APPENDIX

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STEPHEN MORELAND REDD, individually and on behalf of all others similarly situated *Plaintiff-Appellant*, v. PATRICIA GUERRERO, Chief Justice of California; KIMBERLY MENNINGER, Judge of the Superior Court of California, County of Orange *Defendants-Appellees*.	No. 21-55464 D.C. No. 2:16-cv01540-DMG-PJ ORDER

Filed December 11,2024

Before: Marsha S. Berzon, Richard C. Tallman, and Morgan Christen, Circuit Judges.

Order;
Statement by Judge Berzon;
Dissent by Judge Bennett

SUMMARY*

Procedural Due Process/Prisoner Civil Rights

The panel issued an order granting appellees' request to dismiss this appeal as moot, denying appellant's motion for substitution of a party, denying appellees' request to vacate the panel's decision, and denying as moot appellees' petition for panel rehearing and rehearing en banc.

Stephen Redd, a California state prisoner sentenced to death, alleged that state officials violated his procedural due process rights by failing to appoint postconviction relief counsel as required by California law. In October 2023, the panel issued an opinion holding that Redd had been deprived of a protected property interest—the right under state law to representation in habeas proceedings—for over a quarter century, and so had stated a plausible procedural due process claim for declaratory relief. Redd died two months after the opinion issued. The panel, in its discretion, declined to vacate its opinion.

Respecting the denial of rehearing en banc, Judge Berzon, joined by Judges Wardlaw, W. Fletcher, Paez, Tallman, and Christen, stated that the court correctly declined to take this case en banc for the sole purpose of vacating the panel's opinion. First, vacating a decision after the death of a litigant based on disagreement with the merits amounts to deciding a moot case, which is constitutionally forbidden. Second, in improperly addressing the merits of the *Redd* panel opinion, the dissent mischaracterizes the holding of

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

the panel opinion, misreads California law, exaggerates the practical consequences of letting the opinion stand, and dramatically recasts the panel's ordinary procedural due process analysis as "an affront to the principles of federalism."

Dissenting from the denial of rehearing en banc, Judge Bennett, joined by Judges R. Nelson, Collins, Lee, Bress, Bumatay, and VanDyke, stated that this case should have been taken en banc to vacate the panel's opinion, which is plainly wrong and presents an affront to the principles of federalism. The question presented to the panel was purely one of state law: whether California law guarantees appointment of habeas counsel within a certain time frame. Thus, the panel should have determined how the California Supreme Court would have answered the question. Had it done so, the panel would have been compelled to conclude that California law does not guarantee appointment of habeas counsel within a certain time.

ORDER

Appellees' request to dismiss this appeal as moot is GRANTED. The appeal is dismissed.

Appellant's motion for substitution of a party is DENIED. Appellees' request to vacate the panel's opinion is also DENIED.

Appellees' petition for rehearing is DENIED as moot. Judge Christen voted to deny Appellees' petition for rehearing en banc as moot, and Judges Berzon and Tallman so recommended. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 40(c). Judges Gould, Miller,

and H.A. Thomas did not participate in the deliberations or vote in this case. Appellees' petition for rehearing en banc is thus DENIED.

This order shall constitute the mandate of this court.

BERZON, Circuit Judge, joined by WARDLAW, FLETCHER, PAEZ, TALLMAN, and CHRISTEN, Circuit Judges, respecting the denial of rehearing en banc:

Stephen Redd, a California state prisoner sentenced to death, brought a § 1983 claim alleging that California Supreme Court justices and Superior Court judges (the "State Officers") violated his federal due process right by failing, for 26 years, to appoint post-conviction habeas counsel as required by California law. By statute, California promised Redd appointed counsel if he requested it. None was provided. As a result, Redd alleged, he would be unable to investigate and develop his habeas claims, as witnesses had become unavailable, evidence was lost, and memories had faded.

In October 2023, a three-judge panel ruled that Redd had been deprived of a protected property interest—the right under state law to representation in habeas proceedings—for over a quarter century, and so had stated a plausible procedural due process claim for declaratory relief. *Redd v. Guerrero*, 84 F.4th 874, 901 (9th Cir. 2023). Redd died two months after the opinion issued, rendering the appeal moot. The panel, in its discretion, declined to vacate its opinion. My colleagues joining in the Dissent from Denial of Rehearing En Banc ("the Dissent") would have had the court take this case en banc for the sole purpose of

vacating the panel opinion. But the court decided against this course of action—and correctly so, for two compelling reasons.

First, it would be inappropriate for our court to vacate a panel opinion because some of our colleagues disagree with the opinion on the merits. Vacating a decision after the death of a litigant based on disagreement with the merits amounts to deciding a moot case, which is constitutionally forbidden. *See U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 27 (1994). The only appropriate question for our court to have asked at this juncture was whether the panel abused its discretion in declining to vacate the *Redd* opinion. The answer to that question is no—the equitable considerations in this case do not justify the "extraordinary remedy of vacatur." *See Dickens v. Ryan*, 744 F.3d 1147, 1148 (9th Cir. 2014) (en banc) (quoting *U.S. Bancorp*, 513 U.S. at 26).

Second, in improperly addressing the merits of the *Redd* panel opinion, my dissenting colleagues mischaracterize the holding of the panel opinion, misread California law, exaggerate the practical consequences of letting the opinion stand, and dramatically recast the panel's ordinary procedural due process analysis as "an affront to the principles of federalism." Dissent from the Denial of Rehearing En Banc (Dissent) at 20.

I

When an appeal becomes moot after the issuance of a three-judge panel decision, it "deprives a member of our court of the right to seek . . . an en banc rehearing in order to obtain a different decision on the merits." *United States v. Payton*, 593 F.3d 881, 886 (9th Cir. 2010). Post hoc mootness does "leave[] open the opportunity to seek an en banc rehearing for the

purpose of vacating [the underlying] decision." *Id.* But as the Supreme Court has admonished, it is "inappropriate . . . to vacate mooted cases, in which we have no constitutional power to decide the merits, on the basis of assumptions about the merits." *U.S. Bancorp*, 513 U.S. at 27.[1]

Vacatur due to post-decisional mootness is an "extraordinary remedy." *Dickens*, 744 F.3d at 1148. The decision whether to vacate is squarely "within [the court's] discretion based on equity." *Payton*, 593 F.3d at 885 (quoting *Humphreys v. DEA*, 105 F.3d 112, 114 (3d Cir. 1996)). So the only question an en banc court could decide is whether the *Redd* panel abused its discretion in declining to vacate its opinion. That assessment, in turn, depends on the specific facts of Redd's case. *See Dickens*, 744 F.3d at 1148; *Armster v. U.S. Dist. Ct. for the Cent. Dist. of Cal.*, 806 F.2d 1347, 1355 (9th Cir. 1986).

This court weighs three equitable considerations when deciding whether vacatur is appropriate: (1) whether the opinion is "valuable to the legal community as a whole," *Dickens*, 744 F.3d at 1148

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[1] My colleagues who favor rehearing en banc suggest that *U.S. Bancorp* is not pertinent when evaluating whether to call a case en banc for the sole purpose of vacating a validly-issued opinion in a now-moot case. Dissent at 41 n.20. But *U.S. Bancorp's* rationale has not been understood as limited to an appellate court's decision to vacate judgments of subordinate courts. Our court has regularly looked to *U.S. Bancorp* in deciding whether it is appropriate to vacate a panel decision through the en banc process. *See, e.g., Payton,* 593 F.3d at 885; *Dickens,* 744 F.3d at 1148; *Washington v. Trump*, 858 F.3d 1168, 1168 (2017). Three-judge panels have also drawn on *U.S. Bancorp* in deciding whether to vacate their own opinions in moot cases. *See, e.g., Navajo Nation v. U.S. Dep't of the Interior,* 907 F.3d 1228, 1229 (9th Cir. 2018).

(quoting *U.S. Bancorp*, 513 U.S. at 26); (2) whether letting the opinion stand would result in prejudice to the parties, *id.*; and (3) whether mootness arose due to the voluntary conduct of the parties, *see, e.g.*, *Washington v. Trump*, 858 F.3d 1168, 1168 (2017) (citing *U.S. Bancorp*, 513 at 26). None of these factors supports vacatur in this case.

First, the *Redd* opinion is valuable to the legal community. Judicial precedents "are not merely the property of private litigants." *Dickens*, 744 F.3d at 1148 (quoting *U.S. Bancorp*, 513 U.S. at 26). Generally, precedent "should stand unless a court concludes that the public interest would be served by a vacatur." *U.S. Bancorp*, 513 U.S. at 26 (quoting *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 40 (1993) (Stevens, J., dissenting)); *see also Crespin v. Ryan*, 51 F.4th 819, 820 (9th Cir. 2022), *reh'g and reh'g en banc denied*, 56 F.4th 796 (9th Cir. 2023). Absent such a conclusion, there is "no reason to undo th[at] precedent and force future [courts] to duplicate [a panel's] efforts by re-deciding issues [it has] already resolved within the contours of article III." *Dickens*, 744 F.3d at 1148.

The *Redd* opinion focused on Redd's individual claims. There are, however, other capital prisoners who, like Redd, have waited many years for habeas counsel to be appointed. Their claims will have to be decided on the facts of their cases. But *Redd* will provide a decisional framework for district courts deciding these cases at the motion-to-dismiss stage. Vacating the *Redd* opinion would have "force[d]" future courts to "duplicate" the panel's careful efforts in setting out this framework. *See id.*

Second, declining vacatur would not have substantially prejudiced the State Officers. In other

instances of involuntary mootness, this court has exercised its discretion to decline to vacate opinions. *See id.*; *see also Crespin*, 51 F.4th at 820. As in *Dickens* and *Crespin*, the State Officers here are not substantially prejudiced by the denial of en banc review, as the Officers are not entitled to rehearing or certiorari, both of which are discretionary forms of appellate review. And although the ruling will stand, the declaratory relief the *Redd* panel determined might be appropriate was limited. Others will not be entitled to relief unless they show prejudice to their habeas prospects due to delay in the appointment of counsel. Further, the State Officers will later have recourse to challenge the *Redd* opinion's holding if the other capital defendants litigate long delays in appointing counsel, including seeking en banc review and certiorari.[2]

The third factor to consider is "whether the party seeking relief from the judgment below caused the mootness by voluntary action." *U.S. Bancorp*, 513 U.S. at 24. Vacatur is particularly *in*appropriate where mootness arises voluntarily, *id.* at 25, but that principle doesn't mean that vacatur *is* appropriate where mootness arises by "happenstance." *Id*. Involuntary mootness, such as mootness caused by the death of one party, can provide "sufficient reason to

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[2] As the Dissent notes, the Supreme Court has on occasion granted certiorari after a case has become moot to vacate an appellate court's decision. Dissent at 43 n.21 (citing *Azar v. Garza,* 584 U.S. 726, 728–31 (2018) (per curiam)). But the Court has, in the same breath, acknowledged that the weighing of the "unique circumstances" of each case and the "balance of the equities" lies within a court's "discretion," meaning that "not every moot case will warrant vacatur" even if there might have been opportunity for further discretionary review were the case not moot. *Azar*, 584 U.S. at 729–30.

vacate," *id.*, but vacatur under such circumstances is neither mandatory nor commonplace. This court has held, on several occasions, that the death of one of the parties after the publication of an appellate opinion did *not* warrant vacatur, because the equities did not otherwise support this extraordinary remedy. *See, e.g.*, *Dickens*, 744 F.3d at 1147–48; *Crespin*, 51 F.4th at 820.[3]

In sum, a "live controversy existed" when the panel rendered its opinion; the "precedent may provide guidance . . . to parties or other panels in future cases"; there is no substantial prejudice to the State Officers; and involuntary mootness is not alone sufficient to warrant vacatur here. *Black Mesa Water Coal. v. Jewell*, 797 F.3d 1185, 1185 (9th Cir. 2015). Accordingly, the *Redd* panel did not abuse its discretion in deciding not to vacate the opinion. There was no sound reason to convene an en banc court to second guess that exercise of discretion.

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[3] My colleagues are mistaken in asserting that *Dickens* and *Crespin* are inapposite. Dissent at 43–44. *Dickens* was not decided purely on the prejudice prong; it emphasized that the precedent set by the en banc opinion would "undoubtedly affect cases [then] pending before th[e] court." 744 F.3d at 1148. So there, as here, the public interest prong militated strongly in favor of letting the opinion stand.

It is also incorrect to assert that my reliance on *Crespin* is "even further off-point" because in that case, "no party requested vacatur." Dissent at 44. That's irrelevant to whether the court properly declined to vacate the opinion it had issued, as well as incorrect. The same day that the three-judge panel in that case declined to vacate its filed opinion, one of the parties "moved for vacatur, but the motion was denied by text order." *Crespin*, 56 F.4th at 800 (VanDyke, J., dissenting).

II

The inquiry should end there. For completeness, however, I explain why the attack on the merits of this case misses the mark on multiple fronts.

A

The Dissent repeatedly—but incorrectly—insists that *Redd* requires the appointment of habeas counsel within a "certain," "specific," or "guaranteed" time frame. *See, e.g.,* Dissent at 20, 21, 29, 30, 33, 34, 35, 38. This characterization ignores the flexible, context-specific nature of *Redd*'s holding.

Redd expressly acknowledged that although California law "direct[s] the appointment of counsel within a reasonable time," "it does not provide a specific deadline." 84 F.4th at 894; *see also id.* at 895 ("California law does not impose a *fixed* deadline for appointment of counsel . . . ."). As the panel opinion explained, California Penal Code § 1509(f) requires that the superior court conduct capital habeas review proceedings "*as expeditiously as possible, consistent with a fair adjudication*." *Id.* at 894 (emphasis added). The panel concluded that "the state's promise is that habeas counsel will be appointed expeditiously, *and so at a time when counsel will be useful*." *Id.* at 895 (emphasis added). The decision thus equated "expeditiously" with "at a time when counsel will be useful," a context-dependent standard that does not impose a set time limit for the appointment of counsel.

The complaint for declaratory relief alleged that, in Redd's case, numerous witnesses had died; others with critical information had become infirm, impaired, or had substantial memory loss; and critical documents and other exculpatory evidence had been lost or destroyed. *Id.* at 897–98. Given these

allegations, the panel concluded, 26 years could be constitutionally too long to wait in Redd's case—not because Redd had waited for some "specific" period of time with no counsel appointed, but because the complaint plausibly alleged that "the value of Redd's entitlement to appointed habeas counsel ha[d] significantly diminished over the many years he ha[d] been waiting" for counsel. *Id.* at 896–97. Because the complaint's allegation was plausible and cognizable, dismissal was not warranted.

My dissenting colleagues nonetheless say that it is "impossible" for courts to comply with *Redd*. Dissent at 21, 34–38. But that isn't true; the flexible standard articulated in *Redd* contemplates that, in assessing what constitutes a "reasonable" delay, district courts will weigh both the State's legitimate administrative constraints and the loss in value of the right to counsel over time.

In short, my colleagues fundamentally misrepresent the nuanced, context-specific standard articulated in the *Redd* opinion by insisting that the decision imposes a rigid deadline for the appointment of habeas counsel. The remainder of the misfires in the objection to denial of rehearing en banc stem, in large part, from this mischaracterization.

B

My dissenting colleagues assert that the *Redd* panel failed to consider how the California Supreme Court would have construed the right to the appointment of habeas counsel. Not so.

The panel's analysis of the state property interest hinged on California statutes, published California Supreme Court policy, and California Supreme Court case law, including both decisions on which the

Dissent expounds. *See Redd*, 84 F.4th at 894–96, 895 n.13 (discussing *Briggs v. Brown*, 3 Cal. 5th 808 (2017) and *In re Morgan*, 50 Cal. 4th 932, 939 (2010)). That analysis represented the panel's objective prediction of how the highest state court should—and so would—determine the scope of the capital defendant's property interest in appointed counsel, using available authority.[4]

In particular, the panel expressly considered *Briggs*, the California Supreme Court decision which, according to my dissenting colleagues, contradicts *Redd*. *Briggs* is in no way inconsistent with *Redd*'s holding, as the panel opinion explains. *See Redd*, 84 F.4th at 895 n.13.

The *Briggs* decision addressed whether the state legislature's enactment of two habeas timing requirements—(1) that "the superior court . . . resolve an initial petition within one year unless a substantial claim of actual innocence requires a delay" and (2) that

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[4] My dissenting colleagues suggest that the panel should have certified the state-law interpretive question to the state supreme court. Dissent at 40–41. Certifying state law questions to state supreme courts is a discretionary process; federal courts are ordinarily fully competent to interpret and apply state law. *See McKesson v. Doe*, 592 U.S. 1, 5 (2020). Questions certified to the California Supreme Court have sometimes taken years to resolve. *See, e.g., Rattagan v. Uber Techs., Inc.*, 553 P.3d 1213, 1222 (Cal. 2024) (answering in August 2024 a question this court certified in 2021). Certification in this case would have built in yet more delay in a case in which inordinate delay was the core concern.

Additionally, from a practical standpoint, it's unclear how the California Supreme Court could hear this case. All of its Justices, as well as all the judges of the California Superior Courts, are defendants, albeit in their administrative rather than judicial capacities.

every initial habeas corpus proceeding be completed within two years—violated the state separation of powers doctrine. 3 Cal. 5th at 849. *Briggs* held that the state legislature's imposition of "fixed time limits on the performance of *judicial functions*" and interference with the courts' *jurisdiction* "raise[d] serious separation of powers concerns." *Id.* at 849–50 (emphasis added). To avoid "constitutional problems," *id.* at 854, the court construed the habeas processing deadlines as "not mandatory," *id.* at 855.

Briggs is in accord with the result reached in *Redd.* First, *Redd* does not limit or direct the "performance of judicial functions" or threaten to interfere with the court's "jurisdiction" over habeas cases or control over its docket; it concerned an administrative function, the appointment of counsel, not the decision of cases. State separation of powers concerns are therefore inapplicable.

Further, *Briggs* was concerned with absolute, short deadlines, not with flexible statutory provisions such as those at issue in *Redd*. *Briggs* was quite explicit that this distinction very much matters, declaring that "grants of priority to certain matters, and *directives to conduct proceedings as speedily as possible*, are a common feature of procedural statutes," and "[t]hese legislatively imposed priorities have never been held to impair the courts' authority to control the disposition of the cases on their dockets." *Id.* at 848 (emphasis added). What's more, *Briggs* specifically notes that the provisions of Proposition 66 "imposing a duty on [the California Supreme Court] to 'expedite the review' of capital cases, appoint [capital] counsel 'as soon as possible,' and grant extensions of time for briefing only for 'compelling or extraordinary reasons'" lie "within the ordinary range of legislative

authority." *Id.* at 849 (quoting Cal. Penal Code § 1239.1(a)). "The same is true," elaborated *Briggs*, "for provisions that require superior courts to conduct habeas corpus proceedings 'as expeditiously as possible.'" *Id.* (quoting Cal. Penal Code § 1509(f)). So *Briggs* directly *supports* the panel's objective prediction of how the California Supreme Court would interpret the statutes at issue here—as imposing permissible, flexible standards for the appointment of counsel, tied to both practical possibility and meaningful representation.

Aside from their reliance on *Briggs*, my dissenting colleagues invoke *In re Morgan*, maintaining that *Morgan* supports their assertion that the California Supreme Court would have disagreed with *Redd*'s interpretation of state law. Not so.

Morgan held that it is appropriate to defer the decision on a habeas petition until the court appoints habeas counsel and counsel has a reasonable opportunity to investigate the claim(s) for relief and amend the petition. 50 Cal. 4th at 942. In so ruling, the California Supreme Court explained that "[i]deally, the appointment of habeas corpus counsel should occur shortly after an indigent defendant's judgment of death." *Id.* at 937. *Morgan* acknowledged, however, a "critical shortage of qualified attorneys," making appointment of habeas counsel shortly after an indigent defendant's judgment of death difficult. *Id.* at 934, 937–38. Nowhere does *Morgan* suggest that appointing counsel within a time frame consistent with a fair adjudication would be "impossible," or sanction appointment of counsel more than a quarter century after the judgment of death.

The district court in *Redd*, addressing the "impossibility" argument in the context of standing, noted

that "[a]t the very least, [the respondents] could more actively publicize the dire need for eligible volunteers and announce compensation or reimbursement standards for the first time since the passage of Proposition 66." Pro bono representation is available in capital cases through national programs and pro bono initiatives at private law firms. *See, e.g.*, Autumn Lee & Emily Olson-Gault, *Saving Lives Through Pro Bono: The ABA Death Penalty Representation Project*, Am. Bar Ass'n (Sept. 19, 2019), https://www.americanbar.org/groups/young_lawyers/resources/after-the-bar/public-service/saving-lives-through-pro-bono-the-aba-death-penalty-representation-project [perma.cc/57F4-WVB5] ("[The Death Penalty Representation Project] recruits pro bono law firms and attorneys to work on all stages and types of matters . . . As of this summer, the Project's volunteers have saved 100 prisoners from wrongful death sentences[.]"); *Previous Award Winners*, American Bar Association, https://www.americanbar.org/groups/committees/death_penalty_representation/get_involved/volunteering/volunteer_firms/previous_winners [perma.cc/MC64-JQTQ] (identifying 35 major law firms "who have demonstrated exceptional commitment to providing high quality pro bono representation for indigent death row prisoners.").

