, all further section references are to Title 28 of the United States Code.

Congress further directed the Attorney General to "promulgate regulations to implement the certification *procedure* under subsection (a)." § 2265(b) (emphasis added).

Despite the purpose of the act to reduce delay, the Attorney General did not promulgate a final rule until two and a half years after enactment. *See* AOB 5. Plaintiff Habeas Corpus Resource Center filed an action challenging the rule on notice grounds in the same court as the present action, and the District Court preliminarily enjoined enforcement. *See ibid*.

Rather than appealing this ruling, the Department of Justice withdrew the rule and, despite the purpose of the act to reduce delay, still had not promulgated a new final rule as of April 18, 2013. On that date, the Attorney General of Arizona applied for certification notwithstanding the absence of a final rule. A copy of that application was attached to the complaint in this action as Exhibit 6 and is attached to this brief as Appendix A. The Department responded in a letter, Exhibit 8 of the complaint and Appendix B to this brief, stating in essence that it would not proceed until the final rule had been promulgated.

The Department promulgated a new final rule on September 23, 2013, over seven years after the 2006 amendments. *See* AOB 6. The new rule granted the capital inmates major concessions of dubious legality, including a five-year expiration on certifications, *see* 28 C.F.R. § 26.23(e), ER2_57[2], and presumptive requirements for qualification of counsel more stringent

2. Following Appellants' numbering system, this refers to Excerpts of Record, Volume 2, page 57. *See* AOB 1 n.1.

than those Congress has enacted for federal capital cases. *Compare* 28 C.F.R. § 26.22(b)(1)(i), ER2_56, *with* 18 U.S.C. § 3599(c).

Unsatisfied with these concessions, plaintiffs Habeas Corpus Resource Center and the Federal Public Defender for the District of Arizona filed the complaint in the present action. ER2_12. The District Court issued a temporary restraining order followed by a preliminary injunction, ER1_35, and, on August 7, 2014, a permanent injunction, ER1_2-33. The latter provides,

> "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."

ER1_34. The second sentence was a bolt from the blue. The question of the legality of implementing Chapter 154 without regulations was not briefed or argued by any party and an injunction against such implementation was not included in the prayer for relief. *See* ER2_31.

The Department timely appealed.

SUMMARY OF ARGUMENT

Absent exceptions not applicable here, an administrative agency has complete discretion to resolve questions of interpretation of a statute through rulemaking, case-by-case adjudication, or a combination. Because there is no requirement to establish substantive criteria for qualification by rule at all, the criteria in the rule cannot be invalid as vague or incomplete.

The District Court had no jurisdiction to hear this pre-enforcement challenge. When a statute provides a specific mode of review for agency decisions but is silent about pre-enforcement challenges, jurisdiction to entertain such challenges depends on the structure, objectives, and legislative history of the statute as well as its language. For the act at issue in this case, allowing the District Court to hear this challenge would amount to an evasion of the review scheme established by Congress.

This case is not ripe. Regulations are not ordinarily ripe for review until they have been applied to particular circumstances. No exception applies in this case. The regulation does not command or forbid the plaintiffs or anyone else to do anything. It only establishes the procedure for certifications and some rebuttable presumptions that the Department of Justice intends to employ in making its decisions. Any objections to the substance or procedure can be heard in a judicial forum designated by Congress before any concrete effect is felt. Mere uncertainty as to the application of the law has been specifically rejected by the Supreme Court as a cognizable hardship for the purpose of ripeness analysis.

The Plaintiffs do not have standing. In addition to the reasons stated in the Brief for Appellants, capital defense lawyers are not within the "zone of interests" protected by the Antiterrorism and Effective Death Penalty Act of 1996. Having sought relief only on their own behalf, and not as representatives of their clients, the plaintiffs do not have standing.

The State of Arizona has a pending application for certification with the United States Department of Justice. The injunction granted in this case

effectively halts that pending proceeding. The State therefore has an interest which may be impaired as a practical matter, and under Rule 19 of the Federal Rules of Civil Procedure, any relief granted must be shaped so as not to impair the interests of the absent party. The injunction granted violates Rule 19 to the extent it prevents or delays Arizona's application.

Contrary to established law on injunctions, the District Court completely failed to consider the public interest. The proper balancing clearly weighs against enjoining the implementation of this important law.

ARGUMENT

I. The Attorney General had no obligation to establish substantive rules by regulation at all.

A. Rulemaking by Regulation and Adjudication.

Among the reasons given by the District Court for enjoining the regulations at issue in this case were that the criteria for qualification of counsel were too open-ended, leaving questions to be resolved in the course of adjudicating individual state petitions. For example, along with particular standards of counsel competence, the regulation allows for the possibility of other variations which "reasonably assure a level of proficiency appropriate for State post-conviction litigation in capital cases." ER1_28. The District Court also concluded that the regulation was "arbitrary and capricious" because it did not sufficiently delve into the complex legal questions of what effect would be given to judicial interpretations of the statute rendered prior to its amendment. ER1_30-32.

