No. 16-880

IN THE

# Supreme Court of the United States

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

*Petitioners*,

v.

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.,

*Respondents*.

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

## MOTION TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS


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## MOTION TO FILE BRIEF *AMICUS CURIAE* OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF PETITIONERS

Pursuant to Supreme Court Rule 37.2(b), the American Bar Association ("ABA") respectfully moves for leave to file the attached *amicus curiae* brief in support of Petitioners. The ABA obtained written consent from counsel for Petitioners to file the brief. Counsel for Respondents, despite receiving timely notice of the ABA's intent to file and a request for consent, has neither granted nor denied consent. Hence the need for this motion. Sup. Ct. R. 37.2(b).

The ABA is the largest voluntary professional membership organization and the leading organization of legal professionals in the United States. Its more than 400,000 members come from all fifty states and other jurisdictions, and they include prosecutors, public defenders, and private defense counsel, as well as attorneys in law firms, corporations, non-profit organizations, and government agencies. ABA members also include judges, legislators, law professors, law students, and non-lawyer "associates" in related fields.

The ABA's mission is, in part, to serve the public and the legal profession by advocating for the ethical and effective representation of all clients. The ABA is dedicated to the promotion of a fair and effective system for the administration of justice. *See* ABA Const. art. 1, § 1.2.

Although the ABA has not taken a position on the constitutionality of the death penalty, the ABA considers the right to effective assistance of counsel and the preservation of the writ of *habeas corpus* to be essential elements of a judicial system that

permits the death penalty. Indeed, for more than thirty years, the ABA Death Penalty Representation Project has worked to improve the quality and availability of counsel in death penalty cases.

This case raises critical questions concerning the appointment of competent counsel for death row inmates in post-conviction litigation and the ability of those lawyers to fulfill their professional responsibilities to those defendants.

The ABA promulgates standards and guidelines for the effective representation of criminal defendants, with particular emphasis upon representation in capital cases. The ABA's focus has been and remains on ensuring that all clients, including capital habeas petitioners, receive quality legal representation.

The ABA has adopted policy statements and issued reports urging specific reforms in federal and state post-conviction procedures.[1] The ABA's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases ("ABA Guidelines"),[2] first adopted as ABA policy in 1989 and revised in 2003, establish a benchmark for

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[1] *See*, *e.g.*, *Resolution of the ABA House of Delegates* 112D (1982) (the ABA resolved to "support the prompt availability of competent counsel for both state and federal [post-conviction] proceedings"); *Resolution of the ABA House of Delegates* (Feb. 1988) (resolution calling for the federal government to adopt procedures and standards for the appointment of counsel for death row inmates in federal *habeas corpus* proceedings).

[2] The ABA Guidelines are available at www.ambar.org/2003guidelines and are reprinted in 31 Hofstra L. Rev. 913, 1028 (2003).

effective representation at all stages of a capital case. These Guidelines have been widely adopted by state and local bar associations and indigent defense organizations, and by court rule in many jurisdictions. The ABA Standards for Criminal Justice also provide guidance to counsel on professional conduct based on the consensus views of a broad array of criminal justice professionals.

The ABA has also provided testimony with respect to reform of *habeas corpus* statutes and in support of funding for indigent criminal defense under both the Criminal Justice Act of 1964 and the Antiterrorism and Effective Death Penalty Act ("AEDPA"). And, of particular importance here, the ABA submitted four rounds of comments during the rulemaking proceedings that culminated in the final rule that is the subject of this litigation, 28 C.F.R. Part 26, Subpart B (the "Final Rule"). Throughout the rulemaking process, the ABA warned that the rule-in-progress failed to ensure that States have mechanisms in place to ensure the appointment of "competent counsel," as required by Section 507 of the USA PATRIOT Improvement and Reauthorization Act of 2005, as well as case law interpreting that statute.

Because of the ABA's work to ensure quality representation of death-row inmates, and because the ABA represents a uniquely broad spectrum of the American legal community, the ABA believes its perspective on the central issues in this case will be helpful to this Court.

Respectfully submitted,

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## INTEREST OF AMICUS CURIAE[1]

The Statement of Interest of the ABA is included in the Motion to File. The ABA has no interest in any party to this litigation and no stake in the outcome of this case.

## SUMMARY OF ARGUMENT

Because the Final Rule challenged by Petitioners deprives death row prisoners of competent representation by counsel, this case involves an issue of exceptional importance.

As this Court has recognized, counsel in post-conviction capital representation must have expertise beyond the skill of many appointed counsel. *See McFarland v. Scott*, 512 U.S. 849, 854 n.2 (1994). The Final Rule thwarts Congress' intent that expedited habeas corpus proceedings pursuant to chapter 154 of title 28 of the United States Code ("Chapter 154") be permissible only where State-appointed defense counsel have the high-level

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[1] This brief was not authored in whole or in part by counsel for a party, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than the ABA or its members made a monetary contribution to the preparation or submission of this brief.

