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. §§ 2261-2265, Docket No. OAG-167

BRIEF OF THE HONORABLE RUSSELL D. FEINGOLD AS AMICUS CURIE IN SUPPORT OF PETITIONERS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1)(A), counsel certifies as follows:

A. Parties and *Amici.* Except for the following amici, all parties, intervenors, and amici appearing to date in this Court are contained or referenced in the Initial Opening Brief for Petitioners, Doc. No. 1856479, filed on August 13, 2020. The additional amici are: the American Bar Association, fifteen academic experts in federal criminal procedure and post-conviction practice, and sixteen professors of administrative law.

B. Rulings Under Review. The ruling under review is described in the Initial Opening Brief for Petitioners, Doc. No. 1856479, filed on August 13, 2020.

C. Related Cases. All related cases are listed in the Initial Opening Brief for Petitioner, Doc. No. 1856479, filed on August 13, 2020.

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DATED: August 20, 2020

RULE 29 STATEMENTS

The parties provided blanket consent to the filing of *amicus* briefs.

Pursuant to Circuit Rule 29(d), *amicus* certifies that a separate brief is warranted to provide *amicus*'s unique perspective as a member of the Congress that enacted key provisions of federal habeas law that are at issue in this case. *Amicus* is unaware of other entities or individuals intending to participate whose views and experiences are substantially similar to *amicus*'s.

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), no party or party's counsel contributed money intended to fund preparing or submitting this brief. No party's counsel authored the brief in whole or in part.

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SUMMARY OF ARGUMENT AND INTEREST OF AMICUS CURIAE

Amicus is a former U.S. Senator. As a Senator, *amicus* played a critical role in helping to design and assess federal habeas procedures. *Amicus* did so with an eye toward encouraging states to improve their capital counsel mechanisms such that robust federal habeas review is unwarranted.

As a member of the 105th Congress, *amicus* reviewed, critiqued, and voted on legislation that transferred the authority to determine a state's compliance with Chapter 154 from the local federal courts to the Attorney General and the D.C. Circuit. *Amicus* can clarify the robust role Congress intended this Court to play in reviewing the Attorney General's certification decisions and confirming that certified states offer capital counsel mechanisms that meet the requirements of Chapter 154.

Amicus has an interest in seeing Chapter 154's procedures applied as Congress intended. For that reason, *amicus* writes to underscore that Congress intended this Court to conduct an independent, nondeferential *de novo* review of the appropriateness of certifying a state's capital counsel mechanism under Chapter 154. Congress hoped this Court's robust review of certification decisions would guarantee that curtailed federal habeas procedures are available only to qualifying states, safeguard against the Attorney General's potential structural bias in favor of certification, and ensure that the judicial power to decide federal habeas cases

remains exclusively with the Judiciary. With these goals in mind, Congress charged this Court to determine a state's compliance with Chapter 154's requirements *without any deference to either the Attorney General's certification decision or the Department of Justice's interpretation of Chapter 154's requirements*. Applying these standards, the record is clear that Arizona has not carried its burden and is not entitled to Chapter 154 certification.

ARGUMENT

I. Introduction

A. Congress's Enactment of Chapter 154.

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") added Chapter 154 to Title 28 of the United States Code. Congress enacted Chapter 154 with two goals in mind: (1) assuring high-quality representation of death-sentenced prisoners in state court proceedings, and (2) expediting federal habeas review, while ensuring the protection of constitutional rights.[1] To accomplish these

[1] Congress derived Chapter 154 from the recommendations of the Ad Hoc Committee of the Judicial Conference on Federal Habeas Corpus in Capital Cases, established by Chief Justice William Rehnquist and chaired by retired Associate Justice Lewis Powell. *See* Effective Death Penalty Act of 1995, Antiterrorism and Effective Death Penalty Act of 1996, Comm. on the Judiciary Report, H.R. Rep. No. 104-23 (1995), 1995 WL 56412, at *8. The Powell Committee concluded that the primary cause of delay in federal review of state capital post-conviction cases was the lack of qualified counsel representing death-sentenced individuals in state post-conviction proceedings. 135 Cong. Rec. S13471-04, at S13482 (daily ed. Oct. 16, 1989). The Committee recommended a statutory mechanism of expedited and limited federal review that would incentivize states to guarantee adequate