The District Court appears to have proceeded on a fundamentally erroneous concept of a basic principle of administrative law. It is not at all unusual for Congress to enact a statute in general terms and allow an administrative agency to make those terms more specific. "The law clearly establishes that an agency may choose to establish interpretations of law or make administrative policy through adjudication *even if it has rulemaking authority*. Absolute discretion to choose adjudication was confirmed by the Supreme Court in *SEC v. Chenery* (*Chenery II*) [332 U.S. 194 (1947)]." 1 Charles H. Koch, Administrative Law and Practice § 2.12, at 81-82 (3d ed. 2010) (italics added, footnotes omitted); *see also NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974).

The regulations in the present case would have been valid if they had been limited solely to matters of the certification procedure and said nothing at all about the criteria for qualification.

There are some limitations when it comes to the application of rules created by adjudication rather than rulemaking. "Such a situation may present itself where the new standard, adopted by adjudication, departs radically from the agency's previous interpretation of the law, where the public has relied substantially and in good faith on the previous interpretation, where fines or damages are involved, and where the new standard is very broad and general in scope and prospective in application." *Pfaff v. HUD*, 88 F.3d 739, 748 (9th Cir. 1996) (citing *Bell Aerospace*, 416 U.S. at 294); *see* 1 Richard J. Pierce, Administrative Law Treatise § 6.9, at 514 (5th ed. 2010) (due process limits). For example, suppose the Attorney

General's interpretation of the criteria for qualified counsel made in a certification proceeding departed radically from prior understandings. A court would be warranted in not applying that certification retroactively, with regard to the timely filing requirement, so as to cut off an otherwise timely application made within a few months of the certification. The Supreme Court's generous interpretation of the parallel time limit in Chapter 153 seems to provide more than enough flexibility to make such adjustments. See *Holland v. Florida*, 560 U.S. 631, 649 (2010) (equitable tolling); *McQuiggin v. Perkins*, 133 S.Ct. 1924, 1934 (2013) (exception for miscarriage of justice, despite absence of any basis for one in the statutory language); cf. *id*. at 1937 (Scalia, J., dissenting). These limitations on application can be made as the need arises and do not require that the agency act by rulemaking rather than adjudication.

Congress can, when it chooses, require an agency to adopt its interpretations by rulemaking rather than adjudication. *See* 1 Pierce, § 6.9, at 502. No such intent appears in the statute in this case. The statutory mandate is expressly for the certification procedure, § 2265(b), not the substantive criteria. As to the latter, Congress has expressly forbidden making the criteria any more restrictive than the statute itself. *See* § 2265(a)(3).

Nor is a case-by-case adjudication of whether various state systems meet the statutory criteria inconsistent with the overall design of the chapter.

Indeed, in its original form, with criteria essentially the same as present law,[3] the question of whether a state system qualified was to be made by courts within habeas corpus cases, *see Calderon v. Ashmus*, 523 U.S. 740, 748 (1998), with no administrative involvement at all. The Powell Committee, in the report that proposed what eventually became Chapter 154, considered spelling out criteria in advance and expressly rejected that step. Report of the Ad Hoc Comm. of the Judicial Conf. on Federal Habeas Corpus in Capital Cases, reprinted in 135 Cong. Rec. 24694, 24696, col. 2 (1989). Allowing States to develop their own criteria and deciding case-by-case whether those criteria were adequate was the plan from the beginning. *See* AOB 43-45 & nn.19-20 and authorities there cited.

Thus, even if the Attorney General had the authority to make rules with the force of law in this matter, he would not have been required to do so but could have proceeded to put "meat on the bones" of the statute entirely in the process of determining state certification procedures. It stands to reason that establishing presumptive guidelines and leaving the door open to other variations to be decided in actual certification proceedings is also valid. But there is an additional reason for not casting qualification requirements in concrete in the regulations. The Department has no authority to do so.

B. Legislative v. Interpretative Regulations.

The Administrative Procedure Act exempts from the notice-and-comment requirement a sweeping list of pronouncements that would otherwise fall

3. *Compare* § 2265(a)(1) *with* former § 2261(b), Pub. L. 104-132, § 107, 110 Stat. 1221-1222.

under the broad definition of rules—"interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice . . . ." 5 U.S.C. § 553(b). What is left of the set of "rules," after all those subsets are subtracted, is the category called "substantive rules," *see Colwell v. Department of Health and Human Services*, 558 F.3d 1112, 1124 (9th Cir. 2009), or "legislative rules." *See Gunderson v. Hood*, 268 F.3d 1149, 1154 (9th Cir. 2001).

Telling the difference between "legislative rules" and "interpretive rules" can be difficult, *see*, *e.g.*, *Gunderson*, 268 F.3d at 1154, but there is one clear and rudimentary prerequisite for a legislative rule. A legislative rule has the force and effect of law, not merely persuasive effect as an interpretation of the statute, and an agency cannot promulgate such a rule unless it has been delegated quasi-legislative authority by Congress. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 302-303 (1979); *see also Gonzales v. Oregon*, 546 U.S. 243, 255-256 (2006); *National Park Hospitality Assn. v. Department of Interior*, 538 U.S. 803, 808 (2003); 1 Pierce, § 6.2, at 408; 3 Koch, § 10:21, at 427-248.