The district court also identified other steps the State Officers could take to address Redd's alleged constitutional harm: Despite funding constraints, the Officers could "provide guidance for the hourly rate to be paid to habeas counsel, provide a different maximum for litigation expenses, allocate additional funds for habeas counsel from their own budget, provide additional resources to the [Habeas Corpus Resource Center, an entity established by the California Legislature in 1998 to provide representation to death row

inmates in post-conviction proceedings], or otherwise attract qualified counsel."

These possibilities aside, it is critical to remember that *Redd* was decided at the motion to dismiss stage on a complaint requesting only declaratory relief. Letting the opinion stand does not impose an "impossible"—or any other—obligation on the State Officers. The only consequence of refusing to vacate the opinion is that other similarly-situated prisoners may be able to get past the pleading stage with a federal due process claim. At that point, the parties will have the opportunity to make a record and brief what constitutes a reasonable delay under the framework set forth in *Redd*, including practical considerations such as those emphasized by my dissenting colleagues that may explain some aspects of the delay in appointment.

C

Finally, the Dissent wrongly accuses the *Redd* panel of committing "[a]n affront to centuries-old principles of federalism" by "decreeing to the justices and judges of California what California law means." Dissent at 39, 40. This accusation falls flat.

As I have explained, the *Redd* opinion conducted an objective assessment of a right afforded by California law, starting with the state legislature's decision to codify the right to counsel on habeas for prisoners on death row. But the question presented to the panel was *not* "purely one of state law." Dissent at 20. The panel recognized that Redd had a *federal* due process right to procedures—here, timely implementation of a protected property interest—appropriate to vindicate the right to postconviction capital habeas counsel guaranteed to him under state law. In other words, this case concerns a state law issue embedded in a

federal constitutional framework, thereby triggering the familiar procedural due process analysis.

"The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits." *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 576 (1972). Property interests are "not created by the Constitution"; instead, they are "created and their dimensions are defined by . . . an independent source such as state law." *Id.* at 577. But "[i]f a state grants a property interest, its *procedures* for . . . modifying that interest do not narrow the interest's scope." *K.W. ex rel. D.W. v. Armstrong*, 789 F.3d 962, 973 (9th Cir. 2015) (emphasis added). "'[M]inimum procedural requirements are a matter of *federal* law.'" *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982) (alterations omitted) (emphasis added) (quoting *Vitek v. Jones*, 445 U.S. 480, 491 (1980)). "[U]nder federal law, what process is due is determined by context, to be analyzed in accordance with the three-part balancing test described in *Mathews v. Eldridge*." *Roybal v. Toppenish Sch. Dist.*, 871 F.3d 927, 933 (9th Cir. 2017).

Logan v. Zimmerman Brush Co. models the required due process analysis. In that case, Logan challenged under the federal Due Process Clause the failure of a state agency to adjudicate his employment discrimination complaint, arguing that the failure had deprived him of his state property interest in using the state's adjudicatory process to vindicate his state-created rights. 455 U.S. at 426–27. The Supreme Court agreed, holding that reliance on the state's barrier to adjudicating such complaints after a specified time period "misunderst[ood] the nature of the Constitution's due process guarantee." *Id.* at 432. What mattered was not "the fact that the State may have

specified its own procedures that it may deem adequate"—a "conclusion" that would "allow the State to destroy at will virtually any state-created property interest." *Id.* (quoting *Vitek*, 445 U.S. at 491); *see also Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985). The question was, instead, whether the "procedural limitation on the claimant's ability to assert his rights" was sufficient process under the three-prong federal constitutional standard established in *Mathews v. Eldridge*. *See Logan*, 455 U.S. at 433–34.

Redd carried out precisely the analysis prescribed by *Logan*. The panel weighed the three *Mathews* factors and concluded that: (1) Redd had a substantial property interest in the statutorily guaranteed right to useful habeas counsel; (2) Redd had plausibly alleged that the risk that a 26-year delay in appointing habeas counsel would diminish the value of counsel was great; and (3) the State's challenge in providing capital habeas counsel was also great, but Redd plausibly alleged several actions the State Officers could have taken to reduce the delay. *Redd*, 84 F.4th at 896–98. *Redd* concluded only that the district court erred by dismissing on the pleadings Redd's request for a declaration that the State's 26-year delay violated his right to due process.

My dissenting colleagues cast this run-of-the-mill constitutional analysis as a "violat[ion of] the most basic principles of federalism" and a "dramatic overreach" by a federal court into state affairs, Dissent at 39, and ask, almost incredulously, "[H]ow can the federal Constitution dictate the timing of a state statutory right when the federal Constitution recognizes no such right?" Dissent at 30. But, as I've just explained, under well-established due process principles, it can.

This hyperbolic framing of the question reveals a misunderstanding of the issue.

Rhetoric aside, the Dissent fails to appreciate decades of procedural due process jurisprudence. *Redd* explains that "the federal courts have long adjudicated claims that state procedures for protecting state-created property interests are inadequate under the federal Constitution." *Redd*, 84 F.4th at 890 (citing *Goss v. Lopez*, 419 U.S. 565, 577–84 (1975); *Goldberg v. Kelly*, 397 U.S. 254, 260–61 (1970)). Such state-created property rights are necessarily *not* rights recognized by the federal Constitution. In *Logan*, for example, there was no federal constitutional right to adjudicate an employment discrimination claim; the property right arose solely from state law. So there is no anomaly in applying federal due process standards to a state-created property right that has no parallel in federal constitutional doctrine. To the contrary, the Due Process Clause as applied to the states would be swallowed whole if a federal court couldn't express skepticism about the constitutional adequacy of state procedure to deliver on a state-guaranteed property interest without "intrud[ing]" on state sovereignty. Dissent at 29.

* * *

Neither equitable considerations nor disagreements on the merits justified taking this moot case en banc for the sole purpose of vacating the panel opinion. It would have been a disservice to the legal community—and to the dignity of this court—to vacate on incorrect and exaggerated grounds. The court's decision to deny rehearing en banc in this case was the right one.

BENNETT, Circuit Judge, joined by R. NELSON, COLLINS, LEE, BRESS, BUMATAY, and VAN-DYKE, Circuit Judges, dissenting from the denial of rehearing en banc:

We should have taken this case en banc to vacate the panel's opinion, which is plainly wrong and presents an affront to the principles of federalism.[1] The panel incorrectly decides "a question of exceptional importance": whether the State of California is violating hundreds of indigent capital prisoners' due process rights by failing to timely appoint capital habeas counsel under California statutes. Fed. R. App. P. 35(a)(2).

There is no federal constitutional right to habeas counsel. Coleman v. Thompson, 501 U.S. 722, 752 (1991). In 1997, California, by statute, provided for habeas counsel for indigent defendants convicted of capital crimes and sentenced to death. The question presented to the panel was purely one of state law: whether *California* law guarantees appointment of habeas counsel within a certain time frame. Thus, the panel should have determined how the California Supreme Court would have answered the question. Had

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[1] We may rehear a case en banc to vacate a panel's opinion after a case has become moot. *See United States v. Payton*, 593 F.3d 881, 886 (9th Cir. 2010) ("It is true that our refusal to vacate the decision after it has become moot deprives a member of our court of the right to seek *sua sponte* an en banc rehearing in order to obtain a different decision on the merits (although it leaves open the opportunity to seek an en banc rehearing for the purpose of vacating our decision)."). Appellant died during the pendency of the appellees' petition for rehearing en banc. As is the case here, "mootness by happenstance provides sufficient reason to vacate." *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25 n.3 (1994).

it done so, the panel would have been compelled to conclude that California law does not guarantee appointment of habeas counsel within a certain time.

But rather than predict how the California Supreme Court would interpret the relevant laws, the panel erroneously concluded that, even though the Federal Constitution does not require a state to confer a right to habeas counsel, the Federal Constitution *does* require the State of California to confer that right within a specific time. The panel's opinion effectively mandates, pursuant to 42 U.S.C. § 1983, that, under *California law*, California state court judges *must* appoint capital habeas counsel "within a reasonable time" or "expeditiously" to avoid due process violations.[2] *Redd v. Guerrero*, 84 F.4th 874, 894–95 (9th Cir. 2023). According to the panel, if California judges fail to appoint habeas counsel within that time frame, they are violating the Federal Constitution, no matter that it is impossible for the California courts to comply with the panel's holding, and no matter that the California Supreme Court has previously held that similar statutory habeas time limits on the performance of judiciary functions cannot be construed as imposing

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[2] Judge Berzon claims that the panel's opinion "does not impose a set time limit for the appointment of counsel." Berzon Statement at 10. But that claim is belied by the opinion itself. The opinion states: "California law does direct the appointment of counsel *within a reasonable time*, although it does not provide a specific deadline." *Redd v. Guerrero*, 84 F.4th 874, 894 (9th Cir. 2023) (emphasis added). "[T]he state's promise is that habeas counsel will be appointed expeditiously, and so *at a time when counsel will be useful*." *Id.* at 895 (emphasis added). While these are not fixed, specific dates, they are time frames within which the State must appoint habeas counsel. *Cf. In re Cmty. Voice*, 878 F.3d 779, 784–88 (9th Cir. 2017) (granting a mandamus petition because the agency failed to act "within a reasonable time").

specific time limits. *See Briggs v. Brown*, 400 P.3d 29, 60–61 (Cal. 2017), *as modified on denial of reh'g* (Oct. 25, 2017).

The panel's opinion will have deleterious practical effects. All or some of the 362 prisoners similarly situated to Stephen Redd ("Redd") will likely file claims similar or identical to Redd's. Each California district judge will likely need to deny motions to dismiss, and in each lawsuit the State Officers[3] (or their representatives) will be tasked with presenting their evidence on the individual "burdensome[ness]" of taking further action as to each plaintiff. *Redd*, 84 F.4th at 898. Practically, the panel's opinion presents significant challenges to the already limited resources of the California judicial system. The panel's binding determination of the meaning of the California statutes as mandating that habeas counsel be appointed expeditiously, coupled with its reversal of the district court's dismissal of Redd's § 1983 action, will have an inappropriately destabilizing impact.[4]

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[3] The panel's opinion defines the named defendants—the justices of the California Supreme Court and the judges of the California Superior Courts—as the "State Officers." *Redd*, 84 F.4th at 881–82.

[4] Mandating the expeditious appointment of habeas counsel for all (or many) of the 362 indigent capital prisoners would require a substantial increase in California's budget for both financial and human resources. According to the allegations in the First Amended Complaint ("FAC"), which we must assume to be true, *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001), a successful habeas petition "necessitated $328,000 in litigation expenses" in 2004. Multiplied by 362 (the number of other indigent capital prisoners in Redd's putative class), this would amount to over $118 million, even without accounting for inflation.

The panel's precedential decision inflicts vast immediate and ongoing harm to federalism by allowing up to 362 indigent capital prisoners in California to use the federal courts to dictate what California state court judges must do under the panel's view of California law. The panel concluded that simply because California has elected to appoint postconviction counsel for indigent capital prisoners, this court—and every other federal court—can prescribe for the State Officers, including the Chief Justice of the California Supreme Court, how they must interpret state laws, allocate state judicial resources, structure the State's judicial system, and administer justice. The panel's holding represents dramatic overreach by a federal court and will have far-reaching effects on California's criminal justice system.

I.

A.

There is no federal constitutional right to habeas counsel. *Coleman*, 501 U.S. at 752. But since 1997, California has provided by statute that:

> The superior court[5] that imposed the sentence shall offer to appoint counsel to

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If California fails to meet the panel's new standard, then it would be put in a similarly untenable position: defending itself against claims like Redd's in federal court in up to 362 suits. The ambiguity in the panel's "expeditiously" standard invites lengthy discovery bouts and motions practice on an already encumbered judiciary in already prolonged habeas cases. Even the panel recognizes that in response to suits like Redd's, the State will need to "put on evidence that requiring them to take any further action is unduly burdensome." *Redd*, 84 F.4th at 898.

[5] Before its amendment in 2016 by Proposition 66, the statute placed the responsibility for appointing habeas counsel on the California Supreme Court. *See* Cal. Gov't Code § 68652 (1997).

> represent a state prisoner subject to a capital sentence for purposes of state postconviction proceedings, and shall enter an order containing one of the following:
>
> (a) The appointment of one or more counsel to represent the prisoner in proceedings pursuant to Section 1509 of the Penal Code upon a finding that the person is indigent and has accepted the offer to appoint counsel or is unable to competently decide whether to accept or reject that offer.
>
> (b) A finding, after a hearing if necessary, that the prisoner rejected the offer to appoint counsel and made that decision with full understanding of the legal consequences of the decision.
>
> (c) The denial to appoint counsel upon a finding that the person is not indigent.

Cal. Gov't Code § 68662.

In 2016, California voters approved Proposition 66, which, among other things, added California Penal Code § 1509. *See* 2016 Cal. Legis. Serv. Prop. 66 ("Proposition 66") § 6.[6] Section 1509 provides that "[a]fter the entry of a judgment of death in the trial court, that court shall offer counsel to the prisoner as provided in Section 68662 of the Government Code." Cal. Penal Code § 1509(b). Section 1509(f) further provides that "[p]roceedings under this section shall be conducted as expeditiously as possible, consistent with a fair adjudication." *Id.* § 1509(f).

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[6] Proposition 66 took effect on October 25, 2017. *See Briggs*, 400 P.3d at 61.

But according to the FAC, California courts have appointed no new habeas counsel to indigent capital prisoners since 2016, and 362 indigent capital prisoners besides Redd remain without habeas counsel. This delay is not new. Because of "the underfunding of the capital indigent defense program, there has been a lengthy delay in the appointment of counsel for . . . collateral appeals since" California has recognized a right to habeas counsel. As the complaint alleges, "[b]eginning in the late 1980s, [the California Supreme Court was] unable to perform the duty to appoint post-conviction counsel as the ever-increasing population on death row outstripped the California Supreme Court's appointment capability." The California courts' inability to appoint counsel stems from "California's failure to provide sufficient compensation and litigation expenses to attract private counsel to accept such appointments." In short, California courts simply cannot appoint habeas counsel because of "a critical shortage of qualified attorneys willing to represent capital prisoners in state habeas corpus proceedings." *In re Morgan*, 237 P.3d 993, 994 (Cal. 2010).

B.

Redd was a former Los Angeles County Deputy Sheriff who committed multiple commercial armed robberies. He was convicted in state court of one count of first-degree murder for shooting and killing a store employee, two counts of attempted murder, two counts of second-degree robbery, and two counts of second-degree commercial burglary. On February 28, 1997, Redd was sentenced to death. Redd requested the appointment of postconviction habeas counsel twenty-seven years ago, but none was appointed. *Redd*, 84 F.4th at 878.

Redd filed this action under § 1983,[7] claiming that the State Officers were violating his procedural due process rights by failing to appoint postconviction habeas counsel as promised and thus preventing him from developing and prosecuting his state habeas corpus petition for two decades.[8] *Id.* He brought the suit on behalf of himself and the other 362 indigent capital prisoners in California who have allegedly been deprived of timely appointment of state habeas counsel. *Id.* at 881–82. In opposing the State Officers' motion to dismiss, Redd asserted only a liberty interest, and not any type of property interest in the appointment of habeas counsel. *Id.* at 892. The district court dismissed Redd's complaint for failure to state a claim before the class certification stage. *Id.* at 878, 882–83. Redd appealed.

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[7] As the State Officers noted in their petition for rehearing en banc, Redd did not avail himself of any state law remedies before filing this federal lawsuit:

> Although California law includes procedures by which a party may petition a state court to vindicate rights arising under state law, Redd did not attempt to invoke such state law procedures. *See* [*Redd*, 84 F.4th at 881–82]. Instead, after writing letters to the California Supreme Court protesting the delay in appointing habeas counsel for him, Redd filed this lawsuit, asking a federal court to compel California judicial officers to appoint habeas counsel for him. *Id.*

Dkt. No. 53 at 6.

[8] In *Redd v. Chappell*, 574 U.S. 1041 (2014), Justice Sotomayor, joined by Justice Breyer, issued a statement respecting the denial of certiorari suggesting that Redd "might seek to bring a 42 U.S.C. § 1983 suit contending that the State's failure to provide him with the counsel to which he is entitled violates the Due Process Clause." *Id.* at 1042. But Justice Sotomayor expressed no opinion "on the merits of th[is] possible argument[]." *Id.*

C.

The panel reversed the district court's dismissal of Redd's complaint. It first addressed whether abstention was appropriate under *O'Shea v. Littleton*, 414 U.S. 488 (1974).[9] *Redd*, 84 F.4th at 886–91. The panel recognized that "the State Officers' federalism and comity concerns are surely significant," *id.* at 886, and that "this case does implicate the delicate balance 'between federal equitable power and State administration of its own law,'" *id.* at 888 (quoting *O'Shea*, 414 U.S. at 500). Even so, it concluded that *O'Shea* abstention was not appropriate because the relief Redd requested was somehow "less intrusive" than that requested in other cases in which the court exercised jurisdiction. *Id.*

For the first time on appeal,[10] Redd argued that "he ha[d] a protected, state-created property interest in state-appointed habeas counsel, and, because of the exceedingly long delay in appointing counsel, he ha[d] been denied that right without due process." *Id.* at 892. The panel agreed, holding that Redd had "plausibly alleged a due process claim based on deprivation of his property interest in state-appointed habeas counsel." *Id.* at 892. The panel reasoned that California law uses "mandatory language" and "leaves no discretion to deny habeas counsel to indigent capital prisoners who opt for appointed counsel." *Id.* at 893. The panel, construing California's statutes and policies that admittedly "do[] not impose a fixed deadline for

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[9] The panel also addressed standing and affirmed the district court's conclusion that Redd had standing, because "for purposes of this early stage of the litigation, . . . it is likely that a decision in Redd's favor would redress his injury." *Redd*, 84 F.4th at 884.

[10] The State Officers raised no waiver or forfeiture argument in their answering brief. *See Redd*, 84 F.4th at 892.

appointment of counsel," *id.* at 895 (emphasis omitted), rejected the State Officers' contention that "California does not guarantee the appointment of counsel within a specific time frame," *id.* at 894. Citing various California laws, the panel concluded that the use of "upon" in "upon a finding that the person is indigent and has accepted the offer to appoint counsel," Cal. Gov't Code § 68662(a), indicates that state officials *must* appoint habeas counsel "expeditiously, and so at a time when counsel will be useful" *id.* at 895, or "within a reasonable time," *id.* at 894. Alternatively, the panel held that when California requires appointment of counsel is irrelevant because the timing of appointment is governed by federal constitutional law. *Id.* at 895–96. The panel then concluded that Redd had "plausibly alleged that the State Officers ha[d] violated the Due Process Clause by depriving him of his property interest without adequate process." *Id.* at 896; *see also id.* at 896–98.[11]

D.

On November 3, 2023, the State Officers filed a petition for rehearing en banc, arguing, among other things, that the panel's erroneous decision raises significant "federalism and comity concerns," as it "rewrites [the] state's law" in a way that will have "vast implications for how California courts administer their capital case docket." Dkt. No. 53 at 5. About two months later, while their petition was pending, the State Officers notified the court that Redd had died on December 21, 2023. Dkt. No. 61 at 1. The

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[11] The panel rejected Redd's claim, as alleged, that California's procedures are inadequate to protect his liberty interest in petitioning for habeas. *Redd*, 84 F.4th at 898–901. The panel did not reach Redd's claim that he has a liberty interest in state-appointed habeas counsel. *Id*. at 891–92.

panel agrees that Redd's death moots the case. But it denies the State Officers' request to vacate the panel's opinion, leaving in place a substantively wrong opinion that intrudes upon California's right to interpret its own laws, in violation of federalism principles.

II.

A.

To recap, between 1997 (when Redd was sentenced to death) and October 2017 (when Proposition 66 went into effect), Section 68652 made the California Supreme Court responsible for "offer[ing] to appoint [habeas] counsel" to Redd and "appoint[ing] . . . one or more counsel to represent [Redd] in postconviction state proceedings upon a finding that [Redd] [was] indigent and ha[d] accepted the offer to appoint counsel." Cal. Gov't Code § 68652 (1997). That responsibility shifted to the Superior Court when Proposition 66 took effect in October 2017. Cal. Gov't Code § 68662. Proposition 66 added that the appointment "shall be [made] as expeditiously as possible, consistent with a fair adjudication." Cal. Penal Code § 1509(f).

In considering Redd's due process claim, a threshold question presented to the panel was whether these *California* laws guarantee appointment of habeas counsel within a certain time frame. This is purely a question of state law, and thus the panel should have followed our well-established guidelines for interpreting state laws. "When interpreting state law, a federal court is bound by the decision of the highest state court." *In re Kirkland*, 915 F.2d 1236, 1238 (9th Cir. 1990). "In the absence of such a decision, a federal court must predict how the highest state court would decide the issue using intermediate appellate court

decisions, decisions from other jurisdictions, statutes, treatises, and restatements as guidance." *Id.* at 1239.

Presumably, the panel neglected to apply these principles because it held the incorrect view that federal constitutional law determines when California's state-created right to habeas counsel must be conferred.[12] *Redd*, 84 F.4th at 895–96 ("[I]t is federal constitutional law that determines the procedures required to protect that interest."); *id.* at 896 ("Put another way, recognizing that Redd's federally protected property interest in appointed counsel is subject to due process protections does not depend on whether California has mandated a specific deadline for the appointment of such counsel.").

