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, ET AL.,
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-16

BRIEF *AMICI CURIAE* OF PROFESSORS OF ADMINISTRATIVE LAW 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), undersigned counsel for *amici curiae* certify as follows:

A. Parties and *Amici*

Except for the *amici curiae* listed below, parties, intervenors, and *amici* appearing before this Court are listed in the Brief for Petitioners. Additionally, at present, notices of intent to participate as amicus curiae have been filed by Federal Public Defender Capital Habeas Units, the American Bar Association, and Academic Experts in Federal Criminal Procedure and Post-Conviction Practice.

Amici curiae include:[†]

- Michael Asimow, Professor of Law Emeritus, UCLA School of Law; Dean's Executive Professor of Law, Santa Clara School of Law
- Erwin Chemerinsky, Dean and Jesse H. Choper Distinguished Professor of Law, Berkeley Law
- Daniel Deacon, Lecturer, University of Michigan Law School
- Daniel Farber, Sho Sato Professor of Law, Berkeley Law
- Cynthia R. Farina, William G. McRoberts Research Professor in Administrative Law, Emerita, Cornell Law School
- Ronald M. Levin, William R. Orthwein Distinguished Professor of Law, Washington University in St. Louis

[†] Amici's affiliations are listed for identification purposes. Amici's views are solely their own and do not represent the views of any public or private institution.

- Jeffrey S. Lubbers, Professor of Practice in Administrative Law, American University, Washington College of Law
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- Arnold Rochvarg, Professor of Law, Emeritus, University of Baltimore School of Law
- Edward L. Rubin, University Professor of Law and Political Science, Vanderbilt Law School
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- Sidney A. Shapiro, Frank U. Fletcher Chair in Administrative Law, Professor of Law, Wake Forest Law
- Jamelle Sharpe, Professor of Law, University of Illinois College of Law
- Peter L. Strauss, Betts Professor Emeritus of Law, Columbia Law School
- Daniel E. Walters, Assistant Professor of Law, Penn State Law

B. Ruling Under Review

Reference to the ruling under review appears in the Brief for Petitioners.

C. Related Cases

Reference to any related cases pending before this Court appears in the Brief for Petitioners.

STATEMENT REGARDING SEPARATE BRIEFING

All parties have provided consent to the filing of this brief. *Amici* filed a notice of their intent to participate as *amici curiae* on August 18, 2020.

Pursuant to D.C. Circuit Rule 29(d), *amici curiae* certify that a separate brief is necessary because no other *amicus* brief of which we are aware will address the issues raised in this brief: namely, whether the Attorney General's certification of Arizona (the "Certification") under Chapter 154 of Title 28 of the U.S. code is a rule, whether it complied with the APA, and how de novo review should be applied to the Certification. To our knowledge, no other *amicus* brief will raise administrative law issues on behalf of Petitioners. In light of *amici*'s expertise and scholarship, *amici* are particularly well-suited to discuss these complex questions of administrative law.

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INTEREST OF AMICI CURIAE[1]

Amici curiae are professors of administrative law at institutions across the United States. Together, *amici* have taught courses in administrative law for decades, authored multiple books and scores of articles on administrative law issues, and have addressed numerous groups of judges, lawyers, and academics about issues of administrative law. Their academic work includes extensive study of the procedural protections afforded by the Administrative Procedure Act ("APA"), as well as the scope of judicial review of agency decisions.

Amici are committed to the fair application of the procedures governing review of administrative action. The Attorney General's certification of Arizona (the "Certification") under Chapter 154 of Title 28 of the U.S. Code violates those principles, and *amici* write to provide their insight into key administrative law principles at stake in this case.

SUMMARY OF ARGUMENT

Amici submit this brief to highlight two critical administrative law questions. First, must the Attorney General follow notice-and-comment procedures prior to

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*'s counsel made a monetary contribution to the preparation or submission of this brief. *Amici*'s affiliations are listed for identification purposes. *Amici*'s views are solely their own and do not represent the views of any public or private institution.

issuing a Certification? Second, how should this Court apply the de novo standard of review clearly stated in Chapter 154 to the Certification?

The answers to these questions of first impression will have important systemic effects on the judicial review of administrative action in other contexts, both for future Chapter 154 certifications and for procedural norms that govern agency actions. *Amici* offer their expertise to help answer these process questions in a manner that preserves neutral procedural fairness.

The application of core administrative law principles answers these questions straightforwardly.

First, the Certification must be remanded to the agency for flagrant procedural violations. The Certification was required to comply with notice-and-comment requirements, but violated these obligations in several important ways. The Attorney General changed his position about what kinds of experience are sufficient to assure competent postconviction counsel, and did so without notice to the public. He also failed to address significant aspects of the Petitioners' comments, violated the standard of review adopted in his own regulations, and failed to offer a proposal for public comment. The Attorney General's violations of these requirements were prejudicial and require remand. To hold otherwise would give the Attorney General carte blanche to undermine the public's right to participate in the administrative process.

