No. 16-880

In the Supreme Court of the United States

HABEAS CORPUS RESOURCE CENTER, ET AL.,
PETITIONERS

v.

DEPARTMENT OF JUSTICE, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly concluded that this case, in which lawyer organizations challenge regulatory standards for the Attorney General's potential future certification of certain state postconviction procedures, should be dismissed for lack of jurisdiction.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 816 F.3d 1241. The order of the district court denying summary judgment (Pet. App. 29a-66a) is not published but is available at 2014 WL 3908220.

JURISDICTION

The judgment of the court of appeals was entered on March 23, 2016. A petition for rehearing was denied on November 15, 2016 (Pet. App. 95a-96a). The petition for a writ of certiorari was filed on January 10, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, Tit. I, § 107(a),

110 Stat. 1221, establishes a system, codified at Chapter 154 of Title 28 of the United States Code, wherein States that have "strengthen[ed] the right to counsel for indigent capital defendants" during state postconviction review may rely upon "stronger finality rules on federal habeas review" that follows those state proceedings. H.R. Rep. No. 23, 104th Cong., 1st Sess. 10 (1995); see 28 U.S.C. 2261-2266; USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, Tit. V, § 507, 120 Stat. 250. Application of Chapter 154's special procedures in a particular prisoner's case depends on a State's establishment of a "mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State postconviction proceedings" for indigent capital prisoners; certification by the Attorney General of the United States (subject to judicial review in the D.C. Circuit) of that mechanism's sufficiency; and the availability of that mechanism to the prisoner (if indigent). 28 U.S.C. 2265(a)(1)(A); see 28 U.S.C. 2261(b), 2265(c).[1]

Under Chapter 154, a prisoner may obtain an automatic stay of execution until a federal court denies federal habeas relief. 28 U.S.C. 2262. The special procedures also include modified timing rules for the filing and disposition of a federal habeas petition. Under the normal AEDPA rules, such a petition must generally be filed within a year of the date on which the conviction and sentence become final, subject to

[1] The provision of counsel under such a mechanism applies only to state postconviction review. Federal law provides for the appointment of counsel at federal expense once an indigent capital prisoner reaches the stage of federal collateral review. See 18 U.S.C. 3599(a)(2).

tolling while "a properly filed" application for state postconviction relief "is pending." 28 U.S.C. 2244(d)(2); see 28 U.S.C. 2244(d)(1)(A). Under the Chapter 154 procedures, the federal habeas petition must generally be filed within 180 days of "final State court affirmance of the conviction and sentence on direct review," subject to tolling during this Court's consideration of a petition for a writ of certiorari on direct review and during the pendency in state court of the prisoner's first application for state postconviction relief. 28 U.S.C. 2263. The Chapter 154 procedures also circumscribe the scope of federal habeas review, limit the amendment of federal habeas petitions, and require federal courts to prioritize consideration of the federal habeas petition and adjudicate it within specified timeframes. 28 U.S.C. 2264, 2266.

2. In September 2013, following two rounds of notice and comment, the Attorney General issued a final rule in satisfaction of his statutory obligation to "promulgate regulations to implement the certification procedure" under which he will determine whether a State's counsel-appointment mechanism is sufficiently robust to allow for application of Chapter 154's special procedures. 28 U.S.C. 2265(b); see 78 Fed. Reg. 58,161 (Sept. 23, 2013). Such a certification decision is, by statute, subject to "exclusive[]" de novo review in the D.C. Circuit. 28 U.S.C. 2265(c).

The Attorney General's regulations require, *inter alia*, that a State's request for certification of its counsel-appointment mechanism and any supporting materials be made "publicly available on the Internet" and that the Attorney General "publish a notice in the Federal Register * * * [s]oliciting public comment on the request." 28 C.F.R. 26.23(b) (capitalization

altered). The Attorney General's review must "include consideration of timely public comments received in response to th[at] Federal Register notice," and may include further notices and requests for comment as the process unfolds. 28 C.F.R. 26.23(c) (capitalization altered). Under the regulations, the Attorney General will certify a State's counsel-appointment mechanism only if it offers all indigent state capital prisoners the opportunity for postconviction representation by a competent lawyer who did not previously represent the prisoner at trial; furnishes such counsel in a timely manner; and provides that counsel with adequate compensation and reimbursement of reasonable litigation expenses. See 28 C.F.R. 26.21, 26.22. A certification generally remains effective for only "five years after the completion of the certification process by the Attorney General and any related judicial review," must be re-reviewed periodically, and may be re-reviewed in the event of any significant change in state practices. 28 C.F.R. 26.23(e); see 28 C.F.R. 26.23(d).

