IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

OFFICE OF THE FEDERAL PUBLIC DEFENDER FOR THE DISTRICT OF ARIZONA, et al.,

Petitioners,

v.

MERRICK B. GARLAND, et al.,

Respondents,

STATE OF ARIZONA,

Intervenor.

Case. No. 20–1144

INTERVENOR'S OPPOSITION TO MOTION FOR VOLUNTARY REMAND

INTRODUCTION

Respondents' request for a voluntary remand violates their prior arguments to this Court and would gravely prejudice the State of Arizona (the "State") through compounding already outrageous delay. That request should be denied.

The delays that the federal government have imposed upon the State's attempt to exercise its rights under Chapter 154 are already enormous and intolerable. The State's application for certification under Chapter 154 was filed over *eight years ago* in April 2013—and only in 2013 because the State had been forced to delay submitting its application by Department of Justice's *seven-year* delay (from 2006 to 2013) in issuing the necessary regulations under which the State could apply. And even that understates the relevant delay here, as the State actually implemented a Chapter 154 appointment mechanism more than two decades ago, *in 1998*.

Having attempted to achieve certification under Chapter 154 for 22 years, the State finally received an approval from DOJ in April 2020. Judicial challenge followed shortly thereafter, with this case fully briefed by January, and set for argument on February 16, 2021. In the meantime, however, a new Administration came into office and saw an opportunity to further compound the already epic delays by first postponing oral argument, and now seeking a voluntary remand.

But having waited for nearly a decade for final resolution of the validity of its April 2013 application, the State would be severely prejudiced by further delay.

Moreover, the voluntary remand that Respondents seek would add very little value even under Respondents' own arguments. Specifically, Respondents told this Court that the Attorney General correctly certified Arizona's mechanism for the appointment of counsel in capital post-conviction cases under Chapter 154 and that this Court should affirm under de novo review. Yet now, citing no intervening circumstances other than appointment of a new Attorney General following a presidential election and no new evidence beyond what was already fully briefed in this Court, Respondents ask this Court to remand this matter to the Department of Justice for "further development of the administrative record and reconsideration of the certification order." Doc. # 1896406, at 6.

Given that this Court's review here is *de novo*—as Respondents have conceded (Answering Br. at XX)—a remand would serve little purpose. Nor would revised findings on remand be entitled any deference, so additional proceedings would add little to this Court's resolution of this case. Moreover, Respondents' prior briefing admitted that the additional information now purportedly sought by the voluntary remand does not actually bear on the ultimate issue presented here, but rather on non-dispositive "guideposts." Instead, the

remand sought would simply provide Respondents with an opportunity to apply new political sensibilities to the prior certification.

That is not the proper basis for a voluntary remand—nor is seeking additional information their likely actual intent. Instead, Respondents' rationale appears pretextual. Indeed, tipping their hand, Respondents admit (at 5-6) that their desired reconsideration would render this case outright "moot." But if modest supplementation of the record led to a reaffirmation of the State certification, there would be no formal mootness—only a slightly more developed record for the same essential challenge. Instead, that mootness contention reflects the obvious but unstated basis for the instant request: the chances of affirmation on remand are infinitesimal at best.

The entire purpose of the State seeking intervention—and this Court granting it—was that Respondents might not adequately defend the State's interests. The State's concern now appears prescient. Because this case is fully briefed and the State is fully prepared to defend the certification on the merits, this Court should deny the motion for voluntary remand and instead re-set this case for argument.

STATEMENT

1. In 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act ("AEDPA"). Included in AEDPA was a provision, Chapter 154,

designed to accelerate federal post-conviction proceedings. Chapter 154 provided that if the states agreed to appoint, compensate, and pay reasonable litigation expenses of competent counsel for indigent defendants in capital post-conviction proceedings, they could "opt-in" accelerated habeas corpus proceedings for capital cases. *See Spears v. Stewart*, 283 F.3d 992 (9th Cir. 2002).

2. Two years later, Arizona implemented such a mechanism, which provided for the appointment and compensation of capital post-conviction counsel. [[CITE]]. But federal courts failed to act upon the State's attempt to opt-in to Chapter 154.

3. Frustrated with the delays, Congress in 2006 amended Chapter 154 to shift responsibility for certifying state mechanisms from the federal courts (which had largely failed to certify any state mechanisms) to the Attorney General. The Department of Justice initiated a rule-making process in 2008, but the resulting regulations were enjoined and the Department withdrew the rule. The Department then published a notice of proposed rule-making concerning the Chapter 154 certification process in 2011. JA16–11263.

4. Having waited for seven years for the Department to issue the regulations governing the certification process required by the 2006 amendments, Arizona requested certification under Chapter 154 by letter to the Attorney General on April 18, 2013. JA1–22. Several months later, in September 2013, Attorney

General Holder issued a Final Rule implementing certification procedures. JA16–11212.