Neither this brief nor the decision to file it should be interpreted as reflecting the views of any judicial member of the ABA. No inference should be drawn that any member of the ABA Judicial Division Council participated in the preparation of this brief or in the adoption or endorsement of the positions in it. This brief was not circulated to any member of the Judicial Division Council prior to filing.

expertise and experience necessary to undertake such expedited proceedings.

Chapter 154 requires that States must, as a condition of instituting such expedited proceedings, "establish[] a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings." However, the Final Rule failed to provide standards that will ensure States that are certified by the U.S. Attorney General have the competence to represent capital defendants, particularly in expedited proceedings. The Final Rule therefore is inconsistent with Congress' intent and this Court's rulings on what it takes to provide adequate representation of a capital defendant in habeas litigation. Without adequately trained and experienced counsel, any one of a number of issues could go unaddressed, potentially resulting in the unwarranted dismissal of a death-row inmate's post-conviction claims.

The Final Rule contains no meaningful substantive competency criteria. It does not, for example, reference objective standards such as the ABA Guidelines, available at www.ambar.org/2003guidelines, which have been widely cited and utilized by courts as guides to important counsel qualifications and reasonable counsel performance in capital cases. Further, the Final Rule's inclusion of a "catch-all" provision, which allows the Attorney General to certify a State if its appointment mechanism appears to "otherwise reasonably assure a level of proficiency appropriate to State post-conviction litigation in capital cases," effectively eliminates any requirement that

determinations of attorney competence be based on substantive criteria. Hence, the Attorney General's certification of States' mechanisms for appointment of habeas counsel under the Final Rule could essentially be arbitrary.

These fundamental defects in the Final Rule are a life-and-death matter for capital defendants throughout the nation. Yet the Ninth Circuit determined it could not address those failings on the merits. The Ninth Circuit was wrong.

Petitioners have standing to sue in this case. The Final Rule fundamentally alters the manner in which capital counsel must advise and represent their clients, creating actual and imminent harm. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

Under the Final Rule, Petitioners cannot predict whether a habeas petitioner's filing window is 180 days or 365 days until the Attorney General rules on a State's application for certification. Faced with this uncertainty, Petitioners must choose between conducting a thorough factual and legal investigation, which can easily take as much as a year, and compressing such an investigation into a shortened timeframe to avoid missing critical statutory deadlines, thereby forfeiting comprehensive review of their clients' cases. This Court has recognized the danger of rushed habeas petitions, noting the "time needed by habeas counsel to investigate claims" and "the harms created by last-minute petitions in capital cases." *Lonchar v. Thomas*, 517 U.S. 314, 330 (1996).

Uncertain whether they will be subject to expedited proceedings, Petitioners' attorney members

are necessarily forced to plan for such proceedings, even though that may mean disregarding their obligations to their clients under the ABA Guidelines. Guideline 10.8, for example, provides that an attorney should consider and assert all potential legal claims after "thoroughly investigat[ing] the basis for each potential claim before reaching a conclusion as to whether it should be asserted . . . ." ABA Guidelines, § 10.8(A)(2). The need to conduct such an investigation in 180 days, solely due to the *possibility* of expedited proceedings, works an immediate and palpable harm on Petitioners by fundamentally undermining their ability to fulfill their professional obligations.

Petitioners have standing not only to sue on behalf of their attorney members, but also in their own right as legal organizations. Under *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982), an organization has standing to sue where the conduct being challenged impinges on the organization's ability to carry out its mission. Petitioners' ability to perform their organizational missions—to provide high-quality legal representation to capital defendants in post-conviction proceedings—is fundamentally and immediately undermined by the Final Rule.

The uncertainty created by the Final Rule is not mere "cost of doing business" for defense counsel organizations such as Petitioners. It is a particularized injury that has immediate impact. Review is warranted to correct the Ninth Circuit's failure properly to apply *Havens* and the principles that this Court and courts of appeals have established in other organizational standing cases.

## ARGUMENT

### I. This Case Is Exceptionally Important Because the Final Rule Deprives Death Row Prisoners of Competent Representation by Counsel.

The Final Rule challenged in this case fails to properly implement Chapter 154. Chapter 154 permits a State to institute expedited capital habeas corpus proceedings if the U.S. Attorney General finds that the State has provided death-sentenced inmates with competent, adequately compensated, and adequately resourced counsel in state post-conviction proceedings.