In the 2006 amendments to the Antiterrorism and Effective Death Penalty Act of 1996, Congress has not merely omitted any authority to promulgate substantive rules having the force of law, it has expressly forbidden any additions to the statutory requirements. Congress gave the Attorney General authority to "promulgate regulations to implement the certification *procedure* under subsection (a)." § 2265(b) (emphasis added). If Congress had intended to give the Attorney General the power to make substantive

rules with the force of law, it would not have limited the grant of regulatory authority to procedure. Quite the contrary, Congress expressly forbade the creation of any additional criteria for certification beyond those specified in the statute itself, either by the executive branch or the judiciary. *See* § 2265(a)(3). The Attorney General has no authority to "impose new rights or obligations," which is the hallmark of a legislative rule, *see Mora-Meraz v. Thomas*, 601 F.3d 933, 940 (9th Cir. 2010), but only to give his opinion regarding the meaning of the substantive rules Congress has established in the statute, the hallmark of an interpretive rule. *See ibid*.

With or without authority to issue legislative rules, an agency can "issue interpretive rules . . . to advise the public of the agency's construction of the rules it administers." *Gunderson*, 268 F.3d at 1154; *see also National Park Hospitality*, 538 U.S. at 808-809. Although the Department did not explicitly state whether it intended to promulgate a legislative rule or an interpretive one, it is clear from the authority cited that the rule is merely interpretive. In response to comments challenging whether the Department had any authority to articulate substantive standards, the preamble to the final rule cited an Office of Legal Counsel opinion, which is also cited by the Department in its brief. *See* Certification Process for State Capital Counsel Systems, 78 Fed. Reg. 58160, 58161, col.3 (Sept. 23, 2013), AOB A10; U.S. Dep't of Justice, Off. of Legal Counsel, The Attorney General's Authority in Certifying Whether a State Has Satisfied the Requirements for Appointment of Competent Counsel for Purposes of Capital Conviction Review Proceedings

(Dec. 16, 2009).[4] This memo addressed to the Attorney General states at page 12,

> "pursuant to section 2265(b), you may promulgate regulations that set forth the federal minimum competency standards that you will apply in making certification determinations, although you are not required to take this action."

That describes an interpretive rule. Nowhere in the OLC opinion or the final rule does the Department purport to make any rule with the force of law, binding on courts or the general public. *See Erringer v. Thompson*, 371 F.3d 625, 630 (9th Cir. 2004) ("force of law" as defining characteristic of legislative rule versus interpretive rule); 1 Pierce, § 6.4, at 432-433.

The argument that the agency must crystallize the meaning of a statute in regulations before enforcing it is weak enough in the typical case where the agency has delegated power to make "legislative" regulations that have the force of law in themselves and not merely persuasive force as interpretations of the statute. The argument is far weaker here, where Congress has forbidden anything other than interpretation of the requirements it has imposed, thus limiting the agency to "procedural" and "interpretative" regulations.

A claim that the Attorney General must make the application of certification requirements certain and predictable in advance makes no sense when considered in light of the fact that no interpretative regulations, regardless of how concrete and complete, could possibly do so. A State that

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4. http://www.justice.gov/olc/opiniondocs/capital-counsel-memo.pdf.

believes the regulations are too restrictive and not a correct interpretation of the statute would be entitled to have a denial reviewed in the Court of Appeals for the D.C. Circuit, and that court is directed to review the determination *de novo*. § 2265(c)(3). Given that Congress expressly directed that interpretations of the statute by the Attorney General during certification decisions be given no deference at all, would it make sense for Congress to silently authorize controlling force for the Attorney General's interpretations via rulemaking? Such a dramatic skew in the standard of review for two different forms of interpretation should not be assumed in the absence of clear statutory language to that effect, but the language actually authorizes regulations only for matters of procedure, not substance.

Under this unusual statute, the agency is directed to make an initial interpretation of the statutory criteria in determining whether a State qualifies, but the final interpretation is committed to the *de novo* review of a court. Given that structure, nothing the Attorney General put in the interpretive regulations could possibly provide certainty. A regulation cannot be invalid for not doing the impossible.

II. The District Court has no jurisdiction to hear a challenge to the substance of the rule.

Where Congress has vested exclusive jurisdiction to review agency actions in one court, an attack on implementing regulations in another court may be an evasion of that exclusive jurisdiction. *See United States v. Dunifer*, 219 F.3d 1004, 1007 (9th Cir. 2000); *see also Minority Television Project, Inc. v. FCC*, 736 F.3d 1192, 1211 (9th Cir. 2013) (en banc) (citing

Dunifer). Such evasion must not be allowed, *Dunifer*, at 1007, but that is exactly what the plaintiffs seek to do in the present case.

Statutes which provide an exclusive mechanism for judicial review of agency orders or adjudications but which do not specifically address pre-enforcement challenges to the implementing regulations are fairly common, and there is a substantial body of case law on the question of whether such challenges may be brought under more general sources of jurisdiction, including the Administrative Procedure Act. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 139-140 (1967), framed the question as "whether Congress by the [act in question] intended to forbid pre-enforcement review of this sort of regulation promulgated by the" responsible agency. *Abbott Laboratories* is the case generally regarded as having opened up regulations to pre-enforcement review. *See* 2 Pierce, Administrative Law Treatise § 15.14, at 1359-1360. In that case, the Supreme Court "conclude[d] that nothing in the Food, Drug, and Cosmetic Act itself precludes this action," 387 U. S. at 148, but the question must be asked anew for each statute.

In *Block v. Community Nutrition Institute*, 467 U.S. 340, 345 (1984), the Supreme Court held that

> "[w]hether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved."

