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 OF ARIZONA, ET AL.,

Petitioners,

v.

WILLIAM P. BARR, ET AL.,

Respondents.

STATE OF ARIZONA,

Intervenor.

On Petition for Review of Final Agency Action
of the United States Department of Justice

BRIEF OF INTERVENOR STATE OF ARIZONA

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November 4, 2020

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Cir. Rule 28(a)(1), Intervenors state as follows:

A. Parties, Intervenors, and Amici Curiae

All parties, intervenors, and amici appearing in this Court are listed in the Brief for Respondents.

B. Rulings Under Review

This case concerns the final agency action of the United States Department of Justice titled "Certification of Arizona Capital Counsel Mechanism," published on April 14, 2020 at 85 Fed. Reg. 20,705.

C. Related Cases

There are no other cases involving the same underlying agency order pending review in this Court or any other.

Petitioners challenged the Department of Justice's regulations implementing the certification procedure in the District of Arizona. *See Boggs* v. *U.S. Dep't of Justice*, No. 19-cv-5238 (D. Ariz.). The district court granted the government's motion to dismiss on August 4, 2020. Petitioners appealed to the Ninth Circuit on October 6, 2020, *see* No. 20-16941 (9th Cir.), but have moved, with the government's consent, to suspend the briefing schedule and hold appellate proceedings in abeyance pending this Court's disposition of the instant case.

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STATUTES AND REGULATIONS

Except for the following state law provisions, all applicable statutes, regulations, and court rules are contained in the Brief for Respondents:

Arizona Revised Statutes § 13–4234(D):

In capital cases, on the issuance of a mandate affirming the defendant's conviction and sentence on direct appeal, the clerk of the supreme court expeditiously shall file a notice of postconviction relief with the trial court. On the first notice in capital cases, a defendant has sixty days from the filing of the notice in which to file a petition. The supreme court shall appoint counsel pursuant to § 13–4041, subsection B. All indigent state prisoners under a capital sentence are entitled to the appointment of counsel to represent them in state postconviction proceedings. A competent indigent defendant may reject the offer of counsel with an understanding of its legal consequence. . . .

_____

Arizona Rule of Criminal Procedure 32.5(b):

Capital Cases. After the Supreme Court has affirmed an indigent capital defendant's conviction and sentence, the Supreme Court or its designee must appoint counsel who meets the standards of Rules 6.5 and 6.8 and A.R.S. § 13–4041. If the Supreme Court has authorized the presiding judge of the county where the case originated to appoint counsel, the presiding judge must file a copy of the

appointment order with the Supreme Court. If a capital defendant files a successive notice, the presiding judge must appoint the defendant's previous post-conviction counsel, unless the defendant waives counsel or there is good cause to appoint another qualified attorney who meets the standards of Rules 6.5 and 6.8 and A.R.S. § 13-4041. On application and if the trial court finds that such assistance is reasonably necessary, it must appoint co-counsel.

_____

Arizona Rule of Criminal Procedure 32.5(c):

> **Appointment of Investigators, Expert Witnesses, and Mitigation Specialists.** On application and if the trial court finds that such assistance is reasonably necessary for an indigent defendant, it may appoint an investigator, expert witnesses, and a mitigation specialist, or any combination of them, under Rule 6.7.

INTRODUCTION

In 1998, Intervenor State of Arizona implemented a mechanism to appoint, compensate, and pay reasonable litigation expenses of competent counsel for indigent defendants in capital postconviction proceedings in order to "opt-in" to Chapter 154 of the Antiterrorism and Effective Death Penalty Act of 1996's special habeas corpus procedures for capital cases. *See* 28 U.S.C. § 2261–2266; *Spears v. Stewart*, 283 F.3d 992 (9th Cir. 2002). This appeal, being heard more than two decades after Arizona implemented its mechanism, concerns Arizona's longstanding attempt to be certified to avail itself of those special habeas procedures.