But there is no federal constitutional entitlement to the appointment of habeas counsel *at any time*. *See Coleman*, 501 U.S. at 752. So how can the Federal Constitution dictate the timing of a state statutory right when the Federal Constitution recognizes no such right? It cannot. Federal constitutional law cannot require the appointment of habeas counsel by a certain time. The panel wrongly concluded otherwise because it treated California's statutes as mere procedural rules that protect an already acquired property interest.[13]

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[12] Judge Berzon maintains this incorrect view in her statement. Berzon Statement at 16–19.

[13] Once an individual has acquired a protected property interest, then federal constitutional law applies. *See Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 576 (1972) ("The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has *already acquired* in specific benefits." (emphasis added)).

"To have a property interest in a benefit, a person must 'have a legitimate claim of entitlement to it,' not just 'an abstract need or desire for it.'" *K.W. ex rel. D.W. v. Armstrong*, 789 F.3d 962, 972 (9th Cir. 2015) (quoting *Roth,* 408 U.S. at 577). But California's statutes define when it must confer the right to counsel—that is, when an indigent defendant becomes entitled to habeas counsel. So, like the other substantive (here, statutory) elements of indigency and acceptance of appointment, Cal. Gov't Code § 68662(a), California's timing requirement is a substantive element that limits the right itself, *see Roth*, 408 U.S. at 577 ("Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.").[14] Thus, the timing of when California must confer the right to counsel is governed by California law.

B.

In its analysis interpreting California law, the panel discarded the California Supreme Court's

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[14] The panel's opinion relied on *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), but that case is inapposite. *Logan* involved a state statute requiring that a state commission convene a factfinding conference within 120 days, *id.* at 424, which the Court found to be "a procedural limitation on the claimant's ability to assert his rights, not a substantive element of the [Illinois Fair Employment Practices Act] claim," *id.* at 433. Unlike *Logan*, this case does not involve any procedures created by state statute. The right that Redd asserted—the right to habeas counsel within a certain time frame—is a *substantive* right. For these same reasons, Judge Berzon's reliance on *Logan* is unpersuasive. Berzon Statement at 17–19.

decision in *Briggs* because *Briggs* involved different habeas statutory timing requirements. *See Redd*, 84 F.4th at 895 n.13. But *Briggs* is highly instructive, if not controlling.

In *Briggs*, the California Supreme Court considered whether certain habeas timing requirements contained in Proposition 66 violated the California state constitution's separation-of-powers doctrine. 400 P.3d at 50–61. *Briggs* held that the timing requirements, even though they set strict deadlines, were "merely directive," *id.* at 60, "to avoid separation of powers problems," *id.* at 59. The court explained that it has "long recognized that imposing fixed time limits on the performance of judicial functions raises serious separation of powers concerns." *Id.* at 53. Even when limits appear to be statutorily mandated, California courts have refrained from construing them as such:

> [W]hile the [California] Legislature has broad authority to regulate procedure, the constitutional separation of powers does not permit statutory restrictions that would materially impair fair adjudication or unduly restrict the courts' ability to administer justice in an orderly fashion. Repeatedly, for over 80 years, California courts have held that statutes may not be given mandatory effect, despite mandatory phrasing, when strict enforcement would create constitutional problems.

Id. at 56.

Although *Briggs* did not interpret the *precise* laws at issue here, it provided a framework for interpreting statutory habeas time limits that implicate judicial functions. Under *Briggs*, the laws governing the

appointment of habeas counsel could not be construed as requiring courts to appoint counsel by any specific time because such a construction would amount to imposing a specific time limit "that would materially impair fair adjudication or unduly restrict the courts' ability to administer justice in an orderly fashion." *Id.* Rather than apply the analysis compelled by *Briggs*, the panel does precisely what *Briggs* deemed constitutionally improper: it imposes a specific time limit on the California judiciary that materially impairs the performance of judicial functions.[15]

But even if *Briggs* were not controlling, our task is to predict how the California Supreme Court would

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[15] Judge Berzon's view that *Redd* is distinguishable from *Briggs* because "*Redd* does not limit or direct the 'performance of judicial functions,'" Berzon Statement at 13, is just that—Judge Berzon's view. She discusses no California authority to support that the California Supreme Court would conclude that appointment of capital habeas counsel within a certain time is not a judicial function that "would materially impair fair adjudication or unduly restrict the courts' ability to administer justice in an orderly fashion." *Briggs*, 400 P.3d at 56.

Judge Berzon also argues that *Briggs* is distinguishable because it "was concerned with absolute, short deadlines." Berzon Statement at 13. While *Briggs* involved fixed numerical time limits, 400 P.3d at 52, the California Supreme Court's analysis is not confined to fixed numerical time limits. Rather, *Briggs* explained that separation of powers concerns are implicated when "*statutory restrictions* . . . materially impair fair adjudication or unduly restrict the courts' ability to administer justice in an orderly fashion." *Id*. at 56 (emphasis added). What matters, then, is the nature of the requirement imposed and its impact on the court's "inherent authority and responsibility to fairly and efficiently administer all of the judicial proceedings that are pending before it." *Id.* at 55 (quoting *People v. Engram*, 240 P.3d 237, 246 (Cal. 2010)). Indeed, *Briggs* relied heavily on *Engram*, which did not involve a fixed numerical time limit. *Id.* at 55–56 (quoting *Engram*, 240 P.3d at 249–50).

have decided the issue. *See In re Kirkland*, 915 F.2d at 1239. As discussed above, under *Briggs*, the California Supreme Court would not interpret the laws at issue as requiring appointment of habeas counsel within a certain time. Moreover, in interpreting California laws, the California Supreme Court would follow California's rules of statutory interpretation, including:

> [I]t is settled that the language of a statute should not be given a literal meaning if doing so would result in absurd consequences that the [California] Legislature did not intend. To this extent, therefore, intent prevails over the letter of the law and the letter will be read in accordance with the spirit of the enactment.

In re Michele D., 59 P.3d 164, 168 (Cal. 2002).

Around the time that the California Legislature created the statutory right to habeas counsel for indigent capital inmates, there were more than 130 California capital prisoners waiting for habeas counsel. *Ashmus v. Calderon*, 123 F.3d 1199, 1204 (9th Cir. 1997), *rev'd for lack of a case or controversy*, 523 U.S. 740 (1998), *vacated*, 148 F.3d 1179 (9th Cir. 1998). And it was projected that the numbers would "increase by two or three . . . each month, and [that] it m[ight] take years from the date a condemned inmate requests the assistance of counsel until counsel who will take the case is found and appointed." *Id.* at 1205.

The California Legislature knew of these circumstances when it created the statutory right to habeas counsel, and thus it could not have intended for the courts to appoint counsel within a guaranteed period when it was impossible to do so. *See* California Bill Analysis, S.B. No. 513 (Sept. 11, 1997), Cal. Stats.

1997, ch. 869, sec. 3 ("Currently, there are over 150 inmates on death row for whom no counsel has been appointed, either for purposes of the direct appeal or state habeas proceedings. . . . The State Public Defender is currently stretched as far as her budget will allow and many qualified private counsel are unwilling to accept new cases because of the low rate of compensation authorized by the Supreme Court."). The same circumstances that made it impossible for the courts to guarantee appointment of counsel within a certain time frame continued through the passage of Proposition 66.[16]

Given that it would have been impossible for California courts to guarantee appointment of habeas counsel within a certain time frame, the California Supreme Court would not find that the California Legislature intended the courts to do the impossible. Rather, the California Supreme Court would find that the California Legislature intended for courts to appoint counsel expeditiously after a finding of indigency, *if it was possible to do so*—that is, if qualified

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[16] According to the FAC: "As a result of the underfunding of the capital indigent defense program, there has been a lengthy delay in the appointment of counsel for direct and collateral appeals since the relevant statute was enacted." "Proposition 66, however, has failed to ameliorate the systemic failure to appoint post-conviction counsel in a timely fashion." "[T]he rate at which California courts impose new death sentences outpaces the rate at which state habeas corpus counsel is appointed." "Between January 1, 2013, and December 31, 2017, the state imposed an average of 15 death sentences per year, while appointing counsel for indigent death-sentenced persons in an average of only 5.4 cases. Indeed, there have been no new habeas corpus counsel appointments to represent indigent death-sentenced persons since 2016." "Proposition 66 provides no funding for [appointment of capital habeas counsel] in the Superior Courts."

habeas counsel were available. Indeed, that is precisely what is required under Proposition 66.

Proposition 66 added California Penal Code § 1509, which provides that the Superior Court's offering of habeas counsel to a prisoner under California Government Code § 68662 "shall be conducted as expeditiously *as possible*, consistent with a fair adjudication." Cal. Penal Code § 1509(b), (f) (emphasis added). "Possible" means "being within the limits of ability, capacity, or realization." *Possible*, *Merriam-Webster Dictionary*, https://www.merriam-webster.com/dictionary/possible (last visited Sept. 29, 2024). Even before Proposition 66 took effect, the California Supreme Court's policies stated that: "This court's appointment of habeas corpus counsel for a person under a sentence of death shall be made simultaneously with appointment of appellate counsel *or at the earliest practicable time thereafter*." Supreme Court Policies Regarding Cases Arising from Judgments of Death § 2-1 (amended Jan. 2008) (emphasis added), available at https://supreme.courts.ca.gov/sites/default/files/supremecourt/default/2021-10/Policies_Regarding_Cases_Arising_from_Judgments_of_Death.pdf.[17] Like "possible," "practicable" means "capable of being put into practice or of being done or accomplished." *Practicable*, *Merriam-Webster Dictionary*, https://www.merriam-webster.com/dictionary/practicable (last visited Sept. 29, 2024).

The discussion in *In re Morgan* reinforces that the California Supreme Court would not interpret the

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[17] The California Supreme Court "promulgated the Supreme Court Policies Regarding Cases Arising From Judgments of Death . . . to facilitate and standardize the filing of petitions for writs of habeas corpus in capital cases." *In re Clark*, 855 P.2d 729, 764 (Cal. 1993) (Lucas, C.J., concurring).

statutes to require courts to appoint habeas counsel within a certain time frame. 237 P.3d 993. There, the California Supreme Court had to decide whether it should defer its decision on a habeas petition until it could appoint habeas counsel and until that appointed attorney had a reasonable opportunity to amend the petition. *Id.* at 994. In holding that deferral was appropriate, the court said that "[*i*]*deally*, the appointment of habeas corpus counsel should occur shortly after an indigent defendant's judgment of death." *Id.* at 996 (emphasis added). But the court highlighted why that was impossible:

> [O]ur task of recruiting counsel has been made difficult by a serious shortage of qualified counsel willing to accept an appointment as habeas corpus counsel in a death penalty case. Quite few in number are the attorneys who meet this court's standards for representation and are willing to represent capital inmates in habeas corpus proceedings. The reasons are these: First, work on a capital habeas petition demands a unique combination of skills. The tasks of investigating potential claims and interviewing potential witnesses require the skills of a trial attorney, but the task of writing the petition, supported by points and authorities, requires the skills of an appellate attorney. Many criminal law practitioners possess one of these skills, but few have both. Second, the need for qualified habeas corpus counsel has increased dramatically in the past 20 years: The number of inmates on California's death row has increased from 203 in 1987 to 670 in 2007.

Id. (footnote omitted). The court explained that these were "circumstances beyond [its] control." *Id.* at 998. The California Supreme Court's statement that "[*i*]*deally*" counsel should be appointed "shortly after an indigent defendant's judgment of death," *id.* at 996 (emphasis added), and its insistence that timely appointment of habeas counsel is simply beyond the court's control, strongly suggest that the California Supreme Court would not interpret the statutes as mandating California courts to appoint habeas counsel by a certain time.

Rather than try to predict how the California Supreme Court would interpret the California statutes, the panel came up with its own interpretation of California law: habeas counsel must be appointed "within a reasonable time," *Redd*, 84 F.4th at 894, or "appointed expeditiously, and so at a time when counsel will be useful," *id.* at 895. This is baseless. Under California's case law and rules of statutory interpretation, the California Supreme Court would not interpret the statutes as requiring California courts to appoint habeas counsel within a specific time frame.

C.

While the panel recognized the State's "federalism and comity concerns [were] surely significant," *id.* at 886, it disregarded the long-held maxim that "a State's highest court is the final judicial arbiter of the meaning of state statutes," *Gurley v. Rhoden*, 421 U.S. 200, 208 (1975). The error in the panel's holding is simple: it concludes "California is under no federal constitutional obligation to appoint postconviction counsel for all indigent capital prisoners," *Redd*, 84 F.4th at 878, but because the State has *elected* to do so, this federal court is somehow empowered to mandate how the Chief Justice of the California Supreme

Court and the other State Officers must interpret *state law*, implement *state law*, and administer and allocate *state judicial resources*. An affront to centuries-old principles of federalism, this holding represents dramatic overreach, the impact of which is to bind the justices and judges of California to the views of a federal court, not only as to the meaning of California law but also as to the structure of the State's judicial system. This court is not the final arbiter of California law, and the panel's improper assumption of that role violates the most basic principles of federalism. When the highest court of a state has not decided a question of purely state law, we "must use our best judgment in predicting what that court would hold in this case." *Tavernier v. Weyerhaeuser Co.*, 309 F.2d 87, 88 (9th Cir. 1962); *see also In re Kirkland*, 915 F.2d at 1239.

As the Supreme Court explained in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), "no clause in the Constitution purports to confer . . . upon the federal courts" the power "to declare substantive rules of common law applicable in a state," because the Constitution "recognizes and preserves the autonomy and independence of the states . . . in their judicial departments."[18] *Id.* at 78–79. "Supervision over . . . the judicial action of the States is in *no case permissible* except as to matters by the Constitution specifically authorized and delegated to the United States," and

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[18] While *Erie* is known for its impact on diversity jurisdiction, the requirement that federal courts predict how the highest state court would rule on a particular issue extends beyond matters of diversity. *See, e.g.*, *Comm'r v. Est. of Bosch*, 387 U.S. 456, 465 (1967) ("This is not a diversity case but the same principle may be applied for the same reasons, viz., the underlying substantive rule involved is based on state law and the State's highest court is the best authority on its own law.").

"[a]ny interference" with the judicial action of the states "is an invasion of the authority of the State, and, to that extent, a denial of its independence." *Id.* at 79 (emphasis added). The Supreme Court has reaffirmed that, when state law is unsettled, federal courts must attempt to "ascertain[] what the state courts may hereafter determine the state law to be." *Meredith v. City of Winter Haven*, 320 U.S. 228, 234 (1943). It is not for federal courts to engage in state lawmaking by decision, as the panel has done here.

The panel overstepped in decreeing to the justices and judges of California what California law means. And it overstepped in setting in motion a process of having federal district and appellate judges decreeing that the defendant State Officers here (those same justices and judges), are every day violating the federal constitutional rights of hundreds of individuals convicted of capital crimes.

Had the panel (as it should have) predicted how the California Supreme Court would have answered the question here, the panel would have affirmed the district court's decision. But at the very least, even if the panel had concluded that it was too hard to predict how the California Supreme Court would interpret the statutes at issue, despite the clear indicators already discussed, it should have certified the question to the California Supreme Court.[19]

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[19] Judge Berzon says that "from a practical standpoint, it's unclear how the California Supreme Court could hear this case." Berzon Statement at 12 n.4. But even if certification might have raised questions regarding recusal of the Chief Justice of California or other justices, that would have been a matter for those justices and the California Supreme Court.

The Supreme Court has recognized that certification "save[s] time, energy, and resources and helps build a cooperative judicial federalism." *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974). In deciding whether to certify a question, we consider: (1) whether the question presented is one with "important public policy ramifications" that has yet to be resolved by the state courts; (2) whether the issue is new, substantial, and of broad application; (3) the state court's caseload; and (4) "the spirit of comity and federalism." *Kremen v. Cohen*, 325 F.3d 1035, 1037–38 (9th Cir. 2003). Assuming the issue of California law is indeed undecided, all four factors favored certification. But the panel wrongly chose to impose its own incorrect views on how California should interpret its own laws.

D.

Judge Berzon claims that "[t]he only appropriate question for our court to have asked at this juncture was whether the panel abused its discretion in declining to vacate the *Redd* opinion." Berzon Statement at 5. I disagree.[20] If a panel's precedential decision is flat-out wrong on the merits in a case that becomes moot while the petition for rehearing en banc is

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[20] Judge Berzon relies on *U.S. Bancorp*, which addressed "whether appellate courts in the federal system should vacate civil judgments of subordinate courts in cases that are settled after appeal is filed or certiorari sought." 513 U.S. at 18; *see* Berzon Statement at 5. But that case does not address the standards for taking a case en banc. Neither do the cases from this court cited by Judge Berzon. Berzon Statement at 6 n.1 (citing *Payton*, 593 F.3d at 885; *Dickens v. Ryan*, 744 F.3d 1147, 1148 (9th Cir. 2014) (en banc); *Washington v. Trump*, 858 F.3d 1168, 1168 (9th Cir. 2017)). Thus, none of these cases foreclose us from taking a case en banc if it meets the Federal Rule of Appellate Procedure 35(a) standard.

pending, we have an obligation to remove it from our case law by vacating it en banc, if taking the case en banc meets the Federal Rule of Appellate Procedure 35(a) standard. For the reasons discussed above, this case meets that standard, as it raises the exceptionally important question whether the State of California is violating hundreds of indigent capital prisoners' due process rights by failing to timely appoint capital habeas counsel under California statutes. *See* Fed. R. App. P. 35(a)(2).

I believe Judge Berzon is also wrong on whether the panel abused its discretion in declining to vacate *Redd*. Berzon Statement at 7–9. The analysis for vacatur requires us to look at three equitable considerations: whether the public interest (including value to the legal community) is advanced, whether prejudice to the parties would result, and whether the mootness arose because of voluntary or involuntary conduct. *See U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 24–27 (1994); *Dickens v. Ryan*, 744 F.3d 1147, 1148 (9th Cir. 2014) (en banc). These equitable considerations compel vacatur.

While judicial precedents are valuable to the legal community, Judge Berzon ignores that there is a strong countervailing public interest: "[T]he public interest is best served by granting relief when the demands of 'orderly procedure' cannot be honored." *U.S. Bancorp*, 513 U.S. at 26–27 (citation omitted) (quoting *United States v. Munsingwear, Inc.*, 340 U.S. 36, 41 (1950)). Such is the case here, as Redd's death has foreclosed the State's ability to seek review of this case on the merits. *See id.* at 27 ("Congress has prescribed a primary route, by appeal as of right and certiorari, through which parties may seek relief from the legal

consequences of judicial judgments."). Thus, the first factor does not conclusively weigh in one party's favor.

Second, the prejudice to the State is substantial. Even though the State is not entitled to rehearing or certiorari, the Supreme Court has recognized that the inability to seek such discretionary review of the merits weighs in favor of prejudice.[21] *See id.* at 25 ("A party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment."). Further, despite Judge Berzon's claims to the contrary, the effect of *Redd* will be extensive. *Redd* sets forth a blueprint for all of California's 362 indigent capital prisoners to follow if the State does not appoint counsel "expeditiously"—something even the FAC admits that California has been unable to do since the late 1980s. Thus, under *Redd*, the State will have to defend itself against claims like Redd's in federal court in up to 362 suits.

Finally, the last factor weighs in the State's favor. The case became moot because of Redd's death, an involuntary reason. This factor and the prejudice factor therefore both favor the State. Because the only remaining consideration, the public interest factor, does not conclusively weigh in one party's favor, the equitable considerations compel vacatur. The panel abused its discretion in finding otherwise.

Judge Berzon relies on inapposite cases in arguing that the panel did not abuse its discretion in declining

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[21] Indeed, in cases where mootness has prevented the losing party from seeking review of the merits, the Supreme Court has granted certiorari after the case became moot to vacate the court of appeals' decision. *Azar v. Garza*, 584 U.S. 726, 728–31 (2018) (per curiam).

to vacate *Redd*. Berzon Statement at 8–9 (citing *Dickens*, 744 F.3d at 1148; *Crespin v. Ryan*, 51 F.4th 819, 820 (9th Cir. 2022)). In *Dickens*, we determined that there was no prejudice to the party requesting vacatur because, unlike here, "[b]oth parties' claims ha[d] been subjected to en banc review." 744 F.3d at 1148. Indeed, we relied on that fact to distinguish two cases in which we had determined that vacatur was proper. *Id.* at 1148 n.2. *Crespin* is even further off-point. In that case, we declined to vacate the filed opinion after specifically noting that "[n]o party ha[d] sought vacatur." 51 F.4th at 820.

III.

The panel neither evaluated how the California Supreme Court would address the statutory interpretation issue nor certified this question. And the panel's decision conflicts with California precedent on similar timing issues, which alone warranted taking this case en banc to vacate the panel's substantive error. A decision that implicates "significant" "federalism and comity concerns," *Redd*, 84 F.4th at 886, but then disregards them, warranted rehearing en banc. We should have taken this case en banc to vacate the panel's far-reaching and intrusive opinion, which effectively dictates that California and its judges must appoint habeas counsel to indigent capital prisoners within a certain time frame. I respectfully dissent from our decision not to rehear this case en banc.