In *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207 (1994), the high court applied *Block* to the question of "delayed judicial review," whether an allegedly aggrieved party must wait for the judicial review that follows an

administrative determination or whether he can file suit immediately. The District Court in that case enjoined the enforcement of a regulation that had been adopted to implement the Federal Mine Safety and Health Amendments Act of 1977 (the "Mine Act"). *See id*. at 202-203, 205-206. This act, like the act in the present case, provided for administrative determination and judicial review in the Court of Appeals of particular cases but was "facially silent with respect to pre-enforcement claims." *Id*. at 208.

The Tenth Circuit held that allowing this review " 'would permit preemptive strikes that could seriously hamper effective enforcement of the Act, disrupting the review scheme Congress intended.' " *Id*. at 206 (quoting *Thunder Basin Coal Co. v. Reich*, 969 F.2d 970, 975 (1992)). The Supreme Court affirmed. The court noted the legislative history of the Mine Act, with particular emphasis on Congress's concern that the process was too cumbersome and its intent to strengthen and streamline its enforcement. *Id*. at 209-211, 216. The Supreme Court noted that this difference in legislative purpose distinguished the Mine Act from the statute at issue in *Abbott Laboratories*. *Id*. at 212. For the statute in the present case, it is beyond dispute that curbing delays is *the* central purpose of the habeas reforms of the Antiterrorism and Effective Death Penalty Act of 1996, *see*, *e.g.*, 142 Cong. Rec. 7562, col. 3 (1996) (statement of Sen. Feinstein); *Schriro v. Landrigan*, 550 U.S. 465, 475 (2007), and that congressional frustration with the failure to implement Chapter 154 was the motivation behind the 2006 amendments. *See* Streamlined Procedures Act of 2005, Hearing before the Subcommittee on Crime, Terrorism, and Homeland Security of the Committee on Judiciary,

House of Representatives, 109th Cong., 1st Sess., Serial No. 109-82, pp. 82-83 (2005) (statement of Mr. Lungren) (cited below as "Streamlined Procedures Act Hearing").[5]

The *Thunder Basin* Court distinguished cases in which the claims asserted outside the statutory review procedure were "wholly collateral" to those review provisions. 510 U.S. at 212-213. Claims are not collateral when they "require interpretation of the party's rights and duties under" the statute to be enforced in the administrative proceeding. *Id*. at 214. The heart of the present case is the criteria by which it will be decided whether a State can be certified under Chapter 154. Those are precisely the questions that Congress assigned to the Attorney General to decide with judicial review in the exclusive jurisdiction of the Court of Appeals for the D.C. Circuit.

Thunder Basin also distinguished *McNary v. Haitian Refugee Center, Inc.*, 498 U. S. 479 (1991) as a case where precluding the suit in district court would, as a practical matter, leave the plaintiffs without any meaningful judicial review. *See* 510 U.S. at 213, 215. In the present case, as in *Thunder Basin*, the plaintiffs, or at least the prisoners they represent, can obtain review of their claims in the judicial forum Congress has designated.

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5. As often happens in Congress, language considered in committee hearings for a bill that did not pass was amended into another bill at the last minute. H.R. 3035 § 9 contained amendments to sections 2261 and 2265 establishing a certification procedure largely the same as that adopted in Pub. L. 109-177, § 507, 120 Stat. 250, and the hearing on it may be considered legislative history of the language adopted to the extent it is the same.

If there were any doubt that the same principles apply in a purely facial attack on a regulation, it was eliminated in *Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1 (2000). The question in that case was whether persons "needing advance knowledge for planning purposes" can attack a regulation "on general legal grounds" under 28 U.S.C. § 1331 rather than going through the procedure designated by Congress for making claims. *Shalala*, 529 U.S. at 10. The answer was no. *See id*. at 19 (distinguishing *McNary* and citing *Thunder Basin*).

In the present case, there is an additional, powerful reason in the structure of the statute for finding that it precludes the pre-enforcement challenge at issue here. Unlike the cases noted above, the authority to review administrative determinations under the statute is not vested in courts of appeals generally but rather in one specific court of appeals. Congress was surely aware that questions of interpretation would inevitably arise regarding this statute, as they do for nearly all statutes. If all the cases are channeled to one court, there will be no divisions of authority. On the other hand, if the present suit is allowed and the plaintiffs prevail, the Department of Justice must promulgate a new rule, and that new rule must pass muster with the District Court or this court. But what happens when a certification decision pursuant to that rule comes before the court designated by Congress, the Court of Appeals for the D.C. Circuit? The rule would not be the product of a normal administrative proceeding, but rather it would be shaped by the demands of another court, one of the courts Congress specifically wanted to remove these decisions from. *See* Streamlined Procedures Act Hearing,

supra, at 82-83. Would such a rule be entitled to any deference whatsoever? Particularly in light of the congressional command for *de novo* review, *see* § 2265(c)(3), a prior court interpretation in this case and a regulation resulting from it must either be a nullity and a waste of time and resources or else an interference with the congressional design.

In light of "the legislative history's clear concern with channeling and streamlining the [qualification] process," *Thunder Basin*, 510 U.S. at 216, section 2265 should be understood to preclude the suit in this case.