Chapter 154 reflects a legislative compromise: if a State has "established a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings," it may "fast track" habeas litigation by, among other things, shortening the statute of limitations for filing a habeas petition from one year to six months. *See Lindh v. Murphy*, 521 U.S. 320, 331 (1997). The Final Rule disrupts that compromise, allowing States to institute "fast track" habeas proceedings even where they fail to provide competent state post-conviction counsel.

#### A. Capital Habeas Cases Are Extraordinarily Complex and Demanding Criminal Matters.

No one could reasonably dispute that capital habeas cases are among the most complex proceedings in the criminal justice system. These matters require not just the guiding hand of counsel, but an *expert and experienced* guiding hand.

This Court has explicitly recognized that post-conviction and capital representation require expertise beyond the skill set of many appointed counsel. *See*, *e.g.*, *McFarland v. Scott*, 512 U.S. 849, 854 n.2 (1994) ("Counsel appointed to represent capital defendants in post-conviction proceedings must meet more stringent experience criteria than attorneys appointed to represent noncapital defendants under the Criminal Justice Act of 1964"); *Martel v. Clair*, 565 U.S. 648, 659 (2012) ("[Congress has] aim[ed] in multiple ways to improve the quality of representation afforded to capital petitioners and defendants alike . . . [reflecting] a determination that quality legal representation is necessary in all capital proceedings to foster fundamental fairness in the imposition of the death penalty."[2]

Similarly, the Judicial Conference of the United States has recognized the importance of particularized experience when handling post-conviction capital cases. *See* Judicial Conference of the United States, Committee on Defender Services, Subcommittee on Federal Death Penalty Cases, Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense

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[2] (Internal citation omitted.) *See also Hodges v. Epps*, No. 1:07-CV-66 MPM, 2010 WL 3655851, at *18 n.11 (N.D. Miss. Sept. 13, 2010) (granting habeas relief based on ineffective counsel and noting that defense counsel "was not qualified under the [ABA Guidelines] to take on this representation"); *Colvin-El v. Nuth*, No. Civ.A. AW 97-2520, 1998 WL 386403, at *6 (D. Md. July 6, 1998) ("Given the extraordinarily complex body of law and procedure unique to post-conviction review, an attorney must, at minimum, have some experience in that area before he or she is deemed 'competent'").

Representation 21 (May 1998) (recommending that authorities appointing counsel for death-sentenced inmates "consider the attorney's experience in federal post-conviction proceedings and in capital post-conviction proceedings"); *see also* Jon B. Gould & Lisa Greenman, *Report to the Committee on Defender Services, Judicial Conference of the United States: Update on the Cost and Quality of Defense Representation in Federal Death Penalty Cases* 88 (Sept. 2010) (recognizing the perspective of post-conviction specialists that there is "little time available for inexperienced counsel to 'learn the ropes,' and no safety net if they fail"). As a result, the Judicial Conference promulgated Criminal Justice Act guidelines counseling courts to consider post-conviction and capital litigation experience when making appointments for death-sentenced defendants under 18 U.S.C. § 3599. *See* 7A *Guide to Judiciary Policy*, Appointment of Counsel in Capital Cases, § 620 (2014).

Indeed, in enacting AEDPA, Congress made the same finding regarding the need to secure competent counsel in capital cases through post-conviction proceedings. During the legislative process leading to the enactment of AEDPA, the Ad Hoc Committee on Federal Habeas Corpus in Capital Cases issued a report stressing that "the provision of competent counsel for prisoners under capital sentence throughout both state and federal collateral review is crucial to ensuring fairness and protecting the constitutional rights of capital litigants." 135 Cong. Rec. S13471-04 (1990).

Adequate and experienced counsel in capital cases can, quite literally, mean the difference between life and death. Death penalty counsel must

be aware of frequently changing legal principles, scientific and forensic developments, and psychological concerns. Counsel also must be able to develop and implement strategies that apply existing procedures to the pressure-filled environment of such complex, high-stakes litigation. And counsel must anticipate changes in the law that could result in changes to underlying rulings.

The need for qualified counsel exists not only in the context of habeas petitions, but also in the broader realm of post-conviction litigation. Representing a capital defendant requires identifying all statutory deadlines, including those for both post-conviction motions and habeas petitions. These are a tangled web, beyond those in other types of cases. And the failure to meet any of these deadlines could result in the dismissal of a death-row inmate's case.

Zealous advocacy for a capital defendant requires reinvestigating the case, including a complete examination of the facts underlying the conviction and sentence, as well as possible judicial bias, prosecutorial misconduct, or inadequate performance by trial counsel. Post-conviction attorneys must also search for mitigation evidence that was not presented at trial, including possible mental health defenses. Further, post-conviction counsel has a professional obligation to raise and preserve all meritorious arguments, including challenges to a client's conviction and sentence, as well as constitutional challenges such as possible Eighth Amendment violations.

