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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Steve Boggs, an individual; Mike Gallardo, an individual; Rodney Hardy, an individual; Alvie Kiles, an individual; Pete Rogovich, an individual; Sammantha Allen, an individual; Johnathan Burns, an individual; Alan Champagne, an individual; Andre Leteve, an individual; Steven Parker, an individual; Wayne Prince, an individual; and The Office of the Federal Public Defender for the District of Arizona, a Federal Defender organization,

Plaintiffs,

v.

United States Department of Justice and William P. Barr, in his official capacity as United States Attorney General,

Defendants.

Case No. _____

COMPLAINT AND REQUEST FOR INJUNCTIVE RELIEF

ADMINISTRATIVE PROCEDURE ACT CASE

COMPLAINT AND REQUEST FOR INJUNCTIVE RELIEF

Steve Boggs, Mike Gallardo, Rodney Hardy, Alvie Kiles, Pete Rogovich, Sammantha Allen, Johnathan Burns, Alan Champagne, Andre Leteve, Steven Parker, Wayne Prince, and the Office of the Federal Public Defender for the District of Arizona ("FDO-AZ") (collectively "Plaintiffs") bring this action under the Administrative Procedure Act (the "APA"), 5 U.S.C. §§ 551–559 and 701–06, for injunctive and other relief to set aside Subpart B of Part 26 of Title 28 of the Code of Federal Regulations, 28 C.F.R. §§ 26.20–26.23, enacted through the Final Rule regarding Certification Process for State Capital Counsel System, 78 Fed. Reg. 58,160 (Sept. 23, 2013), issued by Defendants United States Department of Justice (the "Department") and the United States Attorney General. Plaintiffs allege as follows:

INTRODUCTION

1. The guarantee of competent counsel for indigent defendants is bedrock in our criminal justice system. Nowhere is that more important than in capital proceedings where the consequences are literally life-or-death. Since 1973, more than 1,700 death sentences have been overturned and during that time, at least 166 death-row prisoners have been exonerated, including 9 in Arizona.[1]

2. The Sixth Amendment to the United States Constitution establishes the right to competent counsel in state and federal court, at trial, and on direct review of a conviction and sentence. No similar guarantee, however, exists for state postconviction proceedings, even though such proceedings are essential to ensure that defendants are not convicted or sentenced to death in violation of state or federal law. State postconviction proceedings are often the first opportunity to raise a claim that a defendant received constitutionally inadequate representation

[1] As one example, Ray Krone's 1992 conviction and death sentence were both overturned in 2002 as a result of DNA testing.

by counsel during the guilt and sentencing phases. Postconviction counsel must combine expertise in criminal investigations, trial strategy, mitigation presentations, and the myriad specialized substantive and procedural rules that govern postconviction proceedings.

3. In 1996, Congress passed the Antiterrorism and Effective Death Penalty Act ("AEDPA"). Chapter 154 of that law establishes a quid pro quo: expedited federal habeas review and stronger finality rules in capital habeas cases will be available if a state has established a mechanism for the timely appointment, compensation, and funding of competent counsel in state capital postconviction proceedings. To opt in to Chapter 154's expedited federal review, states must request certification of their appointment mechanisms. Under current law, the United States Attorney General is tasked with both promulgating regulations governing certification decisions—the regulations that Plaintiffs are challenging here—and determining whether states have established a qualifying mechanism.

4. The Attorney General promulgated regulations governing certification decisions through the Final Rule in September 2013. Those regulations permit the abridgment of capital habeas review without sufficiently ensuring that timely appointed, competent, and adequately resourced counsel is actually being provided to capital defendants in state postconviction proceedings. The regulations create a procedurally and substantively inadequate procedure by which the Attorney General may certify the adequacy of a state's mechanism for appointing counsel with little public input and few constraints on his discretion. The Attorney General has now been considering the application for certification of the State of Arizona for at least 22 months and as long as six-and-a-half years,[2] with

[2] The Department announced that it was commencing consideration of Arizona's application in November 2017. However, that application was initially submitted by Arizona in March 2013 and the Department indicated at the time that it would commence review even before the September 2013 publication of the Final Rule. *See* Ex. F, Letter from Alexa Chappell, Intergovernmental Liaison, U.S. Dep't of Justice, to Tom Horne, Att'y Gen. of Ariz. (July 16, 2013).

only short periods of public comment and minimal insight into the decision making process. The certification of Arizona would permit the limitation of capital habeas review of proceedings in that state notwithstanding serious issues with the appointment process in practice. The individual Plaintiffs and other individuals that have been sentenced to death in Arizona and have sought or will seek habeas review face significant impediments to review if Chapter 154's provisions apply to their cases. Those potential impediments include abbreviated time frames for filing and litigating petitions, which may necessitate abandonment of potential arguments for lack of proper time to investigate; the potential for being time-barred from filing petitions at all that would have been timely but for the certification of Arizona suddenly changing the deadlines; curtailment of their ability to amend petitions; and limitations on the availability of stays of execution from the federal courts.

BACKGROUND

5. In the late 1980s, retired Associate Supreme Court Justice Lewis Powell led a committee that examined how to pursue a desire for more expeditious federal habeas review while mindful of the "pressing need for qualified counsel to represent inmates in [state] collateral review" of capital cases. Judicial Conference of the United States, Ad Hoc Comm. on Fed. Habeas Corpus in Capital Cases Committee Report (1989) (reprinted in 135 Cong. Rec. S13471-04, S13482 (Oct. 16, 1989)) ("Powell Committee Report"). Recognizing the tension between the critical need to ensure the quality of state postconviction representation and the goal of faster and more efficient federal habeas review, the Powell Committee Report recommended a compromise, abridging federal habeas review only when states affirmatively guarantee the provision of timely appointed, competent, and adequately resourced counsel for state postconviction proceedings.