These procedures matter. There are serious consequences for Arizona's capital prisoners if the Attorney General does not provide procedural fairness. That procedural fairness could be the difference between life and death in some cases. Without following proper notice-and-comment procedures, the agency's decision is made on an incomplete record and the public is deprived of notice of a significant legal change to the system of federal habeas review. In other words, the public cannot participate fully in the decisionmaking process and the quality of the agency's decision is compromised.

Second, even if the Court looks past these procedural violations and reviews the substance of the Certification, it must review the Certification de novo, including portions of the decision that purport to be based on the Attorney General's regulations. This result is expressly dictated by the statute, as well as the legislative history of Chapter 154. And no conceivable rationale for deference exists, even if it were permitted under the statute. Indeed, the Attorney General's regulations do no more than paraphrase the statute, and an agency is not entitled to deference where the regulations being interpreted merely parrot statutory text. As such, no deference should be accorded to any aspect of the Certification.

In sum, the application of core procedural requirements compels the conclusion that the Certification must be vacated and remanded to the agency. And

in the event this Court reviews any aspect of the agency's conclusions, no deference is owed to any part of the Certification.

ARGUMENT

I. The Certification Must Be Vacated and Remanded Because the Attorney General Failed to Use Proper Notice-and-Comment Procedures.

The Attorney General was required to comply with notice-and-comment obligations because the Certification is a rule. Core administrative law principles confirm this conclusion: The Certification is of general application, potentially applying to all capital prisoners in Arizona, and has only future effect. The Attorney General interpreted his authority to preclude him from considering the facts of any particular capital prisoner, and expressly contemplated that the Certification would have to be litigated in future postconviction proceedings—classic characteristics of a rule, meant to change the governing legal regime.

Because the Certification is a rule, the Attorney General was required to provide the basis for his decision and to respond to the key comments challenging Arizona's application. The Attorney General failed to do so, both changing his position compared to his previous Federal Register publication without notice and also ignoring key comments.[2] The Attorney General's failure was not harmless

[2] In order to avoid retreading the same ground covered by the parties, *amici* respectfully refer the Court to the Brief for Petitioners at 5-11 for a discussion of the statutory and regulatory history.

error, because it deprived the public of effective notice and a meaningful opportunity to comment on the agency's proposed course of action. Accordingly, the Certification must be vacated and remanded to the agency.

A. The Attorney General Was Required to Comply with Notice-and-Comment Obligations Because the Certification Is a Rule.

The Certification has general effect with respect to multiple death penalty prisoners sentenced within a given State and applies prospectively with respect to future legal challenges to those death penalty sentences, both key characteristics of a rule. The Attorney General "may not escape the requirements of [5 U.S.C.] § 553 by labeling its rule an adjudication." *Safari Club Int'l v. Zinke*, 878 F.3d 316, 331-32 (D.C. Cir. 2017) (internal quotation marks omitted).

The Attorney General has previously taken the contrary position that "certifications under chapter 154 are orders rather than rules for purposes of the [APA]. They are accordingly not subject to the APA's rulemaking provisions, much less to the APA's requirements for rulemaking or adjudication required to be made or determined on the record after opportunity for an agency hearing." *See Certification Process for State Capital Counsel System*, 78 Fed. Reg. 58,160, 58,174 (Dep't of Just. Sept. 23, 2013) (internal citations omitted). Notably, this statement reflects the Attorney General's view that certifications are subject to the APA. But the assertion that certifications are orders was rejected by the district court in *Habeas Corpus Resource Center v. Department of Justice*, No. C 13-4517, 2014 WL

3908220, at *8-9 (N.D. Cal. Aug. 7, 2014) (rejecting this position and holding that certifications are rules subject to the APA's notice-and-comment provisions), *vacated on jurisdictional grounds*, 816 F.3d 1241 (9th Cir. 2016). To the extent the Attorney General again asserts that certifications are adjudications, this Court should not defer to that interpretation, but instead should review the character of certifications de novo, as required by Chapter 154. *See infra* Part II.C.

