[ORAL ARGUMENT NOT YET SCHEDULED]

IN THE

United States Court of Appeals for the District of Columbia Circuit

No. 20-1144

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

Petitioners,

v.

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

Respondents,

STATE OF ARIZONA,

Intervenor.

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

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GLOSSARY OF ABBREVIATIONS

ABA	American Bar Association
Academic Experts	Academic Experts in Federal Criminal Procedure and Post-Conviction Practice (amici curiae)
Admin Professors	Professors of Administrative Law (amici curiae)
APA	Administrative Procedure Act
Arizona Experts	The Arizona Capital Representation Project, Arizona Attorneys for Criminal Justice, Arizona Justice Project, and Katherine Puzauskas (amici curiae)
A.R.S.	Arizona Revised Statutes
Chapter 153	28 U.S.C. §§2241-2255
Chapter 154	28 U.S.C. §§2261-2266
CJA	Criminal Justice Act
DOJ	Department of Justice
FDO-AZ	Office of the Federal Public Defender for the District of Arizona
Federal Capital Habeas Units	Federal Public Defender Capital Habeas Units (amici curiae)
Federal Judges	Former Federal Judges (amici curiae)
IB	Intervenor Brief (State of Arizona)
Innocence Network	Innocence Network and the Southern Center for Human Rights (amici curiae)
OB	Opening Brief
OLC	Department of Justice Office of Legal Counsel
Powell Committee Report	Judicial Conference of the U.S., Ad Hoc Comm. on Fed. Habeas Corpus in Capital Cases Committee Report (1989) (reprinted in 135 Cong. Rec. S13471-04, S13482 (Oct. 16, 1989))
RB	Response Brief (DOJ)
Rule 6.8	Arizona Rule of Criminal Procedure 6.8

INTRODUCTION AND SUMMARY

Congress was unequivocal: States must provide their death-row prisoners with competent, adequately compensated, and sufficiently resourced counsel in state capital postconviction proceedings if they wish to curtail federal habeas review for those prisoners under Chapter 154. DOJ's implementing regulations are also unequivocal: States must meet certain standards to fulfill those statutory requirements.

And the record here is unequivocal: Arizona's appointment mechanism fails to meet those standards. On its face, the mechanism does not satisfy a single regulatory benchmark for attorney competency or compensation (there are six of them); it contravenes multiple established national guidelines and norms; it allows routine appointment of lawyers who do not meet any objective competency standards; its compensation rate has not changed in twenty years; and it does not require timely appointments or payment of reasonable litigation expenses. It is therefore entirely unsurprising that the mechanism has performed so poorly in practice that the state itself tried to replace it, and that the mechanism has routinely failed to provide competent counsel.

These are not disputed facts. DOJ contests none of them (nor does Arizona). DOJ also does not contest that this Court must review the administrative record de novo to determine whether Arizona has satisfied its burden of establishing its entitlement to certification. Instead, DOJ rests largely on two fictions. First, in a sweep of the pen, DOJ writes off record evidence about "systemic problems" in Arizona's mechanism as a "case-specific" inquiry outside the scope of certification. Response Brief ("RB") 22. But that just is not true. The multiple analyses of Arizona's mechanism in the record—from the likes of the ABA and esteemed criminal justice organizations—are not "case-specific" evidence. Nor are documented and uncontested historical facts about how abysmally the mechanism has functioned. True, petitioners also described the abject performance of specific attorneys, but that uncontested evidence confirms the mechanism's systemic failures.

Second, DOJ retreats repeatedly to the Ninth Circuit's decision in *Spears v. Stewart*. But *Spears* does not inform the certification question now before this Court. Among other things, *Spears* did not address the governing regulatory standards, because the regulations did not yet exist; it considered a version of Arizona's mechanism that the state has

since changed in critical ways, including by deleting the requirement that appointed counsel possess postconviction experience and the mandate that counsel be timely appointed; it did not address the undisputed record showing the mechanism's deficient performance since *Spears* was decided; and it was effectively dicta in the first place.

For its part, Arizona in its intervenor brief does not even try to defend the mechanism's performance. Instead, the state makes the remarkable claim that the "regulations are not relevant" to whether a state satisfies Chapter 154. Intervenor Brief ("IB") 8. Not even DOJ agrees with that. DOJ promulgated the regulations "pursuant to statutory authority," and they "have the force and effect of law." *Chrysler Corp. v. Brown*, 441 U.S. 281, 302-03 (1979). And, contrary to Arizona's assertions, the regulations do not "create [new] standards for certification beyond those contained in Chapter 154." IB9. Rather, they implement the statute's terms just like regulations in other settings.

That said, the regulations fail in other, important respects—as the district court in *HCRC* concluded. For starters, the regulations fail to treat certifications as rulemakings subject to notice and comment. Certifications are rulemakings because they impact a broad class of

prisoners in future proceedings. But the Attorney General instead treated this proceeding as an adjudication. He therefore did not reveal his basis for certification until the certification itself, thereby depriving interested parties of the opportunity to fully comment on (and refute) the Attorney General's misguided reasoning.

The regulations are also invalid because they place no burden on the state to prove eligibility for certification. DOJ denies that, but it cannot identify a single regulatory provision requiring a state to produce information to support its application—and DOJ required no such information here. Arizona provided grossly inadequate, barebones materials in support of its certification request.

In short, the certification must be set aside because, especially on de novo review, the Attorney General's decision is critically flawed on its own terms. But the certification also cannot stand because DOJ's underlying regulations and certification process are themselves invalid.

ARGUMENT

I. Arizona Does Not Qualify For Certification.

A. Arizona's attorney competency standards are inadequate.

DOJ does not dispute that Arizona fails to meet the regulatory benchmarks that give state competency standards a presumption of adequacy. OB40-42. Instead, DOJ asserts that Arizona's standards "otherwise reasonably assure" attorney proficiency comparably to the benchmarks. That is incorrect. Arizona's appointment mechanism is legally deficient on its face, and the administrative record further confirms its shortfalls. Like the Attorney General's decision, DOJ's brief improperly dismisses the record, erroneously relies on *Spears*, and mischaracterizes petitioners' arguments regarding the evident deficiencies in Arizona's scheme.

1. The administrative record matters; DOJ is wrong to dismiss it.

As an initial matter, DOJ does not contest petitioners' description—corroborated by commenter after commenter—of how inadequately Arizona's appointment mechanism has actually performed. OB12-20, 42-57; *see also* Arizona Experts Amicus Br. 1-3, 23-29. Instead, DOJ asserts that the record showing of "systemic

problems," RB22 (quoting certification), is irrelevant to whether the mechanism sufficiently assures competent counsel, *see* RB2, 15, 22, 30-32, 45. That is as wrong as it sounds. It eviscerates the statute, contravenes the regulations, and renders the comment and certification process meaningless.

First, the statute. DOJ cites the Powell Committee Report as illuminating Congress's intent in enacting Chapter 154. *E.g.*, RB3-4, 27, 31-32, 63. But the report undercuts DOJ's position, as FDO-AZ's comment and amici detail. *See* JA__**[R.14.FDO-AZCmt.at3, 7-8]**; Academic Experts Amicus Br. 4-9; Innocence Network Amicus Br. 7-8. The report emphasized the "pressing need for qualified counsel to represent inmates in collateral review," where "the lack of adequate counsel creates severe problems." JA__**[R.154.135Cong.Rec.S13471-04,S13482]** (Powell Committee Report). Following the Powell Committee's recommendation, Chapter 154 limits federal habeas restrictions to states with appointment mechanisms that actually provide competent postconviction counsel to death-row prisoners. Not a paper promise. A genuine assurance. Otherwise, the Chapter 154 bargain is no bargain at all. *See also* Federal Capital Habeas Units

Amicus Br. 5-6, 21-22; Innocence Network Amicus Br. 8-9, 14-20; Federal Judges Amicus Br. 11-15.

