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

BRIEF OF THE CENTER FOR REPRODUCTIVE RIGHTS, THE SOUTHERN POVERTY LAW CENTER, THE NATIONAL HEALTH LAW PROGRAM, THE SOUTHERN COALITION FOR SOCIAL JUSTICE, THE CENTER FOR INQUIRY, THE NATIONAL CENTER FOR LESBIAN RIGHTS, THE CAMPAIGN LEGAL CENTER INC., AND THE JUVENILE LAW CENTER AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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The Center for Reproductive Rights, the Southern Poverty Law Center, the National Health Law Program, the Southern Coalition for Social Justice, the Center for Inquiry, National Center for Lesbian Rights, Campaign Legal Center, Inc., and the Juvenile Law Center submit this brief as amici curiae in support of the petition for a writ of certiorari filed the Habeas Corpus Resource Center ("HCRC") and the Office of the Federal Public Defender for the District of Arizona.[1]

The Center for Reproductive Rights ("CRR") is a global advocacy organization that uses the law to advance reproductive freedom as a fundamental right that all governments are legally obligated to respect, protect, and fulfill. In the United States, CRR's work focuses on ensuring that all people have access to a full range of high-quality reproductive health care. Since its founding in 1992, CRR has been actively involved in nearly all major litigation in the U.S. concerning reproductive rights, in both state and federal courts, including most recently, serving as lead counsel for the plaintiffs in *Whole Woman's Health* v. *Hellerstedt*, 136 S. Ct. 2292 (2016). CRR has a vital interest in protecting indi-

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or any party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than amici curiae, their members, and their counsel, made a monetary contribution intended to fund its preparation or submission. Counsel of record for all parties have received timely notice of amici curiae's intent to file this brief and have consented to the filing of this brief in letters on file with the Clerk's office.

viduals endeavoring to exercise their fundamental legal rights. CRR's ability to bring litigation challenging legislative and regulatory action, and to seek pre-enforcement relief where individuals are threatened with irreparable harm, is crucial to its mission.

The Southern Poverty Law Center ("SPLC") is a nonprofit civil rights organization dedicated to fighting hate and bigotry, and to seeking justice for the most vulnerable members of society. Since its founding in 1971, the SPLC has won numerous landmark legal victories in state and federal courts on behalf of the exploited, the powerless, and the forgotten. The SPLC's work regularly involves challenges to statutes and regulations, and the ability to bring challenges prior to enforcement is an important part of SPLC's mission to protect the vulnerable in our society from irreparable injury.

The National Health Law Program is a 48-year-old public interest law organization that engages in education, litigation and policy analysis to advance access to quality health care and protect the legal rights of low-income and underserved populations.

The Southern Coalition for Social Justice is a multidisciplinary nonprofit organization that partners with communities of color and economically disadvantaged communities to support their efforts to dismantle structural racism and oppression and to defend and advance their social, economic, and political rights through a combination of legal advocacy, research, organizing, and communications.

The Center for Inquiry ("CFI") is a nonprofit educational organization dedicated to promoting and defending reason, science, freedom of inquiry, and

humanist values. Through education, research, publishing, social services, and other activities, including litigation, CFI encourages evidence-based inquiry into science, pseudoscience, medicine and health, religion, and ethics.

The National Center for Lesbian Rights ("NCLR") is a national legal nonprofit organization founded in 1977 and committed to advancing the rights of lesbian, gay, bisexual, and transgender people and their families through litigation, public policy advocacy, and public education. NCLR's programs—including direct legal assistance and impact litigation—focus on employment, immigration, youth, elder law, transgender law, sports, marriage, relationship protections, reproductive rights, and family law in order to advance equality for all.

The Campaign Legal Center, Inc. ("CLC") is a nonpartisan, nonprofit organization that works in the area of democracy law, including campaign finance, voting rights, and ethics. CLC's mission is to improve our democracy and protect the fundamental right of all Americans to participate in the political process. CLC engages in both policy analysis and litigation in state and federal courts to protect and improve our democracy.

The Juvenile Law Center, founded in 1975, is the oldest public interest law firm for children in the United States. Juvenile Law Center advocates on behalf of youth in the child welfare and criminal and juvenile justice systems to promote fairness, prevent harm, and ensure access to appropriate services. Recognizing the critical developmental differences between youth and adults, Juvenile Law Center works to ensure that the child welfare, juvenile

justice, and other public systems provide vulnerable children with the protection and services they need to become healthy and productive adults. Juvenile Law Center participates as amicus curiae in state and federal courts throughout the country, including the United States Supreme Court, in cases addressing the rights and interests of children.