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STEPHEN MORELAND REDD, individually and on behalf of all others similarly situated, *Plaintiff-Appellant*, v. PATRICIA GUERRERO, Chief Justice of California; KIMBERLY MENNINGER, Judge of the Superior Court of California, County of Orange, et al.* *Defendants-Appellees*.	No. 21-55464 D.C. No. 2:16-cv-01540-DMG-PJ OPINION

Appeal from the United States District Court
for the Central District of California
Dolly M. Gee, District Judge, Presiding

Argued and Submitted May 11, 2022
Portland, Oregon

Filed October 20, 2023

* Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Patricia Guerrero is substituted for her predecessor, Tani Gorre Cantil-Sakauye, as Chief Justice of the California Supreme Court.

Before: Marsha S. Berzon, Richard C. Tallman, and Morgan Christen, Circuit Judges.

Opinion by Judge Berzon

SUMMARY**

Procedural Due Process/Prisoner Civil Rights

The panel reversed the district court's dismissal of a complaint for failure to state a claim, and remanded, in a 42 U.S.C. § 1983 action brought by Stephen Redd, a California state prisoner sentenced to death, alleging that state officials are violating his procedural due process rights by failing to appoint postconviction relief counsel as required by California law.

In 1997, the same year that a California court sentenced Redd to death, the California legislature codified a longstanding judicial rule guaranteeing the appointment of postconviction relief counsel to indigent prisoners who had been convicted and sentenced to death. Redd requested the appointment of postconviction habeas counsel 26 years ago. No lawyer has been appointed.

The panel held that Redd has standing because he has adequately shown that the declaratory relief he seeks would redress his injuries.

The panel agreed with the district court that abstention under *O'Shea v. Littleton*, 414 U.S. 488 (1974), as to Redd's individual request for declaratory relief was not appropriate. Providing declaratory relief in this case would not require the federal court to

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

monitor the substance of ongoing state criminal proceedings and would allow Reed's habeas proceeding to finally move forward.

Addressing the merits, the panel held that California is under no federal constitutional obligation to appoint postconviction counsel for all indigent capital prisoners. But because California has guaranteed the appointment of such counsel by statute, Redd stated a viable due process claim by alleging that he has been deprived of a valuable property interest for over a quarter century. Because his property interest claim was legally plausible, the panel reversed the district court's dismissal of Redd's complaint.

However, the panel held that Redd's complaint as presently drafted did not plausibly allege that the state has failed to adequately protect his liberty interest in petitioning for habeas corpus. Under Supreme Court precedent, the absence of appointed counsel, without more, does not preclude Redd from vindicating his liberty interest in petitioning for habeas corpus. Redd had not alleged that he was unable to withdraw his request for appointment of counsel and instead litigate his habeas petition *pro se*.

COUNSEL

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Raymond A. Cardozo (argued) and Brian A. Sutherland, Reed Smith LLP, San Francisco, California;

Kasey J. Curtis, Reed Smith LLP, Los Angeles, California; for Defendants-Appellees.

OPINION

BERZON, Circuit Judge:

In 1997, a California court sentenced appellant Stephen Moreland Redd to death. That same year, the California legislature codified a longstanding judicial rule guaranteeing the appointment of postconviction relief counsel to indigent prisoners who had been convicted and sentenced to death. *See* Cal. Gov't Code § 68662(a), added by Cal. Stats. 1997, ch. 869, sec. 3 (Senate Bill No. 513); *see also* Cal. Penal Code § 1509(b). Redd requested the appointment of postconviction habeas counsel 26 years ago. To this day, no lawyer has been appointed.

Redd filed this action under 42 U.S.C. § 1983, claiming that by failing to appoint counsel as promised and so preventing him from developing and prosecuting his state habeas corpus petition for over two decades, state officials are violating his procedural due process rights. He alleges that in the interim, "numerous witnesses" have died and other critical evidence has been lost or destroyed. The delay has "adversely affected his ability" to present claims that both "his conviction and [his] death sentence are unlawful." By undermining his ability to move forward with his state habeas case, the delay has prevented him from challenging his conviction in a federal habeas petition. He seeks a declaration that state officials' "failure to timely appoint counsel is in violation" of his due process rights. The district court dismissed his complaint for failure to state a claim.

Our central question is whether, based on the circumstances alleged in Redd's complaint, it is legally plausible that he will be able to establish that his 26-year wait for appointed counsel to litigate his habeas petition violates the Due Process Clause. California is under no federal constitutional obligation to appoint postconviction counsel for all indigent capital prisoners. *See Coleman v. Thompson*, 501 U.S. 722, 752 (1991); *Murray v. Giarratano*, 492 U.S. 1, 10 (1989); *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987). But because California has guaranteed the appointment of such counsel by statute, we conclude Redd has stated a viable due process claim by alleging that he has been deprived of a valuable property interest for over a quarter century. As for Redd's claim that the state has failed to adequately protect his liberty interest in petitioning for habeas corpus, we conclude that his complaint as presently drafted does not plausibly state such a claim. Because his property interest claim is legally plausible, we reverse the district court's dismissal of Redd's complaint.

I. Background

A. California's Habeas System

To obtain relief from a criminal conviction in California, "resort to habeas corpus is . . . required" whenever "reference to matters outside the record is necessary to establish that a defendant has been denied a fundamental constitutional right." *In re Bower*, 38 Cal. 3d 865, 872 (1985). Consequently, challenges to convictions based on evidence outside the trial record—including claims based on ineffective assistance of counsel, newly discovered evidence, or reliance on false evidence at trial (*see* Cal. Penal Code § 1473)—ordinarily can be brought only in postconviction habeas. *See People v. Mendoza Tello*, 15 Cal. 4th 264,

266 (1997); *Bower*, 38 Cal. 3d at 872. And because a prisoner generally must exhaust his claims in state court before presenting them in a federal habeas petition, exhaustion of the state's habeas process is usually a prerequisite to filing a federal habeas petition based on the same alleged constitutional violations. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999); 28 U.S.C. § 2254(b)(1)(A), (C).

Concomitantly, California law guarantees the right of "a person unlawfully imprisoned or restrained of their liberty" to challenge the lawfulness of their conviction by seeking habeas corpus relief in state court. Cal. Penal Code § 1473; *see also* Cal. Const., art. I, § 11; Cal. Penal Code § 1509. "If no legal cause is shown for [the] imprisonment or restraint," the court "must discharge" the habeas petitioner from the challenged custody or restraint. Cal. Penal Code § 1485. To permit federal habeas relief, a state habeas petition must ordinarily be filed within one year after a criminal judgment becomes final. *See In re Morgan*, 50 Cal. 4th 932, 939 (2010). The reason is that a federal habeas petition is subject to a one-year limitations period, but that period is tolled as long as a state habeas petition is pending. *See* 28 U.S.C. § 2244(d)(1)(A), (d)(2).

As part of the right to seek habeas relief, California law guarantees the appointment of state habeas counsel for indigent death row prisoners. California Government Code section 68662 provides that the "superior court that imposed the sentence shall offer to appoint counsel to represent a state prisoner subject to a capital sentence for purposes of state postconviction proceedings" and "shall enter an order" appointing such counsel "*upon a finding* that the person is indigent and has accepted the offer to appoint counsel or is unable to competently decide whether to accept

or reject that offer." Cal. Gov't Code § 68662(a) (emphasis added); *see also* Cal. Penal Code § 1509(b) ("After the entry of a judgment of death in the trial court, that court shall offer counsel to the prisoner as provided in Section 68662 of the Government Code.").[1]

As amended in 2016, the California Penal Code imposes a duty on superior courts to conduct capital habeas review proceedings "as expeditiously as possible, consistent with a fair adjudication," and requires the superior courts to "resolve the initial petition within one year of filing unless the court finds that a delay is necessary to resolve a substantial claim of actual innocence, but in no instance shall the court take longer than two years to resolve the petition." Cal. Penal Code § 1509(f); *see also* Cal. Prop. 66, the Death Penalty Reform and Savings Act of 2016 (Gen. Elec. (Nov. 8, 2016) § 6).

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[1] Section 68662, in full, reads:

> The superior court that imposed the sentence shall offer to appoint counsel to represent a state prisoner subject to a capital sentence for purposes of state postconviction proceedings, and shall enter an order containing one of the following:
>
> (a) The appointment of one or more counsel to represent the prisoner in proceedings pursuant to Section 1509 of the Penal Code upon a finding that the person is indigent and has accepted the offer to appoint counsel or is unable to competently decide whether to accept or reject that offer.
>
> (b) A finding, after a hearing if necessary, that the prisoner rejected the offer to appoint counsel and made that decision with full understanding of the legal consequences of the decision.
>
> (c) The denial to appoint counsel upon a finding that the person is not indigent.

Consistent with the statutory requirements that counsel be appointed "upon [the requisite] finding[s]" and that habeas petitions be determined expeditiously, the California Supreme Court has directed "expeditious appointment" of habeas counsel in capital cases "to investigate potential claims for relief and to prepare a habeas corpus petition at roughly the same time that appellate counsel is preparing an opening brief on appeal." *Morgan*, 50 Cal. 4th at 937. To achieve this goal, said the court, habeas counsel "[i]deally" should be appointed "shortly after an indigent defendant's judgment of death." *Id*. Similarly, the California Supreme Court's policies concerning capital cases provide that counsel should be appointed "simultaneously with the appointment of appellate counsel or at the earliest practicable time thereafter." Cal. Sup. Ct., *Policies Regarding Cases Arising from Judgments of Death*, Policy 3, std. 2-1 (amended Feb. 4, 1998), https://www.courts.ca.gov/documents/Policies_Regarding_Cases_Arising_from_Judgments_of_Death.pdf; *see also id.* Policy 3, std. 1–1.1 (amended Nov. 30, 2005).

Once capital habeas counsel is appointed, a petition must generally be filed within one year of the appointment. Cal. Penal Code § 1509(c). But because many capital prisoners, like Redd, in actuality wait years for the appointment of habeas counsel, the California Supreme Court has a "practice of deferring consideration of cursory habeas petitions filed by unrepresented defendants," recognizing that so long as the petitions remain pending, the one-year limitations period for federal habeas petitions is tolled. *Morgan*, 50 Cal. 4th at 937–39 & n.5, 941. Once appointed, counsel may investigate the prisoner's claims and then amend the "shell petition." *Id.* at 941, 942.

In contrast to California law mandating the appointment of postconviction counsel for indigent capital prisoners, there is no federal constitutional right to habeas counsel. *Finley* declined to recognize a constitutional right to counsel for prisoners mounting collateral attacks on their convictions. 48 U.S. at 555. *Murray* extended *Finley* to capital prisoners, concluding that due process does not itself require the assistance of counsel in postconviction proceedings for individuals sentenced to death. 492 U.S. at 10. And *Coleman*, another capital case, cited *Finley* for the proposition that "[t]here is no constitutional right to an attorney in state post-conviction proceedings," but left open the question of whether there might be such a right in "cases where state collateral review is the first place a prisoner can present a challenge to his conviction." 501 U.S. at 752, 755.

B. Redd's Claims

Redd alleges that, despite the California Supreme Court's directive that counsel in capital cases be appointed "expeditious[ly]," *Morgan*, 50 Cal. 4th at 937, he has been waiting for an appointed counsel for more than a quarter century. He was convicted of first-degree murder, attempted murder, second-degree robbery, and second-degree commercial burglary, and sentenced to death, in 1997. After his conviction, the California Supreme Court found that he was indigent and appointed him counsel for his direct appeal; it did not appoint habeas counsel at that time.

Redd lost his direct appeal in 2010. Since that time, Redd has written letters to the California Supreme Court requesting appointment of habeas counsel. Also in 2010, the California Appellate Project, a non-profit organization that assists indigent prisoners facing execution, *see Morgan*, 50 Cal. 4th at 935, n.2,

filed a placeholder "shell" habeas petition on Redd's behalf.[2]

According to the First Amended Complaint (or "complaint"),[3] Redd is one of more than 363 people on death row in California awaiting the appointment of habeas counsel. At the time Redd filed the complaint, 130 of those individuals had been waiting between 15 and 25 years from the time they were sentenced for the appointment of counsel.

Redd alleges that "[u]pon the entry of judgment" in 1997, he was entitled under state law to state-appointed counsel for his habeas proceedings. More than two decades after his death sentence, and despite having been found indigent by the California Supreme Court and having asked for appointment of counsel, Redd continues to await the appointment of counsel to represent him in his habeas proceedings. This delay "has significantly and adversely affected his ability to develop, present, and prove claims that his conviction and death sentence are unlawful." In the interim, numerous witnesses have died and others "with critical information have become infirm or impaired or have had substantial memory loss," and important "documents and other exculpatory evidence have been lost

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[2] Redd's original *pro se* complaint in this case alleged that the California Supreme Court "refuses to file pro se briefs" and that he attempted unsuccessfully to file a *pro se* motion to recall the remittitur in connection with his direct appeal. The currently operative First Amended Complaint does not repeat these allegations.

[3] Because this appeal comes to us from the district court's grant of a motion to dismiss for failure to state a claim, we construe the complaint in the light most favorable to Redd and assume the facts alleged in his complaint are true. *See Gilstrap v. United Air Lines, Inc.*, 709 F.3d 995, 998 n.1 (9th Cir. 2013).

or destroyed." Because he must first exhaust his claims in state court before filing a federal habeas petition, *see O'Sullivan*, 526 U.S. at 842, the delay has also harmed Redd's ability to pursue federal habeas relief.

Redd's complaint names as defendants the justices of the California Supreme Court and the judges of the California Superior Courts (together, "State Officers"), based on their duties as court administrators. Redd alleges that the State Officers are responsible for appointing habeas counsel but "have refused to appoint in a timely manner" the counsel to which he is entitled under state law. He also alleges that the State Officers have not promulgated adequate rules providing for compensation of capital habeas counsel or for reimbursing them for necessary litigation expenses, and they have "fail[ed] to provide sufficient compensation and litigation expenses to attract private counsel to accept such appointments." According to Redd, the failure to appoint qualified capital habeas counsel is due to "underfunding of the capital defense program" and a "serious shortage of qualified . . . counsel willing to accept [] appointment[s] as habeas corpus counsel in a death penalty case." Redd seeks a declaration that California's failure to timely appoint state habeas counsel is depriving him of liberty and property interests without due process of law.

Redd brought the suit on his own behalf and also as a putative class action on behalf of all other indigent capital prisoners in California who have been deprived of the timely appointment of state habeas counsel. As the district court dismissed his complaint, his case never proceeded to the class certification stage. We therefore consider in this opinion only Redd's own due process claim, not that of any other death row

prisoner whose state habeas petition has been delayed pending appointment of habeas counsel.[4]

C. Procedural History

In 2013, Redd filed a *pro se* federal petition for a writ of habeas corpus challenging his conviction. The district court dismissed that petition for failure to exhaust state law remedies. This Court declined to issue a certificate of appealability, and Redd filed a petition for a writ of certiorari in the U.S. Supreme Court. The Supreme Court denied Redd's petition. *Redd v. Chappell*, 574 U.S. 1041 (2014). In a statement respecting the denial of certiorari, Justice Sotomayor, joined by Justice Breyer, suggested that Redd "might seek to bring a 42 U.S.C. § 1983 suit contending the State's failure to provide him with the counsel to which he is entitled violates the Due Process Clause." *Id.* (Sotomayor, J., respecting the denial of certiorari).

Following Justice Sotomayor's suggestion, Redd filed a *pro se* section 1983 complaint in district court. The court dismissed that complaint *sua sponte* for failure to state a claim. Redd appealed. This Court appointed pro bono counsel and granted Redd's unopposed motion to vacate the district court's dismissal and remand to the district court with instructions to give him leave to amend his complaint. Through counsel, Redd then filed the amended complaint in 2019.

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[4] The complaint also alleges that California's delay in appointing state habeas counsel violates Redd's right to access the courts under the First, Fifth, and Fourteenth Amendments. Redd has not challenged on appeal the district court's dismissal of that claim.

D. District Court Decision

The State Officers moved to dismiss Redd's complaint for lack of standing, on abstention grounds, and for failure to state a claim. The district court granted the motion on the ground that the complaint failed to state a claim. *Redd v. California Supreme Ct.*, No. CV161540DMGPJWX, 2021 WL 1803211, at *8–10 (C.D. Cal. Mar. 31, 2021).

The court first rejected the State Officers' argument that Redd lacks standing because his injury is not fairly traceable to their conduct or redressable by a judgment against them. *Id*. at *4–6. The court concluded that although the California legislature, rather than the State Officers, is responsible for funding state habeas counsel, the State Officers "have the ability to provide guidance for the hourly rate to be paid to habeas counsel, provide a different maximum for litigation expenses, allocate additional funds for habeas counsel from their own budget, provide additional resources to the [Habeas Corpus Resource Center][5], or otherwise attract qualified counsel." *Id*. at *5. Redd therefore showed that success against the State Officers "would increase the likelihood that his injury would be directly redressed, at least in part." *Id.* at *6.

The district court next rejected the State Officers' argument that the court must abstain under the equitable doctrine set forth in *O'Shea v. Littleton*, 414 U.S. 488 (1974). *Redd*, 2021 WL 1803211, at *6–7. Under *O'Shea*, federal courts abstain from ruling on the

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[5] The Habeas Corpus Resource Center is a state entity established by the California legislature to represent indigent capital prisoners in postconviction matters. *See Morgan*, 50 Cal. 4th at 938; Cal Gov't Code § 68661.

merits of a claim where the court would have to "monitor the substance of individual cases on an ongoing basis to administer its judgment." *Courthouse News Serv. v. Planet*, 750 F.3d 776, 790 (9th Cir. 2014). The district court concluded that, although Redd brings a systemic challenge to California's system of appointing state habeas counsel, he seeks "a bright-line declaration that the system[] [is] unconstitutional." *Redd*, 2021 WL 1803211, at *7. Awarding him declaratory relief, said the court, would "not require intensive continued intervention by federal courts into state judicial affairs." *Id.*[6]

On the merits, the district court concluded that Redd lacks a constitutionally protected liberty interest in California's appointment of habeas counsel and so failed to state a cognizable procedural due process claim. *Id.* at *9. The court recognized that a state statute may create a protected liberty interest if the statute contains "(1) 'substantive predicates' governing official decisionmaking, and (2) 'explicitly mandatory language' specifying the outcome that must be reached if the substantive predicates have been met." *Id.* at *8 (quoting *Bonin v. Calderon*, 59 F.3d 815, 842 (9th Cir. 1995)). And the court concluded that California Government Code section 68662 met those prerequisites, as it mandates the appointment of counsel as long as a capital prisoner is indigent and accepts an offer for counsel. *Id.* But, the court explained,

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[6] The district court also rejected the State Officers' assertion that the Eleventh Amendment bars Redd's claims, as Redd's lawsuit is an *Ex parte Young* action "seeking only prospective declaratory or injunctive relief against state officers in their official capacities." *Redd*, 2021 WL 1803211, at *7 (quoting *L.A. Cnty. Bar Ass'n v. Eu*, 979 F.2d 697, 704 (9th Cir. 1992)). The State Officers do not raise their Eleventh Amendment argument on appeal.

Redd had no liberty interest in the appointment of counsel because the right to state-appointed habeas counsel is only a "state *procedural* right which is itself designed to facilitate the protection of more fundamental substantive rights." *Id*. at *9. "California's appointment of counsel," the district court reasoned, "is designed to protect Plaintiff's right to present a habeas petition, not to create a 'substantive end' in itself." *Id.* (quoting *James v. Rowlands*, 606 F.3d 646, 657 (9th Cir. 2010)).

Redd timely appealed.

II. Discussion

A. Redressability

In the district court, the State Officers contended that Redd lacks standing because his injury is not redressable by a decision in its favor. They do not renew their standing argument on appeal. We agree with the district court that Redd has standing.

To establish constitutional standing, Redd must show he "has suffered an 'injury in fact,' that the injury is 'fairly traceable' to the conduct at issue in the plaintiff's claim, and that 'it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.'" *Ctr. for Biological Diversity v. Exp.-Imp. Bank of the U.S.*, 894 F.3d 1005, 1012 (9th Cir. 2018) (quoting *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000)). "[T]he ability 'to effectuate a partial remedy' satisfies the redressability requirement." *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 801 (2021) (quoting *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 13 (1992)). "The party invoking federal jurisdiction bears the burden of establishing these elements . . . with the manner and degree of evidence

required at the successive stages of the litigation." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992).

The district court correctly concluded, for purposes of this early stage of the litigation, that it is likely that a decision in Redd's favor would redress his injury. Redd alleges that the state has unlawfully delayed appointing him habeas counsel, and that he has been injured by that delay. He requests a declaratory judgment that the state's failure to timely appoint him counsel violates his procedural due process rights.

Should he ultimately prevail in obtaining that declaration, it would likely redress his injury. Declaratory relief has "the force and effect of a final judgment." *Steffel v. Thompson*, 415 U.S. 452, 470 (1974) (citation omitted). Once a court issues a declaratory judgment, that order effectuates a change in the legal status between the parties such that "'the practical consequence of that change would amount to a significant increase in the likelihood'" that the plaintiff "'would obtain relief that directly redresses the injury suffered.'" *Reed v. Goertz*, 598 U.S. 230, 234 (2023) (quoting *Utah v. Evans*, 536 U.S. 452, 464 (2002)).