This Court has recognized two principles that distinguish rules from orders: general application and prospective effect. First, rules "involve broad applications of more general principles," whereas orders are "case-specific individual determinations." *Safari Club*, 878 F.3d at 332-33 (quotation marks omitted). This principle is grounded both in the APA and in the United States Constitution. *See* 5 U.S.C. § 551(4) (defining a rule as an "agency statement of general or particular applicability and future effect"); *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915) (explaining due process requirements for "[g]eneral statutes" or "a rule of conduct [that] applies to more than a few people"). Second, a common basis for distinguishing rules from orders is that "rules generally have only future effect."[3] *Safari Club*, 878 F.3d at 333 (internal quotation marks omitted); *see*

[3] Some commentary has questioned whether the "future effect" criterion is essential to the definition of a rule, but agrees that it is useful as a generalization. *See* Ronald M. Levin, *The Case for (Finally) Fixing the APA's Definition of "Rule"*, 56 Admin. L. Rev. 1077, 1083-88 (2004).

also Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 216-17 (1988) (Scalia, J., concurring) (The "central distinction between rulemaking and adjudication" is that "rules have legal consequences only for the future").

The Certification is a rule because it establishes a new legal regime that generally applies to virtually all federal habeas petitions filed by capital prisoners in Arizona. This path has already been charted in *Safari Club*, in which this Court struck down findings by the U.S. Fish and Wildlife Service (the "Service") as rules invalidly promulgated without notice and comment. *Safari Club*, 878 F.3d at 320. The Service, claiming to act through adjudication, had published a final notice in the Federal Register announcing that the killing of African elephants in Zimbabwe would not enhance the species' survival. *Id.* These "enhancement findings" effectively suspended all importation of African elephant hunting trophies from Zimbabwe into the United States. *Id.* In concluding that the findings "reflect[ed] a final rule" and therefore could be issued only through rulemaking, this Court emphasized their general application and future effect. *Id.* at 331. First, the Court characterized the enhancement findings as "general" because the Service "did not adjudicate any dispute between specific parties" but rather analyzed country-wide data to establish a standard applicable to all potential Zimbabwean elephant trophy imports. *Id.* at 333. Second, the findings were prospective because they only "[bound] hunters in future permitting adjudications and enforcement actions" and

"resulted in no immediate legal consequences for any specific parties." *Id.* at 333-34.

The Certification is also a rule because of its generalized nature and future effect. Just as the Service's enhancement findings in *Safari Club* "establish[ed] a standard binding on the agency" applicable "to all potential imports of sport-hunted elephant trophies from Zimbabwe," the Certification establishes a new legal regime applicable to all current and future death row litigants in Arizona. *Id.* Per the terms of the Certification, every capital prisoner convicted after May 19, 1998 is subject to a shorter limitations period to file a federal habeas petition, has limited ability to amend a petition once it is filed, and is completely *barred* from bringing an ineffective assistance of counsel claim against State postconviction review counsel. *See* 28 U.S.C. §§ 2261(e), 2263(a), 2266(b)(3)(B). In *Safari Club*, this Court distinguished the Service's country-wide findings, which reflected rulemaking, from the Service's decisions on individual hunters' permit applications, which were case-specific determinations properly conducted through adjudication. *Safari Club*, 878 F.3d at 333-34; *see also* Levin, *supra*, at 1080 (tracing "due process foundations of the distinction between rules and adjudicative orders," which are "rooted in the distinction between generalized and particularized action").

And even though the Certification involved the review of a State's application, this does not transform the Certification into an adjudication. The most

instructive parallel comes from *Yesler Terrace Community Council v. Cisneros*, where an agency contended that its "determination that Washington[State's] state-court eviction procedures met [the agency's] due process requirements" was an adjudication. 37 F.3d 442, 448 (9th Cir. 1994). The Ninth Circuit soundly rejected this contention, because the "determination had no immediate, concrete effect on anyone," but instead changed procedures for future eviction proceedings, and because "the determination affected the rights of a broad category of individuals not yet identified." *Id.* The Certification is analogous to the determinations in *Safari Club* and *Yesler Terrace*, and it accordingly has all of the characteristics of a rule because it has general application and future effect.

The Attorney General himself draws an analogous distinction between his own "general certification function" and the "case-specific," "individual," and "particular" role carried out by the federal habeas courts. *Certification of Arizona Capital Counsel Mechanism*, 85 Fed. Reg. 20,705, 20,708 (Dep't of Just. Apr. 14, 2020) ("Certification"). The Attorney General describes the certification process in terms consistent with the definition of rulemaking: in reviewing Arizona's application, he "has no individual case before him and is not responsible for determining whether a State has complied with its mechanism in any particular case." *Id.* at 20,712. By contrast, he portrays the courts' role in terms that reflect adjudication: once he certifies Arizona's capital counsel mechanism, it falls to the

habeas courts to conduct "case-specific review of the operation of Arizona's mechanism," *id.* at 20,708, and to "address individual irregularities and decide whether . . . chapter 154 will apply in particular cases," *id.* at 20,711 (internal quotation marks omitted). By the Attorney General's own account, he lacks the authority to make "case-specific individual determinations" characteristic of adjudication. *See Safari Club*, 878 F.3d at 332-33 (quotation marks omitted). Rather, his decisions bear the hallmarks of rulemaking because they are "generalized [in] nature" and "applicable across the board" to all habeas petitioners in Arizona. *Id.* at 333 (quoting *United States v. Fla. E. Coast Ry. Co.*, 410 U.S. 224, 246 (1973) (alteration in original)).