This case involves important issues regarding an organization's ability to support its clients by bringing pre-enforcement challenges or bringing such suits on behalf of their clients. Specifically, amici are concerned that the Ninth Circuit's erroneous interpretation of ripeness and the splintered approach to ripeness across the various circuits will thwart amici's ability to challenge unlawful regulations as contemplated by the Administrative Procedure Act ("APA").

SUMMARY OF ARGUMENT

Amici, and other organizations representing all manner of individuals and industries, rely on pre-enforcement challenges to protect their clients from unlawful regulations before such regulations cause widespread harm. Judicial review of facially unlawful regulations *before* they are implemented provides an essential check on administrative overreach. Where, as here, the challenge of a regulation is based not on how the regulation is applied, but rather on whether the agency engaged in reasoned decision-making when formulating the regulation, and judicial review is not expressly foreclosed by statute, the answer to the question of when the claim may be brought is simple: once the regulation is final.

The regulation in this case risks retroactive ex-

tinguishment of the right to seek habeas relief in capital cases to those who have six months or less remaining to file a habeas corpus application. Regardless of how the regulation is ultimately applied, it has an immediate impact on organizations such as Petitioners by forcing them to alter their practices to their detriment and the detriment of their clients. Review of the Ninth Circuit's decision below is necessary because the court articulated a novel and unnecessarily restrictive approach to ripeness, wherein even purely legal challenges will be premature unless (a) a policy is so obviously invalid on its face that it would be impossible to implement in a legal manner, and (b) the policy explicitly required that regulated actors undertake or refrain from certain conduct. The Ninth Circuit's confusion adds to the already splintered interpretations of this Court's ripeness test set forth fifty years ago in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 148–49 (1967). While some circuits hold that "purely legal" challenges to the facial validity of agency regulations are presumptively reviewable and no hardship showing is necessary, other circuits require that both the fitness and hardship prongs be satisfied before judicial review. Still other courts adopt a "sliding scale" approach. As a result, some courts can correct the course of an unlawful regulation before it causes significant damage, whereas other jurisdictions can only clean up after the crash.

Amici frequently rely on pre-enforcement challenges to confront unlawful regulations before they cause widespread harm. On a human level, amici bring pre-enforcement challenges to protect individual clients. On an institutional level, pre-enforcement challenges permit amici to correct er-

rors before they impact broad swaths of populations and industries. The confusion among the circuits and the Ninth Circuit's flawed approach to the ripeness doctrine compromise amici's ability to represent their clients and prevent broader upheaval that results from regulatory overreach.

This Court's intervention is needed to resolve the inconsistent approaches taken by the lower courts, protect effective judicial oversight of the administrative state, and assure that individuals served by organizations like amici are not stripped of their ability to bring meaningful pre-enforcement challenges.

ARGUMENT

I. THE NINTH CIRCUIT ERRED IN DUBBING PETITIONERS' CLAIMS AND THEIR CLIENTS' CLAIMS UNRIPE.

Standing issues aside, the question of ripeness presents an independent need for this Court's review. In the fifty years since this Court decided *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967), pre-enforcement challenges to agency regulations have become a fixture of the legal landscape under the Administrative Procedure Act. *See, e.g.*, Admin. Conference of the U.S., *Judicial Review of Rules in Enforcement Proceedings* (1982) (noting the increase in pre-enforcement challenges brought in the wake of *Abbott Laboratories*). In these cases, courts have repeatedly recognized that a regulated actor may seek judicial recourse by challenging an invalid agency rule before the rule is applied, provided the legal issues raised by the challenge are concrete enough to allow for effective judicial resolution and the injury asserted is sufficiently certain. *See Abbott Labs.*, 387 U.S. at 148–49 (holding that ripe-

ness turns on "the fitness of the issues for judicial decision" and "the hardship to the parties of withholding court consideration"); *see also, e.g.*, *Nat'l Park Hosp. Ass'n* v. *DOI*, 538 U.S. 803, 812 (2003); *Iowa League of Cities* v. *EPA*, 711 F.3d 844, 867 (8th Cir. 2013); *Cement Kiln Recycling Coal.* v. *EPA*, 493 F.3d 207 (D.C. Cir. 2007); *Pittman* v. *Cole*, 267 F.3d 1269, 1278 (11th Cir. 2001); *R.I. Ass'n of Realtors* v. *Whitehouse*, 199 F.3d 26, 33 (1st Cir. 1999).