twin aims, Congress designed a *quid pro quo*: in exchange for guaranteeing death-sentenced prisoners the appointment of competent counsel and litigation resources necessary to develop constitutional claims in state habeas proceedings, Congress would offer states expedited and curtailed federal habeas review.[2] But Congress made clear that restricted federal habeas proceedings may be made available only to states with qualifying capital counsel mechanisms. Congress left to local federal habeas courts the task of determining whether a state's procedures meet the requirements of Chapter 154. *See, e.g.*, *Baker v. Corcoran*, 220 F.3d 276, 284–87 (4th Cir. 2000) (reviewing a district court's determination that Maryland did not satisfy Chapter 154's opt-in criteria).

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representation to death-sentenced prisoners in state habeas corpus proceedings. *See id.*

[2] These procedural advantages available to opt-in states may include: shortening the statute of limitations for the filing of a habeas petition in federal court from one year to 180 days, 28 U.S.C. § 2263(a); limiting the tolling of the statute of limitations period, by excluding (1) the period of time between the finality of direct review in state court to the filing of a petition for writ of certiorari in the United States Supreme Court and (2) the filing of exhaustion or successive state habeas petitions, 28 U.S.C. § 2263(b); restricting a death-sentenced prisoners' ability to amend a filed petition to extraordinary circumstances, 28 U.S.C. § 2266(b)(3)(B); prioritizing the adjudication of petitions subject to Chapter 154 in the federal district court and court of appeals over all non-capital matters, 28 U.S.C. § 2266(a); requiring a federal district court to enter final judgment on a habeas petition within 450 days of the filing of the petition, or 60 days after it is submitted for decision, whichever is earlier, 28 U.S.C. § 2266(b); and requiring the court of appeals to render a final determination of any appeal within 120 days of filing of a reply or answering brief, 28 U.S.C. § 2266(c). In addition, these provisions may apply retroactively. 28 U.S.C. § 2265(a)(2).

Following the enactment of AEDPA, several states claimed entitlement to Chapter 154's expedited and restricted federal habeas proceedings. The federal judiciary carefully examined those states' mechanisms and concluded that they failed to ensure that state death-sentenced prisoners have qualified counsel and the resources necessary to develop and present claims in state proceedings.[3] These conclusions stemmed from the judiciary's recognition that application of Chapter 154's limited and truncated federal review without competent representation and adequate resources during state proceedings may result in the execution of death-sentenced prisoners without appropriate federal review of their state court judgments. *Cf. Bennett v. Angelone*, 92 F.3d 1336, 1342 (4th Cir. 1996) (noting AEDPA "establishe[d] quid-pro-quo relationship: A state seeking greater federal deference to its habeas decisions in capital cases must, by appointing competent counsel to represent indigent petitioners, further ensure that its own habeas proceedings are meaningful.").

To ensure that states fulfill their portion of the *quid pro quo* arrangement, federal courts have required that state mechanisms provide for the following:

- Appointment of counsel in a timely fashion;
- Competency standards that reflect the expertise needed in this specialized and demanding area of litigation, including experience in capital litigation and habeas corpus proceedings;

[3] *See, e.g.*, *Baker*, 220 F.3d at 284–87 (assessing Maryland's capital counsel procedures for compliance with Chapter 154).

- Regular and rigorous enforcement of those standards in the appointment of counsel;
- Compensation at reasonable hourly rates and for all work performed on behalf of death-sentenced prisoners;
- Provision of the financial resources necessary to investigate and develop all potentially meritorious claims in state postconviction proceedings; and
- Proof that the state mechanism operates as intended and is not merely an empty promise.[4]

In short, these courts have rigorously applied Congress's intent that Chapter 154's benefits may not be accorded to a state unless it has "done its part to promote sound resolution of prisoners' petitions." *Lindh*, 521 U.S. at 331.