The implementing regulations make that plain by specifying what a state must provide to meet the statutory standards. The regulations on competency are structured around objective benchmarks. 28 C.F.R. §26.22(b)(1). When a state mechanism meets those benchmarks, it is "presumptively … adequate," *id.* (although contrary evidence can overcome the presumption, JA__**[R.150.78Fed.Reg.58,168-69]**). When a state, like Arizona, does not meet the benchmarks, the Attorney General must undertake a "closer examination," JA__**[R.150.78Fed.Reg.58,172]**, to determine whether the mechanism "otherwise reasonably assure[s] a level of proficiency" that is appropriate, 28 C.F.R. §26.22(b)(2). Importantly, the benchmarks remain "a point of reference" in that inquiry. JA__**[R.150.78Fed.Reg.58,172]**.

That "closer examination" by its nature must consider relevant record evidence about how the mechanism has performed. As DOJ stated in publishing the regulations, "any interested person or entity believing that State standards overall do not [satisfy the statute] … is

free to bring relevant information to the Attorney General's attention through the comment procedure." JA__**[R.150.78Fed.Reg.58,174]**. It would be nonsensical to solicit comments only to ignore them, particularly when the comments provide comprehensive analysis and historical information showing the state's mechanism has failed, on a systemic level, to assure competent representation. That is exactly what the comments here provide. *See* JA__**[R.14.FDO-AZCmt.at58-136]**.

Consider other contexts. In assessing whether product safety standards are adequate to prevent accidents, evidence about how many accidents have occurred is significant. Or in examining whether school standards adequately assure student proficiency, data showing how students have actually performed is plainly germane. Same here: In evaluating whether state standards adequately assure attorney competency, evidence about how the system has actually functioned is directly relevant. *See* Innocence Network Amicus Br. 14-20.

Seeking further to avoid the administrative record, DOJ urges (at RB51) that deference is due to the Attorney General's determination that he need not "review a State's record of appointments in individual

cases to verify that the appointments were made in conformity with the State's established mechanism," because "the statutory scheme does not call for such case-specific oversight." JA__**[R.150.78Fed.Reg.58,162]**. Petitioners agree that "case-specific oversight" regarding the state's compliance with its mechanism is within the purview of federal habeas courts, not the Attorney General. *See* JA__**[R.150.78Fed.Reg.58,162; R.1.85Fed.Reg.20,711-12]**. But that is a different question from whether the mechanism itself reasonably assures competent counsel—the core of the certification inquiry.[1]

Take, for example, a state mechanism that requires appointment from a list of qualified counsel. A habeas court would decide whether a specific appointment complied with the mechanism, i.e., whether counsel from that list was appointed. But the Attorney General decides whether the mechanism—selecting counsel from that particular list—assures competent counsel in the first place. The evidence that commenters produced here is relevant to *that* inquiry, and that evidence

[1] To the extent DOJ seeks deference for an interpretation that permits the Attorney General to ignore any and all record evidence, such interpretation plainly contravenes the statute and regulations. *See supra* 6-8.

must be considered in the certification process. That includes evidence like the ABA report and comments describing Arizona's numerous systemic deficiencies. OB21, 49-51, 63-64, 68. Like Arizona's official state committee reports documenting the inadequacy of compensation. OB19-20, 64. Like expert opinions providing first-hand perspectives on whether Arizona reasonably assures litigation expenses. OB72-73. Like aggregate records showing the years-long delays in appointing counsel. OB76. Like evidence of the state's heavy reliance on its Rule 6.8(e) loophole to appoint counsel who do not meet the state's own competency requirements. OB52-54. And, yes, like descriptions of the substandard performance of individual attorneys, illustrating how those systemic deficiencies manifest in practice. OB22-23, 55-56; *see* Innocence Network Amicus Br. 21-23; Arizona Experts Amicus Br. 23-30.

If the Attorney General were to ignore such evidence and, as a result, certify a state mechanism that does not assure competent counsel, federal habeas courts may be powerless to protect defendants from the application of Chapter 154. *See* 28 U.S.C. §2261(b). As long as "counsel was appointed pursuant to [the certified] mechanism," 28

U.S.C. §2261(b)(2), the federal habeas court may apply Chapter 154. That is why it is critical that the Attorney General rigorously analyze the state mechanism at the certification stage. And that is why it is also critical that this Court exercise its de novo review of the administrative record and vacate this certification.

2. *Spears* does not inform certification.

Instead of engaging the record, DOJ asserts throughout that the Ninth Circuit's decision in *Spears* controls the outcome.

That is wrong five times over.

First, as petitioners explained (at OB57) and DOJ does not contest, *Spears*'s discussion of Arizona's mechanism was effectively dicta. Eleven Ninth Circuit judges agreed it was "clearly unnecessary to [the court's] resolution of the case." *Spears v. Stewart*, 283 F.3d 992, 998-99 (9th Cir. 2002). And no district court applied Chapter 154 in Arizona after *Spears*. *See also Moormann v. Schriro*, 426 F.3d 1044, 1048 (9th Cir. 2005) ("It is undisputed that Arizona has not" established a mechanism satisfying Chapter 154.).

Second, even if not dicta, Arizona itself recognized in its certification application that "Congress abrogated *Spears*" when

amending Chapter 154, JA__**[R.2.AZapplication.at3]**, and Arizona now agrees again that "*Spears* was decided … under the previous incarnation of Chapter 154," IB13. Congress in 2005 removed certification authority from the federal courts, transferred that authority to the Attorney General, and required the Attorney General to promulgate regulations specifying standards states must meet to satisfy statutory requirements. 28 U.S.C. §2265; OB8-9. Those regulations now govern; they did not exist at the time of *Spears*.

Third, even if *Spears* remained good law after Congress amended Chapter 154, it cannot inform whether Arizona meets the regulatory standards. DOJ observes that the pre-regulations case law "provided the background" for the regulations. RB33 (quoting certification). That may be true to some extent, but the regulations established independent standards that control the Attorney General's determinations. For instance, the regulations create benchmarks and specify the type of scrutiny that must be applied to mechanisms that fail the benchmarks. *Spears* cannot inform whether Arizona satisfies that inquiry. Contrary to DOJ's assertion (at RB24, n.4), petitioners' argument is not that the regulations impose requirements beyond the

statute. They do not. Rather, as DOJ's Office of Legal Counsel (OLC) has explained, the Attorney General may implement Chapter 154's statutory requirements by issuing regulations specifying how states may meet those requirements. *See infra* 23; JA__**[R.161.OLCReport.at8]**.

Fourth, even if *Spears* could inform whether Arizona satisfies the regulations, its relevance would be highly limited, given how significantly Arizona's mechanism has changed post-*Spears*. DOJ does not dispute that, since *Spears*, Arizona (1) eliminated the requirement that appointed counsel have postconviction experience; (2) deleted the requirement that counsel be timely appointed; (3) reduced required initial capital-defense training hours; (4) dissolved an independent screening committee for appointing counsel, contravening ABA guidelines; (5) rejected state oversight committee recommendations to address mechanism failures; and (6) dramatically increased reliance on the Rule 6.8(e) loophole to appoint otherwise unqualified counsel. *See* OB14-16, 58-59. DOJ's response is to take each change in isolation and argue that it independently does not foreclose certification. RB34-35. But the constellation of changes means that the mechanism *Spears*

considered is not the mechanism that exists today. And the record exhaustively details why the mechanism, as it exists today (and has existed for some time), fails Chapter 154's requirements.