These requirements exist because of the critical role of the post-conviction process as a safeguard against unjust convictions and death sentences. The ABA has a long history of recruiting and training

post-conviction counsel and has observed the life-and-death difference that qualified counsel makes in a capital case. When post-conviction counsel does not conduct a thorough investigation or does not meet statutory deadlines, the inmate often proceeds to execution without federal court review of some or all of his claims. This has resulted in the execution of individuals who otherwise likely would have been entitled to relief, such as individuals with intellectual disabilities and those who may be actually innocent. For these reasons, the ABA Guidelines make clear that "for post-judgment review to succeed as a safeguard against injustice, courts must appoint appropriately trained and experienced lawyers." ABA Guidelines 1.1, commentary, at 931.

The Final Rule essentially ignores these realities.

### B. The Final Rule Fails to Require Adequate Legal Representation.

The Final Rule fails to achieve the promise inherent in the compromise that States, in order to qualify for the fast-track, must provide competent state post-conviction counsel for death-row prisoners. These failings are evident in two critical areas that the district court below noted but the Ninth Circuit failed to consider.

1. The Final Rule fails to provide substantive criteria by which the Attorney General can determine that a State's appointment mechanism provides for competent counsel. As the district court noted, "when an agency utterly fails to provide a standard for its decision, it runs afoul of more than one provision of the Administrative Procedures Act." *See* Pet. App. 59a.

Respondents' failure to adopt substantive criteria is manifest in its inclusion of a so-called "catch-all" provision in the Final Rule, codified at 28 C.F.R. § 26.22(b)(2), which allows the Attorney General to certify a State if the State's mechanism appears to "otherwise reasonably assure a level of proficiency appropriate for State post-conviction litigation in capital cases." Such an open-ended, "we know it when we see it" justification for agency action is a textbook example of arbitrary and capricious conduct. *See, e.g.*, *Airmark Corp. v. FAA*, 758 F.2d 685, 695 (D.C. Cir. 1985) (concluding it is arbitrary and capricious to fail "to provide a consistent approach that would allow even a guess as to what the decisional criteria would be").

Most critically, the Final Rule does incorporate or otherwise reflect well-recognized standards for the appointment of *competent* post-conviction counsel. For example, the Final Rule fails to reference objective standards such as the ABA Guidelines, which have been widely cited and utilized by courts as guides to important counsel qualifications and reasonable counsel performance in capital cases.[3]

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[3] *See*, *e.g.*, *Bobby v. Van Hook,* 558 U.S. 4 (2009); *Rompilla v. Beard*, 545 U.S. 374 (2005); *Florida v. Nixon*, 543 U.S. 175 (2004); *Wiggins v. Smith,* 539 U.S. 510 (2003); *Saranchak v. Sec'y, Pa. Dep't of Corr.*, 802 F.3d 579, 595-96 (3d Cir. 2015); *Bemore v. Chappell*, 788 F.3d 1151, 1168 (9th Cir. 2015); *United States v. Fields*, 761 F.3d 443, 453 (5th Cir. 2014) *Littlejohn v. Trammell*, 704 F.3d 817, 859-60 (10th Cir. 2013); *Stephens v. Sec'y, Florida Dep't of Corr.*, 678 F.3d 1219, 1229 n.2 (11th Cir. 2012); *Foust v. Houk*, 655 F.3d 524, 534 (6th Cir. 2011); *Ortiz v. United States*, 664 F.3d 1151, 1163 (8th Cir. 2011); *Gray v. Branker*, 529 F.3d 220, 229 (4th Cir. 2008);

2. The Final Rule also fails to require that a State's own standards have been enforced in a manner that ensures that the State is actually providing indigent capital defendants with competent counsel. The Final Rule focuses on whether a State has competency standards, but not on whether those standards are honored in the breach. As the district court noted, there is a difference between a State adopting standards and ensuring that appointed counsel meet those standards. *See* Pet. App. 54a-58a. Simply put, "competency standards are meaningless unless they are actually applied in the appointment process." *Baker v. Corcoran*, 220 F.3d 276, 286 (4th Cir. 2000); *see also Spears v. Stewart*, 283 F.3d 992, 1002 (9th Cir. 2002).

