[ORAL ARGUMENT NOT YET SCHEDULED]

No. 20-1144

IN THE

United States Court of Appeals for the District of Columbia Circuit

OFFICE OF THE FEDERAL PUBLIC DEFENDER FOR THE DISTRICT OF ARIZONA; SAMMANTHA ALLEN; STEVE BOGGS; JOHNATHAN BURNS; ALAN CHAMPAGNE; MIKE GALLARDO; RODNEY HARDY; ALVIE KILES; ANDRE LETEVE; BRAD NELSON; STEVEN PARKER; WAYNE PRINCE; PETE ROGOVICH; & GILBERT MARTINEZ,

Petitioners,

v.

WILLIAM P. BARR, UNITED STATES ATTORNEY GENERAL; UNITED STATES OF AMERICA,

Respondents,

STATE OF ARIZONA,

Intervenor.

On Petition for Review of the Attorney General's April 14, 2020 Decision Certifying Arizona's Capital Counsel Mechanism Under 28 U.S.C. §§ 2261-2266, Docket No. OAG-167

BRIEF OF FORMER FEDERAL JUDGES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to this Circuit's Rule 28(a)(1), *amici curiae* certify:

(A) Parties and *Amici*: Except for the following, all parties, intervenors, and *amici* appearing before this Court are listed in the Petitioners' Initial Opening Brief: *Amici curiae* Hon. William G. Bassler, Hon. Mark W. Bennett, Hon. Nancy Gertner, Hon. Stephen M. Orlofsky, and Hon. Alfred Wolin.

(B) Rulings Under Review: The ruling under review is the Attorney General's April 14, 2020 decision certifying Arizona's capital counsel mechanism under 28 U.S.C. §§ 2261-2266, Docket No. OAG-167. The decision is published in the Federal Register at 85 Fed. Reg. 20,705, and is reproduced in the Joint Appendix at JA R.1.85Fed.Reg.20,705. *Amici curiae* are aware of no other relevant rulings under review in this Court or any other court.

(C) Related Cases: *Amici curiae* are aware of no related cases pending in this Court or any other court.

(D) Corporate Disclosure Pursuant to D.C. Cir. Rule 26.1: This provision is not applicable, as *amici curiae* are not entities required to file disclosure statements under D.C. Cir. Rule 26.1.

CERTIFICATE REGARDING SEPARATE BRIEF

The *amici curiae* are aware that other parties intend to file *amicus* briefs in support of Petitioners. In accordance with D.C. Circuit Rule 29(d), the *amici curiae*, former federal district court judges, have coordinated to avoid overlap between the briefs to the extent practicable.

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INTEREST OF THE *AMICI CURIAE*[1]

Aside from the habeas petitioners on death row and their counsel, the federal judiciary is the group most directly impacted by the Attorney General's certification of Arizona's capital counsel mechanism pursuant to Chapter 154 of the Antiterrorism and Effective Death Penalty Act of 1996 ("Chapter 154"). *See* 28 U.S.C. §§ 2261-2266. To that end, this group of former federal district judges (listed in the Appendix hereto) files this brief *amici curiae* to convey the interests of the federal judiciary as they relate to federal habeas corpus review and the effective administration of justice in Arizona. Although this group of judges takes no position on the underlying merits of the constitutional claims asserted by the individual habeas petitioners as represented by the Office of the Federal Public Defender, they have all adjudicated habeas corpus petitions during their tenure on the bench.

Given their prior experience with federal habeas review, these judges have a keen interest in ensuring that the Attorney General carefully analyzes whether the requirements for certification pursuant to 28 U.S.C. § 2261 and 28 U.S.C. § 2265 have been met before allowing a State to take advantage of Chapter 154's expedited review and bypass the traditional process applicable to the Great Writ.

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[1] *Amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* or their counsel made a monetary contribution to this brief's preparation or submission. Pursuant to this Court's Rule 29(a), all parties have consented to the filing of this brief.

In particular, the Attorney General must conduct a rigorous review to ensure that a State has a qualifying mechanism for timely appointment, compensation, and payment of reasonable litigation expenses of competent counsel. Certification without such a review, as happened with the Arizona application, will result in a process which severely impairs the ability of federal judges to fully and fairly adjudicate habeas petitions because of the pernicious combination of (1) inadequate representation during post-conviction proceedings and (2) the severe restrictions and deadlines imposed by Chapter 154 certification on federal habeas review of state-court death sentences.