The "fitness" prong of *Abbott Laboratories* turns on whether the case presents "a purely legal" question, or whether judicial review of the agency action "would benefit from further factual development." *Nat'l Park Hosp. Ass'n*, 538 U.S. at 812; *see also Toilet Goods Ass'n* v. *Gardner*, 387 U.S. 158, 164 (1967) (considering whether "judicial appraisal of [the claim] is likely to stand on a much surer footing in the context of a specific application" than it would in a "generalized challenge"). The "hardship" prong depends on "the degree and nature of the regulation's present effect on those seeking relief," for instance, whether the agency action could "be said to be felt immediately by those subject to it in conducting their day-to-day affairs." *Toilet Goods Ass'n*, 387 U.S. at 164. Where agency actions "as a practical matter require[]" that petitioners "adjust [their] conduct immediately," this Court has rejected agencies' attempts to evade review by way of ripeness doctrine. *Nat'l Park Hosp. Ass'n*, 538 U.S. at 808 (quoting *Lujan* v. *Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990)).

A. Courts of Appeals Set Forth Conflicting Applications of the *Abbott Laboratories* Test.

This Court has frequently applied the *Abbott Laboratories* test, but has not specified whether and/or when each prong is dispositive. *Compare Texas* v. *United States*, 523 U.S. 296, 302 (1998) (suggesting that hardship is a necessary prerequisite to ripeness), *with Lujan*, 497 U.S. at 891 (suggesting that hardship alone is sufficient), *with Nat'l Park Hosp. Ass'n*, 538 U.S. at 815 (Stevens, J., concurring) (indicating that both prongs must be satisfied for a claim to be ripe). In every major case decided under the *Abbott Laboratories* standard over the last two decades, this Court has concluded that the two factors marshal the same way, leaving open the important question of whether and when a claim that satisfies only one prong can be considered ripe. *See, e.g.*, *Nat'l Park Hosp. Ass'n*, 538 U.S. at 810–12 (majority opinion); *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 479–80 (2001); *Texas*, 523 U.S. at 302; *Ohio Forestry Ass'n* v. *Sierra Club*, 523 U.S. 726, 732–37 (1998).[2]

Lower courts have also acknowledged that "[u]nder Supreme Court precedent . . . the relationship between the fitness and hardship prongs of the ripeness inquiry is not entirely clear." *Pittman* v. *Cole*, 267 F.3d 1269, 1280 n.8 (11th Cir. 2001);

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[2] *See generally* Wm. Grayson Lambert, *Toward a Better Understanding of Ripeness and Free Speech Claims*, 65 S.C. L. Rev. 411, 417 (2013) (discussing the uncertain relationship between the two *Abbott Laboratories* prongs).

Ernst & Young v. *Depositors Econ. Prot. Corp.*, 45 F.3d 530, 535 (1st Cir. 1995) ("The relationship between these two parts of the test—fitness and hardship—has never been precisely defined."). The courts of appeals have adopted conflicting interpretations of *Abbott Laboratories*, and in so doing have created a doctrine of justiciability that varies according to circuit.

The D.C. and Third Circuits, for example, have held that facial challenges raising "purely legal" issues are "presumptively reviewable"; these courts have not required showings of hardship in such cases. *Cement Kiln Recycling Coal.* v. *EPA*, 493 F.3d 207, 215 (D.C. Cir. 2007) (quoting *Nat'l Ass'n of Home Builders* v. *U.S. Army Corps of Eng'rs*, 417 F.3d 1272, 1282 (D.C. Cir. 2005)); *see also La. Forestry Ass'n* v. *DOL*, 745 F.3d 653, 667 n.10 (3d Cir. 2014). The First and Federal Circuits, in contrast, have required that both prongs be satisfied. *See Ass'n of Realtors* v. *Whitehouse*, 199 F.3d 26, 33 (1st Cir. 1999) ("[T]he plaintiff must adduce facts sufficient to establish both fitness and hardship."); *Brocade Commc'ns Sys.* v. *United States*, 120 Fed. Cl. 73, 77 (Fed. Cir. 2015) ("[F]or a claim to be ripe for judicial review, a challenge to the agency's decision must meet both elements [of the *Abbott Laboratories* test]."); *cf. Habeas Corpus Res. Ctr.* v. *DOJ*, 816 F.3d 1241, 1254 (9th Cir. 2016) (indicating that the Ninth Circuit has applied this standard). Still other courts have adopted a "sliding scale" approach. *See, e.g.*, *Iowa League of Cities* v. *EPA*, 711 F.3d 844, 867 (8th Cir. 2013) ("Both of [the *Abbott Laboratories*] factors are weighed on a sliding scale, but each must be satisfied 'to at least a minimal degree.'"