Fifth and finally, *Spears* simply did not have before it the years of evidence showing Arizona's abysmal track record of providing incompetent counsel. That record, especially when this Court reviews it de novo, compels the conclusion that Arizona does not satisfy Chapter 154, notwithstanding anything *Spears* may have said in a different setting twenty years ago.

3. Arizona's competency standards are deficient.

As for the specifics of why Arizona's non-benchmark competency standards are insufficient, DOJ's defense of the Attorney General's decision turns on mischaracterizations and strawmen. The state's mechanism is flawed both facially and in practice.

i. DOJ's main argument is that Chapter 154 and the regulations do not categorically require appointed capital postconviction counsel to have postconviction experience. RB22-24. But petitioners do not contend that postconviction experience is categorically required. *See* OB49.

Petitioners' argument, which DOJ does not appear to dispute, is that postconviction experience is typically the best indicator of postconviction competency. OB43-48. That is what DOJ's own regulations explain: "[T]he difficult and unique demands [of] postconviction law and procedure" make "postconviction litigation experience … a better measure of competency" than trial or appellate experience. JA__**[R.150.78Fed.Reg.58,169]** (preamble). That is why the regulations specifically identify postconviction experience as a benchmark competency standard. 28 C.F.R. §26.22(b)(1).

The record similarly reflects the expert consensus that "to be qualified to undertake a capital postconviction case, one must have actually handled a postconviction representation." JA__**[R.14.11.LiebermanDecl.¶32]**; *see* OB43-46. DOJ does not dispute that this is particularly true in Arizona, where "postconviction proceedings are uniquely complex" and "[p]ostconviction experience is essential." JA__**[R.17.AACJCmt.at3]**; *see also* JA__**[R.14.10.HammondDecl.¶53]**; Arizona Experts Amicus Br. 7-18. Accordingly, a state that does not meet the competency benchmarks or require at least some postconviction experience must make a compelling

alternative showing that its mechanism otherwise achieves equivalent attorney competency.

Here, Arizona not only fails to require postconviction experience; it also requires no postconviction training or support for inexperienced attorneys. OB40. And it fails to require any capital litigation experience. OB40. So, one can be appointed as capital postconviction counsel—one of the highest-stakes appointments imaginable—without having any apposite background.

ii. DOJ observes that the current ABA Guidelines do not require postconviction experience and allow for alternative standards if they ensure lawyers "will provide high quality legal representation in death penalty cases," such as "specialized training," former experience as a prosecutor, or "substantial experience in civil practice." RB27-28. This observation hardly helps DOJ. The ABA has detailed—in a 2005 evaluation of Arizona's mechanism (JA__**[R.14.18.Maher.Decl.¶8]**), in two thorough comments here (JA__**[R.120.ABACmt.; R.138.ABASupp.Cmt.]**), and now in an amicus brief (ABA Amicus Br. 7-22)—the many ways Arizona fails to meet ABA Guidelines for ensuring competent representation.

The systemic violations of the ABA Guidelines, which DOJ does not contest, include Arizona's failure to vest appointment authority outside the judiciary, insufficient attorney training, and insufficient monitoring of attorney performance. OB49-52. DOJ asserts that Chapter 154 "does [not] require compliance with" such standards, or with any non-ABA best practices that Arizona also contravenes. RB34; *see also* RB25-27. This again misses the point. When a state mechanism does not meet the benchmarks, the Attorney General must determine whether it "otherwise reasonably assure[s]" comparable attorney competency. 28 C.F.R. §26.22(b)(2). Commonly accepted guidelines and best practices are relevant to that determination. And Arizona's system offers nothing that could compensate for its departure from both the benchmarks and model guidelines. This is especially concerning given Arizona's Rule 6.8(e) loophole, which regularly allows appointment of counsel who do not meet the state's own standards. *See infra* 20-22.

iii. DOJ notes that the Attorney General found it relevant that Arizona's competency standards "are similar" to federal requirements in 18 U.S.C. §3599. RB18. But this comparison also provides no basis for

concluding that Arizona "otherwise … assure[s]" attorney competency in capital postconviction proceedings. 28 C.F.R. §26.22(b)(2). After careful consideration of public comments, DOJ chose postconviction experience, not the §3599 requirements, as the pertinent benchmark competency indicator because DOJ concluded that conformity with §3599 is insufficient to satisfy Chapter 154. OB47-48. Section 3599 is a general provision that applies both pre-judgment and post-judgment, and to both direct appeals and postconviction proceedings. Chapter 154 is much narrower: It concerns only postconviction proceedings. The regulations reflect the Attorney General's conclusion that "the difficult and unique demands [of] postconviction law and procedure" make "postconviction litigation experience … a better measure of competency" than §3599. JA__**[R.150.78Fed.Reg.58,169]**.

DOJ cannot backtrack and contend that even though Arizona ignores the benchmarks, it should be certified because it conforms in some respects with the provision—§3599—that DOJ rejected as a benchmark because it is an inapt comparator. To the extent DOJ now switches views, no basis exists for crediting that unexplained change of

position. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 46-57 (1983).

Arizona's system does not conform to §3599 anyway. While §3599 requires qualitative assessments of counsel, the Arizona Supreme Court performs no such assessment and disbanded the only committee that did. OB50-52; JA__**[R.140.FDO-AZSupp.Cmt.at33]**; Arizona Experts Amicus Br. 19. Moreover, the CJA Guidelines, which apply to §3599 appointments, require that appointing courts consider attorneys' relevant postconviction experience. OB47. But there is no evidence that Arizona does so; the most DOJ can say is that "nothing in Arizona's statutes or rules suggests that postconviction experience cannot be considered." RB26. DOJ adds that the CJA Guidelines are not themselves binding. RB26. But the point is that Arizona's failure to comply with objective professional standards is strong evidence that its non-benchmark mechanism does not "otherwise … assure" attorney competency. 28 C.F.R. §26.22(b)(2).

DOJ's nihilist stance—that no regulatory benchmark matters and no other guideline or standard can be deemed applicable—cannot

rationalize Arizona's stark failure, on paper and in practice, to assure the provision of competent capital postconviction counsel.

iv. Even if Arizona's competency standards were otherwise facially adequate, the state would still be ineligible for certification because its Rule 6.8(e) loophole permits appointment of counsel who do not meet the state's own competency requirements. Although the rule says that such appointments are restricted to "exceptional circumstances," the state has no standards defining such circumstances, and no finding of "exceptional circumstances" accompanies Rule 6.8(e) appointments. OB52-53. Similarly, the state has established no standards to evaluate the credentials, experience, or qualifications of attorneys considered for such appointments: The rule is a black box. OB52-53. Even the Arizona Attorney General's office has stated it cannot explain the operation of Rule 6.8(e) because, in significant respects, it does not know how the state Supreme Court applies the rule's predicate requirements. *See* JA__**[R.129.AZAG10.16.18Ltr.at8; R140.FDO-AZSupp.Cmt.at23]**; OB23. That is unacceptable.

The reality is that the Rule 6.8(e) loophole has dispensed with any competency requirements in practice. What we know is that as many

as 30% of all appointments have been made pursuant to the loophole, OB53, and that there is little if any substance to the formal requirement that an attorney appointed under it "associate with" a qualified attorney, OB52-53. DOJ makes no effort to assure this Court that Rule 6.8(e) attorneys are competent, just as Arizona made no effort to assure DOJ.