The regulations provide that a state mechanism's "standards of competency" for the counsel appointed in state postconviction proceedings are "presumptively adequate if they meet or exceed" either of two specific "benchmark criteria" derived from longstanding statutory competency standards that Congress has prescribed in related contexts. 28 C.F.R. 26.22(b)(1) and (2); see 78 Fed. Reg. at 58,169-58,171. The regulations also allow States to "retain some significant discretion to formulate and apply counsel competency standards" of their own, 78 Fed. Reg. at 58,172, by permitting certification of standards that "otherwise reasonably assure a level of proficiency appropriate for State

postconviction litigation in capital cases," even if they do not correspond to one of the benchmarks, 28 C.F.R. 26.22(b)(2). Such customized standards "will naturally require closer examination by the Attorney General," and the two specific benchmark criteria remain "a point of reference in judging [their] adequacy." 78 Fed. Reg. at 58,172.

The regulations take a similar approach to assessing the adequacy of compensation for appointed counsel, providing several benchmarks of presumptive adequacy, while also allowing States "significant discretion to formulate alternative compensation schemes, if reasonably designed to ensure the availability and timely appointment of competent counsel." 78 Fed. Reg. at 58,162; see 28 C.F.R. 26.22(c). Finally, a State's counsel-appointment mechanism will be certified only if it "provide[s] for payment of reasonable litigation expenses of appointed counsel," such as "payment for investigators, mitigation specialists, mental health and forensic science experts, and support personnel." 28 C.F.R. 26.22(d).

3. Petitioners are two state-governmental entities that counsel capital prisoners and represent them in federal habeas proceedings. Pet. App. 9a-10a & n.6. One petitioner is in California, which has never requested certification of a counsel-appointment mechanism under Chapter 154. *Ibid.*; Gov't C.A. Br. 10 n.7. The other petitioner is in Arizona, which requested certification of a counsel-appointment mechanism before the Attorney General promulgated his regulations. *Ibid.*

Shortly after the Attorney General promulgated the regulations, petitioners filed a suit in the United States District Court for the Northern District of

California under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, to challenge the regulations. Pet. App. 1a, 4a. Petitioners contended, *inter alia*, that the regulations are substantively invalid because they do not treat a certification decision as an agency rule subject to notice-and-comment requirements and that the criteria for evaluating a state mechanism's standards for counsel competency are insufficient and underspecified. *Id.* at 9a. The district court agreed with those contentions and required the Attorney General to "remedy th[ose] defects" before certifying any state mechanisms under Chapter 154. *Id.* at 65a; see *id.* at 11a, 50a-65a; see also *id.* at 44a-50a (district court order granting summary judgment to government on other claims).

Until recently, preliminary and final relief ordered by the district court has prevented the Department of Justice from beginning to process either Arizona's application or the one other application it has received (from Texas). The Attorney General has not yet made a certification decision on either application.

4. The court of appeals vacated the district court's decision and remanded with instructions that the case be dismissed for lack of jurisdiction. Pet. App. 1a-28a. The court reasoned that petitioners had not "suffered a concrete, particularized injury sufficient to give them standing" under Article III to challenge the regulations. *Id.* at 17a (footnote omitted). The court observed that petitioners are not themselves directly regulated by the regulations, which serve only to "prescribe procedures and criteria to guide the Attorney General's certification" decisions. *Id.* at 14a. And the court found petitioners' theory for why they nevertheless had standing—namely, that they believe

"the Final Regulations are vague" and that they therefore "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" —to be deficient. *Id.* at 17a. Such "bare uncertainty regarding the validity of the Final Regulations and the applicability of the [special procedures] to their clients' federal habeas cases," the court explained, "cannot support standing." *Ibid.*

The court of appeals found no "concrete application" of the regulations "that threatens imminent harm to [petitioners' own] interests." Pet. App. 17a (quoting *Summers* v. *Earth Island Inst.*, 555 U.S. 488, 494 (2009)). Even accepting that petitioners would "'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," the court found no 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." *Id.* at 18a. The court reasoned that this Court's decision in *Clapper* v. *Amnesty International USA*, 133 S. Ct. 1138 (2013), had held that plaintiffs cannot "manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending," even when asserted precautionary measures constitute "a reasonable reaction to a risk of harm." Pet. App. 20a (quoting 133 S. Ct. at 1151). The court of appeals accordingly concluded that "even if their

clients face a 'certainly impending' harm from 'confusion' caused by the Final Regulations, [petitioners] have given us no reason to believe that they can parlay such harm into an injury of their own." *Ibid.*