Arizona's mechanism for appointing, compensating, and paying reasonable litigation expenses of competent postconviction counsel in capital cases is codified in A.R.S. §§ 13–4013, –4041, and –4234, and Arizona Rules of Criminal Procedures 6.8 and 32.5. Arizona requires its supreme court (or, if designated by its supreme court, a county's presiding criminal judge) to appoint counsel after a capital defendant's conviction and sentence is affirmed on direct appeal. A.R.S. §§ 13–4041(B), –4234(D); Ariz. R. Crim. P. 32.5(b). Section 13–4041(C) of the Arizona Revised Statutes provides minimum standards of competency appointed counsel must meet, and Rule 6.8 provides even more stringent, mandatory standards that require counsel to have substantial experience in felony

postconviction or felony trial and appellate matters. Ariz. R. Crim. P. 6.8(a), (d). The Arizona Supreme Court is further required to maintain a list of attorneys meeting these standards. A.R.S. § 13–4041(C).

As for compensation, if appointed counsel is not employed by a public defender office, Arizona law requires payment to counsel at an hourly rate up to $100 per hour. Arizona's mechanism also gives trial courts the discretion to authorize funds "to pay for investigative and expert services that are reasonably necessary to adequately litigate" postconviction claims. A.R.S. § 13–4041(I). Similarly, if reasonably necessary, the trial court may appoint an investigator, expert witness and mitigation specialist to assist the defendant. Ariz. R. Crim. P. 32.5(c); *see also* A.R.S. § 13–4013(B) (trial court "shall" appoint investigators and expert witnesses "as are reasonably necessary to adequately present a defense at trial and at any subsequent proceeding" upon application of defendant and a showing that defendant is unable to pay for such services).

As the Attorney General (and previously, in *Spears*, the Ninth Circuit) correctly determined, Arizona began upholding its end of Chapter 154's bargain in 1998 by implementing this attorney-appointment mechanism. Initial Resp. Br. for Respondents ("Respondents' Br."), Doc. # 1866329, at 13. But to date, Arizona has yet to obtain the benefit of Chapter 154's special procedures for capital habeas

corpus cases, largely due to delays in creating and implementing regulations to guide the procedures for certifying a state's mechanism.

Congress amended Chapter 154 in 2006 to shift responsibility for certification of state mechanisms from the federal habeas courts to the Attorney General. The Department of Justice began a rulemaking process in 2008, but the resulting regulations were enjoined by a federal district court and the Department withdrew the rule. The Department then published a notice of proposed rulemaking concerning the certification process in March 2011. JA__[F.164.76Fed.Reg.11,705]. After a public comment period, the Department published a supplemental notice soliciting additional feedback. JA__[R.164.76Fed.Reg.11,705]. In September 2013, Attorney General Holder issued a Final Rule regarding certification procedures. JA-__[R.165.77Fed.Reg.7,559].

Arizona initially requested Chapter 154 certification by letter to the Attorney General on April 18, 2013, shortly before the Department of Justice issued its Final Rule. JA__[R.1.85Fed.Reg.20,707]. However, Arizona's certification request was delayed because a district court enjoined the regulations implementing the certification process from taking effect. *See Habeas Corpus Res. Ctr. v. United States Dep't of Justice*, 2014 WL 390822, at *3 (N.D. Cal. Aug. 7, 2014). After the Ninth Circuit vacated that injunction, *Habeas Corpus Res. Ctr. v. United States*

Dep't of Justice, 816 F.3d 1241 (9th Cir. 2016), the Department of Justice initiated the certification process that resulted in the Attorney General certifying Arizona's appointment of counsel mechanism in capital postconviction cases under Chapter 154 on April 14, 2020. *See* JA__[R.1.85.Fed.Reg.20,705–07]. This case challenges the approval of that certification.