B. Congress's Modification of Chapter 154.

In 2006, as part of the USA PATRIOT Improvement and Reauthorization Act ("Patriot Reauthorization"), Congress transferred to the Attorney General the authority to initially determine whether a state has established a qualifying capital counsel mechanism. 28 U.S.C. §§ 2261, 2265. As amended, Chapter 154 requires the Attorney General to determine, if requested by an "appropriate State official":

> (A) 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;

[4] *See, e.g.*, *Calderon v. Ashmus*, 523 U.S. 740, 743 (1998) ("If a State meets these criteria, then it may invoke Chapter 154"); *Lindh v. Murphy*, 521 U.S. 320, 327 (1997) (AEDPA "creates an entirely new chapter 154 with special rules favorable to the state party, but applicable only if the State meets certain conditions, including provision for appointment of postconviction counsel in state proceedings"); *Moore v. Reynolds*, 153 F.3d 1086, 1095 (10th Cir. 1998) ("only if it satisfies the requirements" is a state entitled to the procedures in Chapter 154).

> (B) the date on which the mechanism described in subparagraph (A) was established; and
> (C) whether the State provides standards of competency for the appointment of counsel in proceedings described in subparagraph (A).

28 U.S.C. § 2265(a)(1). The statute also requires the Attorney General to "promulgate regulations to implement the certification procedure." 28 U.S.C. § 2265(b).

C. The Attorney General's Certification of Arizona's Capital Counsel Mechanism.

On November 16, 2017, the Department of Justice published in the Federal Register notice that Arizona had requested Chapter 154 certification. 82 Fed. Reg. 53,529 (Nov. 16, 2017). After Arizona submitted an additional letter in support of its request and concerned individuals requested additional time to submit comments, the Department of Justice published another notice and extended the time to submit comments to the certification application to February 26, 2018. 82 Fed. Reg. 61,329 (Dec. 27, 2017). During the public comment period, the Department of Justice received 140 comments opposing certification. The most comprehensive comments were submitted by the Federal Defender for the District of Arizona. *See* Fed. Pub. Def. for the Dist. of Ariz., Comment in Opp'n to Certification (Mar. 13, 2018), https://www.regulations.gov/document?D=DOJ-OLP-2017-0009-0126.

On April 14, 2020, Attorney General Barr certified Arizona as complying with Chapter 154. Certification of Arizona Capital Counsel Mechanism, 85 Fed. Reg.

20,705 (Apr. 14, 2020). Pursuant to the Patriot Reauthorization amendments to Chapter 154, the "determination by the Attorney General regarding whether to certify a State" for the expedited procedures and limitations on habeas review set forth in Chapter 154 "is subject to review exclusively as provided under chapter 158 of this title," 28 U.S.C. § 2265(c)(1), and "shall be subject to *de novo* review" by the D.C. Circuit, 28 U.S.C. § 2265(c)(3).

II. Congress Intended the D.C. Circuit to Conduct an Independent, Nondeferential *De Novo* Review of the Appropriateness of Certifying a State's Capital Counsel Mechanism Under Chapter 154.

When Congress reassigned to the Attorney General the task of first considering whether a state's capital counsel mechanism qualifies for certification under Chapter 154, it did so with the express requirement that the D.C. Circuit would conduct *de novo*—that is, independent and nondeferential—review of the Attorney General's certification decisions. Only with the backstop of *de novo* review did Congress authorize the Attorney General's participation in the certification process. Indeed, the D.C. Circuit's role in conducting an independent review of certifications is integral to ensuring that certification actually accomplishes Congress's dual goals of speeding up federal habeas review *and* bolstering the quality of death penalty representation across the United States. Likewise, the D.C. Circuit's full and robust review of certification decisions was intended to provide a safeguard to protect against the Attorney General's potential structural bias in favor of certification and

to ensure that the Article III judicial power to decide federal habeas cases remains exclusively with the federal judiciary.

A. *De Novo* Review Reflects Congress's Intent to Guarantee That Only States That Provide Quality Representation of Death Row Prisoners Can Benefit From Abridged Federal Habeas Review.

In enacting Chapter 154, Congress intended to make expedited federal habeas review available only to states that provide competent and adequate counsel during state criminal proceedings. The D.C. Circuit's full and robust review of certification decisions is integral to accomplishing Congress's goal.