The court of appeals also declined to remand the case to allow petitioners' clients to intervene as plaintiffs, reasoning that a challenge to the Attorney General's certification procedures was not yet ripe. Pet. App. 22a-27a. The court emphasized that any challenge at this point would be a preenforcement suit against regulations that would affect a capital prisoner's federal habeas petition at most "indirectly," and then only "*if* the sentencing state requests certification and *if* the Attorney General finds that the state's capital-counsel mechanism comports" with the statute and the regulations. *Id.* at 23a. The court found this case "analogous" to this Court's decision in *Ohio Forestry Association* v. *Sierra Club*, 523 U.S. 726 (1998), which had rejected as unripe a challenge to a federal-agency plan that constituted a preliminary step to permitting logging but "did not itself authorize the cutting of any trees." Pet. App. 24a. The court of appeals explained that all three considerations from *Ohio Forestry Association*—"(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"—counseled in favor of finding a challenge to the regulations here to be similarly unripe. *Id.* at 23a (quoting 523 U.S. at 733); see *id.* at 24a-27a.

First, the court of appeals reasoned that as in *Ohio Forestry Association*, postponement of judicial review

is unlikely to cause hardship, because the regulations here do not "command anyone to do anything or to refrain from doing anything," but instead simply anticipate further agency action followed by judicial review, thereby allowing "ample opportunity to bring [a] 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 underlying regulations themselves. Pet. App. 24a (brackets omitted) (quoting 523 U.S. at 733-734). Second, the court reasoned that as in *Ohio Forestry Association*, an immediate challenge "could hinder agency efforts to refine its policies . . . through application" of the regulations, a process that could give the Attorney General an opportunity to address issues that petitioners now assert to be unclear. *Id.* at 26a (quoting 523 U.S. at 735-736). Finally, the court reasoned that, as in *Ohio Forestry Association*, postponing judicial review could obviate any need for the federal courts to consider the sort of "abstract disagreements over administrative policies that the ripeness doctrine seeks to avoid," by providing an opportunity to see whether and how any of the regulatory deficiencies alleged by petitioners might be addressed when the Attorney General makes certification decisions (which will be subject to judicial review in the D.C. Circuit). *Id.* at 26a (quoting 523 U.S. at 736) (citation and internal quotation marks omitted); see *id.* at 26a-27a.

5. The court of appeals denied rehearing and rehearing en banc. Pet. App. 95a-96a. It also denied a motion to stay the mandate pending the filing of a petition for a writ of certiorari. See Pet. 3.

6. Shortly after filing the petition for a writ of certiorari, petitioners submitted an application to recall

and stay the mandate pending the disposition of the petition. Justice Kennedy referred that application to the Court. The Court denied the application. See No. 16A683 (Jan. 27, 2017).

ARGUMENT

Petitioners contend that they have standing to challenge the certification regulations (Pet. 13-24); that a challenge to those regulations by a state capital prisoner would be ripe (Pet. 25-33); and that the ripeness factors considered by the court below are improper (Pet. 33-36). The court of appeals' decision is correct and does not conflict with any decision of this Court or another court of appeals. This case is also an unsuitable vehicle for addressing the questions presented, because the court of appeals' directive that the suit be dismissed for lack of jurisdiction was fully justified on alternative grounds. No further review is warranted.

1. To establish Article III standing, a plaintiff must show, *inter alia*, that he has "suffered an injury in fact * * * which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (footnote and internal citations and quotation marks omitted); see, *e.g.*, *Clapper* v. *Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013). This Court has "repeatedly reiterated" that a "'threatened injury must be certainly impending to constitute injury in fact'" and that "'allegations of possible future injury' are not sufficient." *Amnesty Int'l*, 133 S. Ct. at 1147 (brackets omitted) (quoting *Whitmore* v. *Arkansas*, 495 U.S. 149, 158 (1990)). The court of appeals correctly determined that petitioners could not meet those requirements.

a. No legally cognizable injury to petitioners is "actual," "imminent," or "certainly impending" in the circumstances of this case. As the court of appeals recognized (Pet. App. 14a), the Attorney General's regulations, which simply prescribe standards for evaluating a State's application for certification of its counsel-appointment mechanism, do not directly or immediately affect either petitioners or their clients. Standing is "ordinarily 'substantially more difficult' to establish" when a plaintiff "is not himself the object of the government action or inaction he challenges." *Summers* v. *Earth Island Inst.*, 555 U.S. 488, 493 (2009) (quoting *Defenders of Wildlife*, 504 U.S. at 562). That is especially so where the plaintiff challenges regulations that "neither require nor forbid any action" by the plaintiff but instead "govern only the conduct of [agency] officials engaged in project planning," *ibid.*, as is the case both here and in *Summers* v. *Earth Island Institute*, *supra*, in which the Court found no Article III injury, see *id.* at 492-497.