(quoting *Neb. Pub. Power Dist.* v. *MidAm. Energy Co.*, 234 F.3d 1032, 1039 (8th Cir. 2000))). Amici respectfully request that this Court grant certiorari in order to resolve this confusion and correct the Ninth Circuit's overly rigid approach to ripeness analysis under the APA.

B. The Ninth Circuit's Perfunctory Ripeness Analysis Reflects a Stark Misapplication of this Court's Prudential Holdings.

Even in the face of the splintering among the lower courts as to the correct application of *Abbott Laboratories*, the Ninth Circuit's decision represents a dramatic and novel departure from well-settled aspects of ripeness doctrine. Under the Ninth Circuit's approach below, a pre-enforcement challenge to an agency policy is never ripe unless (a) the policy is so clearly invalid on its face that it would be impossible to implement in a way that comported with applicable law, *and* (b) the policy explicitly required that regulated actors undertake or refrain from certain conduct. *See Habeas Corpus Res. Ctr.*, 816 F.3d at 1253–54. This Court's case law neither requires nor contemplates so restrictive a standard.

1. The Ninth Circuit Erroneously Concluded that the Legal Issues Presented Would Benefit from Further Factual Development.

In rejecting Petitioners' request for limited remand on ripeness grounds, the Ninth Circuit concluded that Petitioners' purely legal APA claims would benefit from further factual development and that the "Final Regulation" is not final. *Habeas Corpus Res. Ctr.*, 816 F.3d at 1254; *see also id.* at 1253–

54 (explaining that any substantive legal problems inherent in the Final Regulation "will become clearer as the Attorney General makes certification decisions and as those decisions undergo de novo review in the D.C. Circuit").[3] This reasoning is inconsistent with the legal nature of APA challenges to notice-and-comment rulemaking and this Court's jurisprudence on pre-enforcement judicial review. *See, e.g.*, *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 149 (1967) (confirming that pre-enforcement challenges to regulations may be justiciable); *Sackett* v. *EPA*, 566 U.S. 120, 129 (2012) (permitting pre-enforcement judicial review of an agency action alleged to have been "arbitrary and capricious" under the APA); *Cement Kiln Recycling Coal.*, 493 F.3d at 215 ("It is well-established that '[c]laims that an agency's action is arbitrary and capricious or contrary to law present purely legal issues.'" (quoting *Nat'l Ass'n of Home Builders* v. *U.S. Army Corps of Eng'rs*, 417 F.3d 1272, 1282 (D.C. Cir. 2005))). A court need not know how an agency will implement a rule in order to determine whether the agency engaged in reasoned decision-making when formulating and enacting that rule.

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[3] The Ninth Circuit analyzed Petitioners' challenge under three factors identified in *Ohio Forestry Ass'n* v. *Sierra Club*, 523 U.S. 726, 732–37 (1998). This test is, in substance, identical to the *Abbott Laboratories* inquiry. *See id.* at 733 (identifying *Abbott Laboratories* as the governing law and applying a cosmetically different formulation of that test); *see also, e.g.*, *Pittman* v. *Cole*, 267 F.3d 1269, 1278 (11th Cir. 2001) (observing that *Ohio Forestry* and *Abbott Laboratories* reflect the same doctrinal test).

The Ninth Circuit also concluded that the Final Regulation is not final because the Attorney General might "refine its policies . . . through application of the Plan in practice." *Habeas Corpus Res. Ctr.*, 816 F.3d at 1253 (quoting *Ohio Forestry Ass'n*, 523 U.S. at 735–36). This Court has consistently refused to allow agencies to leverage this argument to evade judicial review. *See, e.g.*, *Sackett*, 566 U.S. at 129 ("[T]he APA provides for judicial review of all final agency actions, not just those that impose a self-executing sanction."); *Abbott Labs.*, 387 U.S. at 154 (rejecting the government's argument that judicial review of the agency policy would be appropriate only upon enforcement of the policy); *see also U.S. Army Corps of Eng'rs* v. *Hawkes Co.*, 136 S. Ct. 1807, 1815 (2016) (describing this Court's "pragmatic" approach to finality). Indeed, applying the Ninth Circuit's reasoning, it is difficult to envision when a regulation would be sufficiently "final" to warrant pre-enforcement judicial review.

2. The Ninth Circuit Did Not Consider the Immediate Practical Effects that the Attorney General's Final Regulation Will Have on Petitioners' Primary Conduct.

