SUPREME COURT OF THE UNITED STATES

No. 97–391

ARTHUR CALDERON, WARDEN, ET AL., PETITIONERS
v. TROY A. ASHMUS ETC.

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

[May 26, 1998]

JUSTICE BREYER, concurring, with whom JUSTICE SOUTER joins.

The Court says that "[respondents] can litigate California's compliance with Chapter 154" when they "file habeas petitions." *Ante*, at 7. In light of the Court of Appeals' concern, echoed by respondent class members, that without declaratory relief, they would be placed in an untenable remedial "dilemma," Brief for Respondent 16–17, 35–37; 123 F. 3d 1199, 1205 (CA9 1997), I would add that it should prove possible for at least some habeas petitioners to obtain a relatively expeditious judicial answer to the Chapter 154 compliance question and thereby provide legal guidance for others. That is because, in at least some cases, whether a petitioner can or cannot amend, say, a "bare bones" habeas petition (filed within 180 days) will likely depend upon whether California does, or does not, qualify as an "opt-in" State. Compare 28 U. S. C. §2242 (ordinary amendment rules); §2254 Rule 11 (rules of civil procedure applicable to federal habeas petitions); 1 J. Liebman & R. Hertz, Federal Habeas Corpus Practice and Procedure §17.2 (2d ed. 1994 and Supp. 1997) (Federal Rule of Civil Procedure 15's liberal standard for amendment applies to habeas petitions in States not eligible for Chapter 154) with 28 U. S. C. A. §2266(b)(3)(B) (Supp.

1998) (setting forth strict standard for amendment applicable where State falls within Chapter 154). And a district court's determination that turned on the legal answer to that question might well qualify for interlocutory appeal. See 28 U. S. C. §1292(b) (permitting certification, and hence interlocutory appeal, of certain district court determinations). With this understanding, I join the Court's opinion.