INTRODUCTION AND SUMMARY OF ARGUMENT

Chapter 154 mandates truncated federal habeas review in capital cases only when a State lives up to certain guarantees. Originally, the federal judiciary was tasked with reviewing a state's application for Chapter 154 certification to determine "whether the State has established a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State postconviction proceedings brought by indigent prisoners who have been sentenced to death." 28 U.S.C. § 2265(a)(1)(A). Because no State satisfied this standard, the federal judiciary did not permit any State to avail itself of the preferential treatment afforded by Chapter 154.

In 2006, instead of helping the States provide the necessary resources for adequate post-conviction counsel, Congress (as part of the extension of the Patriot Act) stripped the federal judiciary of its Chapter 154 certification authority and gave it to the United States Attorney General. *See* 28 U.S.C. § 2265. The Attorney General also was tasked with promulgating the regulations to implement the state certification process and determine the criteria for certification. *Id.* § 2265(a). Although Arizona is the first state to be certified under the Attorney General's construct, Texas's application is pending and, depending on the outcome of the Arizona matter, many more applications will no doubt follow.

Once a State's capital counsel mechanism is certified, Chapter 154's fast-track procedures for habeas review come into play, eviscerating the role of federal judges as the last bastion against the potentially-unconstitutional execution of capital defendants. Federal judges are required to adjudicate capital habeas petitions within rigid time frames without regard to the complexity of the particular case. 28 U.S.C. § 2266. Petitioners are severely limited in their ability to raise procedurally defaulted claims, to amend their petitions, and to obtain a stay of execution from the federal court. *Id*. §§ 2264(a), 2266(b)(3)(B) & 2262(c). The statute of limitations for filing a habeas petition in federal court is halved, from one year to 180 days. *Id.* § 2263(a). And district judges are required to prioritize

review of capital habeas petitions from certified states like Arizona ***over all other*** criminal and civil matters on their dockets. 28 U.S.C. § 2261.

While this bare-bones review arguably makes sense if the petitioner was provided effective representation at the state post-conviction level, it makes no sense in a place, like Arizona, where the capital counsel mechanism does not guarantee the timely appointment and adequate compensation of competent, experienced counsel. To the contrary, in a place like Arizona, the more likely result is that potentially available meritorious constitutional claims are lost forever and full factual records are never developed.

ARGUMENT

I. RIGOROUS FEDERAL-COURT REVIEW OF HABEAS PETITIONS IS CRUCIAL FOR THE SOUND ADMINISTRATION OF JUSTICE

Habeas review is a crucial responsibility of the federal judiciary. The Supreme Court has declared that "[t]here is no higher duty of a court, under our constitutional system, than the careful processing and adjudication of petitions for writs of habeas corpus, for it is in such proceedings that a person in custody charges that error, neglect, or evil purpose has resulted in his unlawful confinement and that he is deprived of his freedom contrary to law." *Harris v. Nelson*, 394 U.S. 286, 291-92 (1969). In capital cases, the Great Writ plays its most critical function – it is the ***final*** opportunity for a prisoner facing execution to challenge the legality of his sentence.

The statistics demonstrate the importance and the benefits of ***rigorous*** judicial review of death sentences (almost all of which are imposed by state courts). Since 1973, 170 prisoners have been released and exonerated from death row. *Facts about the Death Penalty*, Death Penalty Information Center (Aug. 14, 2020), https://deathpenaltyinfo.org/documents/FactSheet.pdf. These innocent lives were saved because courts carefully scrutinized the death sentences handed down by state trial courts. To a similar effect, 8,466 prisoners were sentenced to death in the United States between 1973 and 2013, but 2,671 of them had their sentences or convictions overturned, including through the federal habeas corpus process. U.S. Dep't of Justice, Bureau of Justice Statistics, *Capital Punishment, 2013—Statistical Tables*, at 19 (Table 16) (Dec. 2014), https://www.bjs.gov/content/pub/pdf/cp13st.pdf. In Arizona, out of the 307 prisoners sentenced to death, 120 – almost 40% – had their sentence or conviction overturned. *Id.* at 20 (Table 17).