The Ninth Circuit's side-stepping of the merits in this case exposes death-sentenced inmates to a very real possibility of representation by incompetent counsel. These defendants are thus at risk of execution despite viable constitutional claims for

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*Stevens v. McBride*, 489 F.3d 883, 895 (7th Cir. 2007); *Canape v. State*, No. 62843, 2016 WL 2957130, at *3 n.7 (Nev. May 19, 2016); *In re Welch*, 61 Cal. 4th 489, 515 (Cal. 2015); *Chatman v. Walker*, 297 Ga. 191, 202 (Ga. 2015); *State v. Ziegler*, 159 So.3d 96, 105 (Ala. Crim. App. 2014); *State v. Herring*, 142 Ohio St. 3d 165, 182-83 (Ohio 2014); *Walker v. State*, 88 So.3d 128, 137-38 (Fla. 2012); *Ward v. State*, 969 N.E.2d 46, 57 (Ind. 2012); *Wilson v. State*, 81 So. 3d 1067, 1092 (Miss. 2012); *Council v. South Carolina*, 670 S.E.2d 356, 363 (S.C. 2008); *State v. Young*, 172 P.3d 138, 142 (N.M. 2007); *Menzies v. Galetka*, 150 P.3d 480, 512-13 (Utah 2006); *see also* ABA Death Penalty Representation Project, *List of Opinions Citing the ABA Guidelines* (Jan. 12, 2017), *available at* http://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/allcites.authcheckdam.pdf.

relief. As the district court recognized, under the current Final Rule, even the most qualified counsel will struggle to fulfill their professional responsibilities in the face of uncertain timeframes for filing thorough habeas petitions. Pet. App. 81a. Thousands of prisoners across the country may be subject to expedited deadlines without having been provided the effective assistance of state post-conviction counsel, which Congress explicitly intended States to provide in order to institute expedited proceedings under Chapter 154, and upon which the lives of these defendants depend.

## II. The Ninth Circuit's Decision On Standing Is Wrong.

An organization can establish its standing to sue in at least two ways. It can demonstrate representational or associational standing on behalf of its members, where its members would themselves have standing to sue. *See Warth v. Seldin*, 422 U.S. 490, 511 (1975). Additionally, an organization can bring suit on its own behalf based on an injury to the organization itself. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 n.19 (1982). Demonstrating one of either (1) a direct injury to the lawyer members or (2) injury to the organization itself is sufficient to support an organization's standing to sue.

Petitioners established both.

### A. The Final Rule Directly Injures Petitioners' Lawyer Members.

Petitioners have demonstrated standing on behalf of their members because the Final Rule fundamentally alters the procedural landscape in which capital counsel must advise and represent

their current clients. This change presents an "actual or imminent" harm—it is not "conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal citations omitted).

Under the Final Rule, the Attorney General is empowered to grant retroactive certification to a State. The existence of this authority forces capital defense counsel to make strategic decisions under the cloud that any habeas petitions filed outside of the 180-day window may subsequently and retroactively be deemed to be untimely. And because the Final Rule lacks substantive certification criteria, such a determination by the Attorney General is entirely unpredictable. This fundamentally changes the bargain that was struck in Chapter 154. Instead of a reasoned tradeoff between competent counsel and accelerated filing deadlines, the Final Rule creates a high-stakes guessing game.

As a result of the Final Rule, counsel must prognosticate whether any current or future Attorney General might decide that a State's mechanism is adequate, without any meaningful guidance as to what an adequate system looks like. Regardless of the actual adequacy of a state mechanism, Counsel for death-sentenced individuals must compress their preparation into an abbreviated timeframe or risk that their clients will forfeit all federal court review of their claims.

The Ninth Circuit concluded that Petitioners suffered no injury because "assisting and counseling clients in the face of legal uncertainty is the *role* of lawyers." Pet. App. 18a. But the impact of the Final Rule is not limited to the type of "legal uncertainty" that is inherent in lawyering, and the Ninth Circuit's

analysis of the Final Rule's impact on Petitioners is far too simplistic.

Under the Final Rule, until the Attorney General rules on a State's application for "fast-tracked" habeas proceedings, Petitioners cannot predict whether a petitioner's habeas petition filing window is 365 days or 180 days. This uncertainty affects both state and federal post-conviction proceedings. Although the plain language of Chapter 154 applies only to federal proceedings, the filing of a state petition almost inevitably affects the deadline for the federal petition, because the filing of the state petition tolls the statute of limitations for filing a federal petition, which typically cannot be filed until state proceedings are complete. So if, for example, a state post-conviction counsel uses six months to prepare her client's state habeas petition, absent certification of the relevant State for expedited proceedings, the client will still have six months following the completion of state habeas proceedings to prepare and file the federal petition. However, should the Attorney General certify the relevant State's mechanism during the course of the state habeas proceedings, depending on the extent of retroactivity of the certification, the 180-day statute of limitations period may already have run, eliminating any opportunity for federal court review of the case.