Furthermore, the Certification is a rule because of its inherently prospective nature. "Adjudication deals with what the law was; rulemaking deals with what the law will be." *Bowen*, 488 U.S. at 221 (Scalia, J., concurring). The Certification establishes a new legal regime—*i.e.*, "what the law will be"—for habeas petitioners in a particular State. For example, the Certification determines whether there will remain a one-year statute of limitations for filing federal habeas petitions, or whether that limitation will be 180 days.

The fact that the Certification on its face has an effective date of May 19, 1998 does not change its prospective character. "[I]t is black-letter administrative law that adjudications are inherently retroactive." *Catholic Health Initiatives Iowa Corp. v.*

Sebelius, 718 F.3d 914, 921 (D.C. Cir. 2013). An action is retroactive if it "alter[s] the past legal consequences of past actions." *Bowen*, 488 U.S. at 219-20 (Scalia, J., concurring). An action is forward-looking if it "deal[s] with past transactions in prescribing rules for the future." *Id.* at 219 (quotation marks omitted). Justice Scalia's concurrence in *Bowen* provides an analogous circumstance to the Certification: "[T]he Treasury Department might prescribe" a rule that would "assess[] future income tax liability" based on income that was "previously . . . considered nontaxable . . . whether those trusts were established before or after the effective date of the regulation." *Id.* So too here. The Certification is prospective because it changes the rules for future habeas filings.

Consistent with these principles, this Court held that the Service engaged in forward-looking rulemaking in *Safari Club*, even though the enhancement findings would apply to some hunters who had already harvested trophies. 878 F.3d at 333 (observing that the Service's "ban on imports was only meant to bind hunters in future permitting adjudications and enforcement actions, regardless of when they actually harvested their elephant trophy"). Despite this limited retroactive impact, the findings were not orders because they did not "immediately bind parties by retroactively applying law to their past actions," nor did they result in "immediate legal consequences for any specific parties." *Id.* at 333-34.

Here too, the certifications by the Attorney General under Chapter 154 are forward-looking rules that do not apply existing law to past conduct, but rather establish new law that will apply to all future habeas proceedings statewide. Furthermore, certification does not have immediate legal consequences for specific parties, but rather creates new habeas policies applicable to the broad, unspecified class of all current and future death row litigants throughout Arizona. *See United States v. Fla. E. Coast Ry. Co.*, 410 U.S. 224, 246 (1973) (explaining that agency engaged in rulemaking because it had formulated judgments "for prospective application only" rather than "adjudicating a particular set of disputed facts"). Accordingly, the Attorney General's own regulations required notice and comment.

B. The Certification Is Procedurally Invalid Because the Attorney General Did Not Comply with Mandatory Rulemaking Procedures, and His Failures Were Prejudicial.

1. The Certification Is Procedurally Invalid.

The Certification is a procedurally invalid rule because the Attorney General failed to provide adequate notice, took an action that was not a logical outgrowth of the proposed rule, and provided an inadequate explanation of his action. These violations of core administrative procedures compel a remand to the agency.

Under the APA, rulemaking must give "interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." 5 U.S.C. § 553(c). The APA "requires an agency conducting notice-

and-comment rulemaking to publish in its notice of rulemaking 'either the terms or substance of the proposed rule or a description of the subjects and issues involved.'" *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007) (quoting 5 U.S.C. § 553(b)(3)). The agency action must, in addition, be a "logical outgrowth" of the notice provided. *Id.* (quotation marks omitted). This requires sufficient notice that "interested parties should have anticipated that [a] change [from the notice] was possible." *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1079-80 (D.C. Cir. 2009) (quotation marks omitted); *see also* Arnold Rochvarg, *Adequacy of Notice of Rulemaking Under the Federal Administrative Procedure Act—When Should a Second Round of Notice and Comment Be Provided?*, 31 Am. U. L. Rev. 1, 11 (1981) (suggesting that second round of notice and comment is required where initial notice is "vague" or "subject to conflicting interpretations"). Additionally, the agency must disclose the possible bases for its decisions in order to enable commenters to respond. *See Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 237 (D.C. Cir. 2008). And, in arriving at its final decision, an agency has the "duty to give reasoned responses to all significant comments." *Interstate Nat. Gas Ass'n of Am. v. FERC*, 494 F.3d 1092, 1096 (D.C. Cir. 2007) (internal quotation marks omitted); *see also Gonzales v. Oregon*, 546 U.S. 243, 269 (2006) (faulting the Attorney General for an "apparent absence of any consultation with anyone outside the Department of Justice who might aid in reasoned judgment"); Kevin M. Stack, *The Constitutional*