Petitioners have not carried their heavy burden here. Before anyone other than the Attorney General (and, possibly, States) could even potentially be affected by the regulations (and even then, only indirectly), a State must apply for certification and the Attorney General must then decide, after considering any public comments, to certify the State's counsel-appointment mechanism (a decision that is then subject to de novo judicial review in the D.C. Circuit). See 28 U.S.C. 2265. Even then, the only adverse effects that petitioners allege (Pet. 16-19) are premised on a fear that the certified mechanism will not sufficiently assure the competence of appointed counsel and that courts will (presumably, over petitioners'

own objections) retroactively shorten the time limit for filing a federal habeas petition even in cases in which a longer time limit had commenced to run before the Attorney General's certification decision. Where, as here, a "theory of standing * * * relies on a highly attenuated chain of possibilities," it "does not satisfy the requirement that threatened injury must be certainly impending." *Amnesty Int'l*, 133 S. Ct. at 1148 (citing *Earth Island Inst.*, 555 U.S. at 496, and *Whitmore*, 495 U.S. at 157-160).

The final link in petitioners' predictive chain is particularly speculative. First, petitioners' concern (Pet. 18-19) that the Attorney General will certify a counsel-appointment mechanism that does not adequately provide for the appointment of competent counsel appears to assume that the Attorney General will *fail* to follow the regulations. See 28 C.F.R. 26.22(b)(2) (competency standards must "reasonably assure a level of proficiency appropriate for State postconviction litigation in capital cases"). Second, even if a State were to argue that certification by the Attorney General retroactively shortened the time limit in cases where the time for filing a federal habeas petition had already started to run, see Pet. 16 n.3, petitioners present no sound reason why a federal court would be likely to agree. Such an argument would implausibly imply that even habeas petitions that had already been filed, and were timely when filed (say, nine months into the preexisting one-year time limit), would suddenly become untimely and subject to dismissal. Nothing in Chapter 154 requires that result. Although the statutory scheme provides that the Attorney General's *decision to certify* a state mechanism relates back to the date on which the mechanism was

established, 28 U.S.C. 2265(a)(2), the statute does not specify that the *statute of limitations* for filing a federal habeas petition is retroactively contracted in cases where it has already started running. In comparable circumstances involving similar retroactivity concerns, federal courts after the original enactment of AEDPA applied its new one-year time limit for filing a federal habeas petition in a manner that did not prejudice prisoners with preexisting claims. See, *e.g.*, *Wood* v. *Milyard*, 132 S. Ct. 1826, 1831 (2012) ("For a prisoner whose judgment became final before AEDPA was enacted, the one-year limitations period runs from the AEDPA's effective date.") (citing *Serrano* v. *Williams*, 383 F.3d 1181, 1183 (10th Cir. 2004)).

b. In any event, this Court's decision in *Calderon* v. *Ashmus*, 523 U.S. 740 (1998), forecloses any argument that a federal court may entertain a suit premised on a plaintiff's uncertainty about whether Chapter 154's shortened time limits may apply to a federal habeas petition. The Court in that case directed the dismissal of a suit by California prisoners seeking to establish that a previous version of Chapter 154 (which did not then provide for certifications by the Attorney General), including its shortened time limits, would be inapplicable to federal habeas petitions that they might later file. See *id.* at 742-749. The Court held that the prisoners' "action for a declaratory judgment and injunctive relief is not a justiciable case within the meaning of Article III," *id.* at 749, rejecting the prisoners' argument that they were entitled to preliminary certainty on the time-limit question, see *id.* at 746-747.