In developing opt-in provisions under both AEDPA and the Patriot Reauthorization, Congress constructed an incentive scheme under which states that take steps to ensure quality representation of death row prisoners can in exchange receive the benefit of expedited federal court habeas review. *See*, *e.g.*, Letter from Senator Patrick Leahy, Chairman, U.S. Senate Comm. on the Judiciary, Senator Edward M. Kennedy, and Senator Russell D. Feingold, to Kim Ball Norris, Senior Policy Advisor for Adjudication, Bureau of Justice Assistance 2 (Sept. 24, 2007) [hereinafter "Letter from Senators Leahy, Kennedy, and Feingold"]; 151 Cong. Rec. S5533-01 (daily ed. May 19, 2005) (statement of Sen. Kyl) (explaining that expedited review procedures later included in the Patriot Act Reauthorization "are available to States that establish a system for providing high-quality legal representation to capital defendants"). Congress intended the opt-in procedures to

address broad concerns that "inadequate capital defense systems in many States may be allowing innocent defendants to be sentenced to death, and perhaps even executed." Letter from Senators Leahy, Kennedy, and Feingold 2. By offering the "carrot" of expedited federal habeas review in individual cases for certified states, Congress hoped to encourage *all* states to enhance the quality of counsel afforded to death row prisoners. *See id.*[5]

The compromise Congress struck depends on the certification process to confirm that a state's capital counsel mechanism in fact provides competent counsel such that expedited federal review is warranted for *every* state habeas matter in which counsel were provided under the mechanism. *See* Letter from Senators Leahy, Kennedy, and Feingold 3 (explaining that Congress did not intend to weaken federal habeas review "without any compensating safeguards"). To do so, Congress established three levels of authority for assessing certification applications—first, by the Attorney General; then by the D.C. Circuit; and finally, by the Supreme Court.

[5] Congress's earlier enactment of the Innocence Protection Act sheds light on the concerns animating Chapter 154. As with Chapter 154, the goal of the Innocence Protection Act was "the appointment of competent, adequately compensated lawyers in capital cases." *See* S. Rep. No. 107-315 at 21 (2002) (recommending passage of the bill). And the means for achieving this goal was closely related to Chapter 154's goal—the development of standards to ensure "appointment, compensation, and payment of reasonable litigation expenses of competent counsel," 28 U.S.C. § 2265(a)(1)(A); *see also* Letter from Senators Leahy, Kennedy, and Feingold 3; *see also* Letter from Representatives Robert C. Scott, John Conyers, Jr., and Jerrold Nadler to Lisa Ellman, Office of Legal Policy, U.S. Dep't of Justice (May 31, 2011) (expressing concern that regulations implementing Chapter 154 had not included critical portions of the Innocence Protection Act's standards for competent counsel).

28 U.S.C. § 2265(c)(2). And Congress clarified that the D.C. Circuit's review is no less robust than the Attorney General's. *See id.* (providing *de novo* review of the Attorney General's certification decision); *see also* 151 Cong. Rec. E2639-01 (statement of Rep. Flake) (explaining that proposed amendments later adopted in the Patriot Reauthorization "assign[] the 154 certification decision to the U.S. Attorney General *and* the DC Circuit") (emphasis added). Indeed, Congress shifted the venue for review to the D.C. Circuit because it trusted that this Circuit would thoroughly and fairly assess certification applications "[b]ecause there is no Federal habeas review of criminal convictions in the District of Columbia, [so] the DC Circuit . . . has no stake in whether or not a State qualifies for chapter 154." *Id.*

Consistent with Congress's desires, the Circuit must conduct a robust and independent review of the record to confirm that a state has met the statutory prerequisites for certification.

B. *De Novo* Review Safeguards Against the Attorney General's Potential Structural Bias in Favor of Certification.

Congress assigned to the Attorney General the task of first assessing a state's compliance with Chapter 154, but members of Congress nonetheless recognized that the Attorney General's role as a prosecutor and law enforcement officer might create a structural bias in favor of certification. The D.C. Circuit's full and independent review of certification decisions offers a critical safeguard against such bias.

When Congress first considered transferring opt-in decisionmaking authority from the local federal courts to the Attorney General, critics raised concerns that the Attorney General is essentially the chief law enforcement officer and prosecutor of the United States and that the position comes with structural bias that would likely favor certification. *See, e.g.*, Habeas Reform: The Streamlined Procedures Act: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 27 (Nov. 16, 2005) (testimony of Former U.S. Solicitor General Seth Waxman) (warning that it was "a very grave mistake and an unwarranted act to take the process of certification, which is essentially an adjudicative process, away from an Article III court and give it to somebody who . . . in the context of an adversarial system of criminal justice is a prosecutor"). As one witness explained, when the Justice Department elects to participate in state habeas litigation, it generally does so in support of the prosecution. *Id.*[6] At the very least, the Attorney General's institutional role creates the appearance of bias in favor of states seeking certification. *See id.*