SUMMARY OF ARGUMENT

Arizona has waited 14 years since Congress shifted review of a state's mechanism for appointing counsel in capital postconviction cases from the federal habeas courts to the Attorney General to obtain certification of the system it has had in place since 1998. Arizona agrees with the majority of the arguments in Respondents' brief defending the Attorney General's certification decision. In addition, even if this Court finds fault in the Department of Justice's regulations, it still should nonetheless affirm the Attorney General's decision certifying Arizona's appoint-of-counsel mechanism under Chapter 154. Congress stated in its 2006 amendments to Chapter 154 that there are no requirements for certification other than those expressly included in that chapter and required the Department to create regulations only for the purpose of implementing procedures for certifications—i.e., the regulations cannot impose any substantive requirements beyond what Chapter 154 provides. The validity of the regulations can thus have no effect on

whether Arizona's mechanism meets Chapter 154's substantive requirements for certification.

Additionally, this Court need not address Petitioners' argument challenging the timeframe in which Arizona appoints counsel in capital postconviction cases. Though acknowledging that Chapter 154 contains no express time requirement for appointment of counsel, the Attorney General concluded that Arizona satisfies the statute by appointing postconviction counsel to indigent capital defendants in a "reasonably timely" manner. Arizona agrees with this conclusion. But the issue is moot because Chapter 154 does not actually contain a "reasonably timely" requirement, and 28 U.S.C. § 2265(a)(3) affirmatively denies the Attorney General any authority to create new substantive requirements for certification not expressly enumerated in Chapter 154. Because Arizona meets Chapter 154's enumerated requirements, this Court should affirm Arizona's certification without addressing Petitioners' challenges to the timeliness of counsel's appointment.

Finally, the federal habeas decisions cited by several Amici do not support Petitioners' or Amici's arguments that Chapter 154 tacitly requires appointed counsel to have prior experience in capital postconviction matters and that certification should look beyond a state's mechanism to evaluate performance of appointed counsel in specific cases. As an initial matter, Chapter 154 contains no express requirement that appointed counsel have previously represented defendants

in capital postconviction cases—instead counsel must only meet competency standards. Arizona far exceeds this requirement—and further surpasses the standards for appointment in federal postconviction proceedings—by requiring counsel to have either postconviction plus trial or appellate experience, or substantial experience in both serious felony trial *and* appellate matters. Assuming those decisions were ever correct, they are irrelevant here because they were decided before Congress placed § 2265(a)(3)'s strict limitation on courts recognizing any substantive requirements beyond Chapter 154's express textual ones.

Similarly, the federal habeas decisions cited by Amici do not mandate that this Court's inquiry go beyond the sufficiency of Arizona's mechanism to scrutinize appointed counsel's performance in particular cases. Several of those cases imposed no such requirement in the first place, and any that did would run afoul of § 2265(a)(3) and disregard a habeas petitioner's ability to argue under 28 U.S.C. § 2261(b)(2) that, though a state is certified, counsel in that petitioner's case was not appointed under the mechanism.

ARGUMENT

I Petitioners' challenges to the Department of Justice's regulations have no bearing on Arizona's certification under Chapter 154.

Petitioners challenge the Department of Justice's regulations, arguing that Arizona's certification must be reversed because the regulations are flawed. *See*

Initial Op. Br. of Petitioners ("Petitioners' Br."), Doc. # 1856479, at 80–97. Arizona agrees with Respondents that these arguments lack merit. But even if this Court finds some fault in DOJ's regulations, that finding would not provide a basis to vacate the Attorney General's certification that Arizona's mechanism satisfies the substantive requirements of Chapter 154.

The regulations, which simply implement the procedures by which a state may seek certification by the Attorney General, are not relevant to the ultimate question whether a 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). Congress required the Attorney General to promulgate regulations to "implement the certification *procedure*" under subsection (a) of section § 2265. 28 U.S.C. § 2265(b); *see also* 28 C.F.R. § 26.20 ("Subsection (b) of 28 U.S.C. 2265 directs the Attorney General to promulgate regulations to implement the certification procedure under subsection (a) of that section."). Thus, the regulations serve only to create and implement a *process* by which a state seeks certification from the Attorney General and do not affect the substantive determination whether a state's mechanism meets Section 2261(b)(1) and 2265(a)'s requirements.