Foundations of Chenery, 116 Yale L.J. 952, 996-98 (2007) (explaining foundational constitutional obligation of agencies to engage in "an ongoing process of reason-giving and justification"). Thus, the Attorney General was required to publish his proposed decision, along with the full factual basis; to provide a period of public comment on his proposal; and finally, to issue and justify the Certification in light of public comments.

Notwithstanding these requirements, the only notice the public received was that Arizona had applied for certification. That notice did not provide a proposed agency action and did not offer any possible explanation for any agency action. As in *Safari Club*, the Attorney General provided no supporting analysis until he issued the final decision in April of this year. *See* 878 F.3d at 335. This failure to disclose critical information concerning the basis of his decision deprived interested parties of a meaningful opportunity to comment, contravening a key principle of administrative law and "virtually repeal[ing the] requirements" of "publishing a notice of a proposed rule and . . . [of] set[ting] forth a statement of the basis and purpose of the rule." *Id.* (quoting *Sugar Cane Growers Co-op. of Fla. v. Veneman*, 289 F.3d 89, 96-97 (D.C. Cir. 2002)). In particular, the public had no notice that the Attorney General would materially change his view as to three key certification requirements: competency standards; the standard of review for States which, like

Arizona, do not meet the benchmarks; and that the Certification relies on a basis for compensation that Arizona itself did not submit as part of its application.

First, in the 2013 Federal Register publication, the Attorney General expressly concluded that competency standards needed to mandate experience in postconviction proceedings. *See* 78 Fed. Reg. at 58,169. The basis for this conclusion was that federal competency standards for capital cases needed to be "adapt[ed]" to fit Chapter 154, because Chapter 154 "deals exclusively with postconviction proceedings," and because "[p]rior postconviction litigation experience" is "more likely on the whole to enable the attorney to provide effective representation in postconviction proceedings." *Id.* But in the Certification, the Attorney General abandoned this position and stated, to the contrary, that Arizona's standards, which do not require postconviction experience, satisfied Chapter 154. *See* 85 Fed. Reg. at 20,709-10. This violates the logical outgrowth test because the Attorney General abandoned his prior reasoned explanation of the competency standard without any additional notice. This left commenters "to divine the agency's unspoken thoughts." *CSX Transp.*, 584 F.3d at 1080 (quotation marks and alterations omitted); *see also Long Island Care*, 551 U.S. at 174.

Second, the 2013 Federal Register publication provided that States that do not meet the benchmarks—like Arizona—should be subject to "closer examination" by the Attorney General than States that meet benchmarks. *See* 78 Fed. Reg. at 58,172.

Yet the Certification ignores this requirement, and instead considers Arizona's application at a general level without considering the State's failures to actually provide and adequately compensate competent counsel—and without engaging in the "closer examination" he previously promised. *See, e.g.*, 85 Fed. Reg. at 20,711. Again, the Attorney General violated his own regulations setting forth the standards for reviewing certification applications without providing prior notice that he would do so.

Third, the Certification is procedurally invalid because the Attorney General cited bases for his decision that were not set forth in Arizona's submissions, thereby depriving commenters of notice of the basis for his decision. For instance, the Certification concludes that Arizona provides for the payment of reasonable litigation expenses in part due to Ariz. Rev. Stat. § 13-4013(B). *See* 85 Fed. Reg. at 20,715-16. This statute is not cited in Arizona's application. And no informed commenter would have anticipated that the Attorney General would rely on this statute, because it relates to expenses in felony criminal appointments, not postconviction proceedings. The fact that the Attorney General relied on a statute not presented by the applicant violates core principles of administrative law: that an agency act on the basis of the administrative record and—after making a tentative decision—make the grounds for such action available for public comment. *See Am. Radio Relay League*, 524 F.3d at 237. This obligation to consult with the public is

all the more important given that the Certification is based on the adequacy of *State* postconviction procedures, an area in which the Attorney General lacks expertise. *See Gonzales*, 546 U.S. at 269 (explaining that deference principles are tempered where agency "lack[s] . . . expertise in th[e] area," and in such cases an "absence of any consultation" makes an agency decision less persuasive).