After the Patriot Reauthorization amendments shifted decisionmaking authority under Chapter 154 to the Attorney General and the D.C. Circuit, commenters reiterated these concerns, explaining that implementing regulations

[6] To be sure, some members of Congress disagreed, viewing the Attorney General as a neutral decisionmaker who "receives no benefits from chapter 154" and who "has expertise in evaluating State criminal justice systems." 151 Cong. Rec. E2639-01 (daily ed. Dec. 14, 2015) (statement of Rep. Flake).

proposed by the Attorney General failed to adequately account for conflicts of interest and the possible appearance of bias. *See, e.g.*, Habeas Corpus Res. Ctr., Comments on Proposed Regs. Regarding Certification Process for State Capital Counsel Systems, OJP Docket No. 1540, at 5-8; Comments of Legal Ethics Professors and Professional Responsibility Lawyers, OJP Docket No. 1540. Members of Congress shared these concerns, and viewed the judicial review provision as potentially mitigating them. As the Members described it, Congress structured the Attorney General's certification decision to constitute only a "partial delegation of 'opt-in' authority." Letter from Senators Leahy, Kennedy, and Feingold 3. That is, Congress did not establish "unfettered power and discretion in the Attorney General." *Id.* Instead, Congress established *de novo* review of certification decisions to provide a critical safeguard against possible structural bias or conflicts of interest on the part of the Attorney General. *Cf. id.*; *see also* 151 Cong. Rec. E2639-01 (statement of Rep. Flake).

C. *De Novo* Review Honors Separation of Powers Principles, Ensuring That the Judicial Power to Decide Federal Habeas Cases Remains Exclusively the Authority of the Federal Judiciary.

The U.S. Constitution creates a separation of powers among the three branches of the federal government, and vests judicial power in the federal courts. U.S. Const. art. III, § 1. Judicial power includes the authority to decide federal habeas cases. *See, e.g.*, *Boumediene v. Bush*, 553 U.S. 723, 745 (2008) (explaining

that constitutional restrictions on suspension of the writ "protect[] the rights of the detained by affirming the duty and authority of the Judiciary to call the jailer to account").

Although "the three branches are not hermetically sealed from one another," *Stern v. Marshall*, 564 U.S. 462, 483 (2011), Article III's divisions were purposefully designed and must not be upended. *See id.* ("'[The judicial power] can no more be shared' with another branch than 'the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto.'" (quoting *United States v. Nixon*, 418 U.S. 683, 704 (1974)). For that reason, Congress may not reassign judicial authority to *decide* habeas cases to another branch of government, even though it may establish some procedures for lowers courts to follow. *See Evans v. Thompson*, 518 F.3d 1, 11 (1st Cir. 2008) (describing the difference between "telling a court how to decide a case given a certain set of facts and limiting the availability of relief").

Without the check of robust D.C. Circuit review, Congress's delegation of certification authority to the Attorney General risks upending the carefully designed separation of powers structure by assigning judicial power to the Executive Branch. The delegation risks "encroach[ing] or aggrandiz[ing]" the Executive Branch at the expense of the judiciary, *Clinton v. Jones*, 520 U.S. 681, 699–701 (1997), which is particularly concerning because federal habeas review is designed to check the

potential prosecutorial abuses of federal and state executives. *Cf. Boumediene*, 553 U.S. at 797 ("[F]ew exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person.").

To keep judicial power in the hands of the judiciary, as Congress intended, this Court is required to conduct a fresh and independent review of the Attorney General's certification decisions. *Cf., e.g.*, *Gulf Power Co. v. United States*, 187 F.3d 1324, 1334–35 (11th Cir. 1999) (explaining that the judicial review of compensation for federal takings preserves separation of powers); *United States v. Shami*, 754 F.2d 670, 672 (6th Cir. 1985) (noting that the requirement that a magistrate judge's report and recommendation is subject to *de novo* review if objected to "is a statutory recognition that Article III of the United States Constitution mandates that the judicial power of the United States be vested in judges with life tenure").

III. This Court Must Independently Determine Whether Arizona Proved Its Capital Counsel Mechanism Complies With Congress's Statutory Requirements for Certification.