A national study reviewing all death sentences from 1973 through 1995 found that 59% of death sentences were affirmed by state supreme courts; in Arizona, the affirmance rate was 58%. California Commission on the Fair Administration of Justice, *Final Report* 136 (June 30, 2008); Liebman et al., *A Broken System: Error Rates in Capital Cases, 1973-1995* (June 12, 2001). Yet the study also found that 40% of death-sentence judgments reviewed through the

federal habeas corpus process were set aside – the reversal rate for Arizona death sentences was ***60%***. *Id.*; Liebman et al., at 55 (Table 7). Given this evidence, federal habeas review undoubtedly serves as an important check on the failures of the state trial, appellate, and post-conviction proceedings. It is a prisoner's final and – in some cases, only – meaningful post-conviction opportunity to establish his innocence or ineligibility for the death penalty.

II. UNWARRANTED CERTIFICATION OF ARIZONA'S CAPITAL COUNSEL MECHANISM WILL SEVERELY IMPAIR THE ABILITY OF FEDERAL DISTRICT COURTS TO ENGAGE IN MEANINGFUL HABEAS REVIEW – THE VERY SAME PROCESS OF JUDICIAL REVIEW WHICH, TIME AND AGAIN, HAS UNCOVERED CONSTITUTIONAL DEFECTS IN STATE-COURT DEATH SENTENCES

A truncated process of federal habeas review pursuant to Chapter 154 is only warranted where a state guarantees the timely provision of competent counsel and sufficient litigation resources to effectively represent clients on death row. *See Lindh v. Murphy*, 521 U.S. 320, 331 (1997) (noting that Chapter 154 applies when a state has fulfilled its obligations to promote the sound resolution of prisoner petitions).

Arizona has offered no proof that its capital counsel mechanism results in capital defendants being represented by attorneys with the requisite experience, competence, and resources to effectively represent defendants during their state-court post-conviction proceedings. Petitioners, on the other hand, have submitted

ample evidence demonstrating that Arizona's capital counsel mechanism fails to do so. *See* Pet'rs' Initial Opening Br. §§ I.A.-D ("Opening Br."). As the American Bar Association Death Penalty Moratorium Implementation Project found in a 2006 study, "[d]espite the qualification standards required by Arizona law, the problem of ineffective assistance of counsel is real." American Bar Association, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Arizona Death Penalty Assessment Report* 147 (2006).

Federal judges in Arizona will continue to be forced to adjudicate habeas corpus petitions, which are often initially filed without a fully developed record of facts or claims. The result of the Attorney General's improvident Chapter 154 certification, if allowed to stand, is that federal judges may now be precluded altogether from reviewing meritorious constitutional arguments, because they are raised in "untimely" filings, and will have to make final, life-and-death decisions on a grossly unrealistic timeline.

A. Federal judges' decision-making process will be severely limited by the artificial time limits imposed by Chapter 154.

Federal habeas review is necessarily a time-consuming process – especially when the petitioner's life is on the line. Federal courts have "the power, not merely to rule on cases, but to ***decide*** them conclusively." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218-19 (1995) (emphasis added). A federal court's ability to decide cases within its jurisdiction is subject to constraint and review

only by courts higher in the Article III hierarchy (*see id.*) – not by the Legislature or any other branch of government. However, when combined with the lack of competent post-conviction counsel in Arizona – and there is ***no*** evidence to suggest that the previously identified problems have been rectified – the Attorney General's Chapter 154 certification will often have the effect of preventing federal judges from actually rendering comprehensive and thoughtful decisions on the habeas corpus matters before them.