Furthermore, the Attorney General failed to respond to significant comments. For example, the Certification does not respond to Petitioners' well-supported comment stating that compensation at $100 per hour is insufficient to run a practice in Arizona, and that Maricopa County sets forth arbitrarily low rates of pay for mitigation specialists, which prevents counsel from retaining qualified specialists. *See* Brief for Petitioners at 62-69. As a result of these deficiencies, Arizona fails to guarantee competent representation in postconviction proceedings. The Attorney General did not consider or respond to these comments in the Certification, despite their duty to do so. *See Interstate Nat. Gas Ass'n*, 494 F.3d at 1096.

2. The Attorney General's Procedural Violations Were Prejudicial.

The Attorney General's violations of bedrock administrative procedure prejudiced Petitioners and the public. They deprived interested parties of an opportunity to respond to several significant changes in the Attorney General's position compared to his regulations and the accompanying Federal Register publication. These changes are not explained and were not subject to notice and

comment, in violation of the APA. *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016); *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41 (1983). Vacatur of a regulation is warranted when the agency's failure to respond to significant comments leaves the court "only to guess whether its decision was based on a consideration of the relevant factors." *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1063 (D.C. Cir. 2001) (internal quotation marks omitted); *see also Cape Cod Hosp. v. Sebelius*, 630 F.3d 203, 211 (D.C. Cir. 2011) (remanding to agency where agency failed to provide a "reasoned response to . . . relevant and significant public comment[s]" (internal quotation marks omitted)); *Int'l Fabricare Inst. v. U.S. EPA*, 972 F.2d 384, 389 (D.C. Cir. 1992) (overturning rulemaking as arbitrary and capricious where agency "failed to respond to specific challenges that are sufficiently central to its decision"). Similarly, the logical outgrowth problem also justifies vacatur and remand, *see CSX Transp.*, 584 F.3d at 1079-80, as does the failure to provide notice of possible bases of the agency's action, *see Am. Radio Relay League*, 524 F.3d at 237.

The object of notice-and-comment requirements "is one of fair notice." *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2385 (2020) (quotation marks omitted). Courts have sometimes concluded that procedural errors which elevate form over substance are harmless where the public received fair notice of an agency's position and proposed course of action. *See PDK*

Labs. Inc. v. DEA, 362 F.3d 786, 799 (D.C. Cir. 2004). For instance, in *Little Sisters*, the Supreme Court concluded that an agency publication that "explained its position in fulsome detail and provided the public with an opportunity to comment on whether . . . regulations . . . should be made permanent or subject to modification" gave the public sufficient notice of possible agency action to comment on the proposal. 140 S. Ct. at 2385 (internal quotation marks and some alterations omitted). The Court accordingly rejected the respondents' argument that the agency's publication was deficient because it did not include the correct title. *See id.*

The failings in the Certification procedure are entirely different from the naming convention error at issue in *Little Sisters*. The public was deprived of notice of three changes in agency position compared to the "fulsome" statement in the 2013 Federal Register publication. *See id.* Because "failure[s] to comply with notice and comment cannot be considered harmless if there is any uncertainty at all as to the effect of the failure," the Attorney General's myriad procedural failings cannot be considered harmless. *Sugar Cane Growers Co-op. of Fla. v. Veneman*, 289 F.3d 89, 96-97 (D.C. Cir. 2002); *see also Safari Club*, 878 F.3d at 335-36 (applying *Sugar Cane* and rejecting harmlessness argument where agency findings did not "invite public comment" but rather presented "conclusions at which the [agency] had already arrived").

II. This Court Must Review All Aspects of the Certification De Novo.

The Certification should be remanded due to the procedural violations described above, and the Court need proceed no further. But if the Court reviews the merits of the Certification, the statute sets forth a clear standard: de novo review. In the context of the Certification—which includes factual conclusions, interpretations of the governing statute, and interpretations of the Attorney General's regulations—this means that no aspect of the decision under review is subject to judicial deference. This result is compelled by the statutory text, which admits of no exception. The history of Chapter 154 confirms that nondeferential judicial review is the cornerstone of the certification process. De novo review is all the more appropriate here because the regulations on which the Attorney General relied do no more than parrot the statutory text in generic language—classic parroting regulations that are not entitled to deference.

A. Chapter 154 Provides a De Novo Standard of Review.

Chapter 154 supplies the standard of review: determinations of the Attorney General "regarding whether to certify a State under [Chapter 154] shall be subject to de novo review." 28 U.S.C. § 2265(c)(3). De novo review of agency actions is required where the text or legislative history of a statute indicate Congress's intention to make such a review available. *See Agosto v. INS*, 436 U.S. 748, 753 (1978) (explaining basis for de novo review of deportation decisions where person

subject to deportation claims U.S. citizenship); *Chandler v. Roudebush*, 425 U.S. 840, 844-45 (1976) (upholding de novo review of employment claims under Title VII).