The practical impact of the Rule, therefore, is to inject an untenable level of uncertainty into the entire post-conviction process—both at the state and federal levels. And this uncertainty creates an unresolvable conflict between key professional obligations of Petitioners. Petitioners are

professionally obligated to use all available time and resources to conduct a thorough factual and legal investigation in support of their clients' petitions, but they also are bound by the deadlines for a timely habeas petition. Of course meeting deadlines is a burden all litigators bear, and preparing a case with those deadlines in mind is part of the art of litigating. But under the Final Rule, capital counsel cannot prepare their cases with any known deadline in mind. Thus, they face an intractable choice: either to forego their responsibilities to conduct the thorough, longer-term investigations that, following the ABA Guidelines, they would undertake under a 360-day deadline, or to undertake such longer-term investigations in service of their clients' life-and-death interests but risk having petitions retroactively deemed untimely.

This dilemma forced upon Petitioners under the Final Rule does not merely require them to sharpen their professional skills in "assisting and counseling clients in the face of legal uncertainty," as the Ninth Circuit opined. Pet. App. 18a. Petitioners are not pursuing this case merely to "make the scope of their clients' rights clearer and their strategies to vindicate those rights more easily selected." *Id.* 19a. Petitioners challenge the Final Rule because it precludes them from devising *any* acceptable strategy to fulfill their professional responsibilities as habeas counsel.

Consider, for example, an attorney employed by Petitioner Arizona Federal Defender's Office who represents capital clients in post-conviction litigation.

The State of Arizona currently has an application submitted and pending before the Attorney General.[4] The Attorney General may grant that application, certifying Arizona for "fast-track" habeas proceedings, which could be applicable retroactively to the date when Arizona first implemented its mechanism for the appointment and compensation of counsel.

That the attorney does not know whether her client will have six months or one year to file a habeas petition, or whether the certification for "fast-track" proceedings will be retroactive, inevitably undermines her ability to represent her client in accordance with the ABA Guidelines. To follow the Guidelines, the attorney must, as an initial matter, thoroughly investigate her client's case before filing a habeas petition. Guideline 10.7 provides that an attorney:

> ha[s] an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty. . . . Counsel at every stage has an obligation to conduct a full examination of the defense provided to the client at all prior phases of the case. . . . Counsel at every stage have an obligation to satisfy themselves independently that the official record of the proceedings is complete and to supplement it as appropriate.

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[4] *Habeas Corpus Res. Ctr. v. U.S. Dep't of Justice*, No. 13-4517 CW, 2014 WL 3908220, at *5 (N.D. Cal. Aug. 7, 2014).

The comments to Guideline 10.7 advise counsel to collect all information that could be potentially relevant to the investigation. ABA Guidelines 10.7, commentary, at 1024. Counsel should, for example, "interview the client's family members . . . , and virtually everyone else who knew the client and his family, including neighbors, teachers, clergy, case workers, doctors, correctional, probation, or parole officers, and others." *Id.* Further, "[c]ounsel should use all appropriate avenues including signed releases, subpoenas, court orders, and requests or litigation pursuant to applicable open records statutes, to obtain all potentially relevant information pertaining to the client, his or her siblings and parents, and other family members . . . ." *Id.* at 1025. Guideline 10.8 further counsels an attorney to consider and assert all potential legal claims after "thoroughly investigat[ing] the basis for each potential claim before reaching a conclusion as to whether it should be asserted . . . ." ABA Guidelines § 10.8(A)(2), *supra*.

The factual and legal investigations contemplated by the Guidelines are time-consuming. Indeed, this Court has recognized the "time needed by habeas counsel to investigate claims" and "the harms created by last-minute petitions in capital cases." *Lonchar v. Thomas*, 517 U.S. 314, 330 (1996). As one federal court of appeals judge put it:

> Federal counsel need adequate time to investigate, research, and prepare proper capital habeas corpus petitions. Prior to even beginning work on the petition, federal counsel must collect and read the record, establish a relationship with the client, assemble a team that includes

> mitigation experts and fact investigators, and make preliminary evaluations regarding such matters as client competency, mental retardation, and mental health issues, as well as comply with the ABA Guidelines. . . . [O]ne year is barely sufficient time to file a federal capital habeas corpus petition even when the petitioner is represented by experienced, institutionally-funded, full-time, federal defender staff well versed in capital habeas litigation.

*Lugo v. Sec., Fla. Dep't of Corr.*, 750 F.3d 1198, 1219 (11th Cir. 2014) (Martin, J., concurring) (emphasis and citation omitted).

It is virtually impossible for an attorney representing a capital defendant to comply with the competing obligations of meeting an uncertain deadline and submitting a thoroughly investigated and researched petition. She must either voluntarily forfeit half the time allotted to prepare a petition in order to meet a *potential* statutory deadline, or conduct a full investigation and risk missing an *actual* deadline. In either situation, the attorney violates a professional obligation and thereby suffers concrete injury.