If there were any doubt that the regulations have no bearing on this Court's review of the Attorney General's certification of Arizona's mechanism, Congress dispelled it by explicitly providing that "[t]here are no requirements for certification or for application of this chapter other than those expressly stated in" Chapter 154. 28 U.S.C. 2265(a)(3). That provision thus precludes the regulations inventing any new requirements for certification beyond what the statutory text provides.

Regulations that serve only to implement the certification *procedure* and that cannot impose any additional substantive requirements for certification in addition to Congress's statutory mandates have no bearing on this Court's de novo review whether Arizona's mechanism satisfies 28 U.S.C. §§ 2261(b), (c) and 2265(a)(1). Because of that, even if this Court were to conclude that the Department's procedural regulations are in any way faulty, that conclusion would not implicate the substantive soundness of the Attorney General's certification decision. The regulations are not relevant to whether Arizona's mechanism satisfies Congress's statutory requirements, and after waiting 22 years to obtain the benefit from upholding its end of Chapter 154's bargain, Arizona should not be forced to wait any longer due to any potential deficiency in merely procedural regulations.

Similarly, this Court should disregard Petitioner's arguments that Arizona's mechanism should not be certified because it fails to meet any purported

requirement contained in the Department of Justice's regulations. In arguing that this Court should reverse the Attorney General's certification, Petitioners argue that Arizona's mechanism fails to meet the regulations' "benchmarks," which create a presumption of adequacy. Petitioner's Br., Doc. # 1856479, at 39–42, 56, 60–63. This Court should disregard Petitioner's arguments comparing Arizona's mechanism against the regulatory "benchmarks" because the regulations cannot create any standards for certification beyond those contained in Chapter 154.

As previously stated, the only substantive requirements Arizona's mechanism must meet to achieve certification are those included in Chapter 154. *See* 28 U.S.C. § 2265(a)(3) ("There are no requirements for certification or for application of this chapter other than those expressly stated in this chapter.") As the Attorney General noted, this provision reflected concern that some courts addressing certification had declined to apply Chapter 154 on grounds going beyond the requirements specified in the relevant statutes. 85 Fed. Reg. 20705, 20706–07 (April 14, 2020) (citing 152 Cong. Rec. 2441, 2445-46 (2006) (remarks of Sen. Kyl); 151 Cong. Rec. E2640 (daily ed. Dec. 22, 2005) (extension of remarks of Rep. Flake)).

Thus, while the Attorney General may certify a state's mechanism because it meets the regulations' "benchmarks," he may not decline to certify a mechanism so long as it satisfies Chapter 154's substantive requirements. Thus, Petitioner's

contentions that Arizona's mechanism falls short of various markers contained in the regulations are irrelevant to the question before this Court—whether Arizona's mechanism for appointing counsel in postconviction proceedings satisfies 28 U.S.C. §§ 2261(c), (d), and 2265(a). Because, as set forth in Respondents' brief, Arizona meets those requirements, this Court need not consider Petitioners' arguments concerning the Department's regulations.

I. Chapter 154 imposes no time requirement on counsel's appointment.

"Chapter 154 does not specify a timeline for appointment of postconviction capital counsel." JA__[R.1.85.Fed.Reg.20,716]. Petitioners nonetheless argue that "Arizona's mechanism cannot be certified because it has no requirement for the timely appointment of capital postconviction counsel." Petitioners' Br., Doc. # 1856479, at 75–79. Arizona agrees with Respondents that Arizona's mechanism provides for the appointment of counsel in a reasonably timely manner. *See* Respondents' Br., Doc. # 1866329, at 45–50. But even if this were otherwise, this Court should reject Petitioners' challenge because Congress included no such timeliness requirement in Chapter 154.