The Supreme Court and this Circuit have regularly applied de novo review where Congress has mandated it. De novo review requires this Court to "put itself in the agency's place, to make anew the same judgment earlier made by the agency." *Doe v. United States*, 821 F.2d 694, 698 (D.C. Cir. 1987) (en banc). In reaching its decision, the Court must make "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." *Strang v. U.S. Arms Control & Disarmament Agency*, 864 F.2d 859, 866 (D.C. Cir. 1989) (other quotation marks omitted); *accord United States v. First City Nat'l Bank of Houston*, 386 U.S. 361, 368 (1967) ("[T]he court is not to give any special weight to the determination of the . . . agency." (internal quotation marks omitted)). This Court and the Supreme Court have applied de novo review in a number of statutory contexts. *See DOJ v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 754-56 & n.9 (1989) (FOIA); *Chandler*, 425 U.S. at 844-45 (Title VII); *Envtl. Def. Fund v. Reilly*, 909 F.2d 1497, 1499-1500 (D.C. Cir. 1990) (Toxic Substances Control Act). As a result of the clear language of Chapter 154, no aspect of the Certification is entitled to deference.

B. The Origins of Chapter 154 Confirm that Searching Judicial Review Is Required.

The history of Chapter 154 confirms that de novo judicial review of the Certification decision, without "any deference [to] the agency's conclusion," is required. *Strang*, 864 F.2d at 866 (quotation marks omitted). Chapter 154 emerged from the recommendations of the 1988 Ad Hoc Committee of the Judicial Conference on Federal Habeas Corpus in Capital Cases, known as the Powell Committee. *See* 135 Cong. Rec. 24,694 (1989); *see also Ashmus v. Woodford*, 202 F.3d 1160, 1163 (9th Cir. 2000) (Chapter 154 "essentially codified" the Powell Report). The Powell Report expressly concluded that searching judicial review would be required.

Chapter 154 is deliberately designed to be a quid pro quo arrangement: a State must provide competent counsel for State postconviction review proceedings; only then can a State benefit from the expedited and sharply curtailed federal habeas review. If a State were to be certified without holding up its end of the bargain, a capital prisoner would lose federal habeas rights without any corresponding gain in State habeas rights—a quo with no quid. As the Powell Committee explained, "[t]he final judgement as to the adequacy of any system for the appointment of counsel . . . rests ultimately with the federal judiciary." 135 Cong. Rec. 24,696.

Congress's decision in 2006 to vest initial Chapter 154 certification with the Attorney General did not diminish the de novo review Congress entrusted to federal

courts. Whereas the amendments assigned initial determinations to the Attorney General, they also codified the D.C. Circuit's authority to review certifications de novo. *See* USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 507, 120 Stat. 192, 250-51 (2006) (codified at 28 U.S.C. § 2265). The legislative history confirms that eliminating perceived biases—not a less searching review—was the primary goal of the 2006 Amendments. *See* 151 Cong. Rec. E2640 (daily ed. Dec. 22, 2005) (extended remarks of Rep. Flake).

C. De Novo Review Is Required for All of the Attorney General's Conclusions, Including Conclusions About the Scope of His Authority and Conclusions Purportedly Based on His Regulations.

To the extent the Attorney General argues that the Certification is entitled to deference as an interpretation of the Chapter 154 regulations, he is wrong. The Certification relies on generic regulatory text that does no more than parrot the statute. These regulations do not reflect the exercise of administrative expertise, and there is no basis to carve out deference to some portion of the Certification.

First, there is no basis in the statute for concluding that some, but not all, of the Certification is entitled to deference. The statute commands that certification determinations "shall be subject to de novo review" without qualification. 28 U.S.C. § 2265(c)(3). For the reasons stated above, this Court is required to review de novo all aspects of the Certification decision. To do otherwise would countermand the plain text of Chapter 154.

Second, even absent the clear statutory standard of review, the Attorney General's conclusions and findings of fact in the Certification are not entitled to deference even insofar as they are based on his own regulations. The Attorney General relied on portions of those regulations that merely parrot the statute. While courts defer to reasonable federal agency interpretations of their own ambiguous regulations under *Auer v. Robbins*, 519 U.S. 452 (1997), agency interpretation of regulations that parrot or paraphrase statutory language are not entitled to deference because the agency is not interpreting its own words.

Deference is grounded in respect for agency expertise as to matters within an agency's jurisdiction. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). But "[a]n agency does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language." *Gonzales*, 546 U.S. at 257 (denying deference where regulation "just repeats two statutory phrases and attempts to summarize the others"). And cosmetic or "stray differences between . . . statutory and regulatory definitions" are insufficient, because such minor changes do not "interpret[] the key statutory language." *Fogo De Chao (Holdings) Inc. v. DHS*, 769 F.3d 1127, 1136 (D.C. Cir. 2014); *see also Kisor v. Wilkie*, 139 S. Ct. 2400, 2417 n.5 (2019) (reaffirming the validity of this doctrine).