Instead, DOJ relies almost entirely on *Spears*. RB29-30. Apart from why *Spears* is generally irrelevant, today's reality of Rule 6.8(e) bears little resemblance to the time of *Spears*. *Spears* assumed Rule 6.8(e) was reserved for truly exceptional circumstances, such as when "an excellent capital-defense lawyer from another jurisdiction" wishes "to associate in an appropriate case." 283 F.3d at 1013 n.13. We now know that is not true: Arizona uses the loophole routinely, not to accommodate the occasional excellent attorney with qualifications not envisioned in the rules. *Spears* also found it particularly important that attorneys appointed under Rule 6.8(e) would meaningfully associate with otherwise qualified attorneys. 283 F.3d at 1013. We now know that is also not true: The state gives no guidance on the type or degree of association expected and even rejected a 2018

recommendation from its oversight committee to require that association be "meaningful[]." OB53-54. In short, Rule 6.8(e) independently prevents Arizona from reasonably assuring that appointed attorneys are competent.

4. Arizona misunderstands the role of the regulations.

Arizona's intervenor brief, meanwhile, attempts no full-throated defense of its mechanism's performance. Instead, it asserts that "[t]he regulations are not relevant" to whether a state satisfies Chapter 154, IB8, and that this Court may "disregard" the regulations' benchmarks altogether, IB9. As support, Arizona cites 28 U.S.C. §2265(a)(3), which provides "[t]here are no requirements for certification … other than those expressly stated in this chapter." IB9.

Arizona's position is misguided. Chapter 154 requires the Attorney General to "promulgate regulations to implement the certification procedure." 28 U.S.C. §2265(b). Far from creating extra-statutory requirements, the regulations specify the standards by which the state can meet Chapter 154's requirements. Regulations "have the force and effect of law," where, like here, the agency promulgated them

"pursuant to statutory authority" and they "implement the statute." *Chrysler*, 441 U.S. at 302-03.

DOJ agrees. OLC has explained that §2265(a)(3) does not "compel [a] limited view of the Attorney General's interpretive authority." JA__**[R.161.OLCReportat8]** (OLC memorandum). "[T]he Attorney General would not be adding to the requirements for certification, or otherwise applying chapter 154 in ways not expressly stated," by adopting standards to implement the statute's terms. JA__**[R.161.OLCReportat8]**. Thus, the Attorney General may unquestionably specify regulatory standards as part of "implementing … the certification requirement that a State establish a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of *competent* counsel, 28 U.S.C. §2265(a)(1)(A)—just as agency officials regularly do in other contexts under the now familiar *Chevron* framework." JA__**[R.161.OLCReportat8]**.

And even if Arizona were correct that the Attorney General exceeded his authority in the regulations, the remedy would be invalidating the regulations and certification issued under them, so that DOJ could conduct a new rulemaking. Congress required the Attorney

General to promulgate implementing regulations, and certifications must be made pursuant to them.

B. Arizona's compensation is inadequate.

Certification was independently erroneous because Arizona provides insufficient compensation to appointed counsel: a maximum of $100 per hour. It is undisputed that Arizona's rate fails all four regulatory benchmarks for compensation. OB61-62; RB39.

Those benchmarks must "guide the Attorney General's evaluation," JA__**[R.150.78Fed.Reg.58,173]**, of whether Arizona's compensation is "otherwise reasonably designed to ensure the availability for appointment of [competent] counsel,"[2] 28 C.F.R. §26.22(c)(2). The state must provide "sufficient financial incentives to secure the appointment of competent counsel in sufficient numbers to timely provide representation." JA__**[R.150.78Fed.Reg.58,173]**.

[2] DOJ asserts that petitioners "misapprehend[] the regulatory benchmarks as mandates rather than guideposts." RB39. Not so. Petitioners do not contend that Arizona's failure to satisfy the benchmarks is reason alone not to certify Arizona. Rather, as DOJ agrees, RB39, the benchmarks remain "guideposts" even when they are not satisfied.

Arizona does not do so. Its rate is nearly half or less than half of the first two benchmark rates. OB61.

And the record is replete with evidence confirming the insufficiency of Arizona's compensation. *See* OB63-67. DOJ would have the Court believe that the evidence consists only of "comments and declarations from a handful of individual attorneys who are not interested in accepting an appointment at Arizona's rate." RB41. That characterization is grossly inaccurate.

As petitioners explained, OB63-67, the record overflows with comments, reports, and statements unanimous in the studied judgment that Arizona's compensation rate is insufficient to consistently attract competent counsel. That view is held by some of the most respected national and state criminal justice organizations; the ABA and the former head of the ABA's death penalty project; Arizona's capital case oversight committee; Arizona supreme court justices; the former state bar president; the former head of the statewide postconviction public defender's office; and the former chair of the state bar's indigent defense task force. OB63-64; *see also* Arizona Experts Amicus Br. 20-23.

And, yes, several eminent criminal defense attorneys deeply familiar with Arizona's criminal justice system have stated (in sworn declarations) that they share this assessment, based on first-hand experience. Indeed, numerous uncontested declarations explain that attorneys *lose* money when they accept appointments. JA__**[R.14.20.PhalenDecl.¶67; R.14.13KimererDecl.¶33; R.14.6MaynardDecl.¶22; R.14.19.GormanDecl.¶11; R.14.7.DarbyDecl.¶25]**. DOJ largely pretends this evidence does not exist, and cites no contrary record evidence.

DOJ insists that because Arizona has been able to appoint postconviction counsel, compensation is necessarily adequate. RB41. But that again is extraordinarily misleading. As petitioners explained and DOJ does not contest, many of those appointments resulted from private organizations recruiting out-of-state *pro bono* counsel, because the state could not find attorneys willing to take cases at its compensation rate. OB68. Many other appointments were made under Rule 6.8(e) or otherwise to attorneys not on the Arizona Supreme Court's list of qualified counsel. *See supra* 20-22.

And, of course, just because Arizona has been able to appoint counsel does not mean those counsel are competent. To the contrary, as the record explains, "limiting compensation to $100 per hour almost guarantees ineffective assistance of counsel," because the only lawyers "consistent[ly] interest[ed] in accepting appointments are those who will not be hired" otherwise. JA__**[R.14.18MaherDecl.¶22]**.

Finally, even if Arizona's compensation were sufficient to eventually attract competent counsel, DOJ does not contest that it is insufficient to secure timely appointment. OB67. Compensation "will be deemed adequate only if the State mechanism … ensure[s] the availability for appointment of [competent] counsel." 28 C.F.R. §26.22(c)(2). And "appointment means provision of counsel in a manner that is reasonably timely." 28 C.F.R. §26.21. Yet Arizona capital postconviction counsel frequently have not been appointed until years after the direct appeal concludes. *See* JA__**[R.14.3.ArmstrongDecl.¶¶43, 47; R.14.10HammondDecl.¶¶44-45, 59]**. Those delays are in part attributable to Arizona's inadequate compensation rate. *See*

JA__**[R.14.3.ArmstrongDecl.¶¶43, 45, 47; R.14.10.HammondDecl.¶¶44-45, 59]**.

DOJ also repeats its refrain that Arizona provides adequate compensation because … *Spears* said so. RB37-38. But *Spears* did not say so. The reasonableness of Arizona's compensation rate was not disputed in *Spears*. "[N]either [the prisoner] nor amici argue[d]" that the "rate of up to $100 an hour … was unreasonable" in that case, and the court therefore did not analyze it. 283 F.3d at 1015.

And even if the maximum $100-per-hour rate were deemed sufficient then, almost twenty years have passed. The rate has remained unchanged—with no adjustment for inflation or cost of living, OB67-68; JA__**[R.150.78Fed.Reg.58,176]**—while the analogous rate for appointed federal habeas counsel has risen more than 50%, OB62. No record evidence supports Arizona's belief that $100 per hour is adequate today.