Congress has charged this Court to determine whether Arizona has affirmatively established its capital counsel mechanism complies with the express requirements of Chapter 154 without any deference to either the Attorney General's certification decision or the Department of Justice's interpretation of these standards. The record is clear that Arizona has not carried its burden and is not entitled to

certification. But even if additional information is necessary for the Court to complete its *de novo* review, this Court should remain the independent and principal adjudicator of whether Arizona has met the standards Congress established in §§ 2261 and 2265.

A. The Attorney General's Certification Decision and Department of Justice Regulations Are Entitled to No Deference in This Court's *De Novo* Review of Arizona's Compliance With Statutory Certification Requirements.

In performing the *de novo* review required by Congress, this Court owes no deference to the Attorney General's determination that Arizona's capital counsel mechanism complies with the requirements of §§ 2261 and 2265. Congress's adoption of a *de novo* standard of review obligates this Court to evaluate independently whether Arizona carried its burden of proving it "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" and "provides standards of competency for the appointment of counsel in [such] proceedings." 28 U.S.C. § 2265(a)(1)(C). The *de novo* standard applies not only to issues of fact, but also to issues of law—that is, this Court must construe the statute without according deference to the Department of Justice's view of statutory standards as reflected in the Attorney General's certification decision, Certification of Arizona Capital

Counsel Mechanism 85 Fed. Reg. 20,705 (Apr. 14, 2020), or in the Department of Justice certification regulations, *see* 28 C.F.R. § 26.22.

Congress plainly intended this Court to perform an independent factual and legal evaluation of state requests for certification. In most cases when a court of appeals reviews agency actions, the agency's decision "must be upheld if supported by substantial evidence and not arbitrary or capricious." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 755 (1989). In § 2265(c)(3), however, Congress specially required this Court to review the Attorney General's determination to certify a state "*de novo*." Long before Congress centralized the certification review process in this Court, then-Judge Ginsburg, writing for the *en banc* Court, explained that "*de novo*" review is entirely different from the usual, deferential standard of review:

> De novo means here, as it ordinarily does, a fresh, independent determination of "the matter" at stake; the court's inquiry is not limited to or constricted by the administrative record, nor is any deference due the agency's conclusion.

Doe v. United States, 821 F.2d 694, 697–98 (D.C. Cir. 1987) (*en banc*). When Congress specifies *de novo* review, the "court's charge [is] to put itself in the agency's place." *Id* at 698. The *en banc* Court also confirmed the *de novo* review standard extends beyond questions of fact: "*de novo*" review signals that "the legal issue presented is to be reviewed nondeferentially." *Id*. at 698 n.9; *see also*, *e.g.*,

Church of Scientology v. IRS, 792 F.2d 146, 148–51 (D.C. Cir. 1986) (Scalia, J.) (concluding the Freedom of Information Act's *de novo* review standard applied and construing meaning of tax statute without deference to the IRS). Supreme Court precedent further confirms that when Congress provides for *de novo* judicial review of agency action, the reviewing court, not the agency, has the final say on legal issues. *See, e.g.*, *Reporters Comm.*, 489 U.S. at 776 (*de novo* review standard in the Freedom of Information Act means "a court must balance the public interest in disclosure against the interest Congress intended the Exemption to protect"); *United States v. First City Nat'l Bank*, 386 US. 361, 368 (1967) (*de novo* review means "that the court should make an independent determination of the issues").

Congress's express provision for *de novo* review of the Attorney General's decision overrides even the deference courts typically owe an agency's construction of a statute through rulemaking. *De novo* review extends to questions of law even where Congress delegated substantive rulemaking power to an agency. Such delegation creates a "*presumption*" that Congress intended courts to defer to the agency's construction of the relevant statute. *See Smiley v. Citibank (South Dakota)*, 517 U.S. 735, 740–41 (1996) (emphasis added). The presumption is overcome in this case, however, by Congress's clear intent that the Judiciary act as final adjudicator of whether a state's capital counsel mechanism qualifies under Chapter 154. *See* 28 U.S.C. § 2265(c)(3). Consequently, this Court must do more than

independently evaluate the Arizona mechanism's compliance with Department of Justice regulations: it must independently determine whether that mechanism complies with statutory standards. *Cf. Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990) (no deference to agency's statutory interpretation where "Congress has expressly established the Judiciary and not the Department of Labor as the adjudicator of private rights of action arising under the statute"); *Kelley v. EPA*, 15 F.3d 1100, 1105 (D.C. Cir. 1994) (EPA regulation not entitled to deference when Congress "provided for *de novo* judicial review of [EPA's] 'particularized decision respecting liability.'").