This Court consistently has recognized the right to pre-enforcement review of "substantive rule[s] which as a practical matter require[] the plaintiff to adjust his conduct immediately." *See Lujan*, 497 U.S. at 891; *see also Nat'l Park Hosp. Ass'n*, 538 U.S. at 1024. This represents a functional, rather than formal, approach to the "hardship" prong of the *Abbott Laboratories* test. *See Toilet Goods Ass'n*, 387 U.S. at 1524–25. For the hardship prong to be

satisfied, the challenged agency action must influence "primary conduct," or there must be "irremediable adverse consequences" that would result were the court to postpone the legal challenge. *See id.*; *see also, e.g.*, *Reno* v. *Catholic Soc. Servs.*, 509 U.S. 43, 56 (1993) (applying this standard).

According to the Ninth Circuit's approach, Petitioners and their putative clients would not be able to bring justiciable claims until the Attorney General actually certified a particular state's capital counsel mechanism, at which point they could challenge this certification decision in the U.S. Court of Appeals for the D.C. Circuit. *See Habeas Corpus Res. Ctr.*, 816 F.3d at 1254. This certification, however, would immediately (and retroactively) extinguish the habeas corpus rights of death-sentenced prisoners within the state who previously had six months or less to file their habeas petitions. *See* 28 U.S.C. § 2263(a). While such prisoners and their counsel could then challenge the agency action in the D.C. Circuit, this is an inadequate opportunity for judicial review of the Final Regulation. As an initial matter, the D.C. Circuit is tasked with reviewing certification decisions, as opposed to the regulation itself.[4] Moreover, the uncertainty and delays inherent in the judicial process suggest that the regulation would cause irreparable harm to this

[4] The Ninth Circuit inappropriately conflated the D.C. Circuit's authority to review certification decisions with the judicial power to review the underlying Final Regulation. *See Habeas Corpus Res. Ctr.*, 816 F.3d at 1254. The existence of the former has no bearing on the content or importance of the latter. *See, e.g.*, *Sackett*, 566 U.S. at 129.

population by the time the court was able to exercise meaningful judicial review.

The Ninth Circuit's decision thus presents Petitioners and their clients with a Hobson's choice: File a habeas corpus application within six months of the relevant state-court judgment—even if this means sacrificing investigations into leads that could save the prisoner's life—or risk losing the window to file an application entirely.[5] *See* Petition for Certiorari at 32–33, *Habeas Corpus Resource Ctr.* v. *DOJ*, No. 16-880 (U.S. Jan. 10, 2017). The Final Regulation is thus "felt immediately by those subject to it in conducting their day-to-day affairs." *Toilet Goods Ass'n*, 387 U.S. at 164; *see also, e.g.*, *Sackett*, 566 U.S. at 129–31 (determining that EPA compliance letters were subject to judicial review based on their practical effects on private actors' behavior).[6] Petitioners and their clients should not be forced to wait until the regulation becomes rotten before their claims are deemed to be ripe.

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[5] Condensing Petitioners' timeline to require the filing of habeas petitions within six months is particularly problematic in light of Chapter 154's prohibition on amending habeas petitions. *See* 28 U.S.C. § 2266(b)(3)(B).

[6] The Ninth Circuit's contrary conclusion represents an unduly formalistic understanding of hardship that is impossible to reconcile with the "pragmatic" approach this Court endorsed as to related doctrines of reviewability. *Hawkes Co.*, 136 S. Ct. at 1815–16 (addressing the doctrine of finality); *McCarthy* v. *Madigan*, 503 U.S. 140, 148 (1992) (considering the issue of exhaustion).

II. THE NINTH CIRCUIT'S HOLDING UNDERCUTS THE IMPORTANT WORK OF NONPROFIT ORGANIZATIONS, LIKE AMICI.

Pre-enforcement challenges are an important vehicle whereby litigants can, in a single suit, contest the legality of a regulation before it causes harm. Rather than address a single application of the regulation to one individual, pre-enforcement challenges seek to rectify unlawful regulations as a whole. *See generally Abbot Labs.* v. *Gardner*, 387 U.S. 136, 152–54 (1967); *cf. Bowen* v. *Mich. Acad. of Family Physicians*, 476 U.S. 667, 667 (1986) (distinguishing between "challenges as to the *method* by which" the regulation is applied from "the *determinations* themselves"); *McNary* v. *Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 497–98 (1991) ("We recognized that review of individual determinations of the amount due on particular claims was foreclosed, but upheld the collateral attack on the regulation itself, emphasizing the critical difference between an individual 'amount determination' and a challenge to the procedures for making such determinations." (quoting *Bowen*, 476 U.S. at 676)). Challenges of this nature have been brought to advance a broad range of goals, including:

- To protect free-speech interests. *Holder* v. *Humanitarian Law Project*, 561 U.S. 1 (2010).
- To challenge the denial of veterans' benefits. *Traynor* v. *Turnage*, 485 U.S. 535 (1988).
- To protect unions' ability to organize. *Babbitt* v. *United Farm Workers Nat'l Union*, 442 U.S. 289 (1979).
- To protect reproductive rights. *Isaacson* v.