DOJ dismisses these concerns by asserting how much attorneys could make if they billed 2,000 hours annually at a $100 hourly rate. RB38-39. But the Attorney General's assumption that the compensation rate is therefore adequate is not based on anything in the

statute or regulations, or on any comment or evidence reflecting real-world experience. No record evidence supports the proposition that an experienced Arizona criminal defense attorney can sustain a law practice at a $100 hourly rate; as petitioners have shown, the applicable record evidence is uniformly to the contrary. *See supra* 25-26. And tellingly, Arizona's brief does not address petitioners' arguments about compensation—perhaps because the Arizona Attorney General's office itself supports increasing the compensation rate. JA__**[R.140.FDO-AZSupp.Cmt.Ex.2at5]**.

Finally, DOJ insists that Arizona provides adequate compensation because its rate exceeds what two other states paid more than twenty years ago. RB40. (Never mind that that some states have rates substantially above Arizona's.) JA__**[R.14.FDO-AZCmt.at127-28]** (describing rates in Ohio, Virginia, and California). The two cases DOJ cites—*Baker v. Corcoran*, 220 F.3d 276 (4th Cir. 2000) and *Mata v. Johnson*, 99 F.3d 1261 (5th Cir. 1996), *vacated in part on other grounds*, 105 F.3d 209 (5th Cir. 1997)—arose before the regulations, and do not support Arizona's rate. In *Baker*, the court found inadequate a compensation rate lower than Arizona's. That a lower rate was found

inadequate does not render all higher rates adequate. *Baker* explained that "[a] compensation system that results in substantial losses to the appointed attorney or his firm simply cannot be deemed adequate." 220 F.3d at 285-86. In Arizona, attorneys lose money when they accept appointments. *See supra* 26. As for *Mata*, the Fifth Circuit provided no analysis or support for its conclusion that the compensation Texas provided was adequate. *See* 99 F.3d at 1266. And that decision cannot control here, where the record overwhelmingly demonstrates that Arizona provides inadequate compensation. *See supra* 25-27.

C. Arizona does not guarantee reasonable litigation expenses.

DOJ is also wrong in its defense of the Attorney General's conclusion that Arizona sufficiently assures reasonable litigation expenses. The Attorney General's error here was straightforward. The relevant regulation, 28 C.F.R. §26.22(d), embodying the Attorney General's interpretation of the statute, "reflects the requirement to provide for payment of reasonable litigation expenses." JA__**[R.150.78Fed.Reg.58,173]**. That is unambiguous: A state mechanism *must* provide for payment of expenses that are deemed reasonable. Of course, a court has discretion to decide what is

reasonable. Nobody disputes that (contrary to DOJ's representation, RB43-44). But a state has no discretion in this context to permit denial of reasonable expenses.

Yet Arizona does just that. A.R.S. §13-4041(I) provides that "[t]he trial court *may authorize* additional monies to pay for investigative and expert services that are reasonably necessary to adequately litigate" the case. (emphasis added). "[T]he word 'may' … implies discretion" rather than "connot[ing] a requirement." *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1977 (2016). That is the beginning and end of the matter. And the record confirms that Arizona courts indeed exercise their statutory discretion to deny reasonable litigation expenses in capital postconviction proceedings. OB72-73; *see also* Arizona Experts Amicus Br. 27-29.

DOJ and Arizona do not refute this showing.

1. DOJ retreats to *Spears*. *Spears* is particularly uninformative for litigation expenses, because *Spears*'s expense analysis (283 F.3d at 1015-16) never addressed §13-4041(I) (then §13-4041(J)), which Arizona agrees governs payment of relevant expenses in capital postconviction proceedings. Arizona's 2013 certification

application relied exclusively on §13-4041(I) in asserting it provided "for the payment of reasonable litigation expenses." JA__**[R.2.AZapplicationat2]**. Arizona's 2018 supplemental letter similarly relied on §13-4041(I) and recognized that the provision vests "discretion" in the trial court to decide whether to pay reasonable expenses. JA__**[R.129.AZAG10.16.18Ltr.at7]**. And Arizona's intervenor brief again relies on §13-4041(I) and describes it as "giv[ing] trial courts the discretion to authorize" reasonable litigation expenses. IB2.

DOJ correctly notes that §4041(I) (then (J)) was part of Arizona's mechanism at the time of *Spears*. RB44-45. But that makes it more conspicuous that *Spears* did not address it in discussing whether Arizona's system assures payment of reasonable expenses. 283 F.3d at 1016. Instead, *Spears* discussed two different provisions, §13-4041(G) (then §13-4041(H)) and §13-4013(B). *Id.* Section 13-4041(G) is plainly inapposite: It requires payment of counsel's "fees and costs," and does not govern the separate and distinct "investigative and expert services" that fall within §13-4041(I). Arizona has agreed. *See* JA__**[R.2.AZapplicationat2]** (describing §4041(G) as concerned with

attorney compensation). As for §13-4013(B), Arizona never stated it was relevant in the state's 2013 certification application, its 2017 letter reiterating its certification request, or its 2018 supplemental letter, and Arizona's brief in this Court barely alludes to it. All for good reason: §13-4041 specifically concerns postconviction proceedings; §13-4013 does not. If any doubt existed, Arizona Rule of Criminal Procedure 32.5(c)—also specific to postconviction proceedings—is consistent with the §13-4041 standard in providing that a trial court "may" provide for reasonable expenses.[3]

Spears also did not have the record in this case showing that Arizona state courts have—consistent with their statutory discretion—often denied reasonable and necessary expenses in capital postconviction proceedings. OB72-73. The relevance of such evidence cannot be doubted. In publishing the regulations, DOJ explained that "as with other requirements, the Attorney General is not dependent on the State's representations, and any interested person or entity believing that State standards overall do not provide for payment of

[3] Sections 13-4013 and 13-4041 are also differently worded in another respect: §4013(B) refers to "investigators and expert witnesses," but §4041(I) refers more broadly to "investigative and expert services."

reasonable litigation expenses is free to bring relevant information to the Attorney General's attention through the comment procedure." JA__**[R.150.78Fed.Reg.58,174]**. That is what commenters did here. They explained, among other things, that because the state forces individual counties to fund almost all litigation expenses, counties with fewer resources have often denied reasonable expense requests. *See* OB72-73. And it is uncontested that in Arizona's largest county, Maricopa, "the denial of reasonable litigation expenses was commonplace for much of the period from 1998 until around 2010—depending on the county's budgetary circumstances, the preferences of county administrators, and the identity of the presiding judge." JA__**[R.14.10.HammondDecl.¶64]**.

DOJ simply ignores this evidence.

2. DOJ maintains that Arizona's statutory language is acceptable because it is similar to the expense provision of the federal statute governing expense payments in capital cases, 18 U.S.C. §3599(f). That is wrong too.

As DOJ correctly describes, Congress at one time required that federal habeas courts "shall" provide reasonable litigation expenses,

and that Congress changed "shall" to "may" in a 1996 amendment. RB42-43. DOJ speculates that Congress could not have intended different standards for states under Chapter 154. But stricter standards make perfect sense. The consequence of Chapter 154 certification is a radical curtailment of federal habeas rights for state prisoners. So it is more than reasonable that Congress wanted a more stringent standard to ensure that the critical state court proceedings would fully develop and resolve a prisoner's challenges to his conviction and death sentence.