III. The case is not "ripe."

> "Under the terms of the APA, respondent must direct its attack against some particular 'agency action' that causes it harm. Some statutes permit broad regulations to serve as the 'agency action,' and thus to be the object of judicial review directly, even before the concrete effects normally required for APA review are felt. Absent such a provision, however, *regulation is not ordinarily considered the type of agency action 'ripe' for judicial review under the APA* until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him. (The major exception, of course, is a substantive rule which as a practical matter requires the plaintiff to adjust his conduct immediately. Such agency action is 'ripe' for review at once, whether or not explicit statutory review apart from the APA is provided.)" *Lujan v. National Wildlife Federation*, 497 U.S. 871, 891 (1990) (emphasis added).

As *Lujan* indicates, allowing an attack on a regulation prior to any enforcement is the exception, not the rule. The "major exception" for "substantive rule[s]," requiring an immediate change in behavior does not

apply here. For the reasons described in Part I, *supra*, the regulation in this case cannot and does not have the force of law, determining whether a state qualifies. Where this exception applies, requiring a regulated party to wait for specific application may create a hardship, but the hardship must be " 'adverse effects of a strictly legal kind.' " *National Park Hospitality Assn. v. Department of Interior*, 538 U.S. 803, 809 (2003) (quoting *Ohio Forestry Assn., Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998)). If a regulation

> " 'do[es] not command anyone to do anything or to refrain from doing anything; [it] does not grant, withhold, or modify any formal legal license, power, or authority; [it] does not subject anyone to any civil or criminal liability; [and it] create[s] no legal rights or obligations,' "

then it does not create the kind of hardship that warrants an exception to the general rule. *Ibid*. (alterations by the Court). The Supreme Court specifically rejected an argument that "mere uncertainty as to the validity of a legal rule constitutes a hardship for purposes of the ripeness analysis." *Id*. at 811. Mere uncertainty over whether a legal rule will apply to a particular circumstance is no more a hardship, and it presents even greater reasons to wait for the particular application.

In the present case, the uncertainty over whether particular states qualify for certification is the claimed injury. *See* ER 1_46. Obviously, the best way to resolve that uncertainty is to proceed with the certification process. Indeed, it is the only way to resolve it finally. Given the general wording of the criteria in the statute, § 2265(a)(1), and Congress's prohibition against adding additional restrictions, § 2265(a)(3), it is not possible under this

statute to establish by rulemaking a set of criteria specific enough that certification decisions can be mathematically predicted in advance.

The District Court's concerns about "bare-bones" applications, *see* ER 1_25, or ex parte communications, *see* ER 1_32-33, can also be better addressed in the context of an actual certification proceeding. These concerns may never materialize. If they do, review of an actual decision on its administrative record is superior to considering "abstruse and abstract arguments," *see Natural Resources Defense Council v. Abraham*, 388 F.3d 701, 705 (9th Cir. 2004), about procedure in a brand new type of proceeding with no history to go on.

The issues in this case are not ripe for judicial decision. They should wait for a decision on an actual application and be reviewed in the manner and forum designated by Congress.

IV. Plaintiffs lack standing because their alleged injury does not fall within the "zone of interests" protected by the statute.

Multiple reasons why the Plaintiffs lack standing are explained by Defendants. *See* AOB 17-23. Amici will add one more, with a precedent that is squarely on point.

Justice O'Connor, acting as Circuit Justice on a stay application, explained the rule on standing in the special context of review of administrative actions in *INS v. Legalization Assistance Project of Los Angeles Federation of Labor*, 510 U.S. 1301, 1304-1305 (1993):

> "Congress has in fact considered the proper scope of federal court jurisdiction to review administrative agency actions. It has explicitly

> limited such review to claims brought by 'person[s] suffering legal wrong[s] because of agency action' (not applicable to the respondent organizations involved here) or by persons 'adversely affected or aggrieved by agency action *within the meaning of a relevant statute*.' 5 U.S.C. § 702 (emphasis added). We have consistently interpreted this latter clause to permit review only in cases brought by a person whose putative injuries are 'within the "zone of interests" sought to be protected by the statutory provision whose violation forms the legal basis for his complaint.' *Lujan* v. *National Wildlife Federation*, 497 U.S. 871, 883 (1990) *(NWF*); see also *Clarke* v. *Securities Industry Assn*., 479 U.S. 388, 396-397 (1987)."

Justice O'Connor concluded that, if presented with the issue, the Supreme Court would hold that the difficulties faced by a legal advocacy organization in representing its clients were not within the zone of interests. *Id*. at 1305. Later in the litigation, this Court accepted Justice O'Connor's analysis regarding standing of the organizations to sue in their own right, although it directed that they be permitted to amend the complaint to establish representative standing for ripe claims of their clients. *See Immigrant Assistance Project of the Los Angeles County Federation of Labor v. Immigration and Naturalization Service*, 306 F.3d 842, 867 (9th Cir. 2002).

In the present case, it could not be seriously contended that Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 to protect the interests of defense organizations as distinct from their clients. Plaintiffs could have named their clients as parties, or they could have alleged representative standing, but they have done neither. If they did either, the court would have to confront whether *Calderon v. Ashmus*, 523 U.S. 740 (1998) bars the suit, which is probably why they did not. For the purpose of

the present appeal, it is sufficient that plaintiffs had no standing, and the injunction should be vacated.