Horne, 716 F.3d 1213 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 905 (2014).

- To challenge financial regulation under Dodd-Frank. *State Nat'l Bank of Big Spring* v. *Lew*, 795 F.3d 48 (D.C. Cir. 2015).
- To protect citizens' ability to videotape law enforcement officers. *ACLU* v. *Alvarez*, 679 F.3d 583 (7th Cir. 2012).
- To challenge laws that restrict family arrangements. *Bronson* v. *Swensen*, 500 F.3d 1099 (10th Cir. 2007).

Organizations like amici routinely rely on pre-enforcement challenges to protect vulnerable populations and further their organizations' missions by bringing their own claims and helping their clients bring claims. *See, e.g.*, *Fla. Bankers Ass'n* v. *Dep't of Treasury*, 799 F.3d 1065 (D.C. Cir. 2015); *Bus. Roundtable* v. *SEC*, 647 F.3d 1144 (D.C. Cir. 2011); *ACLU* v. *FCC*, 823 F.2d 1554 (D.C. Cir. 1987); *KindHearts for Charitable Humanitarian Dev., Inc.* v. *Geithner*, 647 F. Supp. 2d 857 (N.D. Ohio 2009); *Ga. Latino All. for Human Rights* v. *Deal*, 958 F. Supp. 2d 1355 (N.D. Ga. 2013); *cf. Texas* v. *United States*, No. 7:16-cv-00054-O, 2016 U.S. Dist. LEXIS 113459 (N.D. Tex. Aug. 21, 2016).

The restrictive application of the *Abbott Laboratories* test adopted by the Ninth Circuit will not only harm Petitioners and their clients, it will also shut the door to many other important pre-enforcement challenges. As a result, (i) numerous litigants, including amici and their clients, will incur unnecessary harm, (ii) courts will be burdened with needlessly duplicative litigation, (iii) industries will in-

vest unnecessary resources to comply with unlawful regulations bound for reversal, and (iv) an important check on administrative overreach will be weakened.

A. The Ninth Circuit's Restrictive Application of the Ripeness Doctrine Will Force Amici, Their Clients, and Others to Incur Unnecessary Harm and Waste Resources Complying with Unlawful Regulations.

Pre-enforcement challenges are crucial tools for various associations, nonprofit organizations, and businesses across multiple industry sectors to challenge laws and final regulations before they cause widespread harm. On the individual level, pre-enforcement challenges help protect those affected by the regulation from unnecessary harm. On the institutional level, pre-enforcement challenges allow resolution of disputes before affected individuals and entities waste significant resources by changing their practices in order to comply with those regulations.

It is well established that a litigant need not wait for a law or regulation to inflict irreparable damage before bringing a challenge. *See generally Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 143 (1974) ("One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough." (quoting *Pennsylvania* v. *West Virginia*, 262 U.S. 553, 593 (1923))); *Iowa League of Cities* v. *EPA*, 711 F.3d 844, 867 (8th Cir. 2013) ("We do not require parties to operate beneath the sword of Damocles until the threatened harm actually befalls them, but the injury must be 'certainly impending.'" (quoting *Pub. Wa-*

ter Supply Dist. No. 10 v. *City of Peculiar*, 345 F.3d 570, 573 (8th Cir. 2003))). Indeed, this Court has recognized that pre-enforcement litigation may be the only practicable choice for litigants in circumstances similar to Petitioners'.

In the Regional Rail Reorganization Act cases, for example, this Court expressly approved a pre-enforcement challenge to a land reorganization statute, despite the distinct lack of information in the record as to how the law would be applied in individual cases. *Reg'l Rail Reorganization Act Cases*, 419 U.S. at 144–45. Even though "[t]he precise contours of the [regulation would] not be known until shortly before its certification," this Court concluded there would be "no better time to decide the [challenge] to minimize or prevent irreparable injury." *Id.* at 144. As a matter of necessity, the factual record could develop—and as-applied challenges could be brought—only upon the government's determination that the statute applied in a particular case, at which time the government would demand conveyance of the land. *See id.* at 145. By the time aggrieved parties could seek meaningful judicial review, the law "in practical effect w[ould] be irreversible." *See id.*