For example, this Court must independently decide whether Arizona's current mechanism, which allows for the appointment of counsel with no postconviction litigation experience, no training regarding postconviction practice, and no experience with death-penalty cases, *see* Petitioners' Opening Brief ("Pet. Br.") at 39–40, provides for appointment of "competent" counsel for purposes of Chapter 154. *See, e.g.*, *Colvin-El v. Nuth*, No. AW 97-2520, 1998 WL 386403, at *6 (D. Md. Jul. 6, 1998) (recognizing that because of the unique nature of postconviction proceedings under § 2261, "an attorney must, at a minimum, have some experience in that area before he or she may be deemed 'competent'"); *Wright v. Angelone*, 944 F. Supp. 460, 467 (E.D. Va. 1996) (finding Virginia did not qualify for certification under Chapter 154 where its 1995 standards of attorney competency would, *inter*

alia, permit an attorney with no experience with capital cases to serve as counsel in state habeas proceedings). Likewise, this Court must independently evaluate whether Arizona's $100-per-hour maximum rate of compensation, *see* Pet. Br. at 60, and non-mandatory scheme for paying reasonable litigation expenses, *see id.* at 70–71, satisfy § 2265's requirement that the state establish a mechanism for "compensation" and "payment of reasonable litigation expenses of competent counsel," especially in light of the evidence in the record. *See, e.g.*, *Colvin-El*, 1998 WL 386403 at *4 (appointment of competent counsel under Chapter 154 cannot be assured when they are compensated "at a rate substantially below the break-even point of doing business").

B. Arizona Retains the Burden of Persuasion in This Court's *De Novo* Review of the State's Compliance With Statutory Certification Requirements.

In performing its *de novo* review, this Court must ensure the burden of persuasion remains on Arizona. In other words, if the Court cannot conclude that Arizona's capital counsel mechanism qualifies under the statutory standards, it must deny the application. *See, e.g.*, *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 56 (2005) (explaining that the term "burden of persuasion" means the party with the burden "loses if the evidence is closely balanced"); *Tech. Licensing Corp. v. Videotek, Inc.*, 545 F.3d 1316, 1327 (Fed. Cir. 2008) ("Failure to prove the matter as required by the applicable standard means that the party with the burden of

persuasion loses on that point—thus, if the fact trier of the issue is left uncertain, the party with the burden loses.").

In appeals of agency action, courts sometimes assign the burden of persuasion to the party challenging the agency's findings and decision. In this case, Arizona must retain the burden of persuasion for at least two reasons. First, Arizona's retention of the burden comports with the *de novo* standard of review established by Congress. Under the *de novo* standard, this Court must independently make the same type of determination that the Attorney General was required to make—*i.e.*, whether Arizona's mechanism satisfies the statute. In applying for certification, Arizona bore the burden of persuasion. *See* 5 U.S.C. § 556(d) ("Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof."); *see also Dir., Off. of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 276 (1994) (Administrative Procedure Act's reference to "burden of proof" means "burden of persuasion," not simply "burden of production"). Therefore, in performing its *de novo* review, this Court must independently determine whether Arizona met its burden of persuasion.

Second, Arizona's retention of the burden of proof through the appeal process comports with the overall statutory scheme. As discussed above, Chapter 154 incorporates a *quid pro quo* approach to certification: states receive substantial procedural benefits in federal habeas cases in exchange for ensuring that state death-

sentenced prisoners have access to qualified counsel and the resources necessary to develop and present claims in state proceedings. Congress plainly did not intend to confer any benefits to states unless and until they proved their eligibility through a successful application. *See, e.g.*, *Calderon*, 523 U.S. at 747 (noting Chapter 154 is an "affirmative defense" to the state); *Lindh*, 521 U.S. at 327 (concluding that Chapter 154 is applicable "only if the State meets certain conditions"); *Ashmus v. Woodford*, 202 F.3d 1160, 1164 (9th Cir. 2000) (holding Chapter 154 inapplicable unless the state "affirmatively establishes that it has satisfied each condition in the federal statute"); *cf. Lavine v. Milne*, 424 U.S. 577, 584 (1976) (describing "the normal assumption that an applicant is not entitled to benefits unless and until he proves his eligibility").