Petitioners' jurisdictional argument here is even weaker than the one that the Court found insufficient in *Ashmus*, as petitioners are lawyers rather than prisoners, and thus one further level removed from any effect that application of the Chapter 154 procedures might have. As the court of appeals observed (Pet. App. 19a), petitioners have identified no authority supporting a derivative theory of injury that "would permit attorneys to challenge [a] governmental action or regulation" simply because "doing so would make the scope of their clients' rights clearer and their strategies to vindicate those rights more easily selected." Cf. *Kowalski* v. *Tesmer*, 543 U.S. 125, 127 (2004) (concluding that lawyers could not assert rights of "hypothetical indigents" to challenge state procedure for appointing appellate counsel); *Conn* v. *Gabbert*, 526 U.S. 286, 292 (1999) (concluding that lawyer "had no standing to raise the alleged infringement of the rights of his client" to have an attorney present outside the grand-jury room).

c. Petitioners cannot avoid the fundamental flaws in their standing argument by pointing (Pet. 16-19) to actions that they are voluntarily undertaking in order to hedge against the possibility that the Chapter 154 time limit would apply retroactively. As the court of appeals observed (Pet. App. 19a-20a), this Court's decision in *Clapper* v. *Amnesty International USA*, *supra*, holds that incurring present precautionary costs does not establish standing where the harm is "not certainly impending." 133 S. Ct. at 1151. The Court in that case explained that permitting "enterprising plaintiff[s]" to "manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly im-

pending * * * would be tantamount to accepting a repackaged version" of an otherwise "failed theory of standing." *Ibid.* That logic requires the rejection of petitioners' efforts here to rely on precautionary measures to bootstrap their standing.

d. Contrary to petitioners' contention (Pet. 15), the court of appeals' decision does not conflict with this Court's decisions in *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363 (1982), and *McNary* v. *Haitian Refugee Center*, 498 U.S. 479 (1991). Nor do petitioners identify any conflicting decision from another court of appeals.

In *Havens Realty Corp.*, the Court found that a nonprofit organization had standing to sue for damages based on allegations that *ongoing* discrimination in violation of the Fair Housing Act, 42 U.S.C. 3601 *et seq.*, had "perceptibly impaired" the nonprofit's "ability to provide counseling and referral services," resulting in a "drain on the organization's resources." 455 U.S. at 379. Similarly, in *McNary*, the Court noted that the district court had found standing where the plaintiff organizations challenged *ongoing* practices and policies for the administration of an immigration program. 498 U.S. at 487-488 & n.8. Neither those decisions, nor any of the circuit decisions cited by petitioners as examples of situations in which courts have found organizational standing (Pet. 19-21), involved an organization whose claim of standing rests upon actions taken to mitigate the attenuated risk of a hypothetical *future* event.[2] Accordingly, none of them

[2] In each case, the plaintiff organization was alleging harm from an already-implemented action. See *Nnebe* v. *Daus*, 644 F.3d 147, 150 (2d Cir. 2011) (challenge by organization to ongoing rules under which members' taxi licenses were suspended); *Common*

suggests that either this Court or another court of appeals would reach a result different than that of the court of appeals on the facts of this case.

Furthermore, petitioners themselves state (Pet. 21 n.4) that "until this case," the court of appeals "generally adhered" to the standing approach they advocate. Accordingly, even on their view of the state of circuit law, any further review that might be necessary on the first question presented should occur in the first instance in the court of appeals. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

2. This Court's intervention is likewise not required to address the court of appeals' circumstance-specific determination that a challenge to the regulations is not yet ripe.

Cause/Ga. v. *Billups*, 554 F.3d 1340, 1350 (11th Cir.) (challenge by organization to ongoing voter-identification statute), cert. denied, 556 U.S. 1282 (2009); *Abigail Alliance for Better Access to Developmental Drugs* v. *Eschenbach*, 469 F.3d 129, 132 (D.C. Cir. 2006) (challenge by organization to ongoing rules restricting access to experimental drugs), vacated on reh'g en banc, 495 F.3d 695 (D.C. Cir. 2007), cert. denied, 552 U.S. 1159 (2008); *Powell* v. *Ridge*, 189 F.3d 387, 403-404 (3d Cir.) (challenge by organization to ongoing education-related funding practices), cert. denied, 528 U.S. 1046 (1999); *Village of Bellwood* v. *Dwivedi*, 895 F.2d 1521, 1526 (7th Cir. 1990) (challenge by organization to ongoing housing-related practices); *Granville House, Inc.* v. *Department of Health & Human Servs.*, 715 F.2d 1292, 1297-1298 (8th Cir. 1983) (challenge by organization to ongoing Medicaid funding policy); see also *Miami Valley Fair Hous. Ctr., Inc.* v. *Connor Grp.*, 725 F.3d 571, 576 (6th Cir. 2013) (concluding that organization suffered measurable financial harm traceable to advertisements at issue in the case); *Cleburne Living Ctr., Inc.* v. *City of Cleburne*, 726 F.2d 191, 202-203 (5th Cir. 1984) (concluding that organization lacked standing), aff'd in part and vacated in part, 473 U.S. 432 (1985).