In *Reed*, for example, a Texas prisoner filed a section 1983 action claiming that the state's postconviction DNA-testing procedures violated procedural due process. *Id*. at 233. A state court had denied his motion for DNA testing of evidence based on a strict state law chain-of-custody requirement. *Id*. The "only relief" sought was "a declaration that the [state court's] interpretation and application of state law was unconstitutional." *Id*. at 238, 245 (Thomas, J., dissenting); *see id.* at 234 (majority opinion). The Supreme Court held that a declaratory judgment against the state prosecutor would redress the state's denial of DNA

testing. *Id*. at 234 (majority opinion). The declaration sought "would eliminate the state prosecutor's justification for denying DNA testing" and make it "'substantially likely' that the state prosecutor would abide by such a court order." *Id.* (quoting *Utah*, 536 U.S. at 464).

Similarly, in *Franklin v. Massachusetts*, 505 U.S. 788 (1992) (plurality), Massachusetts and two of its residents challenged the legality of a census-counting method that impacted the apportionment of state seats in the U.S. House of Representatives; the plaintiffs hoped that recalculation would lead to the assignment of an additional representative to Massachusetts. *See id.* at 803; *see also Utah*, 536 U.S. at 459–60, 463–64. *Franklin* concluded that the plaintiffs' injury "is likely to be redressed by declaratory relief against the Secretary alone." 505 U.S. at 803. Although "the President and other executive and congressional officials" with authority over reapportionment "would not be directly bound by such a determination," the Supreme Court "assume[d] it is substantially likely" that those officials "would abide by an authoritative interpretation of the census statute and constitutional provision by the District Court." *Id.* *Utah* reaffirmed *Franklin*'s redressability holding on similar facts, concluding that "a declaration" would "lead[]" the Secretary to issue a new report, making it "substantially likely" that other officials would abide by the court's decision. *Utah*, 536 U.S. at 463–64 (quoting in part *Franklin*, 505 U.S. at 803).

Here, there's no question that the State Officers have the authority and the duty to appoint habeas counsel to an individual indigent capital prisoner like Redd, once requested. *See* Cal. Gov't Code § 68662(a); Cal. Penal Code § 1509(b). In addition, Redd alleges

that the State Officers could have taken action that would have reduced the delay in appointment of counsel but failed in their responsibility to do so. Under California law, superior court judges are responsible for "develop[ing] and implement[ing] a plan to identify and recruit qualified counsel who may apply to be appointed" to represent indigent capital prisoners. Cal. R. Ct. 4.562(f). They have authority to appoint as habeas counsel qualified private attorneys, attorneys from a public defender's office, or attorneys from the Habeas Corpus Resource Center. Cal. Gov't Code § 68661(a); *see also* Cal. R. Ct. 4.561(e)(2). Further, the superior courts are authorized to provide for the appointment of qualified attorneys who are not members of the statewide panel of attorneys qualified to represent persons in death penalty-related habeas proceedings. *See* Cal. R. Ct. 4.562(g). In addition, the California Supreme Court is charged, along with the California Judicial Council, with adopting "binding and mandatory competency standards for the appointment of counsel in death penalty" habeas proceedings and must "reevaluate the standards as needed to ensure" competent counsel and "to avoid unduly restricting the available pool of attorneys so as to provide timely appointment." Cal. Gov't Code § 68665(a), (b). Also, the Chief Justice of the California Supreme Court "may allocate funding appropriated" for the Supreme Court's annual budget to the Habeas Corpus Resource Center. Cal. R. Ct. 10.101(c)(2). And the California Supreme Court has the authority to set policy for compensation and payment of litigation expenses for appointed habeas counsel. Cal. Gov't Code § 68666. So, as the district court found, the State Officers "have the ability to provide guidance for the hourly rate to be paid to habeas counsel, provide a different maximum for litigation expenses, allocate

additional funds for habeas counsel from their own budget, provide additional resources to the [Habeas Corpus Resource Center], or otherwise attract qualified counsel." *Redd*, 2021 WL 1803211, at *5.

Finally, Redd's showing of redressability is not undermined by his allegations that a shortage of qualified attorneys willing to accept appointment as capital habeas counsel and the underfunding of the capital indigent representation program have contributed to the delays. As noted, the State Officers are obligated to ensure that the qualification standards they set do not "unduly" restrict the pool of attorneys. Cal. Gov't Code § 68665(b). Nor does the fact that the State Officers may not have unlimited financial resources to draw from when taking action consistent with any declaratory judgment preclude a finding of redressability. Moreover, "[a] case [against government officials] seeking prospective relief . . . can't be dismissed simply because there is a shortage of resources." *Peralta v. Dillard*, 744 F.3d 1076, 1083 (9th Cir. 2014); *see Watson v. City of Memphis*, 373 U.S. 526, 537 (1963) ("[I]t is obvious that vindication of . . . constitutional rights cannot be made dependent upon any theory that it is less expensive to deny than to afford them.").

At this stage of the litigation, we conclude Redd has adequately shown that the declaratory relief he seeks would redress his injuries. If the case progresses to the summary judgment stage, he will have to "offer evidence and specific facts demonstrating each element" of standing, including redressability. *Ctr. for Biological Diversity*, 894 F.3d at 1012.

B. Abstention

The State Officers argue that we should affirm the dismissal of Redd's suit on the ground that the district court should have abstained under *O'Shea*. Because Redd's action never proceeded to the class certification stage, we deal only with his individual claims; whether abstention would be appropriate at the class certification stage is not before us and would likely be a considerably more viable contention. As to Redd's individual claims, although the State Officers' federalism and comity concerns are surely significant, ultimately we agree with the district court that *O'Shea* abstention is not appropriate here.[7]

1.

O'Shea abstention is one exception to the "virtually unflagging obligation" of federal courts "to exercise the jurisdiction given them." *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). *O'Shea* held that "the need for a proper balance in the concurrent operation of federal and state courts counsels restraint against the issuance of injunctions against state officers engaged in the administration of the State's criminal laws in the absence of a showing of irreparable injury which is 'both great and immediate.'" 414 U.S. at 499 (quoting *Younger v. Harris*, 401 U.S. 37, 46 (1971)).

O'Shea involved a class action lawsuit brought by civil rights activists alleging that the state prosecutor,

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[7] As the parties correctly note, the standard of review for the district court's *O'Shea* abstention is "unsettled." *Courthouse News*, 750 F.3d at 782. We need not resolve whether the applicable standard is de novo or abuse of discretion review; under either standard, we conclude, the district court properly declined to abstain under *O'Shea*.

local police, and state judges had engaged in a pattern of discriminatory criminal prosecutions in retaliation for the plaintiffs' activism. 414 U.S. at 490–92. The activists sought an injunction to prevent the judicial defendants from engaging in certain unlawful practices, including setting bond without regard for individualized facts, imposing harsher sentences based on race, and requiring class members to pay for costs associated with their jury trials. *Id.*

In concluding in *O'Shea* that abstention was appropriate, the Supreme Court noted that the plaintiffs there did "not seek to strike down a single statute" but rather sought "an injunction aimed at controlling or preventing the occurrence of specific events that might take place in the course of future state criminal trials." *Id.* at 500. The relief sought, said the Court, "contemplate[d] interruption of state proceedings to adjudicate assertions of noncompliance by petitioners" and would constitute "nothing less than an ongoing federal audit of state criminal proceedings." *Id.* at 500–01. The Court's concern in *O'Shea*, then, was that the requested injunction "would disrupt the normal course of proceedings in the state courts via resort to the federal suit for determination of the claim *ab initio*." *Id*. at 501.

O'Shea abstention has proved exceedingly rare.[8] We have abstained under *O'Shea* only "where the relief sought would require the federal court to monitor the substance of individual cases on an ongoing basis to administer its judgment." *Courthouse News*, 750

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[8] We are aware of just two published cases in which we have concluded that abstention was proper under *O'Shea*: *E.T. v. Cantil-Sakauye*, 682 F.3d 1121 (9th Cir. 2012) (per curiam), and *Miles v. Wesley*, 801 F.3d 1060 (9th Cir. 2015). We discuss these cases in greater detail below. *See infra*, Section II.B.3.

F.3d at 790. Whether *O'Shea* abstention applies depends on the degree to which awarding relief in federal court would interfere intrusively in the state's administration of its judicial system going forward. *Id.* at 789–90. Accordingly, *O'Shea* is not implicated when a plaintiff's only requested remedy is a "bright-line finding" that the defendant's action is unlawful, as such a finding does not require "the ongoing monitoring of the substance of state proceedings." *Id.* at 791; *see also Arevalo v. Hennessy*, 882 F.3d 763, 766 n.2 (9th Cir. 2018).

For example, *Los Angeles County Bar Association v. Eu*, 979 F.2d 697 (9th Cir. 1992), held that a lawsuit alleging that "delays in Los Angeles Superior Court deprive[d] litigants of their rights to due process and equal protection" did not call for abstention under *O'Shea*. *Id.* at 702–04. There, the Los Angeles County Bar Association sought a declaration that a California statute prescribing the number of state superior court judges was unconstitutional because it created a shortage of judges, causing "inordinate delays in civil litigation." *Id.* at 699–700. *Eu* held that the "case [wa]s a proper one for the exercise of our declaratory jurisdiction." *Id.* at 703–04. We reasoned that the case did not require "[f]urther factual development" concerning the details of particular state court cases, and a bright-line declaration of the statute's unconstitutionality "would resolve a substantial and important question currently dividing the parties." *Id.* at 703–04. As we later explained, "*O'Shea* did not apply" in *Eu* "because once the question of the number of judges was settled, 'supervision of the state court system by federal judges' would not be required." *Miles*, 801 F.3d at 1064 (quoting *Eu*, 979 F.2d at 703).

Similarly, *Courthouse News* held that *O'Shea* did not require abstention from a news organization's lawsuit seeking declaratory and injunctive relief ordering the clerk of the Ventura County Superior Court to provide the organization with same-day access to newly filed civil complaints. 750 F.3d at 779, 789. The requested relief was "more akin to the bright-line finding" approved in *Eu* because, to "determine whether the Ventura County Superior Court is making complaints available the day they are filed, a federal court would not need to engage in" any "intensive, context-specific legal inquiry." *Id.* at 791. *Courthouse News* explained that the "federal courts would not need to 'examin[e] the administration of a substantial number of individual cases' to assess whether the Ventura County Superior Court is adopting" adequate methods for compliance. *Id.* (alteration in original) (quoting *E.T.*, 682 F.3d at 1124). The fact that "*some* additional litigation may later arise" to enforce a federal court injunction did "not itself justify abstaining." *Id.* at 792.

2.

We are mindful that this case does implicate the delicate balance "between federal equitable power and State administration of its own law." *O'Shea*, 414 U.S. at 500 (quoting *Stefanelli v. Minard*, 342 U.S. 117, 120 (1951)). Redd sues state judicial officers, albeit in their administrative roles, and alleges profound problems with California's promise of postconviction habeas counsel for indigent capital prisoners.

But Redd requests less intrusive relief than that requested in *Eu* or *Courthouse News*, in which we concluded it was appropriate to exercise jurisdiction. At this stage of his case, we are dealing with only his individual request for declaratory relief rather than any

systemic remedy: Redd seeks a declaration that the State Officers have violated *his* individual procedural due process rights by failing to appoint him habeas counsel for 26 years.

As only declaratory relief is sought, the district court, if it grants such relief, will have no occasion by virtue of that relief alone to further involve itself in the state officials' appointment of habeas counsel for Redd. So the central concern of *O'Shea* abstention—whether "the relief sought would require the federal court to monitor the substance of individual cases on an ongoing basis," *Courthouse News*, 750 F.3d at 790—is not implicated.

True, declaration in hand, Redd could seek an injunction in federal or state court mandating that he be appointed counsel. In the context of a different abstention doctrine, *see Younger*, 401 U.S. 37, the Supreme Court has stated that "declaratory relief alone has virtually the same practical impact as a formal injunction would," *Samuels v. Mackell*, 401 U.S. 66, 72 (1971). Noting that "a declaratory judgment issued while state proceedings are pending might serve as the basis for a subsequent injunction against those proceedings to 'protect or effectuate' the declaratory judgment," *id*., *Samuels* held that for purposes of assessing the intrusiveness of injunctive and declaratory relief aimed at enjoining pending criminal proceedings, "the same equitable principles relevant to the propriety of an injunction must be taken into consideration by federal district courts in determining whether to issue a declaratory judgment," *id*. at 73. *Samuels* also recognized, however, that "[t]here may be unusual circumstances in which an injunction might be withheld because, despite a plaintiff's strong claim for relief under the established standards, the

injunctive remedy seemed particularly intrusive or offensive; in such a situation, a declaratory judgment might be appropriate." *Id*. at 73.

Three years later, *Steffel* considered whether abstention was appropriate where no criminal prosecution was pending and the plaintiff sought only declaratory relief. 415 U.S. at 462–63. In holding that abstention was not required, the Court explained that "even though a declaratory judgment has the force and effect of a final judgment, . . . it is a much milder form of relief than an injunction. Though it may be persuasive, it is not ultimately coercive; noncompliance with it may be inappropriate, but is not contempt." *Id.* at 471–72 (citations and internal quotation marks omitted); *see also id.* at 466 (explaining that "declaratory relief . . . [is] an alternative to the strong medicine of the injunction"). *Steffel* held that "[w]hen no state prosecution is pending," it is error to "treat[] [] requests for injunctive and declaratory relief as a single issue." *Id.* at 462–63.

Here, no state criminal prosecution is pending, and Redd makes no request for injunctive relief; nor does he seek to block any state proceedings.[9] To the

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[9] The State Officers, understandably, do not contend that *Younger* abstention is applicable here. "The Supreme Court [has] firmly cabined the scope of the [*Younger*] doctrine." *Applied Underovriters, Inc. v. Lara*, 37 F.4th 579, 588 (9th Cir. 2022). The *Younger* doctrine applies where the federal plaintiff seeks to "stay or enjoin" a pending state criminal prosecution or certain government-instigated state civil enforcement proceedings and other threshold requirements are satisfied. *See, e.g.*, *Younger*, 401 U.S. at 41 (holding that it was improper for the district court in that case to enjoin a state prosecution against Younger, in light of "the national policy forbidding federal courts to stay or enjoin pending state court proceedings except under special circumstances"); *Gilbertson v. Albright*, 381 F.3d 965, 978 (9th

contrary, he seeks relief that would allow his state habeas petition to finally go forward. And a declaration that he has a right to be appointed counsel promptly would not result in ongoing interference with "the daily conduct of state criminal proceedings," *O'Shea*, 414 U.S. at 502, or with his state habeas proceedings. Should Redd later seek an injunction, the district court then could, and should, consider carefully whether comity concerns counsel against such an injunction, especially if no attempt were first made to obtain relief in state court based on the federal declaratory relief. Because no request for injunctive relief is before us, however, we need not decide that question here. *See Steffel*, 415 U.S. at 463 (explaining that the propriety of injunctive relief was "a question we need not reach today since petitioner has abandoned his request for that remedy").

Cir. 2004) (en banc) (explaining that *Younger* applies in noncriminal cases "*[i]f* a state-initiated proceeding is ongoing"); *AmerisourceBergen Corp. v. Roden*, 495 F.3d 1143, 1149 (9th Cir. 2007) (same); *see also Credit One Bank, N.A. v. Hestrin*, 60 F.4th 1220, 1225 (9th Cir. 2023) (explaining that *Younger* abstention applies only, inter alia, where "the requested relief seeks to enjoin or has the practical effect of enjoining the ongoing state judicial proceeding") (citation and internal quotation marks omitted). (In a third category of cases, *Younger* applies where the federal litigant seeks to negate certain state court orders issued in a civil proceeding. *Applied Underwriters*, 37 F.4th at 588, 590 n.4.) Even where a state criminal prosecution is pending, "*Younger* abstention is not appropriate" where the federal constitutional question raised in the federal action "is separate from the state prosecution, and would not interfere with those proceedings." *Arevalo*, 882 F.3d at 766. Here, the only pending state proceeding is a habeas petition, initiated by Redd, and his goal is to allow that proceeding to progress, rather than to block it. *Younger* therefore has no application to this case.

Aside from the nature of the relief sought, the district court's exercise of jurisdiction over Redd's claims is no more disruptive than the adjudication of other cases involving claims that state postconviction or other procedures violate due process. For example, in *Coe v. Thurman*, 922 F.2d 528 (9th Cir. 1990), a habeas case, we held that a four-year delay in a California prisoner's criminal appeal violated due process and remanded with instructions to the district court to order the petitioner's release unless his appeal was heard within 90 days. *Id*. at 531–32. *Dist. Attorney' s Off. for Third Jud. Dist. v. Osborne*, 557 U.S. 52 (2009), similarly, resolved the merits of a section 1983 challenge to Alaska postconviction procedures for obtaining DNA evidence. *Id*. at 60, 67–71. The Supreme Court ultimately concluded that the plaintiff had not established a due process violation. *Id.* at 69–71. In so doing, the Court took into account federalism concerns in its merits analysis, explaining that "[f]ederal courts may upset a State's postconviction relief procedures only if they are fundamentally inadequate to vindicate the substantive rights provided." *Id*. at 69. *See also, e.g.*, *Skinner v. Switzer*, 562 U.S. 521, 525 (2011) (holding that a state prisoner's "postconviction claim for DNA testing is properly pursued in a § 1983 action"); *Morrison v. Peterson*, 809 F.3d 1059, 1064–65 (9th Cir. 2015) (holding, in a section 1983 challenge to California's postconviction DNA procedures, that the prisoner had a state law "liberty interest in demonstrating his innocence with new evidence . . . . because California law provides a right to be released from custody pursuant to a writ of habeas corpus when there is no legal cause for imprisonment") (internal quotation marks and citation omitted). More recently, in the civil context, we considered whether a California insurance indemnity statute violated a

state court litigant's due process right to retain counsel, rejecting the challenge on the merits. *See Adir Int'l, LLC v. Starr Indem. & Liab. Co.*, 994 F.3d 1032, 1041 (9th Cir. 2021).

Likewise, the federal courts have long adjudicated claims that state procedures for protecting state-created property interests are inadequate under the federal Constitution. *See, e.g.*, *Goss v. Lopez*, 419 U.S. 565, 577–84 (1975) (holding that Ohio's public school disciplinary procedures were insufficient to protect students' property interest in public education); *Goldberg v. Kelly*, 397 U.S. 254, 260–61 (1970) (holding that New York hearing procedures for termination of public benefits violated procedural due process).

3.

We disagree with the State Officers' contention that *E.T.* and *Miles* and control the result here. In *E.T.*, a plaintiff class of foster children alleged that overwhelming caseloads in Sacramento County dependency courts prevented court-appointed attorneys from providing effective assistance of counsel. 682 F.3d at 1122. We explained that, "[b]ecause the question is one of *adequacy of representation*," as opposed to a bright-line determination like that in *Eu*, "potential remediation might involve examination of the administration of a substantial number of individual cases" to determine whether the quality of representation in each case met constitutional standards. *Id.* at 1124 (emphasis added). Providing relief to Redd, by contrast, would require no federal supervision over the quality of representation, only its provision.

Miles is likewise inapposite. There, the plaintiffs challenged, on constitutional and statutory grounds, a plan by the Los Angeles County Superior Court to

reduce the number of courthouses hearing unlawful detainer cases from 26 neighborhood courthouses to five centrally located "hub" courts. 801 F.3d at 1062. The plaintiffs sought "an injunction preventing [the Los Angeles superior courts] from eliminating even a single courthouse that, prior to the [state's] fiscal crisis, heard unlawful detainer actions. They also request[ed] an order requiring [the superior courts] to hold public meetings before planning any future unlawful detainer courtroom closures, and for the district court to retain jurisdiction for an unspecified period of time to ensure compliance." *Id.* at 1064. As *Miles* explained, the relief requested required "ongoing" interference with the administration of the state's judicial system. *Id.* In light of the "breadth of Plaintiffs' requested relief," *Miles* concluded that abstention under *O'Shea* was appropriate. *Id.* In so doing, *Miles* distinguished *Eu* on the ground that *Eu* did not call for "the use of injunctive power to restructure the state courts." *Id.* at 1065. The same is true here.

4.

Finally, even if abstention were otherwise appropriate, we would affirm the district court's abstention ruling because *O'Shea* abstention applies only "*in the absence of a showing of irreparable injury which is 'both great and immediate*.'" *O'Shea*, 414 U.S. at 499 (emphasis added) (quoting *Younger*, 401 U.S. at 46). Here, Redd's 26-year delay in the appointment of habeas counsel has indisputably caused him "great and immediate" irreparable harm. *Id*. According to his complaint, he has waited under a death sentence without the assistance of counsel in investigating, developing, and litigating his habeas challenges to his conviction and his sentence, despite California's promise of appointed counsel. During this quarter

century, witnesses have died and valuable memories and evidence have been lost.