And, indeed, that is what the Attorney General concluded in publishing the regulations, when he interpreted Chapter 154 as "requir[ing] … payment of reasonable litigation expenses." JA__**[R.150.78Fed.Reg.58,173]**. The regulations could have adopted the §3599(f) standard. They did not; the regulations do not cite §3599(f) as relevant to the question.[4]

[4] Nor does the record contain any indication of whether §3599(f) is actually permissive in practice, or whether federal courts, instead, apply it as mandating the payment of reasonable expenses, unlike the practice in Arizona state postconviction proceedings.

D. Arizona does not guarantee timely appointments.

Nor does Arizona satisfy the independent requirement that a state mechanism "adequately provide[] for the reasonably timely appointment of counsel." JA__**[R.150.78Fed.Reg.58,166]**; *see* 28 C.F.R. §26.21. DOJ and Arizona concede that the state has no timeliness provision. RB46-48; IB10-13. In 2000, Arizona *deleted* its requirement that appointment of capital postconviction counsel be made within 15 days of issuance of the notice for postconviction review, and substituted no other timeliness requirement.[5] OB75-76. For that reason alone, Arizona cannot be certified.

DOJ and Arizona also do not dispute the factual record showing that Arizona death-row prisoners have routinely waited months, even years, before receiving counsel. *See* OB76. All they argue, mistakenly, is that this does not matter.

DOJ asserts that Arizona's system is adequate because routine and prolonged delays in appointments *might* not result in prisoners

[5] Notably, in non-capital cases, Arizona Rule of Criminal Procedure 32.5(a) requires that counsel be appointed within 15 days of the initial notice of postconviction review. The state has thus retained a time-limit requirement for the appointment of postconviction counsel in noncapital cases, but not in capital cases.

losing statutory time to file a federal habeas petition. RB46-49. This argument is pure speculation and underscores that Arizona has not carried its burden.

DOJ rests on its belief that *Isley v. Arizona Department of Corrections*, 383 F.3d 1054 (9th Cir. 2004), will apply to Chapter 154 cases. RB47-49. *Isley* held that an Arizona prisoner's notice of postconviction relief—the procedural equivalent of filing a notice of appeal—rather than the later-filed substantive petition for postconviction review triggers tolling under Chapter 153. OB77-78. But DOJ acknowledges that *Isley* says nothing about Chapter 154. RB48-49. As DOJ itself points out, Chapter 154 refers to a "*petition* for post-conviction review" while Chapter 153 refers to an "*application* for State post-conviction [review]" to describe the beginning of the tolling period, among other discrepancies in the relevant provisions. *See* RB49; OB78. It is uncertain whether courts will import *Isley*'s holding to Chapter 154. *See also* Federal Judges Amicus Br. 15-16.

The most DOJ can say is that it sees "no reason to believe" that courts would not import *Isley* to Chapter 154. RB49. The state's eligibility for certification under the statute and regulations cannot

depend on such guesswork. DOJ's hunch that *Isley might* apply does not overcome the undisputed facts: Arizona used to have a timeliness provision, repealed that provision years ago, has no timeliness provision now, and has regularly left its death-row prisoners awaiting appointment of state postconviction counsel for many months and sometimes years. *See* OB75-76.

Petitioners' opening brief also established that losing one's statutory time to file a federal petition is not the only harm that delayed appointments cause. A prompt appointment is also necessary to build an effective postconviction case—while witnesses remain available, evidence remains relatively fresh, and memories remain reliable. OB79. DOJ brushes off these considerations, asserting that the timeliness requirement concerns only "'the time limitations for seeking State and Federal postconviction review and the time required for developing and presenting claims in the postconviction proceedings,'" RB49 (quoting 28 C.F.R. §26.21), and "not any independent requirement to preclude the attrition of evidence," *id.* But a prisoner cannot adequately "develop[] and present[]," 28 C.F.R. §26.21, claims to the postconviction court if an appointment delay

causes "attrition of evidence," RB49. And that delay may also affect federal habeas proceedings, because federal-court review is ordinarily limited to the state-court record. *See* 28 U.S.C. §2254(e). The administrative record here shows that the problem of stale evidence is serious in Arizona, JA__**[R.14.3.ArmstrongDecl.¶43]**, and contrary to DOJ's assertion, it directly informs Arizona's entitlement to certification.

For its part, Arizona has never explained how its mechanism generates timely appointments, or offered any information countering the record showing of egregious and routine appointment delays. Instead, the state contends that the timeliness requirement is nonbinding and thus inoperative because it appears in the regulations, not in Chapter 154 itself. IB10-14. But as the regulations' preamble explains, only a reasonably timely appointment "can logically be regarded as providing for appointment of counsel within the meaning of chapter 154." JA__**[R.150.78Fed.Reg.58,165]**. The requirement therefore "does not add to the express requirements for certification" but merely "implement[s]" the statute. JA__**[R.150.78Fed.Reg.58,166]**. And even if this Court were to

perceive statutory ambiguity, DOJ's interpretation easily qualifies as reasonable and would have to be upheld under *Chevron*.

II. The Regulations Are Invalid And The Certification Process Is Fundamentally Flawed.

The certification is unsound on its own terms, but it would also have to be vacated because the underlying regulations are invalid and the certification process is flawed. OB80-97.

A. The certification should have been issued through notice and comment.

1. Chapter 154 certifications are rules, as *HCRC* correctly concluded. *See Habeas Corpus Res. Ctr. v. DOJ*, No. 13-cv-4517-CW, 2014 WL 3908220, at *8-9 (N.D. Cal. Aug. 7, 2014), *vacated and remanded on justiciability grounds*, 816 F.3d 1241 (9th Cir. 2016) (*HCRC*). Certifications satisfy this Court's rulemaking criteria because (1) they are "generally applicable to an open class of" death-sentenced prisoners in Arizona, and (2) they have "future effect" in yet-to-be-identified federal habeas proceedings. *Safari Club Int'l v. Zinke*, 878 F.3d 316, 332-33 (D.C. Cir. 2017); *see* Admin Professors Amicus Br. 6-8.

DOJ fails to demonstrate otherwise. Regarding the first factor, DOJ emphasizes that adjudications can also, at times, "affect a large

group." RB55 (quoting *Goodman v. FCC*, 182 F.3d 987, 994 (D.C. Cir. 1999)). That is true when other factors indicate the agency's action is an adjudication. *E.g.*, *Goodman*, 182 F.3d at 993-95 (agency action affecting large group was not a rule where other factors, like retrospective effect, indicated it was an adjudication). But typically, agency action affecting a broad group is a rule—especially when no member of the group is a party to the proceeding. *E.g.*, *Safari Club*, 878 F.3d at 332-33; *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 417 F.3d 1272, 1284-86 (D.C. Cir. 2005).

Regarding the second factor, DOJ does not dispute that the legal effect of Chapter 154 is to alter the rules applicable to parties in individual habeas proceedings going forward. DOJ cannot deny that certification does not, by itself, "immediately bind" either the state or the prisoner in any individual habeas proceeding. *Safari Club*, 878 F.3d at 333; *see, e.g.,* RB5 ("[E]ach federal habeas court must still find that the habeas petitioner himself was provided with counsel … pursuant to the State's certified mechanism.").