The Attorney General made four determinations in the Certification based on regulations so conclusory that they merely paraphrase statutory language with only "stray differences."[4] *Fogo de Chao*, 769 F.3d at 1136. As a result, even if the Attorney General's regulations are valid, deference to the agency's interpretations of regulations is not appropriate here.

1. Appointment: The appointment regulation is 28 C.F.R. § 26.22(a). As the Certification states, this "track[s] the[] statutory requirements" found in 28 U.S.C. § 2261(c)-(d) almost word for word. 85 Fed. Reg. at 20,708. This conclusory regulation merely copies the statute, and so the Attorney General's determinations regarding it are not entitled to deference under any standard.

2. Competency: The competency regulation has two components: presumptively adequate "benchmarks," and a provision that merely requires standards that "reasonably assure a level of proficiency appropriate for State postconviction litigation in capital cases." 28 C.F.R. § 26.22(b)(2). This is merely a paraphrase of the statutory requirement for "competent counsel in State postconviction proceedings." 28 U.S.C. § 2265(a)(1)(A), (C). The Certification determined that Arizona qualified under the generic regulation simply summarizing

[4] The Attorney General made a fifth determination, that Arizona timely appoints postconviction counsel, and purported to interpret his regulation to reach that conclusion. This determination must be reviewed de novo, and it is erroneous for the reasons given by the Petitioners. *See* Brief for Petitioners at 75-79.

the statute. *See* 85 Fed. Reg. at 20,710-11. Therefore, there is no basis to defer to that determination.

3. Compensation: The compensation regulation also has two components, specific benchmarks and a provision that paraphrases the statute in general terms. The benchmarks provide specific examples of presumptively adequate compensation schemes. *See* 28 C.F.R. § 26.22(c)(1). The other provision of the regulation requires compensation "reasonably designed to ensure the availability" of competent appointed counsel. 28 C.F.R. § 26.22(c)(2). This general language tracks the statutory language, which requires "a mechanism for the . . . compensation . . . of competent counsel." *Id.* § 2265(a)(1)(A). Again, the agency has exercised no expertise in formulating the regulation on which it relies, which merely requires what Congress legislated in paraphrased terms. And the agency chose to certify Arizona using this parroting regulation. *See* 85 Fed. Reg. at 20,714-15. As a result, no deference is due to either the factual determination or the legal interpretation, such as it was, of the compensation element.

4. Expenses: The expenses regulation is only a paraphrase. It states that a State's "mechanism must provide for payment of reasonable litigation expenses of appointed counsel," provides a list of examples of what such expenses "*may* include," and then provides that a State may use presumptive limits "only if means are authorized for payment of necessary expenses above such limits." 28 C.F.R.

§ 26.22(d). The statute provides that a State must provide "payment of reasonable litigation expenses." 28 U.S.C. § 2265(a)(1)(A). The agency has done nothing more than restate the statute, list examples, and then provide that the mechanism for reasonable, necessary expenses must actually reimburse counsel for all necessary expenses. This is not an exercise of agency expertise, as the Attorney General candidly admits, stating that this regulation "[f]ollow[s] the statutory requirement." 85 Fed. Reg. at 20,715. The Attorney General's interpretation of it is accordingly deserving of no deference.

Because the Attorney General has merely "repeat[ed some] statutory phrases and attempt[ed] to summarize the others" in the regulations that are the basis of the Certification, his subsequent determinations are not entitled to deference. *Gonzales*, 546 U.S. at 257.[5] The Court must therefore determine whether Arizona has shown that its postconviction framework satisfies the requirements of Chapter 154 entirely de novo. That determination must be made without any deference to the Attorney General's factual findings or legal conclusions, including those conclusions that purport to interpret the Attorney General's regulations.

[5] *Gonzales* involved an interpretation that would have been entitled to deference had it not been based on a parroting regulation, *see* 546 U.S. at 257, and so there is even less reason to apply deference here, where the statute specifies de novo review *and* the Certification relied on parroting regulations. *See also Fogo De Chao*, 769 F.3d at 1135.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge that the Court vacate the Certification and remand the matter to the Attorney General, or, in the alternative, apply de novo review to the merits of the Certification.

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) and 32(a)(7)(B) because this brief contains 6,402 words, excluding the parts of the document exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(6)-(7) because this brief has been prepared using Microsoft Office Word and is set in Times New Roman 14 point font.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing brief was filed electronically on August 20, 2020 and will therefore be served electronically on all counsel.

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