The Ninth Circuit's characterization of the impact of the Final Rule as merely creating "legal uncertainty" erroneously trivializes the impact of the Final Rule on Petitioners. Not all uncertainty in the legal profession is created equal. While Petitioners undoubtedly must often make strategic decisions without the benefit of all relevant facts, and deal with uncertainty as to the applicability of laws to a given case, they face a distinctly different type of

impact—an immediate and concrete injury—when the procedural landscape can be upended in a way that cannot be predicted. Procedural uncertainty that forces Petitioners, right now, to choose among competing professional obligations does not simply require them to change their legal strategies—it causes them distinct and present injury by precluding them from being able to plan so as to fulfill their professional obligations. That is an injury of the first order and the court of appeals should have reviewed the Final Rule on the merits.

### B. The Final Rule Directly Injures The Defender Organizations.

The Final Rule does more than impair individual lawyers' compliance with the professional standards reflected in the ABA Guidelines. The Final Rule also injures defender organizations as they seek to conduct their operations and pursue their organizational missions.

As this Court held in *Havens*, an organization suffers an "injury in fact" when another party's conduct "ha[s] perceptibly impaired" that organization's ability to carry out its objectives. *Havens*, 455 U.S. at 379. Accordingly, an organization has standing to bring suit where the challenged conduct hinders its activities and forces it to expend additional resources. *See id.*; *Nnebe v. Daus*, 644 F.3d 147, 157 (2d Cir. 2011); *Sierra Club v. Marita*, 46 F.3d 606, 612-13 (7th Cir. 1995); *Spann v. Colonial Village, Inc.*, 899 F.2d 24, 27 (D.C. Cir. 1990); *Pacific Legal Foundation v. Goyan,* 664 F.2d 1221, 1224 (4th Cir. 1981).

The Ninth Circuit effectively ignored the principles established in *Havens*. There, an

organization whose purpose was "to make equal opportunity in housing a reality," sought to accomplish that objective with "efforts to assist equal access to housing through counseling and other referral services". 455 U.S. at 379. This Court recognized the organization's standing to sue a housing complex that engaged in housing discrimination. *Id.* The Court's reasoning was straightforward: "Plaintiff . . . has had to devote significant resources to identify and counteract the defendant's . . . racially discriminatory . . . practices." *Id.* (citing the plaintiff's complaint). Standing existed because there was a "concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources." *Id.* "[T]here can be no question," the Court emphasized, "that the organization suffered injury in fact" because the discriminatory practices "perceptibly impaired [the organization's] ability to provide counseling and referral services for low-and moderate-income homeseekers." *Id.*

*Havens* should have been dispositive here. Like the discrimination in *Havens*, the Final Rule impinges on Petitioners' ability to carry out their organizational missions, which are also reflected in the ABA Guidelines. Guideline 3.1, for instance, calls for the designation of "responsible agencies," which are defined as defender organizations such as Petitioners, that will "ensur[e] that each capital defendant in the jurisdiction receives high quality legal representation." ABA Guidelines 3.1(A)(1), at 944. And Guideline 6.1 urges defender organizations to "implement effectual mechanisms to ensure that the workload of attorneys representing defendants in death penalty cases is maintained at a level that enables counsel to provide each client with high

quality legal representation in accordance with these Guidelines." ABA Guidelines 6.1, at 965. The comments to Guideline 6.1 add that defender organizations should "distribute assignments in light of each attorney's duty under the Rules of Professional Conduct to provide competent representation to a client, which requires the legal knowledge, skill, thoroughness and preparation necessary for a complex and specialized area of the law." ABA Guidelines 6.1, commentary, at 969 (internal quotation marks and footnotes omitted).

The Final Rule severely undermines Petitioners' ability to distribute their resources in a manner consistent with these Guidelines and Petitioners' organizational missions. In particular, the shortening of the statute of limitations for filing habeas petitions—from one year to a mere 180 days—forces Petitioners into fundamental restructurings of their daily operations. Shortened habeas deadlines naturally affect "the calculation of legal and financial resources available to competently prepare and litigate cases." Pet. App. 132a. The injury is compounded in that this compressed timeline may be applied retroactively. As explained by the Executive Director of Petitioner Habeas Corpus Resource Center ("HCRC"), the threat of retroactively shortened habeas deadlines "requires *immediate* decisions about whether to commit limited attorney time and financial resources." Pet. App. 137a (emphasis added). Because of the uncertainty created by the Final Rule, Petitioners must *immediately* begin proceeding along two tracks: in addition to allocating their attorney resources as they would under a one-year habeas deadline, they must *simultaneously* prepare *each* case for the possibility that the 180-day deadline might apply.