Left to stand, the Ninth Circuit's decision will insulate regulations from judicial review unless and until they are actually applied, regardless of their practical effects. *See Habeas Corpus Res. Ctr.*, 816 F.3d at 1253–54. In the context of reproductive rights, for example, courts have recognized that pre-enforcement challenges are necessary in light of the time-sensitive nature of litigants' underlying interests, and that delayed judicial review would, in effect, render numerous challenges moot. *See Isaac-*

son, 716 F.3d at 1221; *cf. Roe* v. *Wade*, 410 U.S. 113, 125 (1973). Similarly, Petitioners' case involves critically important and time-sensitive rights, many of which could not be fully vindicated through judicial review after the Attorney General has applied the Final Regulation. The decision to certify a state would immediately extinguish the statutory rights of the death-sentenced prisoners within that state who have six months or less to file a habeas corpus application. To those whose sentences are consummated, the consequences will be irreversible.

In addition to the direct harm caused by an unlawful regulation, organizations and individuals may expend significant resources to comply with the challenged regulation. If a court finds the regulation unlawful or the agency otherwise reverses its course, regulated actors and their representatives will be forced to waste further resources in response to these changes. *See generally* Mark Seidenfeld, *Playing Games with the Timing of Judicial Review: An Evaluation of Proposals to Restrict Pre-enforcement Review of Agency Rules*, 58 Ohio St. L.J. 85, 119 (1997) ("Perhaps the most significant factor in the calculus of the relevant benefit of pre-enforcement review is the extent to which judicial reversal of the rule at the enforcement stage threatens industry with significant wasted investment."). Economic uncertainty is deeply undesirable as a matter of policy, *see id.*; and this Court has recognized that parties aggrieved by such injuries are entitled to seek judicial review, *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 369 (1982).

B. The Ninth Circuit's Restrictive Application of the Ripeness Doctrine Will Waste Judicial Resources and Weaken an Important Check on Agency Overreach.

Pre-enforcement review of agency rulemaking allows the judiciary to correct unlawful regulations efficiently before they result in numerous separate lawsuits. *See generally Abbott Labs.*, 387 U.S. at 152–54 (reasoning that individual litigation after enforcement "might harm [the petitioners] severely and unnecessarily" and that efficiency considerations in fact marshaled in favor of pre-enforcement judicial review).

Ripeness—like the related threshold issues of finality, exhaustion, and mootness—reflects considerations of administrative and judicial convenience. *See, e.g.*, *Nat'l Park Hosp. Ass'n* v. *DOI*, 538 U.S. 803, 812 (2003) (observing that ripeness doctrine depends in part on the extent to which further factual development is warranted); *FTC* v. *Standard Oil Co.*, 449 U.S. 232, 243 (1980) (finality depends in part upon whether "immediate judicial review would serve . . . efficiency [and] enforcement"). In developing the ripeness doctrine, this Court struck a careful balance among several competing factors, including agencies' need for autonomy, litigants' interests in efficient reliance, and courts' ability to render a meaningful judicial resolution. *See Ohio Forestry Ass'n* v. *Sierra Club*, 523 U.S. 726, 734–36 (1998) (weighing judicial economy, administrative autonomy, and litigants' financial interests); *Standard Oil*, 449 U.S. at 242 (considering whether judicial review would constitute "interference with the proper functioning of the agency and a burden for the courts").

Although no factor is necessarily dispositive, the hardship that would result from delayed judicial consideration may support a challenge under the APA even when the agency claims efficiency interests in postponing review. *See, e.g.*, *Sackett*, 566 U.S. at 130 ("The APA's presumption of judicial review is a repudiation of the principle that efficiency of regulation conquers all.").

These pragmatic concerns weigh even more clearly in favor of review when, as here, both the agency and litigants stand to benefit from early judicial consideration. As discussed *supra* Section I, Petitioners and their putative clients will incur substantial costs by virtue of the Final Regulation, regardless of what, if any, certification decisions the Attorney General chooses to make.[7] Judicial efficiency considerations also favor pre-enforcement review. *See Standard Oil*, 449 U.S. at 242 (unlike pre-enforcement requests for declaratory relief, pre-enforcement rulemaking challenges do not require expensive and inefficient "piecemeal" review, nor did the issue presented require significant fact-finding or development). From both the judicial and agency standpoints, "if there is something wrong with the [regulation], it is better to know now than later." *Am. Farm Bureau Fed'n* v. *EPA*, 792 F.3d 281, 294 (3d Cir. 2015), *cert. denied*, 136 S. Ct. 1246 (2016); *see also id.* at 293–94 (observing that the agency in