Prior to the Patriot Reauthorization's designation of the Attorney General to determine certification, courts reviewing state certification requests required strict compliance in a manner consistent with congressional intent. *See, e.g.*, *Satcher v. Netherland*, 944 F. Supp. 1222, 1245 (E.D. Va. 1996) ("Strict interpretation of the stringent opt-in requirements of the Act is not mere formalism. Rather, strict interpretation is necessary to meaningfully effectuate the *quid pro quo* arrangement which lies at the core of Chapter 154."); *Zuern v. Tate*, 938 F. Supp. 468, 472 (S.D. Ohio 1996) ("Congress did not write § 2261 in terms of substantial compliance. Rather the section is replete with mandatory language."). The Patriot

Reauthorization did not alter the fundamental *quid pro quo* arrangement in Chapter 154: states requesting certification are still required to prove their capital counsel mechanisms meet the statutory requirements. In performing its *de novo* review, this Court must ensure states have carried out their end of the bargain before they may receive the benefits of certification.

C. This Court Must Retain Control Over Any Additional Factfinding Necessary to Evaluate Arizona's Compliance With Statutory Certification Requirements.

If this Court correctly places the burden of persuasion on Arizona, it should be able to resolve this case based on the record compiled by the Attorney General. This is not a typical agency review case where remand for additional investigation or explanation would be appropriate if the record does not support the agency action, the agency has not considered all relevant factors, or the Court simply cannot evaluate the challenged agency action on the basis of the record before it. Under the *de novo* review process Congress established in Chapter 154, if this Court concludes the administrative record does not sufficiently support Arizona's application, it should simply deny the application.

Amicus believes the record below is wholly insufficient to show that Arizona's capital counsel mechanism meets the standards Congress established in §§ 2261 and 2265. To the contrary, the record shows Arizona's mechanism fails in both design

and implementation to meet Congress's basic requirements for ensuring timely appointment and adequate compensation of competent counsel.

If the Court were to conclude, however, that additional information is required to perform its *de novo* review, it has at least three means at its disposal to gather additional information. First, the Court may transfer the proceedings to a district court for a hearing pursuant to 28 U.S.C. § 2347(b)(3).[7] Second, the Court may appoint a special master pursuant to Rule 48 of the Federal Rules of Appellate Procedure to hold hearings and gather additional information. Third, the Court may fashion any other "appropriate modes of procedure" to gather the evidence it needs pursuant to its authority under the All Writs Act, 28 U.S.C. § 1651. *See Harris v. Nelson*, 394 U.S. 286, 299 (1969) (courts may rely on the All Writs Act "in issuing orders appropriate to assist them in conducting factual inquiries"). This Court could, if necessary, apply one of these means to gather additional information while retaining control of this proceeding and completing its independent, *de novo* review, as required by Congress.

CONCLUSION

The Patriot Reauthorization's provision for this Court's *de novo* review of the Attorney General's certification decisions played a critical role in securing approval

[7] Section 2265(c)(1) provides that certification determinations are subject to review as provided under chapter 158 of Title 28, which includes § 2347(b)(3).

of the *quid pro quo* approach adopted in Chapter 154. Courts of Appeals do not typically engage in *de novo* review of agency decisions, but the standards for such a review—a fresh, independent evaluation of both facts and law—were well established in this Court. This Court's careful application of the *de novo* standard is essential to ensuring that states do not receive the substantial benefits available under Chapter 154 until they prove their capital counsel mechanisms provide timely access to qualified counsel with access to the resources necessary to represent their clients in state postconviction proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 32(g)(1) because it contains 5,718 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and D.C. Cir. R. 32(e). 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 it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman and 14 point font.

/s/ Michael L. Rosenthal
Michael L. Rosenthal

DATED: August 20, 2020

CERTIFICATE OF SERVICE

I hereby certify that on August 20, 2020, I caused the foregoing Brief to be served by the Court's CM/ECF system, which will send a notice of the filing to all registered CM/ECF users.

/s/ Michael L. Rosenthal
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DATED: August 20, 2020