a. In cases involving potential challenges to federal agency action under the APA, the ripeness doctrine is "designed 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect * * * agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.'" *National Park Hospitality Ass'n* v. *Department of the Interior*, 538 U.S. 803, 807-808 (2003) (quoting *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 148-149 (1967)). At its most basic level, the ripeness doctrine precludes federal courts from adjudicating claims involving "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Thomas* v. *Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580-581 (1985) (citation omitted). The doctrine's focus on the likelihood of future events means that it overlaps to some degree with the imminent-injury element of Article III standing. Ripeness analysis, however, additionally requires a focus on "'the fitness of the issues for judicial decision' and 'the hardship to the parties of withholding court consideration.'" *Id.* at 581 (quoting *Abbott Labs.*, 387 U.S. at 149); see, *e.g.*, *National Park Hospitality Ass'n*, 538 U.S. at 808.

As this Court has explained, "a 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." *National Park Hospitality Ass'n*,

538 U.S. at 808 (quoting *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 891 (1990)). No such concrete action has occurred in this case. The Attorney General has not rendered any decision on whether to certify Arizona's counsel-appointment mechanism, and California has not even presented (or indicated that it will present) an application for potential certification. It remains to be seen whether a mechanism would be certified in either State, what regulatory provisions the Attorney General would rely upon for any such certification, whether the D.C. Circuit would sustain such certification on de novo review, and what effect such certification might have on any particular capital prisoner. As the court of appeals correctly recognized (Pet. App. 26a), it would be substantially premature to address petitioners' contentions "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" without the benefit of the further specificity that an actual application of the regulations to a particular state application for certification would provide. See *ibid.*

b. As the court of appeals also correctly recognized (Pet. App. 23a-27a), the circumstances of this case are substantially similar to the circumstances of *Ohio Forestry Association* v. *Sierra Club*, 523 U.S. 726 (1998), in which the Court found a challenge to a federal land-management plan to be unripe.

First, as in *Ohio Forestry Association*, the agency action challenged here "do[es] not command anyone to do anything or to refrain from doing anything," but instead simply lays the groundwork for more specific

and focused agency determinations—there, about particular logging activities; here, about particular state counsel-appointment mechanisms. 523 U.S. at 733. Like in *Ohio Forestry Association*, a plaintiff with standing "will have ample opportunity later to bring [a] legal challenge at a time when harm is more imminent and more certain," *id.* at 734, by seeking de novo review in the D.C. Circuit of any certification decision, 28 U.S.C. 2265(c)(1) and (2); p. 25, *infra* (explaining that such judicial review could include a challenge to the certification regulations themselves).

Second, as in *Ohio Forestry Association*, "immediate judicial review * * * could hinder agency efforts to refine its policies * * * through application" of the regulations. 523 U.S. at 735. Indeed, the regulations specifically anticipate that the Attorney General's decisionmaking process may be influenced by public comments on an actual state proposal. See 28 C.F.R. 26.23(c). Third, as in *Ohio Forestry Association*, "further factual development would 'significantly advance [a court's] ability to deal with the legal issues presented' and would 'aid [a court] in their resolution.'" 523 U.S. at 737 (quoting *Duke Power Co.* v. *Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 82 (1978)). Considering petitioners' legal claims in the context of an actual application of the regulations would obviate any need to speculate about how the Attorney General might respond in hypothetical or abstract situations. See, *e.g.*, *National Park Hospitality Ass'n*, 538 U.S. at 812 (concluding that a facial challenge to a regulation about concession contracts should "await a concrete dispute about a particular concession contract"); *Reno* v. *Catholic Soc. Servs., Inc.*, 509 U.S. 43, 58-59 (1993) (concluding

that claim was not ripe before regulation was applied to a particular individual).