* * * *

We emphasize that we are permitting Redd's individual claim for federal relief to go forward "not without some trepidation," *Eu*, 979 F.2d at 704. But Redd has been waiting 26 years to litigate his state habeas petition. The question whether the delay in appointment of habeas counsel violates his federal due process rights is collateral to, and not the subject of, his habeas proceeding. Rather than "disrupt the normal course of proceedings in the state courts," *O'Shea*, 414 U.S. at 501, appointment of counsel would allow Redd's habeas proceeding finally to move forward. Further, providing declaratory relief as to whether California has violated Redd's due process rights by failing to appoint postconviction counsel for 26 years would not require the court "to monitor the substance of individual cases on an ongoing basis." *Courthouse News*, 750 F.3d at 790. And whether any declaration Redd may obtain draws the line at the 26-plus year delay he has experienced or at some other point, the declaration would "serve a useful purpose in clarifying and settling the legal relations between the parties." *Eu*, 979 F.2d at 703. Should Redd later seek more intrusive relief in federal court, an *O'Shea* analysis would have to be conducted anew and could well come out differently. For these reasons, the exceedingly compelling circumstances presented in this case outweigh at this juncture the considerable comity concerns asserted by the State Officers.

We therefore decline the State Officers' invitation to abstain under *O'Shea* and proceed to the merits of Redd's claims.[10]

C. Procedural Due Process

To assess Redd's Fourteenth Amendment procedural due process claims, we first examine his asserted property or liberty interests and then consider whether the state's procedures were constitutionally sufficient to protect those interests. *See K.W. ex rel. D.W. v. Armstrong*, 789 F.3d 962, 972–73 (9th Cir. 2015); *Zerezghi v. U.S. Citizenship & Immigr. Servs.*, 955 F.3d 802, 808 (9th Cir. 2020). On appeal, Redd raises three closely related procedural due process theories. He asserts that he has both a property interest and a liberty interest in state-appointed habeas counsel, both stemming from California's statutory guarantee. In addition, Redd contends that he has a liberty interest in petitioning for habeas corpus, and that, based on the operation of California's habeas system, the appointment of counsel is necessary to protect that liberty interest. We conclude that Redd has plausibly alleged a violation of his state-created property interest in the appointment of habeas counsel, and so do not reach his alternative argument that he has a liberty interest based on the same statutory guarantee. As for his liberty interest in petitioning for habeas corpus, we conclude that his complaint as currently drafted does not state a claim.

We review de novo the district court's dismissal of Redd's complaint for failure to state a procedural due process claim under Federal Rule of Civil Procedure

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[10] As Redd acknowledges in his briefing, the district court may reassess whether abstention is appropriate should he seek class certification; we do not pass on that question.

12(b)(6). *See Boquist v. Courtney*, 32 F.4th 764, 773 (9th Cir. 2022). Given that "this case was resolved on a motion to dismiss for failure to state a claim, the question below was 'not whether [Redd] will ultimately prevail' on his procedural due process claim . . . but whether his complaint was sufficient to cross the federal court's threshold." *Skinner*, 562 U.S. at 529–30 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974) and citing *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002)). The complaint need only "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Boquist*, 32 F.4th at 773 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "[O]nce a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 563 (2007).

1. Property Interest in State-Appointed Habeas Counsel

Redd contends that he has a protected, state-created property interest in state-appointed habeas counsel, and, because of the exceedingly long delay in appointing counsel, he has been denied that right without due process. The State Officers do not dispute that a state's guarantee of appointed counsel could constitute a protected property interest, contending only that Redd has received all the process due with respect to that interest. We disagree and conclude that Redd has plausibly alleged a due process claim based on deprivation of his property interest in state-appointed habeas counsel.

(a)

As an initial matter, Redd did not advance this theory in district court in opposition to the State Officers' motion to dismiss, as the State Officers note. But rather than argue that we should decline to consider it as a result, the State Officers in their briefing addressed the issue on the merits. "'[T]his court will not address waiver if not raised by the opposing party.'" *United States v. Doe*, 53 F.3d 1081, 1082 (9th Cir. 1995) (quoting *United States v. Schlesinger*, 49 F.3d 483, 485 (9th Cir. 1995)). For this reason, as well as because this pure legal question has been sufficiently briefed by the parties, and in light of the extraordinary delay Redd has already experienced and the injustice that would otherwise result, we exercise our discretion to resolve the issue. *See Singleton v. Wulff*, 428 U.S. 106, 121 (1976); *Carrillo v. Cnty. of L.A.*, 798 F.3d 1210, 1223 (9th Cir. 2015).

(b)

Due process protects property interests "well beyond actual ownership of real estate, chattels, or money." *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 571–72 (1972). Courts have recognized a range of state-created property interests protected by due process, including property interests in utility service*, Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9, 11–12 (1978), public education, *Goss*, 419 U.S. at 573, welfare benefits, *Goldberg*, 397 U.S. at 261–63, driver's licenses, *Bell v. Burson*, 402 U.S. 535, 539 (1971), nursing care, *O'Bannon v. Town Ct. Nursing Ctr.*, 447 U.S. 773, 786 (1980), a cause of action, *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429–30 (1982), and a type of immigration petition, *Zerezghi*, 955 F.3d at 809. *See also Greene v. Babbitt*, 64 F.3d 1266, 1272 (9th Cir. 1995) (collecting examples).

Recognizing such property rights "protect[s] those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined." *Roth*, 408 U.S. at 577.

"The hallmark of property . . . is an individual entitlement grounded in state law." *Logan*, 455 U.S. at 430; *see also Town of Castle Rock. v. Gonzales*, 545 U.S. 748, 756–57 (2005). "To have a property interest in a benefit, a person must 'have a legitimate claim of entitlement to it,' not just 'an abstract need or desire for it.'" *K.W.*, 789 F.3d at 972 (quoting *Roth*, 408 U.S. at 577). We look to "the language of the statute and the extent to which the entitlement is couched in mandatory terms" to determine whether state law gives rise to a protected property interest. *Greene*, 64 F.3d at 1272; *see also Ching v. Mayorkas*, 725 F.3d 1149, 1155 (9th Cir. 2013).

By its mandatory language, California law leaves no discretion to deny habeas counsel to indigent capital prisoners who opt for appointed counsel. As noted, California Government Code section 68662(a) provides that the court "shall enter an order" appointing habeas counsel for indigent capital prisoners who have accepted the offer to appoint counsel. *See also* Cal. Penal Code § 1509(b). Accordingly, indigent capital prisoners are "statutorily entitled to appointed habeas corpus counsel." *Morgan*, 50 Cal. 4th at 941; *see also People v. Superior Ct. (Morales)*, 2 Cal. 5th 523, 526 (2017) (indigent prisoners subject to capital sentences are "entitled to the appointment of habeas corpus counsel"); *In re Sanders*, 21 Cal. 4th 697, 718 (1999) ("state law *requires* appointment of counsel to represent capital defendants in postconviction proceedings" (emphasis added)).

Further, the individual statutory right to counsel for capital habeas petitions directly benefits capital prisoners, "protect[ing] the[ir] interests . . . by assuring that they are provided a reasonably adequate opportunity to present [] their habeas corpus claims." *Barnett*, 31 Cal. 4th at 475; *see also Morgan*, 50 Cal. 4th at 937; *Sanders*, 21 Cal. 4th at 717. Redd's entitlement to the appointment of counsel also resembles more traditional conceptions of property in that representation by counsel has an "ascertainable monetary value." *Town of Castle Rock*, 545 U.S. at 766–67 (quoting Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 Va. L. Rev. 885, 964 (2000)). Like the state-created entitlements to public education, nursing care, or utility service, access to counsel is a valuable service for which counsel is recompensed. And indeed, in the context of considering a Takings Clause claim by an attorney required to donate his services to a court, we have previously recognized that "there is no question that [an attorney's] services constitute private property." *Scheehle v. Justs. of Supreme Ct. of Ariz.*, 508 F.3d 887, 893 n.6 (9th Cir. 2007). In sum, California law gives rise to a protected property interest in appointed counsel.

(c)

The State Officers' sole contention in response to Redd's property interest argument is that because California does not guarantee the appointment of counsel within a specific time frame, "under California law, Redd has received everything to which he is entitled." We disagree.

First, contrary to the State Officers' contention, California law does direct the appointment of counsel within a reasonable time, although it does not provide a specific deadline. California Penal Code section

1509(f) provides that the superior court must conduct capital habeas review proceedings "as expeditiously as possible, consistent with a fair adjudication." The superior court must likewise act promptly to appoint habeas counsel. California Penal Code section 1509(b) requires the superior court to offer to appoint counsel "[a]fter the entry of a judgment of death in the trial court." California Government Code section 68662(a) further provides that the court "shall enter an order" appointing habeas counsel for state prisoners subject to death sentences "*upon* a finding that the person is indigent and has accepted the offer to appoint counsel" (emphasis added). California Government Code section 68662's timing requirement is the same, verbatim, as 28 U.S.C. § 2261(c)(1), which this Court has interpreted to require "that counsel is to be appointed expeditiously." *Spears v. Stewart*, 283 F.3d 992, 1017 (9th Cir. 2002); *see also Ashmus v. Calderon*, 123 F.3d 1199, 1208 (9th Cir. 1997), *rev'd on other grounds*, 523 U.S. 740 (1998), *vacated*, 148 F.3d 1179 (9th Cir. 1998).[11] This conclusion accords with the ordinary

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[11] Title 28 U.S.C. § 2261(c)(1) provides that for a state to qualify for expedited federal habeas review, the state must, inter alia, appoint counsel to capital prisoners in state postconviction proceedings "upon a finding that the prisoner is indigent and accepted the offer." In *Ashmus*, this Court held that California's existing mechanism for the appointment of counsel to capital prisoners did not comply with 28 U.S.C. § 2261(c)(1) because "counsel . . . is not appointed until years after a prisoner accepts the offer of counsel." *Ashmus*, 123 F.3d at 1208. *Ashmus* held that California's practice of "tak[ing] years to appoint counsel" was incompatible with 28 U.S.C. § 2261(c)(1)'s requirement that the state provide for appointment of counsel "upon a finding that the prisoner is indigent and accepted the offer." *Ashmus*, 123 F.3d at 1208.

Approximately two months after *Ashmus*, the state legislature enacted California Government Code section 68662,

temporal meaning of the word "upon," which is "on the occasion of," "at the time of," "immediately following on," or "very soon after." *See* Upon, *Webster's Third New Int'l Dictionary* 2518 (1993) (definitions 10a, 10b); *see also* Upon, *Oxford English Dictionary* 301 (2d ed. 1989) (definitions 6, "[d]enoting the day of an occurrence, regarded as a unit of time"; 6b, "[i]n, at, or during (any period of time)"; 7a, "[o]n the occasion of"; 7b, "[i]mmediately after; following on"); *Olagues v. Perceptive Advisors LLC*, 902 F.3d 121, 129 & n. 4 (2d Cir. 2018) (explaining that when used temporally, "upon" means "on the occasion of" or "at the time of").

Other California statutes and policies reflect the requirement that capital habeas counsel be appointed in a timely manner. California Government Code section 68665(b), which directs the California Supreme Court to adopt competency standards for capital habeas attorneys, reflects the high court's obligation to ensure that the standards it adopts are consistent with its obligation "to provide timely appointment." Further, Policy 3 of the California Supreme Court's Policies Regarding Cases Arising from Judgments of Death (amended Jan. 2008)[12] provides that the "court's appointment of habeas corpus counsel for a person under a sentence of death shall be made simultaneously with appointment of appellate counsel or

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adopting the temporal language of 28 U.S.C. § 2261(c)(1). *See* Cal. Stats. 1997, ch. 869, sec. 3 (Senate Bill No. 513). In so doing, the legislature aimed to "[p]rovide[] for legal representation of indigent death row prisoners to reduce the backlog of capital cases and to begin to comply with federal requirements for expedited federal habeas corpus procedures." California Bill Analysis, Senate Bill No. 513 (Sept. 11, 1997), Cal. Stats. 1997, ch. 869, sec. 3.

[12] Available at Policies_Regarding_Cases_Arising_from_Judgments_of_Death.pdf.

at the earliest practicable time thereafter." Similarly, California Government Code section 68661(a), which authorizes the appointment of attorneys employed by the Habeas Corpus Resource Center to represent capital prisoners in their habeas proceedings, specifies that "[a]ny such appointment may be concurrent with the appointment of . . . counsel for purposes of direct appeal." Under California's system, "the appointment of habeas corpus counsel should occur shortly after an indigent defendant's judgment of death" so that a habeas petition can be prepared "at roughly the same time that appellate counsel is preparing an opening brief on appeal." *Morgan*, 50 Cal. 4th at 937; *see also* Cal. Sup. Ct., *Policies Regarding Cases Arising from Judgments of Death*, Policy 3, std. 1–1.1 (a habeas corpus petition "will be presumed to be filed without substantial delay if it is filed within 180 days after the final due date for the filing of appellant's reply brief on the direct appeal"). So, although California law does not impose a *fixed* deadline for appointment of counsel, the state's promise is that habeas counsel will be appointed expeditiously, and so at a time when counsel will be useful.[13]

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[13] In *Briggs v. Brown*, 3 Cal.5th 808 (2017), the California Supreme Court considered whether the state legislature's enactment of two timing requirements—that "the superior court . . . resolve an initial [habeas] petition within one year unless a substantial claim of actual innocence requires a delay" and that every initial habeas corpus proceeding be completed within two years—violated the state constitution's separation of powers doctrine. *Id.* at 845–46, 849 (discussing deadlines in Cal. Penal Code § 1509(f)). *Briggs* held that these habeas processing deadlines were "merely directory" and therefore did not violate the separation of powers. *Id.* at 851, 860. Nonetheless, *Briggs* noted that "[l]egislated time limits can establish as a matter of policy that the proceedings they govern should be given 'as early

Second, and in any event, the State Officers' contention that the process for appointing counsel, including its precise timing, limits the property interest defined by the state misunderstands the nature of due process protections. State law creates the property interest, but it is federal constitutional law that determines the procedures required to protect that interest. *See Logan*, 455 U.S. at 432. A state "may elect not to confer a property interest," but "it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards." *K.W.*, 789 F.3d at 973 (quoting *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985)). "[B]ecause 'minimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate.'" *Logan*, 455 U.S. at 432 (quoting *Vitek v. Jones*, 445 U.S. 480, 491 (1980)).

Here, California law unmistakably confers on Redd—whom the California Supreme Court found indigent—an entitlement to have counsel appointed for pursuing his state habeas petition. *See* Cal. Gov't Code § 68662; Cal. Penal Code § 1509(b). Our question is whether Redd has plausibly alleged that the state's deprivation of that interest for two and a half decades violates due process. Whether the 26-year-long denial of counsel to Redd complies with *state* procedural requirements is beside the point, because the procedures required by the federal Due Process Clause are a matter of federal law.

In *Logan*, for example, the plaintiff had a property interest in using the state's adjudicatory procedures

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a hearing and decision as orderly procedure . . . will permit.'" *Id.* at 860 (citation omitted).

to redress employment discrimination. 455 U.S. at 429–30. Under the applicable state statute, once the plaintiff filed a discrimination charge, a state commission had 120 days in which to convene a fact-finding conference. *Id*. at 424–25. However, due to inadvertent delay, the commission failed to schedule the conference within the required timeframe, resulting in the dismissal of the plaintiff's claim for lack of jurisdiction. *Id.* at 426–27. The Supreme Court held that the 120-day requirement was "a procedural limitation on the claimant's ability to assert his rights, not a substantive element" of his property interest, and held that enforcing the 120-day limit deprived Logan of a federally protected property interest in the state-created right to have his charge heard. *Id.* at 431–33.

Similarly here, Redd alleges that due to the state's delay, his right to appointed counsel has been inadequately protected. Any timing rule for appointing counsel that would ratify the state's 26-year delay is not part of Redd's right to appointed counsel, but part of the state's procedures for securing that right—procedures that Redd alleges are inadequate. *Cf. Coe*, 922 F.2d at 531–32 (holding that the state's excessive delay in adjudicating a convicted prisoner's appeal violated due process). Put another way, recognizing that Redd's federally protected property interest in appointed counsel is subject to due process protections does not depend on whether California has mandated a specific deadline for the appointment of such counsel.

(d)

Our final question is whether Redd has plausibly alleged that the State Officers have violated the Due Process Clause by depriving him of his property interest without adequate process. The process required

by the Constitution will depend on "the importance of the private interest and the length or finality of the deprivation, . . . the likelihood of government error, ... and the magnitude of the government interests involved." *See Logan*, 455 U.S. at 434 (citing, *inter alia*, *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976), and *Memphis Light*, 436 U.S. at 19). "[T]he State may not finally destroy a property interest without first giving the putative owner an opportunity to present his claim of entitlement." *Id*.

The State Officers do not dispute that, if Redd has a protected property interest in the appointment of counsel, then it is legally plausible that the state's procedures—which have allegedly deprived him of the assistance of counsel mandated under state law and prevented him from litigating his habeas claims for 26 years—are inadequate to protect that interest.[14] Their silence on this question is unsurprising. It is more than plausible that the value of Redd's entitlement to appointed habeas counsel has significantly diminished over the many years he has been waiting, and that the 26-year delay has deprived him of his property interest in appointed counsel.

Redd's interest in the appointment of habeas counsel is obviously substantial. In the context of

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[14] Redd asserts that the applicable standard for evaluating the adequacy of the state's procedures to protect his interest in appointed counsel is the three-part balancing test established in *Mathews*, a contention the State Officers also do not dispute. In the alternative, Redd asserts that he would also prevail under the standard set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972), for assessing delays in criminal proceedings. *See also Betterman v. Montana*, 578 U.S. 437, 448 & n.12, 439–440 (2016); *Coe*, 922 F.2d at 530–32. Given the egregious circumstances alleged by Redd, his claim would be plausible under either standard.

federal habeas petitions, the Supreme Court has observed that "quality legal representation is necessary in capital habeas corpus proceedings in light of 'the seriousness of the possible penalty and . . . the unique and complex nature of the litigation.'" *McFarland v. Scott*, 512 U.S. 849, 855 (1994) (quoting former 21 U.S.C. § 848(q)(7)). "An attorney's assistance prior to the filing of a capital defendant's habeas corpus petition is crucial, because '[t]he complexity of our jurisprudence in this area . . . makes it unlikely that capital defendants will be able to file successful petitions for collateral relief without the assistance of persons learned in the law.'" *Id.* at 855–56 (quoting *Murray*, 492 U.S. at 14 (Kennedy, J., joined by O'Connor, J., concurring in judgment)).

The state's interest in appointment of habeas counsel for indigent capital prisoners is likewise substantial, as reflected in the state's decision to mandate such appointed counsel by statute. Appointing such counsel "promotes the state's interest in the fair and efficient administration of justice." *Barnett*, 31 Cal. 4th at 475; *accord Morgan*, 50 Cal. 4th at 937; *see also In re Sanders*, 21 Cal. 4th 697, 717 (1999) (explaining that appointment of habeas counsel to represent indigent capital defendants "promote[s] the cause of justice") (citation and internal quotation marks omitted).

Redd has also plausibly alleged that the deprivation resulting from a 26-year delay is significant and potentially irreversible. Redd alleges "the delay in the appointment of habeas corpus counsel . . . has significantly and adversely affected his ability to develop, present, and prove claims that his conviction and death sentence are unlawful," not only during his twenty-six-year wait but ever. "[N]umerous witnesses—including immediate family members and at

least one member of his trial defense team—have died, and many other persons with critical information have become infirm or impaired or have had substantial memory loss." Further, "critical documents and other exculpatory evidence also have been lost or destroyed." Redd's allegations are consistent with this Court's observation that when there is a lengthy state postconviction "delay, there is a substantial likelihood that witnesses will die or disappear, memories will fade, and evidence will become unavailable." *Phillips v. Vasquez*, 56 F.3d 1030, 1036 (9th Cir. 1995); *accord Coe*, 922 F.2d at 532. No matter how skilled, any attorney appointed to represent Redd in his habeas petition at this late date will begin with an immense disadvantage, vastly reducing or entirely negating the value of Redd's entitlement.

Further, a "system or procedure that deprives persons of their claims in a random manner . . . necessarily presents an unjustifiably high risk that meritorious claims will be terminated." *Logan*, 455 U.S. at 434–35. Here, California law guaranteed the appointment of habeas counsel to Redd once he accepted the state's offer, *see* Cal. Gov't Code § 68662(a), and it is certainly plausible that the extreme delay Redd has suffered has by now erroneously deprived him of his property interest in the appointment of such counsel.

At the same time, the state's challenge in providing capital habeas counsel to those indigent prisoners who need it is great. But Redd alleges that the State Officers could have taken a number of actions that would have reduced the delay in appointment of counsel. *See supra* Section II.A. No doubt the State Officers will wish to put on evidence that requiring them to take any further action is unduly burdensome. But

at the pleading stage Redd's allegations are at least plausible.

We therefore reverse the district court's dismissal of Redd's complaint for failure to state a procedural due process claim.