[7] The Final Regulation requires Petitioners and their clients to make an immediate decision regarding the clients' habeas corpus application timelines and strategies. This is precisely the sort of dilemma that the APA is designed to remedy. *See supra* Section I.B.2.

fact stood to benefit from pre-enforcement judicial review, given that it was "poised to spend more time, energy, and money in developing an implementation plan"). *See generally* Richard A. Epstein, *The Role of Guidances in Modern Administrative Procedure: The Case for* De Novo *Review*, 8 J. Legal Analysis 47, 82–90 (2016) (analyzing the efficiency considerations identified by the Court).

Robust judicial oversight of agency action reflects the system of checks and balances enshrined in the federal Constitution and designed to safeguard against governmental overreach that may threaten individual freedom and autonomy. *See, e.g.*, Merrick B. Garland, *Deregulation and Judicial Review*, 98 Harv. L. Rev. 507, 556 (1985) (judicial review can help prevent agencies from deviating from congressional intent due to political pressures); *see also Stern* v. *Marshall*, 564 U.S. 462, 483–84 (2011) (outlining the ways in which the judicial branch "protects liberty"); *Kucana* v. *Holder*, 130 S. Ct. 827, 831 (2010) (referencing the separation-of-powers principles that underpin judicial review of agency action); *FCC* v. *Fox Television Stations*, 556 U.S. 502, 536 (2009) (Kennedy, J., concurring in part and concurring in the judgment) ("If agencies were permitted unbridled discretion, their actions might violate important constitutional principles of separation of powers and checks and balances."); *The Federalist No. 78*, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (asserting that "'there is no liberty if the power of judging be not separated from the legislative and executive powers'" (quoting 1 Baron de Montesquieu, *The Spirit of Laws* 181 (Nugent trans., 10th ed. 1773))). Federal courts are, there-

fore, obligated to adjudicate Article III cases and controversies, even if the issues presented concern the legal authority of the other branches.[8] *Zivotofsky* v. *Clinton*, 566 U.S. 189, 196 (2012); *cf.* Cass R. Sunstein, *Interest Groups in American Public Law*, 38 Stan. L. Rev. 29, 61–64 (1985) (asserting that judicial scrutiny of agency action fosters accountability and promotes the values of democratic government).

This Court has repeatedly affirmed the need for zealous judicial oversight of administrative agency action like the Final Regulation. *See, e.g.*, *City of Arlington* v. *FCC*, 133 S. Ct. 1863, 1878 (2013) (Roberts, C.J., dissenting) ("[T]he danger posed by the growing power of the administrative state cannot be dismissed."); *see also, e.g.*, *Perez* v. *Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1210 (2015) (Alito, J., concurring in part and concurring in the judgment) (addressing the "understandable concern about the aggrandizement of the power of administrative agencies"); *Fox Television Stations*, 556 U.S. at 547 (Breyer, J., dissenting) (asserting that an independent administrative agency's relative "freedom from ballot-box control makes it all the more important that courts review its decisionmaking to assure compliance with applicable provisions of the law").

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[8] While amici believe that Petitioners' case can be resolved on the grounds presented in Question Two of the Petition for Certiorari and discussed herein, amici also note that this case presents an excellent opportunity to resolve the broader question of the continued viability of ripeness doctrine, which this Court declined to address in *Susan B. Anthony List* v. *Driehaus*, 134 S. Ct. 2334 (2014).

Judicial oversight serves a critical function by ensuring that agencies are held accountable. *See, e.g.*, *Sackett*, 566 U.S. at 130 (agencies cannot "strong-arm[] . . . regulated parties into 'voluntary compliance' without the opportunity for judicial review"); *Perez*, 135 S. Ct. at 1221 (Thomas, J., concurring in the judgment) (asserting that courts are required to "exercise independent judgment" as to agency actions). Pre-enforcement judicial review of final agency regulations is among the tools that enable courts to exercise their constitutional duty to serve as a check on the administrative state. *See Sackett*, 566 U.S. at 130.

Even if the Ninth Circuit was correct in its analysis of Petitioners' standing—it was not—amici respectfully ask this Court to grant certiorari in order to correct the Ninth Circuit's misguided approach to the ripeness of Petitioners' clients' claims and affirm the judiciary's Article III authority to police agency overreach.

CONCLUSION

In light of the broad impact of the Ninth Circuit's erroneous interpretation and application of this Court's ripeness doctrine, amici respectfully request that this Court grant certiorari.

Respectfully submitted,

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