The Ninth Circuit's decision in *Yesler Terrace Community Council v. Cisneros* is instructive. *See* 37 F.3d 442 (9th Cir. 1994); Admin

Professors Amicus Br. 8-9. Under a statutory scheme paralleling Chapter 154, a federal agency could certify a state's eviction procedures. 37 F.3d at 445. Once certified, a state would receive litigation advantages when evicting public-housing tenants. The Ninth Circuit held the agency's certification of Washington's eviction procedures was a rulemaking because it "affected the rights of a broad category of individuals not yet identified." *Id.* at 448. Notably, the court held that the certification itself "had no effect on the State," but rather carried "legal consequences for yet-to-be-identified individuals only prospectively." *Id.* at 449. The same is true here, where certification will alter the rules in "yet-to-be-identified" individual habeas cases moving forward. *Id.*

Even if certifications immediately affected states, they would still be rules. The APA requires notice and comment in rulemakings to ensure "fairness to affected" groups who are not parties. *Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1044 (D.C. Cir. 1987). Adjudications, in contrast, do not require notice and comment because there is a party "before the tribunal" to represent the interests of "similarly situated non-parties." *Goodman*, 182 F.3d at 994. Here, the applicant state can

represent its own interests, but certifications also carry life-or-death consequences for prisoners, who are not parties. And their interests plainly cannot be represented by the state—an adverse entity. Thus, the APA requires treating certifications as rules so that prisoners and their counsel, too, can submit "facts and information" through notice and comment. *Bowen*, 834 F.2d at 1044.[6]

DOJ's remaining arguments fare no better. DOJ emphasizes that agencies may "ha[ve] discretion to determine whether to proceed by adjudication or rulemaking." RB53. But that does not mean they may call a rulemaking an adjudication. Where, as here, agency action satisfies the APA's "very broad[]" definition of a rule, the "agency may not escape the [notice-and-comment] requirements of §553 by labeling its rule an 'adjudication.'" *Safari Club*, 878 F.3d at 332.

DOJ also contends that certifications are adjudications because they involve a "fact-bound inquiry" into whether a "mechanism for providing postconviction counsel satisfies certain statutory criteria."

[6] Although the regulations allow limited public comment, they fall short of what §553 requires. *See infra* 45-48. And if this Court held that certifications were adjudications, the Attorney General might be free to amend the regulations and curtail public comment even further.

RB53. Certifications, however, turn not on the "facts" of a specific case, but rather on overall "procedures adopted as policy by a state." *HCRC*, 2014 WL 3908220, at *8; *see* Admin Professors Amicus Br. 9-10. In any event, agency action is not an adjudication merely because it "applie[s]," rather than "change[s]," a legal "standard." *Safari Club*, 878 F.3d at 334. Rather, such actions may fall squarely within the APA's definition of a rule by "implement[ing]," "interpret[ing]," and "prescrib[ing]" law. 5 U.S.C. §551(4); *Safari Club*, 878 F.3d at 320-21.

Finally, DOJ argues (at RB54) that certifications are adjudications because federal habeas courts previously made analogous determinations in individual prisoner suits. But that proves petitioners' point. When a federal habeas court determined that an individual prisoner was appointed counsel pursuant to a qualifying mechanism, its decision fit the definition of an adjudication: It resolved a "dispute between specific parties" (a prisoner and a state) "immediately bind[ing]" them to legal consequences (application of Chapter 154 in that suit). *Safari Club*, 878 F.3d at 333. When Congress transferred certification authority to the Attorney General, however, it transformed the proceedings. The Attorney General's

certification governs an indeterminate class of current and future prisoners in the state, not an individual prisoner. And the certification, by itself, no longer immediately binds any parties to Chapter 154 in any particular proceeding. *See id.*

2. Because certifications are rules, they must comply with APA notice-and-comment requirements. *See HCRC*, 2014 WL 3908220, at *9. Those requirements were not satisfied here, because the Attorney General certified Arizona without soliciting or accepting comments on his decision. *See* JA__**[R.1.85Fed.Reg.20,705-21]**.

DOJ argues (at RB57-58) that the process was good enough because petitioners could comment before the final decision. But under 5 U.S.C. §553, a notice of proposed rulemaking must "provide sufficient factual detail and rationale for the rule to permit interested parties to comment meaningfully." *Honeywell Int'l, Inc. v. EPA*, 372 F.3d 441, 445 (D.C. Cir. 2004). And "interested parties will not be able to comment meaningfully" if "the notice … fails to provide … the reasoning that has led the agency to the proposed rule." *Connecticut Light & Power Co. v. Nuclear Regul. Comm'n*, 673 F.2d 525, 530 (D.C. Cir. 1982); *see also U.S. Lines, Inc. v. Fed. Mar. Comm'n*, 584 F.2d 519, 534 (D.C. Cir. 1978)

(rulemaking notice must "set forth [the agency's] thinking"). Here, in significant respects, the Attorney General's pre-certification notices provided no hint of his later reasoning. They therefore did not afford petitioners an opportunity to comment meaningfully on the yet-to-be-issued certification. *See* OB81; Admin Professors Amicus Br. 13-14.

For example, the Attorney General provided no notice that he would rely on Arizona's supposed conformance with 18 U.S.C. §3599's competency standards. *See* Admin Professors Amicus Br. 15. As explained (at 18), the regulations specifically rejected reliance on §3599. JA__**[R.150.78Fed.Reg.58,169]**. Without warning, the Attorney General switched positions in the certification decision, citing Arizona's supposed alignment with §3599 to justify certification. JA__**[R.1.85Fed.Reg.20,709-10]**. Petitioners were deprived of an opportunity to comment meaningfully by explaining that §3599 is an inapt comparator and that Arizona's mechanism does not actually comport with §3599. *See supra* 18-19.

Another example of inadequate notice is the Attorney General's back-of-the-envelope revenue estimate in his compensation analysis. *Supra* 28-29. DOJ does not dispute that petitioners had no notice that

this casual arithmetic, in derogation of the record, would anchor the Attorney General's reasoning. DOJ's only response is that the estimate "was simply a matter of multiplying [the $100 rate] by a standard 2000-hour work-year." RB58-59. But as explained (at 28-29), reliance on that elementary equation is fundamentally flawed. If petitioners had received notice, they would have offered additional evidence why the Attorney General's assumptions—*e.g.,* 2,000 annual billable hours—were wrong and unrealistic. Because petitioners would have "had something useful to say about" the Attorney General's assumptions, the certification violated the APA. *Chamber of Com. of U.S. v. SEC*, 443 F.3d 890, 905 (D.C. Cir. 2006).

The Attorney General further violated §553 through his surprise reliance on A.R.S. §13-4013(B) in analyzing whether Arizona assures reasonable litigation expenses. *See supra* 32-33; Admin Professors Amicus Br. 16-17. DOJ observes (at RB59) that §13-4013(B) was referenced in a few Arizona Supreme Court appointment orders attached to Arizona's October 16, 2018, supplemental letter. But DOJ cites no authority requiring petitioners to scour hundreds of pages of attachments to a supplemental filing to identify and rebut a provision

that Arizona never relied on.[7] Moreover, Arizona's letter also attached—as examples of the "standard Arizona Supreme Court appointment order," JA__**[R.129.AZAG10.16.18Ltr.at5]**—more recent orders that do not reference §13-4013(B). *E.g.*, JA__**[R.129.AZAG10.16.18Ltr.atPDF14]**; JA__**[R.129.AZAG10.16.18Ltr.atPDF16]**. Petitioners could not reasonably be expected to predict that the Attorney General would consider the provision relevant.[8]

Because the certification violated §553, it must be vacated.

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[7] DOJ's effort (at RB59) to fault petitioners for failing to identify relevant Arizona statutes, while excusing Arizona's failure, is yet another example of its improper burden-shifting. *See infra* 49-52.

[8] DOJ also notes that Arizona's supplemental letter "attach[ed] over 200 pages of exhibits." RB12. The attachments are largely an unexplained and incomplete amalgam of spreadsheet entries, *see* JA__**[R.129.AZAG10.16.18Ltr.atPDF23-153]**, and reimbursement records, *e.g.*, JA__**[R.129.AZAG10.16.18Ltr.atPDF248]** (shipping receipt); JA__**[R.129.AZAG10.16.18Ltr.atPDF249]** (hotel bill), often from unspecified sources. This indiscriminate data dump sheds no light on the system's functioning.