Chapter 154 requires that federal district courts enter a final judgment on capital habeas petitions "not later than 450 days after the date on which the application is filed, or 60 days after the date on which the case is submitted for decision, whichever is earlier." 28 U.S.C. § 2266(b)(1)(A). It also imposes time limits on federal appellate courts, requiring them to decide an appeal in a capital habeas matter "not later than 120 days after the date on which the reply brief is filed, or if no reply brief is filed, not later than 120 days after the date on which the answering brief is filed." *Id.* § 2266(c)(1)(A). These artificial deadlines seriously hinder the flexibility that is needed to properly decide habeas cases – especially capital habeas cases. *See Harris*, 394 U.S. at 291 ("The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected."); *In re Berry*, 521 F.2d 179, 181 (10th Cir. 1975) (stating that, under the 30-day limit

placed on federal judges deciding appeals pursuant to the recalcitrant witness statute, 28 U.S.C. § 1826(b), judges "can do no more than hurriedly review the transcript and complex briefs").[2]

A 2007 study found that the average time to decide capital habeas corpus cases in 13 federal districts was 1,152 days – not the 450 days mandated by the Attorney General and Congress. Nancy J. King *et al.*, *Final Technical Report: Habeas Litigation in U.S. District Courts: An Empirical Study of Habeas Corpus Cases Filed by State Prisoners Under the Antiterrorism and Effective Death Penalty Act of 1996*, at 7 (Aug. 21, 2007). The average time in the District of Arizona was more than 1,500 days – more than three times the 450 days mandated by the Attorney General and Congress. *Id.* at 42. In cases where the district court reached the merits on at least one claim, it took much longer to resolve the case. *Id.* at 85. Not surprisingly, the federal district courts have historically taken longer – indeed, much longer – to decide capital habeas cases than Chapter 154 would permit, but it was time well spent. *See, e.g.*, Mark W. Bennett, *Sudden Death: A Federal Judge's Reflections on the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 42 Hofstra L. Rev. 391,

[2] In *In re Berry*, the Tenth Circuit acquiesced in the 30-day limit placed on judges to decide an appeal under the recalcitrant witness statute, while acknowledging the difficulties it imposed on judges. At the risk of understatement, the stakes in a capital habeas case are a bit higher than under the recalcitrant witness statute.

394 (2013) (highlighting the length and complexity of capital post-conviction review and noting that, "[i]n the course of [] two death penalty cases and a 28 U.S.C. § 2255 post-conviction proceeding, [one court] published thirty-four death penalty opinions . . . . These decisions totaled 1333 pages—often on multiple, cutting-edge pretrial, trial, and post-trial federal death penalty issues."). And, according to the Department of Justice, "federal courts appear to be devoting time according to the complexity of the issues brought before them." U.S. Dep't of Justice, Bureau of Justice Statistics, *Federal Habeas Corpus Review: Challenging State Court Criminal Convictions* 28 (Sept. 1995).

The enforcement of rigid deadlines on the judicial decision-making process, like those contained in Chapter 154, creates a "serious constitutional problem." *In re Grand Jury Proceedings*, 605 F.2d 750, 752 n.1 (5th Cir. 1979) (discussing application of the recalcitrant witness statute). Such meddling with a federal judge's decision-making process is an intrusion on the powers vested in the federal judiciary by the United States Constitution. Indeed, the Supreme Court has observed that "the power of the federal courts to conduct inquiry in habeas corpus is equal to the responsibility which the writ involves: 'The language of Congress, the history of the writ, the decisions of this Court, all make clear that the power of inquiry on federal habeas corpus is ***plenary***." *Harris*, 394 U.S. at 292 (emphasis added). At their core, the artificial time limits created by 28 U.S.C. § 2266 and

imposed by the Attorney General – requiring district judges in Arizona to issue final decisions in capital habeas cases in a small fraction of the time it has historically taken – raise serious concerns under the doctrine of separation of powers and preclude the federal courts from discharging their duty to exercise "plenary" power in habeas corpus matters. On top of that, imposing these time limits when a State has not done its part to develop the cases in state-court proceedings threatens the very integrity of our judicial process.

B. Federal judges in Arizona will still often receive a poorly developed record, because there is no evidence of improvement in the performance of appointed capital counsel in Arizona, but will now have no ability to mitigate the problem.

In an ideal world, Chapter 154's rigid time deadlines might not be a significant impediment to judicial decision-making in capital habeas cases. But this is not an ideal world. Arizona's capital counsel mechanism does not require that appointment of post-conviction counsel occur on a timely basis, that appointed post-conviction counsel have any post-conviction experience, or even that appointed counsel actually provide effective representation. The result is inevitable: Arizona post-conviction counsel, just like appointed post-conviction counsel in many other jurisdictions, will continue to perform a cursory, incomplete, and rushed job, not fully appreciating the procedural rules governing post-conviction review nor developing all potentially meritorious constitutional claims or a complete record of the facts.