Petitioners are also prevented by the Final Rule from fulfilling a variety of their other organizational objectives. Petitioner HCRC's activities, for instance, are not limited to representing capital defendants, but also "recruiting members of the private bar to accept death penalty habeas corpus case appointments," Cal. Gov't Code § 68661(c), and "provid[ing] assistance and case progress monitoring as needed," *id.* § 68661(j). And Petitioner Federal Public Defender for the District of Arizona similarly must provide "assistance, consultation, information and other related services to eligible persons and appointed attorneys regarding federal habeas corpus litigation," United States Dist. Ct. for the Dist. of Ariz., Gen. Order 07-08: Criminal Justice Act Plan § VII(C), and it must "provide training for those attorneys," *id.* § VII(D).

The Final Rule makes carrying out these missions significantly more onerous. Petitioners must expend additional resources, financial and otherwise, providing additional training and counseling to private counsel regarding the added complexities involved in representing a capital defendant on a compressed schedule. Similarly, the uncertainty created by the Final Rule discourages attorneys from stepping up, undermining Petitioners' efforts to recruit counsel to undertake the already imposing task of representing a person sentenced to death. This in turn results in additional expenditures in recruiting.

Being forced to undertake such a diversion of resources constitutes concrete organizational harm. *See Arcia v. Florida Sec'y of State*, 772 F.3d 1335, 1341 (11th Cir. 2014) (recognizing voter's rights organization's standing to challenge program purging

ineligible voters from voter rolls because the organization was forced to divert resources to assist incorrectly purged members); *Nnebe v. Daus*, 644 F.3d at 157 (upholding standing of taxi drivers' union to challenge a procedure for summarily suspending drivers' licenses because the union was forced to divert resources from its core activities to "provid[e] initial counseling, explain[ ] the suspension rules to drivers, and assist[ ] the drivers in obtaining attorneys."); *see also e.g.*, *Abigail All. for Better Access to Developmental Drugs v. Eschenbach*, 469 F.3d 129, 132-33 (D.C. Cir. 2006); *Powell v. Ridge*, 189 F.3d 387, 404 (3d Cir. 1999).

Indeed, the Ninth Circuit itself has relied on the diversion-of-resources theory to confer standing on *legal services* organizations. *See El Rescate Legal Servs., Inc. v. Exec. Off. of Immigr. Rev.*, 959 F.2d 742 (9th Cir. 1991). In *El Rescate*, two legal service organizations claimed that the Executive Office for Immigration Review violated the APA by implementing a practice of "using incompetent translators and of not interpreting many portions of immigration court hearings." *Id.* at 745. The organizations had been "established to assist Central American refugee clients, most of whom are unable to understand English, in their efforts to obtain asylum and withholding of deportation in immigration court proceedings." *Id.* at 748. The Ninth Circuit held that "[t]he allegation that the EOIR's policy frustrates these goals and requires the organizations to expend resources in representing clients they otherwise would spend in other ways is enough to establish standing." *Id.* at 748.

Petitioners have alleged that the Final Rule has resulted in a large-scale operational restructuring at

the organizational level and further requires them to divert their scarce resources away from other activities central to their organizational mission. When a new action or regulation forces an organization to re-prioritize its activities at the expense of its other initiatives, that organization has suffered a particularized injury.

In stark contrast to the decision below, the Second Circuit recently applied *Havens* to confer organizational standing on groups of lawyers. In *N.Y. Civil Liberties Union v. N.Y.C. Transit Authority*, an organization of lawyers involved in advocacy and the representation of clients challenged the defendant's policy limiting open-access to its hearings. 684 F.3d 286 (2d Cir. 2015). In holding that the NYCLU had standing on its own behalf as an organization to challenge the policy, the Second Circuit emphasized that the harm to the organization itself is distinct from the harm to the individual members of the organization. *Id.* at 295 ("[The organization] sues to vindicate its own rights as an organization with goals and projects of its own.") (internal citations omitted). The court tied the organizational injury to the NYCLU's "interest in open access to TAB hearings as a matter of professional responsibility to clients." The court reasoned, "[i]n order to represent clients before the TAB, NYCLU must prepare, in part, by observing TAB hearings. NYCLU has shown that the access policy has impeded, and will continue to impede, the organization's ability to carry out this aforementioned responsibility." *Id.*

In directly contrary reasoning, the Ninth Circuit concluded that Petitioners lack standing to challenge

a rule that forces them to fundamentally alter their operations. *Havens* commands otherwise.

## CONCLUSION

The court below should have addressed the merits of this case of extraordinary, nationwide importance. This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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