Specifically, Petitioners argue that Arizona's mechanism fails to meet the regulatory requirement that it appoint counsel "in a manner that is reasonably timely in light of the time limitations for seeking State and Federal postconviction review and the time required for developing and presenting claims in the

postconviction proceedings." Petitioners' Br., Doc. # 1856479, at 75 (citing 28 C.F.R. § 26.21). But Chapter 154 contains no "reasonably timely" requirement. Instead, it requires only that the state "establish[] a mechanism for the appointment … of competent counsel in State postconviction proceedings," 28 U.S.C. § 2265(a)(1)(A), and that the mechanism "offer counsel to all State prisoners under capital sentence" and "provide for the entry of an order by a court of record … upon finding that the prisoner is indigent" and accepted the offer or is not competent to do so, finding that the prisoner knowingly rejected the offer, or denying appointment if the prisoner is not indigent, *id.* § 2261(c).

Petitioners refer to Chapter 154's special time limit for federal habeas filings to justify creation of a non-statutory timeliness requirement for state appointment of counsel mechanisms. *See* Petitioners' Br., Doc. # 1856479, at 75 (citing JA__[R.150.78Fed.Reg.at58,165]); see also 28 U.S.C. § 2263(a) (creating 180-day statute of limitations for filing federal habeas petition), § 2263(b)(2) (tolling statute of limitations between filing of petition for certiorari and final disposition of petition, and between filing "first petition for post-conviction review or other collateral relief until the final State court disposition of such petition"). However, while Congress specifically addressed the timing of state court proceedings in creating special time limits and tolling provisions for federal habeas petitions under Chapter 154, it also declined to impose any such time-based requirement on state

appointment of counsel mechanisms under §§ 2261 or 2265. In light of this conspicuous omission, the timeframe in which a state's mechanism actually appoints counsel is not relevant to whether a state mechanism is adequate under Chapter 154. *See Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 341 (2005) ("We do not lightly assume that Congress omitted from its adopted text requirements that it nonetheless intends to apply, and our reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make sure a requirement manifest.").

Nor does the Ninth Circuit's decision in *Spears* add a time-based requirement to the certification requirements. There, the court concluded that, although the text of Chapter 154 did not specify "how soon after affirmance of a defendant's conviction and sentence the state must extend its offer of postconviction counsel," the "context" of § 2261 and chapter 154's legislative history made "it clear that Congress intended that a state extend the offer expeditiously." *Spears*, 283 F.3d 992, 1016 (9th Cir. 2002). Thus, the court held that "to comply with Chapter 154, a state must offer counsel to all indigent capital defendant shortly after the later of (1) the conclusion of the defendant's direct appeal in state court or (2) the Supreme Court's disposition of the defendant's petition for certiorari." *Id.* at 1017.

Spears was decided, however, under the previous incarnation of Chapter 154. Its invention of a timeliness requirement based on the prior version of § 2261's context and legislative history—if ever correct—was thus superseded by statute in 2006 when Congress amended § 2265 to provide that "[t]here are no requirements for certification or for application of this chapter other than those expressly stated in this chapter." *See* Pub. L. No. 109–177, § 507, 120 Stat. 192, 250 (2006); 28 U.S.C. § 2265(a)(3). Congress presumably inserted that limiting language (as well as shifted the certification decision from federal habeas courts to the Attorney General) because federal habeas courts had been engrafting additional requirements onto the statute that Congress had not intended. To the extent *Spears* recognized a timeliness requirement, that aspect of the decision was superseded by statute.

In sum, to decline certification of a state's mechanism that provided for the appointment of postconviction counsel because it failed to specify a timeframe when the appointment must be made would violate Congress's mandate that there are no requirements for certification other than those it "expressly" included in Chapter 154. This Court thus need not address Petitioners' argument that Arizona fails to ensure timely appointments and should affirm certification because Arizona's mechanism provides for the appointment of competent counsel, as well

as compensation and payment of reasonable litigation expenses. *See* 28 U.S.C. § 2265(a)(1)(A).

II. The particular cases and federal habeas decisions Petitioners and Amici cite do not undermine the Attorney General's conclusion that Arizona's mechanism meets Chapter 154's requirements.