2. Redd's State-Created Liberty Interest in Petitioning for Habeas Corpus

(a)

Redd also contends that his complaint plausibly alleged a procedural due process claim based on his liberty interest in petitioning for habeas corpus. It is common ground between the parties that Redd's state-created right to petition for habeas gives rise to a liberty interest protected by due process. The State Officers' acknowledgment is well-taken.[15]

State laws governing postconviction relief can, under certain circumstances, give rise to a liberty interest protected by federal due process. In *Osborne*, for example, Alaska had established a process for vacating a conviction based on newly discovered evidence. 557 U.S. at 64–65. The Court held that individuals

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[15] Redd raises this formulation of his liberty interest theory for the first time on his appeal. Although he did not assert this precise liberty interest in his opposition to the motion to dismiss in district court, the State Officers do not object to his asserting this legal issue on appeal; instead, they respond on the merits. Once again, because "[i]t is well-established that the government can waive waiver implicitly by failing to assert it," we exercise our discretion to consider the issue. *See United States v. Pridgette*, 831 F.3d 1253, 1258–1259 (9th Cir. 2016) (quoting *Tokatly* v. *Ashcroft*, 371 F.3d 613, 618 (9th Cir. 2004 (citation omitted)); *see also Carrillo*, 798 F.3d at 1223 (addressing an issue not raised in district court "because the issue is purely one of law, and because our addressing it at this juncture will not prejudice the" other party).

seeking to challenge their Alaska convictions on that basis have a postconviction constitutionally protected liberty interest in demonstrating their innocence as state law permits. *Id*. at 68. Similarly, *Morrison* determined that the prisoner in that case had a state law "'liberty interest in demonstrating his innocence with new evidence' . . . . because California law provides a right to be released from custody pursuant to a writ of habeas corpus when there is no legal cause for imprisonment." 809 F.3d at 1064–65 (quoting *Osborne*, 557 U.S. at 68).

Likewise, California law guarantees Redd a right to challenge his conviction collaterally via a habeas corpus petition, so he has a constitutionally protected liberty interest in that right. *See* Cal. Penal Code §§ 1473, 1485, 1509; *Morrison*, 809 F.3d at 1065. California law specifies grounds for granting the writ; these grounds include a showing that the conviction is based on false evidence, Cal. Penal Code § 1473(b)(1)–(2); the existence of new evidence that more likely than not could have changed the outcome at trial, *id*. at § 1473(b)(3); evidence that a criminal conviction or sentence was sought or obtained based on racial, ethnic, or national origin bias, *id.* at § 1473(f); and other grounds demonstrating that the petitioner is "unlawfully imprisoned or restrained of their liberty," *id*. at § 1473(a). And California law requires that if a petitioner establishes that the challenged confinement is unlawful, the court "*must* discharge [the petitioner] from the custody or restraint under which [the person] is held." Cal. Penal Code § 1485 (emphasis added). Where, as here, state law contains "explicitly mandatory language specifying the outcome that must be reached if [state-law] substantive predicates have been met," the state law gives rise to a protected liberty interest. *Marsh v. Cnty. of San Diego*, 680 F.3d

1148, 1155 (9th Cir. 2012) (quoting *James v. Rowlands*, 606 F.3d 646, 656 (9th Cir. 2010). "[B]ecause California law provides a right to be released from custody pursuant to a writ of habeas corpus when there is no legal cause for imprisonment," *Morrison*, 809 F.3d at 1065, Redd has a protected liberty interest in challenging his conviction in state habeas.

(b)

Redd contends that his complaint sufficiently states a claim that the state's procedures are inadequate to protect his liberty interest in petitioning for habeas. Based on his complaint as currently pleaded, we disagree.

Redd's liberty interest claim is premised on the theory that the delay in appointing him counsel undermined his ability to petition for habeas. Put another way, to succeed, he must show that under California's habeas system, he cannot vindicate his right to petition for habeas unless the state appoints him counsel.

As discussed earlier, Supreme Court precedent has not recognized a constitutional right to counsel in state habeas proceedings. *See supra* Section I.A. The State Officers contend that because Redd has no recognized federal constitutional right to appointed habeas counsel, his option to represent himself is sufficient to protect his liberty interest in habeas.

Redd's response, contained in his briefs, is that under California's habeas procedures, once he accepted the state's offer to appoint counsel, he had no option to withdraw his request for counsel and represent himself. As a result, he has been precluded from moving forward with his habeas petition during his decades-long wait for the appointment of counsel,

while his ability meaningfully to develop and present his habeas claims diminishes with each passing year. In other words, the theory Redd presents in his briefs is that the state induced him into accepting its seemingly advantageous offer to appoint counsel and then forced him to wait more than a quarter century for counsel to be appointed, with no off-ramp. The consequence, under this theory, is that having at the outset requested appointment of counsel, Redd has been deprived of his federally protected liberty interest in pursuing state postconviction relief at all, with no end in sight.

But Redd's operative complaint includes no such allegations.[16] His First Amended Complaint does not allege that he is unable to withdraw his election of appointed counsel, nor does it allege that he has, at any time since his initial request for appointed counsel, attempted to change course (either by filing a motion or otherwise) and seek to represent himself in his postconviction proceedings. Although Redd's appeal briefs represent that after he accepted the state's offer to appoint habeas counsel, his "*pro se* filings have been repeatedly rejected by the California Supreme Court on [this] ground," these allegations appear nowhere in his First Amended Complaint. It is also unclear whether any such *pro se* filings were submitted in connection with his direct appeal, in which he is

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[16] Should Redd seek to amend his complaint to make such allegations, nothing in this opinion precludes the district court from permitting amendment and considering whether Redd can state a liberty interest claim based on a habeas system in which California induces indigent capital prisoners into accepting its offer of appointed counsel and then requires them to wait decades without any subsequent self-representation right in habeas.

represented by counsel, or his habeas petition, in which he is not.

Thus, as presently drafted, Redd's First Amended Complaint does not allege that since he first requested appointed counsel, he has been unable to withdraw his request for appointment of counsel and instead litigate his habeas petition *pro se*.[17] Under Supreme

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[17] In asserting that he is now unable to represent himself in his habeas petition, Redd relies on *In re Barnett*, 31 Cal. 4th 466 (2003), which concerned "whether inmates have a right to self-representation when seeking habeas corpus relief in our courts." *Id*. at 475. *Barnett* concluded that California "[i]nmates . . . have no state constitutional right to self-representation in habeas corpus proceedings," nor do they have such a right under the federal Constitution. *Id.* *Barnett* then explained that California Government Code Section 68662 "alludes to the matter of self-representation" by recognizing a capital prisoner's ability to "reject[]" the offer to appoint habeas counsel when made, but it emphasized that that right is limited. *Id.* at 476 (quoting, in part, Cal. Gov't Code § 68662). Although Section 68662 "contemplate[s] that a capital inmate [seeking to pursue state postconviction relief] may decline [the] offer of counsel *at the outset*, so long as he or she fully understands the legal consequences of such a decision, [it] specif[ies] no right to withdraw an election of professional legal representation once made." *Id.* (emphasis added). Redd relies on *Barnett* to assert that he may not proceed *pro se* in state habeas proceedings, because any right to represent himself must be asserted "at the outset," *id*., and he chose instead to opt for representation by counsel. The State Officers dispute Redd's characterization of *Barnett*, maintaining that Redd is currently free to represent himself in his habeas petition even though he earlier requested counsel and that there is language in *Barnett* consistent with that conclusion. In light of Redd's failure to allege in his First Amended Complaint that he is unable to withdraw his request for counsel, we do not consider whether *Barnett* would support such an allegation or what facts Redd would have to allege to make such an allegation plausible. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009).

Court precedent, the absence of appointed counsel, without more, does not preclude Redd from vindicating his liberty interest in petitioning for habeas. *See Coleman*, 501 U.S. at 752; *Murray*, 492 U.S. at 10; *see also supra* Section I.A. For this reason, Redd's complaint as currently formulated does not plausibly allege that California's procedures are inadequate to protect his liberty interest in petitioning for habeas.

III. Conclusion

Redd has waited over a quarter of a century for California to appoint counsel to aid him in pursuing his capital habeas petition, despite state law assurances that counsel would be available to him promptly. As a result, the likelihood that a viable petition can be filed in the future is diminishing to the vanishing point, given the likely unavailability of witnesses and documents concerning the long-ago crime and trial.

For the reasons surveyed in this opinion, we conclude that the district court should not have dismissed Redd's procedural due process claim for failure to state a claim at the pleading stage. We reverse the dismissal and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

Present: The Honorable	DOLLY M. GEE, UNITED STATES DISTRICT JUDGE

KANE TIEN	NOT REPORTED
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiff(s) None Present	Attorneys Present for Defendant(s) None Present

Proceedings: IN CHAMBERS—ORDER RE DEFENDANTS CHIEF JUSTICE TANI GORRE CANTIL-SAKAUYE AND JUDGE KIMBERLY MENNINGER'S MOTION TO DISMISS [53]

On August 13, 2019, Plaintiff Stephen Redd filed his First Amended Class Action Complaint ("FAC") on behalf of himself and other indigent persons who have been sentenced to death in the State of California. [Doc. # 31.] Plaintiff's FAC contains two 42 U.S.C. section 1983 causes of action against Defendants Chief Justice of the Supreme Court of California Tani Cantil-Sakauye, Orange County Superior Court Judge Kimberly Menninger, and other similarly situated California Supreme Court and Superior Court Judges, for violations of Plaintiff's and putative class members' right to due process of law and right to access the courts. *Id.* at ¶¶ 11–17, 41–49.

On January 17, 2020, Defendants filed a motion to dismiss this action ("MTD"). [Doc. # 53.] This motion has since been fully briefed. [Doc. ## 62, 66]. For the reasons set forth below, the Court **GRANTS** Defendants' MTD.

I.
FACTUAL BACKGROUND

A. The Death Penalty and Appointment of Habeas Counsel in California

Since 1977, California has continuously maintained some form of capital punishment and, currently, 734 individuals remain on the state's death row. *See* FAC ¶ 27 (describing the history of California's death penalty); Cal. Penal Code § 190.2 (articulating the current requirements for a crime to be death-eligible). For that entire period, indigent individuals on death row have been entitled to appointment of state habeas corpus counsel. FAC ¶ 28. That right was first announced by the California Supreme Court, which stated that it would appoint counsel to represent indigent defendants who had been sentenced to the death penalty in proceedings after the termination of their state appeals. *In re Anderson*, 69 Cal. 2d 613, 633–34 (1968). The right to appointment of state habeas counsel for indigent individuals on death row was subsequently memorialized in the California Supreme Court Internal Operating Practices and Procedures and the California Supreme Court Policies, and by the Legislature in California Government Code section 68662. *See In re Sanders*, 21 Cal. 4th 697, 718 (1999). On April 29, 2019, due to the passage of Proposition 66 in 2016 and rules promulgated to implement Proposition 66, the responsibility to appoint habeas counsel to death penalty prisoners shifted from the California Supreme Court to the

Superior Court judges who enter judgment against the individual defendants. FAC ¶ 29; *see* Cal. Gov't Code § 68662 (effective Oct. 25, 2017); Cal. R. Ct. 4.545-4.562 (effective Apr. 29, 2019).[1] Proposition 66 also requires that the Supreme Court and the Judicial Council, the policymaking body of the California court system, in evaluating binding and mandatory standards for attorneys, "shall consider the qualifications needed to achieve competent representation, the need to avoid unduly restricting the available pool of attorneys so as to provide timely appointment, and the standards needed to qualify for Chapter 154 of Title 28 of the United States Code." Cal. Gov't Code § 68665.

Both before and after the passage of Proposition 66, California has suffered a dearth of qualified counsel willing to accept an appointment as habeas counsel for individuals sentenced to death. FAC at ¶ 31 (citing *In re Morgan*, 50 Cal. 4th 932, 938 (2010)). According to Plaintiff and the California Supreme Court, reasons for this shortage of qualified counsel include the low number of counsel that meet the standards of representation and are willing to accept the rate of pay offered, the increased population of prisoners that require such appointed counsel, and the funding and staffing limitations of the Habeas Corpus Resource Center ("HCRC"), established by the California Legislature in 1998 to provide representation to death row inmates in post-conviction proceedings. *Id.* at ¶¶ 31–33; *see also In re Morgan*, 50 Cal. 4th at 938.

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[1] Since March 13, 2019, there has been a moratorium on the death penalty in California. *See* FAC at ¶ 36. This moratorium does not affect, however, Plaintiff's case or legal rights to due process and court access.

Plaintiff alleges that inadequate funding is a major issue in attracting qualified counsel. Prior to Proposition 66's passage, state-appointed habeas counsel were paid $145 per hour with a budget of $50,000 for a case, which Plaintiff alleges is far short of what is necessary to successfully litigate a habeas petition. FAC ¶ 31 (citing *In re Lucas*, 33 Cal. 4th 682 (2004) (requiring $328,000 in litigation expenses for a successful habeas petition)). But Proposition 66 and its implementing rules provide no guidance for the hourly rate to be paid to appointed habeas counsel or the provision of reasonable litigation expenses, and it does not provide additional funding for Superior Courts to use in appointing counsel. *Id.* at ¶ 32; *see* Cal. Gov't Code § 68662; Cal. R. Ct. 4.545–4.562 (containing no provisions for compensating counsel for work performed on behalf of death row inmates). A 2008 report by the California Commission on the Fair Administration of Justice suggested that the HCRC alone required a five-fold increase over its then-annual budget of $14.9 million. FAC ¶ 33.

Due to this shortage of counsel, lengthy delays remain for California death row inmates awaiting appointment of counsel to pursue a writ of habeas corpus in state court. Plaintiff alleges that 363 of the 734 individuals on California's death row do not have appointed habeas counsel. Of those 363 individuals, one continues to wait for appointment of counsel more than 25 years after being sentenced, 51 have been waiting between 20 and 24 years, and 157 have been waiting between 10 and 19 years. FAC ¶ 37. These wait times for appointed counsel are shockingly longer than the five-year recommended time limit on all death penalty appeals and initial state habeas reviews contemplated by Proposition 66. *Id*. at ¶ 34; *see also Briggs v. Brown*, 3 Cal. 5th 808, 858–59 (2017)

(finding Proposition 66's five-year limit to be directive rather than mandatory).

B. Plaintiff's Claims

In 1997, a jury found Plaintiff guilty of one count of first-degree murder, two counts of attempted murder, two counts of second-degree robbery, and two counts of second-degree commercial burglary and sentenced him to death. *See People v. Redd*, 48 Cal. 4th 691, 697 (2010). That conviction and sentence was affirmed on direct appeal in 2010, and his petition for writ of *certiorari* to the United States Supreme Court was denied on October 4, 2010. *Id*.

Plaintiff has not yet been appointed state habeas counsel, though the California Appellate Project filed a habeas petition asserting a limited number of claims (a so-called "shell" petition) on his behalf. That petition was filed on October 5, 2010, the day after the United States Supreme Court denied the petition for writ of *certiorari*. Plaintiff has attempted to file *pro se* motions with the California Supreme Court, primary among them being motions to recall the remittitur and reopen briefing on his direct appeal. He has also written letters to the California Supreme Court requesting the appointment of habeas counsel. That court has rejected Plaintiff's *pro se* filings and has also notified him that it is still attempting to find counsel to appoint for his state habeas case.

Plaintiff alleges that the delay in the appointment of habeas counsel has significantly and adversely affected his ability to develop, present, and prove claims that his conviction and death sentence are unlawful because key witnesses have died or have suffered memory loss with age, and critical documents and

other exculpatory documents have been lost or destroyed. FAC ¶ 40.

II.
PROCEDURAL BACKGROUND

A. Prior Action and Appeals

A circuitous route of petitions and appeals leads to the instant motion. In 2013, Plaintiff filed a premature petition for a writ of habeas corpus in this Court, which was dismissed for failure to exhaust state law remedies. *Redd v. Chappell*, No. CV 13-7238-ABC (C.D. Cal. Oct. 10, 2013) [Doc. # 4]. The Court declined to issue a certificate of appealability ("COA") because Plaintiff had not made a substantial showing of the denial of a constitutional right. Plaintiff filed a motion for reconsideration, which the Court also denied. Plaintiff appealed the dismissal and denial of his *pro se* habeas petition.

The Ninth Circuit invited Plaintiff to seek a COA in that court. In response, Plaintiff filed a document urging the Ninth Circuit to issue an order

> mandating that the California Supreme Court accept and file his *pro se* motion to recall the remittitur on direct appeal for consideration of eyewitness identification and search issues. Plaintiff insists the California Supreme Court's alleged refusal to consider his recall of the remittitur motion violates his rights to due process, equal protection, and access to the courts.

See No. CV 13-7238-ABC [Doc. # 11]. The Ninth Circuit declined to issue a COA because "[w]hether a remittitur is recalled on direct appeal raises an issue of state law that is not cognizable on federal habeas." *Id*.

Plaintiff then petitioned for a writ of *certiorari* from the United States Supreme Court. Though the Supreme Court denied the petition, Justice Sonia Sotomayor issued a statement, joined by Justice Stephen Breyer, stating:

> I vote to deny the petition for certiorari because it is not clear that petitioner has been denied all access to the courts. In fact, a number of alternative avenues may remain open to him. He may, for example, seek appointment of counsel for his federal habeas proceedings. *See* 18 U.S.C. § 3599(a)(2). And he may argue that he should not be required to exhaust any claims that he might otherwise bring in state habeas proceedings, as "circumstances exist that render [the state corrective] process ineffective to protect" his rights. 28 U.S.C. § 2254(b)(1)(B)(ii). Moreover, petitioner might seek to bring a 42 U.S.C. § 1983 suit contending that the State's failure to provide him with the counsel to which he is entitled violates the Due Process Clause. Our denial of certiorari reflects in no way on the merits of these possible arguments. Finally, I also note that the State represents that state habeas counsel will be appointed for petitioner "[i]n due course"—by which I hope it means, soon.

Redd v. Chappell, 135 S. Ct. 712, 713 (2014). Subsequently, Plaintiff filed a request for appointment of federal habeas counsel. That request was denied on the same bases as the prior habeas denials and dismissals. *See* CV 15-1460-DMG (C.D. Cal. Jan. 1, 2016) [Doc. # 4].

B. The Instant Action

Encouraged by Justice Sotomayor's statement, Plaintiff, proceeding *pro se*, filed this action on March 4, 2016 alleging four causes of action under 42 U.S.C. section 1983: (1) violation of equal protection, (2) denial of effective corrective process, (3) denial of access to the courts, and (4) violation of due process. [Doc. # 1.] Plaintiff requested a new trial or an order requiring the California Supreme Court to either recall the remittitur in his criminal case or supply him with counsel without further delay. Compl. at 8.[2] On October 3, 2017, this Court *sua sponte* dismissed Plaintiff's case because it requested a remedy available only under habeas corpus. *Redd v. Cal. Supreme Ct.*, No. CV 16-1540-DMG, 2017 WL 4410747, at *5 (C.D. Cal. Oct. 3, 2017).

Plaintiff appealed the Court's dismissal to the Ninth Circuit, which vacated and remanded Plaintiff's case and ordered this Court to allow Plaintiff to amend his complaint. *Redd v. Cal. Supreme Ct.*, No. 17-56696, 2018 WL 8244893 (9th Cir. Dec. 20, 2018). Plaintiff, now represented by counsel, accepted the Ninth Circuit's invitation to amend his complaint by filing his FAC, which is the focus of the instant MTD. [Doc. # 31.]

Plaintiff brings this suit under 42 U.S.C. section 1983 on his own behalf and on behalf of a class defined as "all other indigent persons who have been sentenced to death by the State of California and who have been deprived of the timely appointment of counsel to represent them in state habeas corpus proceedings." FAC ¶ 4. Specifically, Plaintiff asks this Court

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[2] All page references herein are to page numbers inserted by the CM/ECF system.

to certify the class, declare that Defendants' failure to appoint habeas counsel violates Plaintiff's and class members' Fifth and Fourteenth Amendment rights to due process and access to the courts, and declare that such violations render California's collateral review process constitutionally deficient. *Id.* at ¶ 51(a)–(c).

Defendants now seek to dismiss the FAC for lack of standing, under equitable abstention principles, and for failure to state a claim.

III.
LEGAL STANDARD

Pursuant to Federal Rule of Civil Procedure 12(b)(1), a defendant may seek dismissal of a complaint for lack of subject matter jurisdiction. "A Rule 12(b)(1) jurisdictional attack may be facial or factual." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). "In a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction. By contrast, in a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction." *Id.* The challenge here is facial. Accordingly, the Court "presume[s] the truthfulness of the plaintiff's allegations" and determines whether subject matter jurisdiction exists. *See id.*

Federal Rule of Civil Procedure 12(b)(6) states that a defendant may seek dismissal of a complaint for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). A court may grant such a dismissal only where the plaintiff fails to present a cognizable legal theory or fails to allege sufficient facts to support a cognizable legal theory. *Shroyer v. New Cingular Wireless Servs., Inc.*, 622

F.3d 1035, 1041 (9th Cir. 2010) (quoting *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001)).

To survive a Rule 12(b)(6) motion, a complaint must articulate "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556). In evaluating the sufficiency of a complaint, courts must accept all factual allegations as true. *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555). Legal conclusions, in contrast, are not entitled to the assumption of truth. *Id.*

IV.
DISCUSSION

A. Article III Standing

Article III of the Constitution "limits federal courts' subject matter jurisdiction by requiring . . . that plaintiffs have standing" to sue. *Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1121 (9th Cir. 2010). The standing analysis concerns "whether the plaintiff is the proper party to bring the matter to the court for adjudication." *Id.* at 1122. To demonstrate standing, a plaintiff must have: "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016).