V. Under FRCP 19, an injunction effectively halting Arizona's pending application cannot be granted in an action to which Arizona is not a party.

The nominal defendant in this case is the United States Department of Justice, but the real targets are certification applications made or to be made by States. Indeed, the District Court cited the pending application by the State of Arizona and the possibility it might be granted as the basis for the Arizona Federal Defender's standing. *See* ER1_46.

This court addressed a very similar gambit in *American Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015 (9th Cir. 2002). Opponents of Indian gaming filed a suit against a state governor to enjoin renewing gaming contracts without joining the tribes that were parties to those contracts. *See id*. at 1018. The court found that this stratagem was a violation of Federal Rule of Civil Procedure 19. "This litigation is *aimed* at the tribes and their gaming." *Id.* at 1026 (emphasis in original). Similarly, the present litigation is *aimed* at the States and their pending or potential certification applications. If an indispensable party has sovereign immunity and cannot be joined, the case must be dismissed. *See id*. at 1018.

Arizona applied for certification on April 18, 2013. This application is Exhibit 6 in the complaint, and a copy is attached as Appendix A to this brief. On page 4, Arizona requested that its application be decided within the reasonable time of 90 days. That was almost two years ago. The Department of Justice's response (Complaint Exhibit 8, Appendix B to this brief) implies

that the Department will not proceed on the application, other than preliminary information gathering, until the final rule is in place. This District Court's permanent injunction forbids the Department to proceed without a regulation, *see supra* at 5, despite the lack of any request for such an order or briefing supporting it. Thus in litigation between the Department and two defense agencies, the District Court gratuitously reached out to decide a live dispute between the Department and the State of Arizona.

States have a powerful interest in enforcing their capital punishment laws and in reducing the delay of enforcement through federal habeas corpus. That is the central purpose of the habeas reforms of the Antiterrorism and Effective Death Penalty Act of 1996. *See Ryan v. Gonzales*, 133 S.Ct. 696, 709 (2013). An interest strong enough to warrant a landmark act of Congress is certainly strong enough to invoke Rule 19 of the Federal Rules of Civil Procedure.

> "Rule 19(a) provides for joinder of a party (again, in the traditional terminology, as 'necessary') if *any* of the following requisites is met: . . . '(2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest . . . .' "

American Greyhound, 305 F.3d at 1022 (quoting Rule 19). A property interest is not required. The interest of a party to a contract in renewal of that contract, even if voluntary on the part of the other party, is a sufficient interest. *Id*. at 1023. The interest of the State of Arizona in the timely consideration of its pending application—consideration already needlessly

delayed by the District Court's orders in this case—is surely an interest at least as substantial as the one in *American Greyhound*.

Outright dismissal can be avoided if relief can be shaped to avoid prejudice to the absent party. *See Cook v. Food & Drug Admin.*, 733 F.3d 1, 12 (D.C. Cir. 2013). For example, to the extent the plaintiffs complain about ex parte communications, the Department could be ordered to give notice of all communications without prejudicing the interests of States. However, no injunction that obstructs or delays the processing of a State's application or resolves disputed questions about the standards to be applied in determining those applications can be entered in the present case without running afoul of Rule 19.

VI. The District Court completely failed to consider the powerful public interest in the implementation of Chapter 154.

In addition to the reasons in the preceding parts, there is the basic rule on injunctions that the plaintiff must demonstrate, among other factors, "that the public interest would not be disserved by a permanent injunction." *eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).

In this case, the public interest extends far beyond the institutional interests of the United States Department of Justice. This case involves the long-delayed enforcement of the criminal judgments of the States in the most important cases, prosecutions for the very worst crimes. States have a compelling interest in the timely enforcement of those judgments, an interest strong enough to motivate the enactment of the major legislation at issue in this case. The surviving family members of the victims of these homicides

have a particular interest in timely enforcement, an interest recognized in an act of Congress. *See* 18 U.S.C. § 3771(a)(7), (b)(2)(A).

In a shocking display of judicial tunnel vision, the District Court at the preliminary injunction stage simply ignored these other interests and purported to weigh the equities by considering only the harm to the Department. ER1_58. The interests of States and victims had been brought to the attention of the District Court by amicus Marc Klaas, but the court brushed this aside in a cavalier footnote. *See* ER1_36. The decision on the permanent injunction did not consider the public interest factor at all. It is error to simply assume that injunctive relief follows from the existence of a violation without weighing the required factors, including the public interest. *See Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 156-158 (2010).

Chapter 154 is an important law intended to promote a vital interest in justice in the very worst criminal cases. It has already been badly delayed. Any further delay would require the most compelling justification, and the ones offered by the plaintiffs and accepted by the District Court are no more than a feather on the scales in comparison.

CONCLUSION

The injunction issued in this case should be vacated. The District Court should be directed to dismiss the entire case for lack of jurisdiction, lack of standing, and unripeness. If the court decides that dismissal or reversal of the entire case is not required, at a minimum the District Court should be directed to tailor its injunction so as not to hinder the Department's

processing of certification applications or prejudge any issues to be decided on those applications.