Petitioners attempt to distinguish *Ohio Forestry Association* primarily by characterizing their claims as involving "purely legal" (*e.g.*, Pet. 29) questions. But this Court has recognized that even a "purely legal" challenge to a "final agency action" may nevertheless be unripe if it lacks sufficient concreteness. *National Park Hospitality Ass'n*, 538 U.S. at 812 (citation omitted); see *Toilet Goods Ass'n* v. *Gardner*, 387 U.S. 158, 163 (1967). And in the circumstances of this case, petitioners' claims cannot reasonably be adjudicated in a vacuum. Adjudication at this stage would require a court simply to guess about whether, how, and why the Attorney General might approve some state counsel-appointment mechanism. Such "abstract disagreements over administrative policies" are precisely what "the ripeness doctrine seeks to avoid." *Ohio Forestry Ass'n*, 523 U.S. at 736 (citation and internal quotation marks omitted).[3]

c. Petitioners fail to demonstrate that the court of appeals' ripeness determination conflicts with any decision of another court of appeals.

Contrary to petitioners' contention (Pet. 27), the decision below did not "creat[e] a presumption against review" in any particular category of cases. Petition-

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[3] The court of appeals' decision not to remand for purposes of allowing petitioners' clients to intervene is supported not only by the ripeness analysis in the text, but also by the fact that those clients would themselves face no certainly impending injury for purposes of Article III. Although capital prisoners would have a stronger standing argument than petitioners do, the argument would be unavailing for many of the same reasons. See pp. 11-15, *supra*; *Ashmus*, 523 U.S. at 742-749.

ers criticize (Pet. 29) the decision below for not "mention[ing]" that their "claims are 'purely legal'" and expressly announcing that such claims enjoy a "presumption of fitness." But even assuming such statements would be correct, the court of appeals was not obligated to explicitly include them in its opinion, and their absence would not signal legal error. Cf. *Sprint/United Mgmt. Co.* v. *Mendelsohn*, 552 U.S. 379, 386 (2008) (cautioning against overreading lower-court decisions to find legal error).

Moreover, circuit decisions cited by petitioners (Pet. 28-29) recognize—consistent with this Court's own jurisprudence and with the decision below—that even a case presenting "purely legal" issues may nevertheless be unripe. See *Iowa League of Cities* v. *EPA*, 711 F.3d 844, 867 (8th Cir. 2013) (noting that "cases presenting purely legal questions are *more likely* to be fit for judicial review," but conducting a case-specific ripeness analysis) (emphasis added); *Cement Kiln Recycling Coal.* v. *EPA*, 493 F.3d 207, 215 (D.C. Cir. 2007) ("[W]e have cautioned that sometimes even purely legal issues may be unfit for review.") (citations and internal quotation marks omitted); *National Ass'n of Home Builders* v. *United States Army Corps of Eng'rs*, 417 F.3d 1272, 1282 (D.C. Cir. 2005) (same); *Cedars-Sinai Med. Ctr.* v. *Watkins*, 11 F.3d 1573, 1582, 1585 (Fed. Cir. 1993) (concluding that particular legal challenge satisfied fitness factor, but not hardship factor, and was therefore unripe), cert. denied, 512 U.S. 1235 (1994). Those decisions do not show that those circuits would have decided this case differently.[4]

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[4] To the extent petitioners contend (Pet. 28, 30-33) that particular D.C. and Eighth Circuit decisions have addressed circumstances

3. Petitioners alternatively suggest (Pet. 33-36) that the Court should grant certiorari and overrule prior decisions, including *Ohio Forestry Association*, that have relied on the ripeness factors considered by the court below. That suggestion is misconceived.

As petitioners note (Pet. 34), this Court in *Susan B. Anthony List* v. *Driehaus*, 134 S. Ct. 2334 (2014), observed in passing that finding a claim to be nonjusticiable "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

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like this case and reached results different from the decision below, that contention is mistaken. In *National Association of Home Builders*, *supra*, the government argued to the D.C. Circuit that a challenge to general permits that allowed certain activity were unripe in part because the agency could "override," "add * * * conditions" to, "expand," or even disregard those permits in certain instances. Gov't C.A. Br. at 23, *National Ass'n of Home Builders*, *supra* (No. 04-5009); see 417 F.3d at 1274-1277, 1281-1283. The court reasoned that the agency's retention of "some measure of discretion" about whether to apply the permit to a particular activity was not sufficient to render the suit unripe, explaining that "'the fact that a law may be altered in the future has nothing to do with whether it is subject to judicial review at the moment.'" *Id.* at 1282 (quoting *Appalachian Power Co.* v. *EPA*, 208 F.3d 1015, 1022 (D.C. Cir. 2000)); see *Appalachian Power Co.*, 208 F.3d at 1023 n.18 (finding challenge to agency guidance fit for review where challenge would "not turn on the specifics" of its application and application-specific decision would not necessarily be reviewable in federal court). The government's ripeness argument here, in contrast, does not depend on any suggestion that it may "alter" the law in the future. And in *Iowa League of Cities*, *supra*, the Eighth Circuit found hardship in circumstances where the plaintiffs were directly regulated parties who had no realistic choice but to comply with an agency's pronouncement. See 711 F.3d 868.