5. Consideration of Arizona's certification request was delayed, however, when a District Court for the Northern District of California enjoined the Department's regulations from taking effect. *See Habeas Corpus Res. Ctr. v. United States Dep't of Justice*, 2014 WL 390822, *3 (N.D. Cal. Aug. 7, 2014). After the Ninth Circuit vacated the 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 process finally culminated in the Attorney General certifying Arizona's appointment of counsel mechanism in capital post-conviction cases under Chapter 154 on April 14, 2020. JA1–20–22.

6. On April 29, 2020, Petitioners filed a petition for review of the Attorney General's certification decision in this Court under 28 U.S.C. § 2265(c). Doc. # 1840904. This Court subsequently granted Arizona's motion to for leave to intervene. Docs. # 1842716, 1844560.

7. The parties completed briefing and, on January 11, 2021, this Court entered an order scheduling oral argument for February 16, 2021. Doc. # 1879382. In their answering brief, Respondents argued that this Court should affirm its certification of Arizona's mechanism for appointment of counsel in capital post-conviction cases because, in part, "[t]he Attorney General correctly determined

that Arizona's compensation provisions for appointed counsel satisfy the requirements of Chapter 154." Doc. # 1877229, at 36.

8. Less than a week before oral argument, however, Respondents moved to postpone oral argument, stating that then-Acting Attorney General Wilkinson believed "aspects of the certification order may benefit from further certification or further development of the record." Doc. # 1884703. Over Intervenor's objection, this Court granted the motion, holding the case in abeyance and directing Respondents to file status reports every 30 days beginning March 29, 2021. Doc. # 1884962.

9. On March 29, 2021, Respondents filed their first status report stating that Attorney General Garland, who had been confirmed on March 10, 2021, was reviewing the certification order and underlying administrative record. Doc. # 1892125.

10. On April 28, 2021, Respondents moved for voluntary remand, stating that the Attorney General "has now determined that Arizona's application for certification warrants further review and that the existing record lacks certain information necessary to the Attorney General's statutorily assigned function of 'determin[ing] … whether the State has established a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings brought by indigent

prisoners who have been sentenced to death.'" Doc. # 1896406, at 3 (quoting 28 U.S.C. § 2265(a)(1)). Specifically, Respondents state that remand is necessary because the Department of Justice "plans to make further informational requests to Arizona, including by reiterating certain inquiries about the State's compensation system that the Department first posed in June 2018, and in response to which the State provided incomplete answers." *Id.* at 5 (internal citations omitted).

11. In its prior (and not withdrawn) filings in this Court, however, Respondents admitted that "the Attorney General could not administratively superimpose additional requirements onto the framework Congress enacted" and that the compensation data that Respondents seek is only a "guidepost[]" and not a "mandate[]." Answering Br.14, 38.

ARGUMENT

In deciding whether to grant a motion to remand, this Court considers "whether remand would unduly prejudice the non-moving party." *Util. Solid Waste Activities Group v. Envtl. Protection Agency*, 901 F.3d 414, 436 (D.C. Cir. 2018) (citing *FBME Bank Ltd. v. Lew*, 142 F.Supp.3d 70, 73 (D.D.C. 2015)). It is also appropriate to deny remand if the agency's request "appears to be frivolous or made in bad faith." *Id.* (citing *SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001); and *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 349 (D.C. Cir. 1998)). This Court should deny remand here because (1) granting the

motion would prejudice Intervenor's interest in applying Chapter 154 to its capital habeas cases and (2) because Respondents' proffered rationale appears pretextual: because supplementing the record with information that goes merely to non-binding guideposts is unnecessary, the unstated (but readily discernable) intent appears to be to apply changed political sensibilities to the same essential evidence and rescind the prior administration's certification.

Granting Respondents' motion for voluntary remand would cause undue prejudice to the State of Arizona. As outlined above, Arizona has been forced to wait 14 years after Congress tasked the Attorney General with certifying state mechanisms under Chapter 154 to receive a certification decision. Now, after Petitioners' challenge to Arizona's certification has been fully briefed for de novo review by this Court, the Department of Justice seeks to reconsider its decision, only to request (putatively) additional information that it easily could have sought during the 7 year-period Arizona's request for certification was pending.

Remand would add further delay to the already absurdly long period of time Arizona waited for a final decision on its request for certification under Chapter 154. During that interval, Arizona was unable to take advantage of Chapter 154's special procedures for capital habeas cases despite upholding its end of Chapter 154's bargain by providing competent counsel to inmates in capital post-conviction proceedings. If this Court grants remand, Arizona's ability to apply Chapter 154's

provisions to otherwise eligible cases will be impeded yet again during the time the Attorney General reconsiders the certification decision. Thus, in light of the length of time Arizona has already waited for certification, remand would cause undue prejudice and should be denied. *See Util. Solid Waste Activities Group*, 901 F.3d at 436 (denying agency's "last-minute request for a remand" where "remand would prejudice the vindication of [Petitioners'] own claim").