Respondents persuasively explain why the performance of individual attorneys appointed under the mechanism in particular cases falls outside the scope of Chapter 154's certification inquiry. *See* Respondents' Br., Doc. # 1866329, at 30–32. Petitioners nonetheless cherry-pick a handful of cases in which they assert counsels' performance was subpar and then argue that these examples show that Arizona's counsel-appointment mechanism is inadequate "in practice." Petitioners' Br., Doc. # 1856479, at 54–56. Petitioners' anecdotal approach is not what Chapter 154 envisions. Notably, Petitioners point to not a single case in which appointed counsel fell short of Rule 6.8's competency standards. And the hand-picked cases in which Petitioners take issue with counsel's performance do not even support their argument that Arizona's mechanism fails to function "in practice." That is because Chapter 154 requires a mechanism for the "appointment, compensation, and reimbursement of counsel," 28 U.S.C. § 2261(c), not for the ongoing monitoring of counsel's performance in individual cases.

There is a difference between whether counsel is qualified and competent under the requirements of Arizona's mechanism, and whether counsel fails to

perform their duties in a particular case. And isolated incidents do not render Arizona's mechanism defective for purposes of Chapter 154. Thus, while Petitioners may claim that they would have handled certain cases differently, or would not have appointed particular lawyers, the lawyers and cases they identify do not demonstrate that Arizona fails in practice to appoint and compensate counsel according to its Chapter 154-compliant mechanism.

Respondents' brief also explains why Chapter 154 does not require state mechanisms to mandate specific experienced in postconviction and capital litigation. Respondents' Br., Doc. # 1866329, at 22–29. Arizona further notes that, although Arizona Rule of Criminal Procedure has not specifically required postconviction experience for appointment since 2011, like its federal counterpart in 18 U.S.C. § 3599 the rule permits an attorney to meet the requirements by trial, appellate, *or* postconviction experience. Ariz. R. Crim. P. 6.8(c)(2). Moreover, Arizona requires counsel appointed in capital postconviction cases to either (1) have been lead counsel in a death penalty trial or lead counsel in an appeal or postconviction proceeding in a case where the death penalty was imposed; *and* have been lead counsel in at least three felony appeals and a trial or postconviction proceeding with an evidentiary hearing; or (2) lead counsel in at least six felony appeals (including two from first- or second-degree murder convictions), *and* lead counsel in at least two felony trials or postconviction proceedings with evidentiary

hearings. Ariz. R. Crim. P. 6.8(d) (2020). In other words, only an attorney with combined, substantial felony trial *and* appellate experience may be appointed without having previous postconviction experience. These requirements far exceed Chapter 154's general mandate that a state mechanism must ensure that appointed counsel are "competent."

Amicus Academic Experts cite *Ashmus v. Calderon*, 935 F. Supp. 1048, 1074 (N.D. Cal. 1996), *Hill v. Butterworth*, 941 F. Supp. 1129, 1142 (N.D. Fla. 1996), and *Wright v. Angelone*, 944 F. Supp. 466 (E.D. Va. 1996), however, to argue that a state's competency standards must require particular experience in postconviction cases. Brief of Amici Curiae Academic Experts in Federal Criminal Procedure and Post-Conviction Practice in Support of Petitioners ("Academic Experts"), Doc. # 1857550, at 25. Those cases, however, were decided before Congress limited the certification requirements to those "expressly stated" in Chapter 154. *See* 28 U.S.C. § 2265(a)(3). And even before Congress added § 2265(a)(3) to Chapter 154, the Ninth Circuit had observed that "[t]he legislative history of Chapter 154 clarifies that Congress did not envision any specific competency standards but, rather, intended the states to have substantial discretion to determine the substance of the competency standards." *Spears*, 283 F.3d at 1012–13 (citing 137 Cong. Rec. S3191–02, S3220).