Defendants argue that Plaintiff fails to satisfy the traceability and redressability prongs, although they concede that he sufficiently alleges an ongoing injury

based on the failure to appoint him habeas counsel. *See* MTD at 14. While these two prongs are independent of one another, the traceability and redressability inquiries are "closely related" as they focus primarily on whether Defendants caused Plaintiff's alleged injuries. *Nat. Res. Def. Council v. EPA*, 542 F.3d 1235, 1245 (9th Cir. 2008).

According to Defendants, Plaintiff's injury is caused by "underfunding" for which Defendants are not responsible and have no power to change. *See* MTD at 15. There is some merit to this argument. Indeed, Plaintiff acknowledges that the California Legislature, and not Defendants, controls funding for state-appointed habeas counsel. *See* FAC ¶ 33 (noting that the Legislature has not authorized the additional funding that the California Commission on the Fair Administration of Justice asserts is needed to shorten current delays in appointing habeas counsel).

Even so, Plaintiff has plausibly alleged that Defendants' actions and inactions, separate from or compounding the underfunding issue, have contributed to his injuries and those of the putative class. "Causation may be found even if there are multiple links in the chain connecting the defendant's unlawful conduct to the plaintiff's injury, and there's no requirement that the defendant's conduct comprise the last link in the chain." *Mendia v. Garcia*, 768 F.3d 1009, 1012 (9th Cir. 2014). Here, despite funding constraints outside of Defendants' control, Defendants have the ability to provide guidance for the hourly rate to be paid to habeas counsel, provide a different maximum for litigation expenses, allocate additional funds for habeas counsel from their own budget, provide additional resources to the HCRC, or otherwise attract qualified counsel. *See* Opp. at 18–19 [Doc.

62]; *see also* Cal. R. Ct. 10.101(c)(2); Cal. Gov't Code § 68664. Plaintiff asserts that these choices have constitutional dimensions and that Defendants cannot justify their inaction and have the case dismissed through lack of funding alone. *See* Opp. at 18-19 (citing *Newman v. Alabama*, 466 F. Supp. 628, 630 (M.D. Ala. 1979) (noting that even "within funding limitations imposed by the legislature," state actors must make a "genuine effort" at constitutional compliance)); *see also Peralta v. Dillard*, 744 F.3d 1076, 1083 (9th Cir. 2014) ("A case seeking prospective relief thus can't be dismissed simply because there is a shortage of resources."). Although Defendants assert that they have appointed at least some habeas counsel to indigent death row inmates, taking the factual allegations and drawing inferences in Plaintiff's favor, the Court finds that Defendants' severely delayed appointment of Plaintiff's habeas counsel is traceable to Defendants' alleged failure to improve their system for attracting and appointing counsel for death row prisoners.

In addition, Plaintiff has satisfied the lenient standard to show redressability. *See Renee v. Duncan*, 686 F.3d 1002, 1013 (9th Cir. 2012) (quoting *Bennett v. Spear*, 520 U.S. 154, 171 (1997)) (a plaintiff's burden to demonstrate redressability is "relatively modest"). "Plaintiffs need only show that there would be a 'change in a legal status,' and that a 'practical consequence of that change would amount to a significant increase in the likelihood that the plaintiff would obtain relief that directly redresses the injury suffered.'" *Id.* (quoting *Utah v. Evans*, 536 U.S. 452, 464 (2002)). Plaintiff seeks a declaration that "Defendants' failure to appoint counsel is in violation of the rights of Plaintiff . . . and the Class he represents," which would amount to a change in his legal status. FAC ¶ 51(b).

If the Court declares that the current system of appointing habeas counsel to indigent death row inmates is unconstitutional, the Court "'may assume it is substantially likely that . . . officials would abide by an authoritative interpretation of the [disputed] statute.'" *Utah*, 536 U.S. at 460 (quoting *Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992)). In this case, it is substantially likely that Defendants would act within their powers to ameliorate any constitutional defect. *See L.A. Cnty. Bar Ass'n* (*LACBA*) *v. Eu*, 979 F.2d 697, 701 (9th Cir. 1992) (assuming that if the court made a declaration of unconstitutionality, state defendants were substantially likely to act). It is true that, unlike in *Eu*, no representative of the California Legislature is a party to this action, and thus no Defendant can address the issue of insufficient overall funding. *Cf. id.* at 701 (naming as defendants, *inter alia*, California's Governor, President *Pro Tem* of the California Senate, and Speaker of the California Assembly in an action seeking legislative redress). But Plaintiff has sufficiently alleged that the judicial officer Defendants could adopt new policies to hasten the appointment of habeas counsel for California's death row inmates. For example, at the very least, the Superior Court Defendants could more actively publicize the dire need for eligible volunteers and announce compensation or reimbursement standards for the first time since the passage of Proposition 66. *See* FAC at ¶ 35. Drawing all inferences in Plaintiff's favor regarding the actions Defendants could take to attract qualified counsel to take on the state habeas petitions of death row prisoners, Plaintiff has plausibly alleged that Defendants could reduce the time Plaintiff must wait to be appointed habeas counsel.

Plaintiff has thus "adequately demonstrated that, were this court to rule in [his] favor, it is likely that

the alleged injury would be *to some extent* ameliorated," even if Defendants cannot eliminate the habeas counsel appointment backlog entirely. *Id.* at 701 (emphasis added). Moreover, given the systematic dysfunction in California's system for appointing state habeas counsel to indigent death row inmates, Plaintiff's injury cannot be described as "the result of the independent action of some third party not before the court" and therefore redressable only by that third party. *Bennett*, 520 U.S. at 167. The numerous failures Plaintiff ascribes to Defendants are part of the broken system, and Defendants may act to at least partially address them. Therefore, Plaintiff has met his relatively modest burden to show that an announcement that the current system is unconstitutional would increase the likelihood that his injury would be directly redressed, at least in part. *See Renee*, 686 F.3d at 1013.

Accordingly, the Court concludes that Plaintiff has Article III standing to bring his claims to the extent those claims allege that Defendants' actions or inaction caused his lack of access to habeas counsel and consequently violated his Due Process and court access rights.[3]

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[3] Defendants argue that Plaintiff does not have standing to request an additional declaration that the constitutional violations Plaintiff alleges "render[] California's collateral review process ineffective to protect the rights of Plaintiff . . . and the Class he represents." FAC ¶ 51(c). Defendants suggest that this declaration seeks to decide an element of a future federal habeas petition and does not present a current case or controversy. *See* MTD at 18 (citing 28 U.S.C. § 2254(b)(1)(B)(ii) (providing that a writ of habeas corpus shall not be granted unless the applicant has exhausted all available state remedies or "circumstances exist that render such process ineffective to protect the rights of the applicant")); *see also Calderon v. Ashmus*, 523 U.S. 740 (1998).

B. Abstention

Federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them." *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). But under the equitable abstention doctrine enunciated in *O'Shea v. Littleton*, 414 U.S. 488 (1974), federal courts abstain from ruling on the merits of a claim where the court would have to "monitor the substance of individual cases on an ongoing basis to administer its judgment." *Courthouse News Serv. v. Planet*, 750 F.3d 776, 790 (9th Cir. 2014); *see also E.T. v. Cantil-Sakauye*, 682 F.3d 1121, 1124 (9th Cir. 2012) (finding *O'Shea* abstention appropriate where requested relief would "amount to an ongoing federal audit" of state court processes) (citation and internal quotation marks omitted). Moreover, if a ruling in federal court granting declaratory relief would require continued monitoring of state court processes, "the equitable restraint considerations" urging abstention are "nearly absolute." *E.T.*, 682 F.3d at 1125. But a "bright-line finding" of unconstitutionality that would not require an "intensive, context-specific legal inquiry" in later litigation does not require abstention, even if the ruling imposes "systemic changes to an institution." *Courthouse News*, 750 F.3d at 791–92.

Defendants argue that this case is similar to *E.T.*, in which the Ninth Circuit dismissed claims brought against Chief Justice Cantil-Sakauye, the Presiding

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The Court need not rule on whether Plaintiff has standing to seek an additional declaration premised on the same constitutional violations for which Plaintiff has established standing. For the reasons set forth below, the Court need not determine what declaratory relief is available absent the establishment of a constitutional violation.

Judge of the Sacramento County Superior Court, and the director of the Judicial Council under 42 U.S.C. section 1983 contending that juveniles received inadequate counsel in dependency proceedings in Sacramento County. 682 F.3d at 1125. The court concluded that issuing a declaratory judgment challenging the adequacy of counsel would "inevitably lead to precisely the kind of piecemeal interruptions of . . . state proceeding condemned in *O'Shea*." *Id.* (citation and internal quotation marks omitted). Defendants contend that Plaintiff's requested declaration that California's systems for appointing habeas counsel are unconstitutional would lead to the same unacceptable outcome: an "ongoing intrusion into the State's administration of its own laws," as this Court or other federal courts would have to continually decide whether "state judges are doing enough" to satisfy their obligations under the Court's Order. MTD at 19.

Plaintiff acknowledges that he proposes "systemic changes" to the judiciary's appointment system but argues that the declarations sought would represent a "bright-line finding" of unconstitutionality rather than an imposition of an "ongoing federal audit" of the California judiciary. *Courthouse News*, 750 F.3d at 791–92. Indeed, in the Ninth Circuit, even declarations that "inevitably require restructuring" of parts of a state government are permissible on two conditions. *Eu*, 697 F.2d at 703. First, the declaration must resolve "a substantial and important question currently dividing the parties." *Id.* at 703–04. Second, while "*some* additional litigation" may be needed to enforce the declaratory injunction, a declaration is inappropriate if it would inevitably lead to repeated "intensive, context-specific legal inquir[ies]" to adjudicate compliance. *Courthouse News*, 750 F.3d at 791–92.

Plaintiff has met both elements to show that the declaration he seeks does not require intensive continued intervention by federal courts into state judicial affairs, and thus abstention is not appropriate. The question of the constitutionality of California's current system for appointing state habeas counsel to indigent individuals sentenced to death is substantial and important to Plaintiff, the other death row inmates he seeks to represent, Defendants, and the State of California. Plaintiff also seeks a bright-line declaration that the systems are unconstitutional. *See* FAC, Prayer for Relief. This case is thus unlike *E.T.*, in which plaintiffs sought federal court oversight over the *competency* of individual state-court-appointed counsel for foster children, and more like *Eu*, in which the plaintiff sought a declaration that the *quantity* of judges in Los Angeles County was so insufficient that litigants were deprived of their due process rights. *Compare E.T.*, 682 F.3d at 1123, *with Eu*, 697 F.2d at 703. Like the Ninth Circuit in *Eu*, the Court acknowledges that some additional federal litigation may be necessary to "explor[e] the contours" of any rights announced in issuing the declaration Plaintiff seeks. 697 F.2d at 703. But because a declaration of unconstitutionality would still "serve a useful purpose in clarifying and settling the legal relations between the parties" on a matter of grave importance, the Court declines to exercise *O'Shea* abstention and turns to the sufficiency of Plaintiff's allegations. *Id.*

C. Eleventh Amendment

Defendants argue that the Eleventh Amendment bars Plaintiff's claims. The Eleventh Amendment does not bar, however, "actions seeking only prospective declaratory or injunctive relief against state officers in their official capacities." *Eu*, 979 F.2d at 704

(quoting *Ex parte Young*, 209 U.S. 123, 155–56 (1908)); *see also Va. Office for Prot. and Advocacy v. Stewart*, 563 U.S. 247, 255 (2011). In addition, the Ninth Circuit has specifically rejected an argument that suits against state actors must be dismissed solely because the plaintiff seeks comprehensive reforms. *Armstrong v. Wilson*, 124 F.3d 1019, 1026 (9th Cir. 1997) ("Even where the relief sought may have a 'substantial ancillary effect on the state treasury,' a suit against state officials may proceed so long as the relief 'serves directly to bring an end to a present violation of federal law.'") (quoting *Papasan v. Allain*, 478 U.S. 265, 278 (1986)).

Here, Plaintiff clarifies that he is "not asking this Court to tell Defendants *how* to change the state's appointment system, but simply to affirm that federal constitutional rights dictate that they *must* make the appointments in a timely fashion." Opp. at 27. Due to the prospective declaratory relief sought, *Ex parte Young* applies and, therefore, the Eleventh Amendment does not bar Plaintiff's claims.

D. Procedural Due Process

Plaintiff's first claim is for violation of procedural due process based on the deprivation of his liberty interest in the appointment of state habeas counsel. A procedural due process claim has three elements: "(1) a liberty or property interest protected by the Constitution; (2) a deprivation of the interest by the government; (3) lack of process." *Portman v. Cnty. of Santa Clara*, 995 F.2d 898, 904 (9th Cir. 1993).

Neither the U.S. Supreme Court nor the California Supreme Court recognize a constitutional right to habeas counsel. *See Ryan v. Gonzales*, 568 U.S. 57, 67 (2013) (noting no constitutional right to collateral

review at all, or to habeas counsel); *Bonin v. Vasquez*, 999 F.2d 425, 429 (9th Cir. 1993) ("Clearly, there is no constitutional right to counsel on habeas."); *In re Barnett*, 31 Cal. 4th 466, 475 (2003) ("California likewise confers no constitutional right to counsel for seeking collateral relief from a judgment of conviction via state habeas corpus proceedings."). The U.S. Supreme Court has held, however, that "when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution—and, in particular, in accord with the Due Process Clause." *Evitts v. Lucey*, 469 U.S. 387, 401 (1985). Because California has opted to provide a statutory right to habeas counsel for indigent death row prisoners, the Court examines whether that statutory right may be considered a constitutionally protected liberty interest.

A statute creates a constitutionally protected liberty interest where it contains: "(1) 'substantive predicates' governing official decisionmaking, and (2) 'explicitly mandatory language' specifying the outcome that must be reached if the substantive predicates have been met." *Bonin v. Calderon*, 59 F.3d 815, 842 (9th Cir. 1995) (quoting *Ky. Dept. of Corr. v. Thompson*, 490 U.S. 454, 462–63 (1989)). The California statute for appointment of habeas counsel provides:

> The superior court that imposed the sentence *shall* offer to appoint counsel to represent a state prisoner subject to a capital sentence for purposes of state postconviction proceedings, and *shall* enter an order containing one of the following:
>
> > (a) The appointment of one or more counsel to represent the prisoner in

> proceedings pursuant to Section 1509 of the Penal Code upon a finding that the person is indigent and has accepted the offer to appoint counsel or is unable to competently decide whether to accept or reject that offer.
>
> (b) A finding, after a hearing if necessary, that the prisoner rejected the offer to appoint counsel and made that decision with full understanding of the legal consequences of the decision.
>
> (c) The denial to appoint counsel upon a finding that the person is not indigent.

Cal. Gov't Code § 68662 (emphasis added). This language mandates State action through the use of the word "shall," and it substantively limits official discretion by requiring the Superior Court to appoint habeas counsel to any prisoner sentenced to death if he has met two predicates: (1) he is indigent and (2) he accepts the offer of counsel or is not competent to accept or reject the offer of counsel. *Cf. Chaney v. Stewart*, 156 F.3d 921, 925 (9th Cir. 1998) (finding no substantive predicates constraining official discretion to appoint expert witnesses for indigent criminal defendants where the court could determine what witnesses "are reasonably necessary"). Section 68662 thus appears to confer upon Plaintiff a statutorily-created right to appointment of capital habeas counsel.

Defendants argue, however, that the right to appointed habeas counsel, even if mandatory and nondiscretionary, does not create a constitutionally protected substantive liberty interest because it is instead a "state *procedural* right which is itself designed to facilitate the protection of more fundamental

substantive rights." MTD at 23 (quoting *Calderon*, 59 F.3d at 842) (emphasis added). In *Calderon*, a federal habeas petitioner argued that he had been deprived of a liberty interest created by a California statute providing that "two counsel on each side may argue the cause" for a capital defendant in his direct criminal proceedings. 59 F.3d at 841-42. Characterizing the two-attorney statute as creating a state procedural right to protect the substantive rights to effective assistance of counsel and a reliable verdict, the Ninth Circuit emphasized the "careful distinction between procedural protections created by state law and the substantive liberty interests those procedures are meant to protect." *Id.* at 842; *see also id.* ("[T]here is certainly no federal constitutional right to have two attorneys make closing arguments even in death penalty cases."). Defendants also rely on *James v. Rowlands*, 606 F.3d 646 (9th Cir. 2010), in which a father sued officials from the state Child Protective Services for failing to abide by California's requirement that officials notify parents immediately upon taking their child into protective custody. *Id.* at 656. In *James*, the Ninth Circuit recognized the plaintiff's constitutionally protected liberty interest in the care and management of his child, but held that the California statute merely establishes procedures to protect that liberty interest, rather than a separate liberty interest in notification. *Id.* at 657. The court concluded that because "[a] state does not create new constitutional rights by enacting laws designed to protect existing constitutional rights, ... non-compliance with those procedures does not necessarily violate the Due Process Clause." *Id.*

Although the statutory right in Plaintiff's case differs in detail from those discussed in *Calderon* and *James*, it ultimately falls into the same category of

procedural rights. The fundamental right at issue here is Plaintiff's right to the writ of habeas corpus, through which he can challenge the deprivation of other constitutional rights in his direct criminal proceedings. Plaintiff's argument that "the state guarantee of appointed habeas counsel is a *fundamental safeguard* of an individual's rights in those state habeas proceedings" in fact underscores the procedural role of appointed counsel. Opp. at 30. The Court does not disagree that having counsel in a complex capital habeas case can be critical to vindicate a habeas petitioner's constitutional rights. *See In re Barnett*, 31 Cal. 4th at 477 ("[W]ith their formal legal training, professional experience, and unrestricted access to legal and other resources, counsel possess distinct advantages over their inmate clients in investigating the factual and legal grounds for potentially meritorious habeas corpus claims and in recognizing and preparing legally sufficient challenges to the validity of the inmates' death judgments."). But California's policy choice to appoint habeas counsel for death row inmates does not create new constitutional obligations where "[s]tates have no obligation to provide postconviction relief, and when they do, the fundamental fairness mandated by the Due Process Clause does not require that the State supply a lawyer as well." *Pennsylvania v. Finley*, 481 U.S. 551, 552 (1987). California's appointment of counsel is designed to protect Plaintiff's right to present a habeas petition, not to create a "substantive end" in itself. *See James*, 606 F.3d at 657.

Thus, although the stark reality in which a prisoner must wait two decades to be appointed statutorily-guaranteed counsel dramatically fails to fulfill the statute's intended purpose, such a failure does not necessarily violate the U.S. Constitution. Because

Plaintiff has no constitutionally protected liberty interest in the appointment of state habeas counsel, his procedural due process claim must be dismissed.

E. Right of Access to the Courts

Plaintiff also asserts that he has been deprived of "meaningful access to the courts." FAC ¶ 49; Opp. at 32-33. The "constitutional right to court access [is] grounded in the First Amendment right to petition and the Fourteenth Amendment right to due process." *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010). The Supreme Court has held, however, that prisoners need only "be able to present their grievances to the courts," not to "litigate effectively" through "permanent provision of counsel." *Lewis v. Casey*, 518 U.S. 343, 354, 360 (1996). Indeed, this constitutional right has primarily arisen in the context of the adequacy of prison law libraries and assistance for prisoners from persons trained in the law, not in the separate context of the availability and adequacy of constitutionally guaranteed counsel. *See id.* at 355; *Hebbe*, 627 F.3d at 342. The right to court access guarantees prisoners only "the means for ensuring a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts." *Lewis*, 518 U.S. at 351 (citations and internal quotation marks omitted).

Plaintiff acknowledges that he and others waiting decades for state habeas counsel have the option—as unattractive as that option may be—of representing themselves in their state habeas proceedings. *See* Opp. at 33. Plaintiff and other indigent individuals sentenced to death must choose between lengthy delays in appointment of counsel or proceeding *pro se* and waiving the right to counsel. *See Redd v. Chappell*, 574 U.S. 1041, 1041 (2014) ("[T]he California

Supreme Court refuses to consider capital inmates' pro se submissions relating to matters for which they have a continuing right to representation.") (citing *In re Barnett*, 31 Cal. 4th at 476–477). He does not allege that if he proceeded *pro se*, he would be denied the type of "reasonably adequate" aid guaranteed by the constitutional right to court access, such as access to law libraries. He also cites to no precedent by which the right to court access can be applied to sidestep the U.S. and California Supreme Courts' conclusions that prisoners have no constitutional right to habeas counsel. *See Ryan v. Gonzales*, 568 U.S. 57, 67 (2013); *Bonin v. Vasquez*, 999 F.2d 425, 429 (9th Cir. 1993).

Accordingly, Plaintiff's claim for deprivation of his right to court access must be dismissed.

V.
CONCLUSION

This Court joins many others in decrying the dysfunction and unconscionable delays rife in California's death penalty system. *See, e.g.*, *People v. Potts*, 6 Cal. 5th 1012, 1064 (2019) (Liu, J., concurring) (collecting cases); *Jones v. Chappell*, 31 F. Supp. 3d 1050, 1064 (C.D. Cal. 2014), *rev'd sub nom. Jones v. Davis*, 806 F.3d 538 (9th Cir. 2015). This is an issue that should be addressed as a matter of public policy by the State Legislature in collaboration with the state courts. But because Plaintiff's FAC fails to state a claim for relief under Section 1983, Defendants' motion is **GRANTED** with prejudice.

IT IS SO ORDERED.