By way of illustration, Rule 32 of the Arizona Rules of Criminal Procedure does not provide a method for prisoners to obtain discovery during post-conviction proceedings in state court,[3] but the state trial court does have inherent authority to grant a petitioner's request for discovery on a showing of "good cause." *Canion v. Cole*, 115 P.3d 1261, 1263 (Ariz. 2013). Incompetent, or merely ineffective, counsel might miss this nuance of Arizona post-conviction procedure,[4] which would prevent the petitioner from compelling discovery during post-conviction proceedings and from developing a full factual record germane to the constitutional questions raised by his conviction and death sentence.

The lack of an adequately developed post-conviction factual record has always been an impediment to the efficient disposition of federal habeas corpus petitions. Chapter 154 certification brings a renewed urgency to the problem because, under Chapter 154, the district court can generally only consider a claim that was previously raised and decided on the merits in state court. While there are

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[3] Because Rule 15.1 of the Arizona Rules of Criminal Procedure only imposes an obligation on the State to disclose information at the trial stage, defense counsel must *compel* discovery from the State at the post-conviction stage. Ariz. R. Crim. P. 15.1.

[4] Before a trial court can compel discovery based on a showing of "good cause," a petitioner must file a post-conviction petition seeking relief and the petition must state a colorable claim for relief. *See Canion*, 115 P.3d at 1263. In *Canion*, for example, a criminal defendant was denied post-conviction discovery, seeking a crime scene diagram used at his trial, because he had only filed a ***notice*** of post-conviction relief without filing a ***petition*** seeking such relief. *Id.* at 1264.

some exceptions to this exhaustion requirement, the exception most relevant to the instant proceeding is limited to situations where the newly asserted claim "is based on a factual predicate that ***could not have been*** discovered through the exercise of due diligence in time to present the claim for State or Federal post-conviction review." 28 U.S.C. § 2264(a)(3) (emphasis added). Thus, whereas before the Attorney General's Chapter 154 certification, the failure of an appointed capital counsel in Arizona to fully develop the facts supporting a claim in state court could potentially be cured through evidentiary hearings in federal court,[5] now the result could be losing a meritorious constitutional claim in federal court altogether. That is because, even if a factually undeveloped claim could satisfy one of the exceptions to Chapter 154's exhaustion requirements, the rigid time limits mandated by Chapter 154 – which will control ***all*** federal capital habeas cases in Arizona without regard to the complexity or need for additional fact-finding in a particular case – would, as a practical matter, often prevent district judges from adequately conducting the additional work necessary to compensate for the shortcomings in the work of appointed capital counsel. *See* Opening Br. at 78-79; *see also Spears v. Stewart*, 283 F.3d 992, 1017 (9th Cir. 2002) (Chapter 154 "also

[5] *See, e.g., Dickens v. Ryan*, 740 F.3d 1302 (9th Cir. 2014) (en banc) (holding that capital habeas petitioner is entitled to an evidentiary hearing to prove that ineffective assistance of post-conviction counsel in Arizona provided cause to excuse failure to develop new facts supporting Sixth Amendment claim of ineffective assistance of trial counsel).

imposes substantial burdens on the federal courts by requiring them to review and resolve opt-in petitions under mandatory, expedited time lines").

Another impediment to the efficient disposition of federal habeas corpus cases has been the failure of state-appointed capital counsel to timely raise legal issues. When incompetent, or merely ineffective, counsel fails to raise federal constitutional claims during the state-court post-conviction process, the result is often that these claims – however meritorious – generally cannot be heard by the district court. *See* 28 U.S.C. § 2254(b)(1) (federal claims must generally first be raised in state court); *Brown v. Allen*, 344 U.S. 443, 487 (1953) ("A failure to use a state's available remedy, in the absence of some interference or incapacity . . . , bars federal habeas corpus."). Appointed counsel's failure to appreciate and comply with the exhaustion requirements for federal habeas corpus is especially acute in Arizona. From 2001 to 2004, 60% of Arizona capital habeas cases included a ruling that at least one claim was barred by procedural default because it was not first raised in state court. *See* Nancy J. King et al., *supra*, at 48 fig. 19. This startling number of cases in which state-appointed counsel failed to develop potentially meritorious claims belies Arizona's assertion that it provides competent representation in state-court proceedings.