February 18, 2015

Respectfully submitted,

s/KENT S. SCHEIDEGGER

Attorney for Amici Curiae
Marc Klaas and Edward G. Hardesty

APPENDIX A

TOM HORNE
ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
STATE OF ARIZONA

April 18, 2013

Honorable Eric H. Holder, Jr.
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530–0001

RE: Opt-In under 28 U.S.C. § 2265(a)

Dear General Holder:

I write to request certification that Arizona qualifies for "opt-in" status entitling Arizona to take advantage of the expedited federal habeas corpus review procedures in capital cases under chapter 154, *Special Habeas Corpus Procedures in Capital Cases*, 28 U.S.C. §§ 2261–2266. I believe that Arizona meets the statutory requirements for opt-in status, and that Arizona's system of appointing qualified, well-compensated counsel in state post-conviction proceedings entitles Arizona to qualify to "opt-in" under the statute.

Chapter 154 provides for expedited federal habeas corpus review in capital cases for states that establish a mechanism for providing qualified counsel to indigent capital defendants in state post-conviction proceedings. These procedures have been in place since the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). 28 U.S.C. § 2261.

The statutory requirements under Section 2261 provide that a state seeking certification (1) "establish 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," 28 U.S.C. § 2265(a)(1)(A); (2) "offer counsel to all State prisoners under capital sentence," 28 U.S.C. § 2261(c); and (3) provide for the entry of an order by a court of record that (a) appoints counsel upon finding either that the defendant is indigent and accepts the offer of counsel or that the defendant is unable competently to accept or reject the offer, § 2261(c)(1); (b) finds that the defendant declined the offer of counsel with an understanding of its legal consequences, § 2261(c)(2); or (c) denies the appointment of counsel upon finding the defendant is not indigent, § 2261(c)(3).

In 1998, Arizona established procedures to appoint qualified counsel in capital post-conviction proceedings. Pursuant to both statute and rule, after the Arizona Supreme Court has affirmed an indigent capital defendant's conviction and sentence, post-conviction counsel is automatically appointed. A.R.S. § 13–4041(B); Ariz. R. Crim. P. 32.4(c). As required by 28 U.S.C. § 2261(d) under

the certification process, appointed counsel cannot have previously represented the defendant at trial or on direct appeal, unless both counsel and the defendant otherwise consent. A.R.S. § 13–4041(C)(3).

Arizona provides for the reasonable compensation for appointed counsel as required by 28 U.S.C. § 2265(a)(1)(A). Indigent capital defendants are represented during post-conviction proceedings either by the Public Defender or other publicly funded offices, or by appointed private counsel. A.R.S. § 13–4041(A), (B) & (C). Counsel employed by publicly funded offices are compensated by salary. A.R.S. § 41–4041 (A). Appointed private counsel are compensated at an hourly rate of up to $100 per hour for up to 200 hours of representation. A.R.S. § 13–4041(F); Ariz. R. Crim. P. 6.7(a), (b). Upon a showing of good cause, appointed counsel may be compensated for representation exceeding 200 hours. A.R.S. § 13–4041(G). In addition, Arizona provides for the payment of reasonable litigation expenses required by 28 U.S.C. § 2265 (a)(1)(A). *See* A.R.S. § 13–4041(I) ("The trial court may authorize additional monies to pay for investigative and expert services that are reasonably necessary to adequately litigate those claims that are not precluded by § 13–4232.") On average, Arizona spends well over $200,000 in attorney fees and litigation costs for each capital post-conviction case.

The statutory certification also requires the appointment of "competent" counsel in a State's capital post-conviction mechanism. 28 U.S.C. § 2265(A). Arizona requires appointed counsel to meet strict competency standards. Counsel must:

1. Be a member in good standing of the State Bar of Arizona for at least five years immediately preceding appointment;

2. Have practiced criminal litigation for 3 years immediately preceding appointment;

3. Must have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases;

4. Within 3 years immediately preceding appointment, must have been lead counsel in an appeal or post-conviction proceeding in a case in which a death sentence was imposed, as well as prior experience as lead counsel in the appeal of at least 3 felony convictions and at least one post-conviction proceeding that resulted in an evidentiary hearing. Alternatively, to be appointed an attorney must have been lead counsel in the appeal of at least 6 felony convictions, at least two of which were appeals from first or second degree murder convictions, and lead counsel in at least two post-conviction proceedings that resulted in evidentiary hearings;

5. Have attended and successfully completed, within one year prior to the initial appointment, at least six hours of relevant training or educational programs in the area of capital defense, and within one year prior to any subsequent appointment, at least 12 hours of relevant training or educational programs in the area of criminal defense; and

6. Must be familiar with and guided by the performance standards in the 2003 American Bar Association Guidelines for the Appointment and Performance of Defense counsel in Death Penalty Cases.

Ariz. R. Crim. P. 6.8(a), (c).[1] These competency requirements, mandated by the Arizona Supreme Court, exceed more general competency requirements set out in A.R.S. § 13–4041(C).

Additionally, although not required for opt-in status, Arizona also contemporaneously adopted heightened standards for counsel who handle capital *trials*. Under Arizona law, Rule 6.2, Ariz. R. Crim. P., a defendant charged with capital murder is entitled to two highly qualified attorneys – a procedure that presumably lessens the likelihood of ineffective assistance of trial counsel and makes post-conviction counsel's job easier.