Thus, because Chapter 154 does not expressly state that appointed counsel must have capital postconviction experience, certification cannot lawfully be withheld simply because a state's mechanism does not include that non-existent requirement. And if, for example, a prisoner believed his appointed counsel did not meet the state mechanism's competency requirements, the prisoner could argue to the habeas court that Chapter 154 was inapplicable to the prisoner's case. *See* 28 U.S.C. § 2261(b)(2) (Chapter 154 applicable only if state's mechanism is certified and "counsel was appointed pursuant to that mechanism," petitioner waived counsel, or petitioner was not indigent).

Amici Academic Experts and Innocence Network also cite *Tucker v. Catoe*, 221 F.3d 600 (4th Cir. 2000), to argue that this Court should looks beyond Arizona's mechanism to its "actual practices" determine whether certification is appropriate. Academic Experts, Doc. # 1857550, at 25–26; Brief of the Innocence Network et al. ("Innocence Network"), Doc. # 1857566, at 16. Respondents correctly explained why the analysis must be focused on the mechanism, rather than delve into, for example, an assessment of counsel's actual performance after appointment. Respondents' Br., Doc. # 1866329, at 30–32.

Tucker does not undermine Respondents' arguments on this point. In fact, the court in *Tucker* did not even assess whether the state's mechanism satisfied Chapter 154. *Tucker*, 221 F.3d at 605 n.3 ("We find it unnecessary to address

whether South Carolina's attempt to comply with 28 U.S.C. § 2261 actually did so."). Instead, it was undisputed in that case that the state postconviction lawyers had not been appointed under the state's opt-in mechanism. *Id.* at 604. The court thus concluded that the state could not invoke Chapter 154's procedures in a case where it did not appoint counsel in accordance with a mechanism promulgated under § 2261. *Id.* at 605. *Tucker* is thus inapposite to the question in this case—whether Arizona's mechanism satisfies Chapter 154's requirements.

Amicus Innocence Network's reliance on *Baker v. Corcoran*, 220 F.3d 276, 286 (4th Cir. 2000), is similarly unavailing. There, although a state regulation provided competency and experience requirements for counsel, the evidence before the district court established that the state did not actually apply those requirements when appointing counsel.[1] The state did not dispute that fact, but argued instead that Chapter 154 did not require it to establish competency standards in the first place. *Id.* at 286–87. The Fourth Circuit, unsurprisingly, rejected that contention. *Id.* at 287. Thus, even if analysis of a state's actual practices, rather than the mechanism itself, was required by § 2265, there is *no* evidence here that Arizona actually fails to apply Rule 6.8 in appointing postconviction counsel.

[1] The head of the state appointing office had testified "that he was not even aware of the regulation until the commencement of" relevant litigation. *Baker*, 220 F.3d at 286.

Nor does *Ashmus v. Calderon*, 202 F.3d 1160 (9th Cir. 2000) further Amici's argument. Although Amicus Innocence Network cites that decision for the proposition that inquiry into how a state mechanism operates is proper at the certification stage (Doc. # 1857566, at 16), the court there conducted no such analysis. Instead, at the cited portion of the opinion, the court noted instead that California's mechanism did not satisfy Chapter 154 because its competency standards for counsel were not contained in a rule of court or statute, and were "neither mandatory nor binding." *Id.* at 1168. This Court's inquiry should therefore focus on Arizona's mechanism, not the performance of counsel in specific postconviction cases.

CONCLUSION

For the foregoing reasons, in addition to the reasons explained in Respondents' brief, this Court should deny the petition for review challenging the Attorney General's certification of Arizona's capital counsel mechanism.

November 4, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), the undersigned hereby certifies that this brief complies with the type-volume limitations of D.C. Cir. R. 32(e)(2).

1. This brief is 4,063 words excluding the portions exempted by Fed. R. App. P. 32(f), if applicable.
2. This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman type, which complies with Fed. R. App. P. 32(a)(5) and (6).

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CERTIFICATE OF SERVICE

I hereby certify that on this November 4, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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