Moreover, imposing Chapter 154's restrictions on federal habeas review of Arizona capital cases compounds the ineffective representation provided by

Arizona in the state post-conviction process. As noted above, more than half of the Arizona capital cases entering the federal habeas process require federal counsel to develop claims which were not presented in the state-court proceedings. However, Chapter 154 cuts in half the time for counsel to prepare and file a federal petition, 28 U.S.C. § 2263, significantly impairing counsel's ability to fully investigate the case. In addition, if counsel identifies any claims after the filing of the petition and the State's answer, federal judicial consideration of the claim may be barred by Chapter 154's restrictions on amending petitions. *See* 28 U.S.C. § 2266(b)(3)(B); *compare* Fed. R. Civ. P. 15 (allowing for liberal amendment of complaints, even up to 21 days after service of a responsive pleading).

C. Federal judges in Arizona may be precluded altogether from any meaningful review of habeas corpus petitions in capital cases because of Arizona appointed counsel's proven difficulty in managing the federal statute of limitations and Chapter 154's severe restrictions on the amendment of petitions.

The severe restrictions imposed by Chapter 154 on a death-row prisoner's ability to amend his petition can have an especially pernicious effect when combined with the vagaries of Arizona's approach to appointed counsel in capital cases. Generally speaking, Arizona does not timely appoint counsel (let alone competent counsel). While post-conviction counsel would normally be appointed at the conclusion of direct appellate review, the Arizona Supreme Court does not appoint such counsel until ***after*** the filing of a "Notice Requesting Post-Conviction

Relief" by the clerk of the Arizona Supreme Court. *See* Ariz. R. Crim. P. § 32.4(b)(3)(C); Opening Br. § I.D. The filing of this Notice triggers a one-year statute of limitations for the filing of a post-conviction petition in Arizona state court. Ariz. R. Crim. P. § 32.4(c)(1)(A).

It is unclear whether the running of the statute of limitations under Chapter 154, *see* 28 U.S.C. § 2244(d)(1), is tolled during the period between the Arizona Supreme Court Clerk's filing of the Notice Requesting Post-Conviction Relief and the Arizona death-row prisoner's filing of his petition for post-conviction relief in state court. And prisoners whose counsel merely comply with Arizona's one-year deadline for filing a petition for post-conviction relief might run out of time to file their federal habeas petitions. *Cf. Spears*, 283 F.3d at 1017 (stating that Chapter 154 does not provide for the statute of limitations to be tolled during the time petitioner is awaiting for appointment of counsel). The problem, of course, is that it can take time – a long time – for prisoners on death row to get appointed counsel. In 2001, eight capital cases in Arizona were delayed at the state post-conviction stage because there were no qualified lawyers available to represent the defendants. Janet Napolitano, *Capital Case Commission Final Report* 14 (2002). Some defendants had to wait more than 18 months before a lawyer was appointed to their case. *Id.*

In light of the foregoing, it is particularly important for capital counsel in Arizona to understand how to navigate the statute of limitations for federal habeas cases. Experienced counsel will know to file an initial petition in state court immediately after being appointed, which – at least in some circumstances – might operate to successfully toll the potential Chapter 154 deadlines for filing a federal habeas petition until final disposition of the case in state court, and then file an amended petition once it is possible to complete a full investigation of the petitioner's case. *See* 28 U.S.C. § 2263(b) (tolling the 180-day time limit for filing a federal habeas petition "from the date on which the first petition for post-conviction review or other collateral relief is filed until the final State court disposition of such petition"). Arizona's failure to require post-conviction experience for counsel in capital cases can prevent this from happening. *See* Opening Br. at 46. Indeed, the Arizona Capital Representation Project is aware of "at least 31 Arizona cases where post-conviction counsel's failure to promptly file an initial petition may foreclose federal habeas review under Chapter 154." Federal Public Defender's Office, Comment Letter on State of Arizona's Application for Opt-In Under 28 U.S.C. § 2265(a), Armstrong Decl. ¶ 38 (Feb. 22, 2018). Given that Arizona struggles mightily to provide competent counsel in time to file for federal habeas review, its certification under Chapter 154 might well

altogether prevent federal judges from exercising their "plenary" authority to decide federal habeas corpus matters. *Harris*, 394 U.S. at 292.