In 2002, the United States Circuit Court of Appeals for the Ninth Circuit found that as of July 17, 1998, Arizona's postconviction procedures for capital defendants established a qualified procedure under chapter 154. *Spears v. Stewart*, 283 F.3d 992, 1007 (9th Cir. 2002). The court declined, however, to apply the expedited procedures due to delay in the appointment of postconviction counsel for Spears (notwithstanding any claim of prejudice resulting from the delay).

In 2005, Congress abrogated *Spears* and amended 28 U.S.C. §§ 2261–66 by enacting the USA PATRIOT Improvement and Reauthorization Act of 2005. Senator Kyl, who sponsored the amendments, explained:

> In *Spears v. Stewart* . . . the Ninth Circuit held that even though Arizona had established a qualifying system and even though the State court had appointed counsel under that system, the Federal Court could still deny the State the benefit of qualification because of a delay in appointing counsel . . . [T]his bill abrogates . . . th[is] holding and removes the qualification decision to a neutral forum . . . . Paragraph (a)(3) of new section 2265 forbids creation of additional requirements not expressly stated in the chapter, as was done in the *Spears* case.

152 Cong. Rec. S1620, 1624–25 (daily ed. Mar. 3, 2006).

The 2005 amendments did not change the requirement that a qualifying State establish a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State capital postconviction proceedings. The amendments provide that the Attorney General promulgate regulations to implement the certification procedure. As of this date, the Department of Justice has not promulgated regulations for the certification procedure. The statute permissively allows the Department of Justice to promulgate regulations, but it does not authorize indefinite suspension of the expedited procedures. Nor does the statute require States to wait for the Department of Justice to promulgate regulations prior to seeking certification.

I believe that it is clear that Arizona's post-conviction mechanism for appointing qualified counsel in capital cases meets the statutory requirements for certification. Given the Ninth Circuit's finding that Arizona satisfies what Congress has now confirmed to be the universe of requirements that must be

[1] In exceptional circumstances, and with consent of the Arizona Supreme Court, attorneys who do not meet these requirements may be appointed, provided that the attorney's experience, stature and record enables the Court to conclude that the attorney's ability significantly exceeds the standards set forth above. However, all appointed counsel must be familiar with, and guided by, the 2003 American Bar Association Guidelines for the Appointment and Performance of Defense counsel in Death Penalty Cases. Ariz. R. Crim. P. 6.8(d).

met, Arizona should be deemed to have "opted-in" to the accelerated review procedures contemplated under AEDPA.

My staff and I would be happy to address any questions you may have regarding Arizona's capital case procedures. We request that a determination regarding opt-in status be made within 90 days. If we do not receive a decision in 90 days we will treat that as a wrongful denial and seek relief in the United States Court of Appeals for the District of Columbia, which has judicial review under the relevant statute.

Sincerely,

Tom Horne

Tom Horne

cc: Eric J. Bistrow, Chief Deputy
Robert Ellman
Jeffrey Zick

3206344

APPENDIX B

U.S. Department of Justice

Washington, D.C. 20530

JUL 16 2013

The Honorable Tom Horne
Attorney General
Office of the Attorney General
State of Arizona
1275 West Washington Street
Phoenix, AZ 85007-2926

Dear General Horne:

This responds to your letter to the Attorney General dated April 18, 2013, requesting certification of the State of Arizona under 28 U.S.C. § 2265.

The Department has been and remains engaged in a rulemaking process in connection with the requirements of Section 2265. *See Certification Process for State Capital Counsel System*, 76 Fed. Reg. 11705 (Notice of Proposed Rulemaking, or NPRM); *Certification Process for State Capital Counsel System*, 77 Fed. Reg. 7559 (Supplemental Notice of Proposed Rulemaking, or SNPRM). The NPRM proposed a certification procedure by which the Department would solicit and consider public comments on any request for certification with the goal of enabling the Attorney General to make sound certification decisions on the basis of a robust record that takes into account views of all interested parties. The NPRM also proposed defining, within reasonable bounds, Chapter 154's requirements for certification, in part to provide notice to interested parties of the standards that the Attorney General would apply in making certification decisions.

In formulating the final rule, the Department has given careful consideration to the comments submitted by interested parties. We continue to make progress on the rulemaking—as our recent submission of the final rule for review under Executive Order 12866 indicates. We expect that the final rule will be issued in the near future. In the meantime, the Department will begin reviewing now Arizona's request for certification on the expectation that it may help speed up the ultimate determination of the certification you requested. As part of that review, we will seek to ascertain whether there is any additional information that you can provide now, even though it may not be possible for us to immediately determine all information that is needed.

While we cannot provide at this time a precise date certain by which a decision will be made, please do not hesitate to contact this office should you or another attorney in your office have any questions about the status of the Department's progress in this area. If there is any updated information we are then in a position to provide, we will be glad to provide it.

Sincerely,

Alexa Chappell
Intergovernmental Liaison

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(5), (6), (7)(B) and (C) and Ninth Circuit Rule 32, I certify that the attached Brief Amici Curiae for Marc Klaas and Edward G. Hardesty is proportionally spaced, uses 15-point Times New Roman type and contains 6903 words.

February 18, 2015 s/KENT S. SCHEIDEGGER

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of February, 2015, I caused the foregoing brief to be electronically filed with the United States Court of Appeals for the Ninth Circuit, and served to counsel, via the ECF system.

s/Kent S. Scheidegger