B. The certification process set out in the regulations places no onus on the state and effectively shifts the burden of proof to third parties.

The certification process that the regulations establish is also "procedurally deficient" because it improperly relieves the state of its burden to prove certification eligibility, and shifts the burden to the public to prove ineligibility. *HCRC*, 2014 WL 3908220, at *9-10. Petitioners' opening brief showed how the certification proceedings here illustrate these defects.

DOJ's brief confirms the point. DOJ denies that its regulations establish any "burden-shifting presumption." RB62. Yet it repeatedly dismisses any argument that the state must show how its mechanism actually satisfies Chapter 154. *See* RB30-31. And DOJ points to nothing in the regulations otherwise requiring a state to demonstrate certification eligibility. To be sure, the regulations *allow* states to "present any and all information they consider relevant or useful." RB61. But permission to submit information is not a requirement to do so. And Arizona failed to submit such information—either in its application materials, or in its briefing here, while also making clear its stance that it has no obligation to do so. *See* OB87-92; IB6-19. Indeed,

Arizona's certification requests and related submissions are conspicuously barebones. *See, e.g.*, JA__**[R.2.AZapplication; R.129.AZAG10.16.18Ltr.]**.

DOJ next claims that the regulations properly implement "the statutory scheme" by "plac[ing] the onus of certification on the Attorney General." RB60; *see* RB62. That characterization may be true as far as it goes, but it is irrelevant: Congress's designation of the Attorney General as certifier says nothing about how the burden of proof is allocated among the parties.

Finally, DOJ argues that the regulations need not require a state to produce information because the Attorney General will deny certification "unless [he] is convinced that a State has established a qualifying capital counsel mechanism." RB61. That claim is repeatedly disproved by these proceedings. As described at OB89-92, Arizona has never attempted to explain how its appointment system functions in crucial respects.

Take competency. What is the meaning of Rule 6.8(a)(3)'s requirement that counsel "have demonstrated the necessary proficiency and commitment that exemplifies the quality of representation

appropriate to capital cases"? The Arizona Attorney General admitted that he "cannot comment," as his "office is not privy to how the Arizona Supreme Court evaluates defense attorneys under this requirement." JA__**[R.129.AZAG10.16.18Ltr.at8]**. That is unhelpful.

Or consider Rule 6.8(e), the state's competency loophole. What are the qualifications of attorneys appointed under that rule that offset their failure to meet even Arizona's limited competency standards? And what counts as "exceptional circumstances" for appointment under Rule 6.8(e)? If the state has that information, it never shared it. As a result, the justification for 25–30% of the state's postconviction capital appointments remains a mystery. *See* OB53.

And what about the substantial record evidence demonstrating that reasonable litigation expenses are often denied, as Arizona law allows? *See supra* 31-34. The Arizona Attorney General has no idea about that either; he explained to DOJ that he stopped trying to find out when "county officials who would have th[at] information" told him "that it is not readily available." JA__**[R.129.AZAG10.16.18Ltr.at6]**.

Chapter 154 certification reduces habeas protections for death-sentenced prisoners and significantly expedites the prospects of their

execution. Congress authorized that result only upon a showing that the state's postconviction process is reasonably designed to assure accurate outcomes. Given Arizona's repeated inability and unwillingness to explicate its own process, that conclusion is impossible to reach on this record. The Attorney General's certification—despite these crucial gaps in his understanding of Arizona's mechanism—confirms that the state bore no meaningful burden to prove eligibility.

C. The regulations provide insufficient substantive standards.

The certification must also be vacated because the regulations provide insufficient substantive standards. OB93-97. The regulations appropriately define "specific, mandatory standards" for the primary competency and compensation benchmarks. *Mata*, 99 F.3d at 1267. But to the extent they permit states to circumvent those benchmarks through amorphous catchall provisions, the regulations "fail to provide [sufficient] 'definitional content'"—violating Chapter 154 and the APA. *HCRC*, 2014 WL 3908220, at *11 (quoting *Pearson v. Shalala*, 164 F.3d 650, 660 (D.C. Cir. 1999)).

DOJ suggests the regulations' catchalls are appropriate because states should "enjoy wide latitude in establishing" their own standards.

RB63. But as *HCRC* admonished in rejecting this argument, "latitude should not be conflated with free rein." 2014 WL 3908220, at *11. Chapter 154 and its legislative history "require that [competency] standards be mandatory and binding" and cannot be "left to the discretion of a court or guideline administrator." *Ashmus v. Woodford*, 202 F.3d 1160, 1167-68 (9th Cir. 2000). The regulations, to the extent they rely on vague and undefined catchall exceptions to their competency and compensation benchmarks, fail that requirement.

Alternatively, DOJ argues that the regulations do provide "substantive content." RB63. It emphasizes first that the regulations require "an independent determination whether a State has established a qualifying mechanism." RB63. But that says nothing about which standards govern that assessment (and provides no guidance to interested parties regarding the standards the Attorney General will apply).

DOJ points next to the preamble's list of "[m]easures that will be deemed relevant," including "standards of experience, knowledge, skills, training, education, or combinations of these considerations." RB64; JA__**[R.150.78Fed.Reg.58,179]**. But what combination of experience,

knowledge, skills, training, and education suffices? The preamble offers no guidance. *See W. Va. Pub. Servs. Comm'n v. U.S. Dep't of Energy*, 681 F.2d 847, 863 n.75 (D.C. Cir. 1982) (agency's "unfettered flexibility too often results in … arbitrary decisions").

DOJ also points to the competency and compensation benchmarks themselves as "guide[s]" to the Attorney General's application of the regulatory catchalls. RB63. But the regulations, at least as applied here, permit certification based on the catchalls alone. For example, the Attorney General certified Arizona's compensation scheme without considering how substantially its rate failed the four benchmark rates. *See* JA__**[R.1.85Fed.Reg.20,714-15]**.

Finally, the regulations' lack of definite standards is exacerbated to the extent the regulations permit certification despite the state's heavy reliance, in turn, on loopholes of its own. Here, more than a quarter of Arizona capital postconviction counsel are appointed under the Rule 6.8(e) loophole and thus fail to satisfy even the state's own competency standards. OB53. Insofar as DOJ's regulations allow certification of such a scheme, they plainly fail to provide sufficiently definite standards. *See* OB96. DOJ offers no response. *See* RB62-66.

D. The deficiencies in the regulations and certification process require vacatur.

In two sentences, DOJ says this Court should affirm the certification even if the regulations and certification process are deficient and violate the APA. RB66; *see also* IB8. DOJ cites no authority for that startling proposition; none exists.

This Court reviews the Attorney General's certification "de novo," 28 U.S.C. §2265(c)(3), and must also "hold unlawful and set aside agency action, findings, and conclusions found to be … arbitrary, capricious," or otherwise "without observance of procedure required by law," 5 U.S.C. §706(2)(A), (D). Petitioners have shown that the certification fails on its own terms. But at a minimum, this Court cannot properly determine whether Arizona's capital counsel mechanism satisfies applicable standards where DOJ's regulations themselves are flawed, the Attorney General has failed to require the state to furnish pertinent information, and the administrative record is missing potentially explanatory evidence because there was no proper notice and comment.

CONCLUSION

The certification of Arizona should be set aside.

Dated: December 7, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and with the Court's Order of June 22, 2020, because, as determined by the Word Count feature of Word 2013, it contains 9,462 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). The brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Century Schoolbook font.

Dated: December 7, 2020

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