D. Federal judges will be unable to responsibly manage their dockets due to Chapter 154's requirement that federal courts prioritize capital habeas cases over all other cases.

Upon the Attorney General's certification, Chapter 154 requires that district and circuit court judges prioritize the adjudication of Arizona's capital habeas petitions over ***all other matters***. *See* 28 U.S.C. § 2266(a). This requirement, if allowed to stand, will no doubt have a domino effect on district and circuit court dockets, which are already flooded with cases. The problem is especially severe when the implications of the Sixth Amendment and Speedy Trial Act are considered. *See* 18 U.S.C. § 3161 (requiring a trial to begin within 70 days of filing an information or indictment or initial appearance of a criminal defendant). Under Chapter 154's docket-busting mandate, district judges will have to handle existing criminal hearings, briefings, and bench and jury trials – while simultaneously fast-tracking the review of lengthy and complex capital habeas petitions, holding evidentiary hearings, and drafting opinions. This will be a Herculean task, especially for judges with burgeoning criminal dockets like in the District of Arizona. In 2018 and 2019, federal district courts in Arizona handled over 5,000 criminal cases – the third most in the country. U.S. Courts, *Federal Judicial Caseload Statistics 2019 Tables* (Mar. 31, 2019), *available at*

https://www.uscourts.gov/federal-judicial-caseload-statistics-2019-tables. Additionally, in light of the COVID-19 pandemic, the burden on federal courts is even heavier. Federal trial courts had approximately 30% more pending cases as of June 30, 2020 than they did at the same point last year. *See* Madison Alder, *Federal Trial Court Pending Caseload Up 30% From Last Year*, Bloomberg Law, Aug. 19, 2020, https://news.bloomberglaw.com/us-law-week/federal-trial-court-pending-caseload-up-30-amid-virus-impact.

Current and former federal judges have recently requested that additional judgeships be created in response to the overwhelming caseload facing the federal judiciary. At a Senate Committee hearing, Judge Brian Stacy Miller testified that "[t]he effects of increasing caseloads without a corresponding increase in judges are profound. Increasing caseloads lead to significant delays in the consideration of cases, especially civil cases which may take years to get to trial." *Judicial Conference's Recommendation for More Judgeships* Before the Sen. Comm. on the Judiciary (June 30, 2020), at 9 (statement of Hon. Brian Stacy Miller).

Given that Arizona does not provide effective post-conviction representation and sufficient resources to prisoners on death row, Chapter 154's mandate to prioritize federal habeas review over all other matters is like putting a round peg in a square hole. The amount of work required by district judges to properly and thoroughly adjudicate the life-and-death issues raised in a capital case will be the

same after the Attorney General's certification as it was before. And the Constitution effectively requires that district judges prioritize criminal matters over all other matters (including habeas matters). The "pie in the sky" time limits imposed by Congress and the Attorney General cannot coexist with our current system of constitutional governance.

CONCLUSION

Chapter 154 certification was born out of the idea that states with effective post-conviction counsel mechanisms should receive the benefit of expedited review at the federal level because, theoretically, the post-conviction record should be sufficiently developed and claims sufficiently exhausted upon their arrival to the federal courts. However, in practice, because Arizona does not guarantee effective and competent post-conviction representation, federal judges are faced with an undeveloped record and cannot carry out their duty to rigorously review state-court judgments, depriving death-sentenced prisoners of their ***last*** opportunity for review and justice. The Attorney General's decision to certify Arizona's capital counsel mechanism should be set aside.

Dated: August 20, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) because this brief contains 4,790 words—no more than one-half the maximum length authorized by the rules for a party's principal brief—excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14-point font.

Dated: August 20, 2020

/s/ Chris A. Hollinger
Chris A. Hollinger

CERTIFICATE OF SERVICE

I hereby certify that, on August 20, 2020, a true and correct copy of the foregoing was filed with the Clerk of the United States Court of Appeals for the District of Columbia Circuit via the Court's CM/ECF system, which will send notice of such filing to all registered CM/ECF users.

Dated: August 20, 2020

/s/ Chris A. Hollinger
Chris A. Hollinger

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