unflagging." *Id.* at 2347 (quoting *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014)) (citation and internal quotation marks omitted). But the Court in *Susan B. Anthony List* explicitly refrained from holding that the ripeness considerations at issue in that case—"whether the factual record was sufficiently developed, and whether hardship to the parties would result if judicial relief is denied at this stage in the proceedings"—are invalid, let alone that they are invalid in the context of a suit against a federal officer or agency under the APA (a situation that *Susan B. Anthony List* did not present). *Ibid.*

Those ripeness considerations are a longstanding feature of this Court's APA jurisprudence, with solid roots in the equitable nature of the relief that is sought in such cases. See 5 U.S.C. 703 (in the absence or inadequacy of a special statutory review proceeding, review may be sought in any applicable form of legal action, including "declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus"). As the Court explained half a century ago in *Abbott Laboratories* v. *Gardner*, *supra*, "[t]he injunctive and declaratory judgment remedies are discretionary, and courts traditionally have been reluctant to apply them to administrative determinations unless these arise in the context of a controversy 'ripe' for judicial resolution," as determined by "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." 387 U.S. at 148, 149; accord *Catholic Soc. Servs.*, 509 U.S. at 57. Although the Court has distinguished those fitness and hardship considerations from constitutional limits on federal-court jurisdiction by describing them

as "prudential," *e.g.*, *National Park Hospitality Ass'n*, 538 U.S. at 808, that nomenclature does not remove them from the realm of factors that courts can and should consider in determining whether and how to exercise their equitable powers in a suit under the APA. See 5 U.S.C. 702 (nothing in the APA's creation of a right of review "affects * * * the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground"). This Court has itself repeatedly applied those considerations to avoid premature adjudication of a challenge to an agency action. See, *e.g.*, *National Park Hospitality Ass'n*, 538 U.S. at 808-812; *Ohio Forestry Ass'n*, 523 U.S. at 732-739; *Catholic Social Servs.*, 509 U.S. at 57-59; *Toilet Goods Ass'n*, 387 U.S. at 162-166.

Petitioners did not argue below that such an approach is in fact legally impermissible, and they identify no court of appeals that has entertained a suit notwithstanding a determination that it would be unripe if fitness and hardship were considered. They accordingly present no sound basis for this Court to grant certiorari for the purpose of revisiting this long-settled issue.

4. In any event, this case would be an unsuitable vehicle for considering the questions presented, because petitioners' APA suit is independently barred by the existence of an alternative judicial forum in which to pursue a remedy.

The APA "authorizes an action for review of final agency action in the District Court" only when "other statutory procedures for review are inadequate." *FCC* v. *ITT World Commc'ns, Inc.*, 466 U.S. 463, 469 (1984); see 5 U.S.C. 703, 704. Where Congress has provided an adequate, but more specific, review

scheme, judicial review is channeled through that scheme rather than through the APA's own cause of action. See 5 U.S.C. 703 ("The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute."); *ITT World Commc'ns*, 466 U.S. at 469.

Here, Congress established such a special review proceeding by providing for judicial review of the Attorney General's certification decisions in the D.C. Circuit. 28 U.S.C. 2265(c). That direct-review provision affords a full and fair opportunity for judicial review of any cognizable claims arising from the certification process, including challenges to the underlying regulations. See, *e.g.*, *United States* v. *Haggar Apparel Co.*, 526 U.S. 380, 392 (1999) ("In the process of considering a regulation in relation to specific factual situations, a court may conclude the regulation is inconsistent with the statutory language or is an unreasonable implementation of it.") Such review in the D.C. Circuit is "exclusive[]," 28 U.S.C. 2265(c)(1), and forecloses petitioners from bringing their preemptive challenge under the more general procedures of the APA.

That point alone, which the government raised below (see C.A. Br. 23-26) but the court of appeals had no need to address, fully supports the court of appeals' directive that this case be dismissed for lack of jurisdiction. See, *e.g.*, *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 202 (1994) (describing effect of specialized statutory-review scheme that precluded an alternative preenforcement suit as an issue of "subject-matter jurisdiction"). And the existence of such an alternative basis for affirmance would interfere with consideration of the questions presented.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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