This Court should also deny the motion because Respondents' justifications for remand do not support their request and appear pretextual. Respondents do not claim that any new evidence or changed circumstances have undermined the Attorney General's original certification decision. *Cf. Ethyl Corp. v. Browner*, 989 F.2d 522, 523 (D.C. Cir. 1993) (voluntary remand appropriate where agency acknowledged that new evidence undermined its decision). Instead, they assert that "additional information is necessary to evaluate whether the State's capital counsel mechanism satisfies the requirements set out in Chapter 154," specifically information regarding "the State's compensation system." Doc. # 1896406, at 4, 5. But Respondents fail to specify what additional information regarding Arizona's compensation system they require and why a request for that information warrants remand.

Attempting to bolster their assertion that the Attorney General requires additional information regarding compensation, Respondents note that "Attorney

General Barr likewise recognized the incompleteness of the State's response on that point" in his April 2020 certification decision; he stated that the information received was insufficient to allow a determination whether Arizona's compensation mechanism met the Department of Justice's regulatory "benchmarks." *Id.* at 5 n.4.

If Respondents desire remand to obtain additional information regarding whether Arizona's compensation mechanism meets the regulatory "benchmarks," they do not make that plain. But if that is their purpose, remand is unwarranted. 28 U.S.C. § 2265(a)(3) provides that "[t]here are no requirements for certification or for application of this chapter other than those expressly stated in this chapter." Thus, Arizona's mechanism need not satisfy the regulatory benchmarks to meet the relevant requirements of Chapter 154—28 U.S.C. §§ 2261(b), (c) and 2265(a)(1). Respondents' brief recognized this reality, arguing that the benchmarks are "guideposts" rather than "mandates" and asserting that Arizona's compensation mechanism nonetheless "satisfies Chapter 154's requirements." Doc. # 1877229, at 38. Respondents do not explain why they require additional information regarding these guideposts when they previously told this Court that the benchmarks were not controlling for the evaluation of Arizona's certification request.

Respondents also do not explain why they previously argued that the Attorney General correctly determined that Arizona's compensation provisions satisfy Chapter 154, yet now advance the contrary claim that additional information is required to determine that very point. *Compare* Doc. # 1877229, at 36 ("The Attorney General correctly determined that Arizona's compensation provisions for appointed counsel satisfy the requirements of Chapter 154."), *with* Doc. # 1896406, at 4 ([T]he Attorney General … has determined that additional information is necessary to evaluate whether the State's capital counsel mechanism satisfies the requirements set out in Chapter 154."). Respondents do not point to any new evidence coming to light or intervening development. And only such development is apparent: the change in administration.

That fact, combined with Respondents' failure to specify the additional information they require and the current presidential administration's publicly-stated opposition to capital punishment,[1] fairly calls into question Respondents' motive for seeking remand. And whatever their true motive, the one supplied to this Court appears pretextual. Respondents' lack of a plausible explanation for remand thus counsels against granting their motion. *See Util. Solid Waste*

[1] President Biden has announced his intention to "[e]liminate the death penalty" by "work[ing] to pass legislation to eliminate the death penalty at the federal level, and incentivize states to follow the federal government's example." *See* www.joebiden.com/justice/, last accessed May 24, 2021.

Activities Group, 901 F.3d at 436 (appropriate to deny remand where request appears "frivolous or made in bad faith").

Finally, Respondents also contend that remand is proper because whether the Attorney General denies or grants certification on remand the present petition for review "will moot" this case. Doc. # 1896406, at 5-6. That is both legally incorrect and inadvertently revealing. If, following a voluntary remand, the Attorney General were to reaffirm his decision certifying Arizona's mechanism, the controversy here would be as acute as ever and (at best) the record would be modestly supplemented.

Only a fundamental change to the decision on review would actually moot this case, which the Attorney General's request all-but presupposes. Respondents' own motion thus appears to contemplate that the voluntary remand *will* lead to "reconsideration [that] will moot" this dispute. (Mot. at 5–6). Similarly, Respondents essentially telegraphed the pre-ordained result on remand by contending that "voluntary reconsideration of the challenged action *would obviate any need for further proceedings* in this litigation." Mot at 6 (emphasis added). That too appears to contemplate a reversal on remand, such affirmance plainly *would* require "further proceedings"—*i.e.*, resolving this fully-briefed case.

Moreover, Respondents' reasoning ignores the fact that this Court's review of the existing certification decision is de novo. 28 U.S.C. § 2265(c)(3). Thus,

because the issue of whether this Court should affirm the certification decision has been fully briefed for consideration by this Court under de novo review, there is no reason to remand for reconsideration by the Attorney General.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court deny Respondents' motion for voluntary remand.

May 24, 2021

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I hereby certify this motion complies with the requirement of Fed. R. App. P. 27(d)(1)(E) because it has been prepared in 14-point, a proportionately spaced font, and that it complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A), because it contains **2,604** words, according to the word-count feature of Microsoft Word.

/s/ Jeffrey L. Sparks

CERTIFICATE OF SERVICE

I hereby certify that on May 24, 2021, 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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