6. In 1996, Congress acted on the Powell Committee's recommendation to provide a "quid pro quo arrangement under which states are accorded stronger

finality rules on federal habeas review in return for strengthening the right to counsel for indigent capital defendants." House Comm. on the Judiciary, Effective Death Penalty Act of 1995, H.R. Rep. No. 104-23, at 16 (1995). To that end, the Antiterrorism and Effective Death Penalty Act ("AEDPA") added Chapter 154 to Title 28 of the United States Code. Chapter 154 established curtailed federal habeas review of capital sentences only for states that guaranteed timely appointed, adequately compensated, and competent counsel and provide those counsel with the necessary resources to fully investigate and raise a defendant's potentially meritorious claims in state court.

7. Chapter 154 provides that once a state is certified to have established a satisfactory mechanism to appoint competent postconviction counsel—and if counsel is appointed pursuant to that mechanism—the statute of limitations for later federal habeas proceedings is significantly shortened, the proceedings are greatly expedited, and judicial review of state judgments is sharply curtailed.

8. This suit challenges the Department of Justice's regulations implementing Chapter 154. As detailed below, the regulations enacted through the September 2013 Final Rule do not ensure that a state provides timely appointed, competent, and adequately resourced counsel to capital defendants in state postconviction proceedings. The regulations create a procedurally and substantively inadequate procedure by which the Attorney General may certify the adequacy of a state's mechanism for appointing counsel with little public input and few constraints on his discretion.

9. In a lawsuit initiated by FDO-AZ and the Habeas Corpus Resource Center following the publication of the Final Rule, the District Court for the Northern District of California issued a temporary restraining order, preliminary injunction, and summary judgment against the Final Rule's taking effect due to the significant procedural and substantive deficiencies in the regulations and in the rulemaking process. However, the Ninth Circuit vacated the lower court's decision because

the panel determined that the institutional plaintiffs lacked standing and, in any event, a challenge to the regulations was not ripe before a certification issued.

10. Following the Ninth Circuit's 2016 decision, the regulations went into effect and consideration of the Arizona application is still in progress today. In the meantime, the window for Plaintiffs to challenge the facially deficient regulations is rapidly closing as the default six-year statute of limitations for challenges to the 2013 Final Rule under the APA, 28 U.S.C. § 2401(a), is nearing its end.[3]

11. On November 16, 2017, the Department of Justice published notice of a three-and-a-half-page application for Chapter 154 certification that the State of Arizona had first submitted in 2013.

12. The Department did not institute notice-and-comment rulemaking to consider Arizona's application, but instead provided only a 60-day comment period with a short supplemental comment period following Arizona's submission of additional information. The Department received more than 100 comments on Arizona's application. Not one contended Arizona's mechanism met the Chapter 154 requirements for certification.[4]

13. The regulations create a certification process that suffers a host of procedural and substantive deficiencies that make those regulations "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The Department also violated the APA by failing to provide adequate notice and ensure informed public comment during the rulemaking

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[3] Plaintiffs recognize that the statute of limitations for a claim under the APA generally runs from the publication of a Final Rule, which in this case occurred nearly six years ago. Given the Ninth Circuit's determination that the claims in *HCRC I* were unripe, Plaintiffs would dispute the applicability of the statute of limitations to bar any claim brought following a certification issued more than six years after the publication of the Final Rule, both on equitable grounds and based upon the delayed accrual of their claim. Neverthless, Plaintiffs have made every effort, including filing this complaint, to challenge the Final Rule in a timely fashion.

[4] The group Arizona Voice For Crime Victims submitted a comment in support of certification because certification "would reduce delays in capital cases." The comment contains no argument that Arizona meets any of the requirements for certification.

process.

14. The regulations contain seven procedural defects in the certification process, each of which render the regulations invalid: (1) the regulations erroneously characterize certification decisions as orders rather than rules and do not provide the required notice-and-comment procedures and protections afforded to rulemakings; (2) the regulations require insufficient information from states seeking certification; (3) the regulations improperly shift the burden of proof for certification from applicant states to interested parties; (4) the regulations do not provide actual notice of certification requests to those most directly affected by the certification decisions—death-sentenced prisoners; (5) the regulations do not require the Attorney General to respond to public comments, even if those comments raise significant problems with a state's application, rendering the requirement that the Attorney General "solicit" and "consider" such comments meaningless; (6) the regulations improperly permit ex parte communications between the United States Attorney General and state officials; and (7) the procedures for certification do not address unavoidable conflicts of interest and the appearance of bias.

15. Apart from those procedural deficiencies, the certification process created by the regulations is substantively defective for five reasons, each of which render the regulations invalid: (1) the regulations insufficiently define what constitutes competent counsel and allow certification of a mechanism that meets *none* of the regulatory benchmarks if the Attorney General determines that the state "otherwise reasonably assure[s] a level of proficiency appropriate for State postconviction litigation in capital cases," 28 C.F.R. § 26.22(b)(2); (2) the regulations do not require any finding that a state adheres to whatever mechanism is written, but the idea that the Attorney General may certify a state that is not actually in compliance with its mechanism is wholly irrational; (3) the regulations do not require adherence or deference to prior jurisprudence interpreting Chapter

154's requirements; (4) the regulations improperly fail to provide any procedures or standards for the public to seek decertification of a state when the state changes or abandons its certified appointment mechanism; and (5) the regulations permit unconstitutional retroactive application of certification decisions.

16. Separately from the deficiencies in the regulations enacted via the Final Rule, during the rulemaking process the Department failed to provide adequate notice of the contents of the Final Rule, in violation of 5 U.S.C. §§ 706(2) and 553(b)(3)–(c).

17. This court should enjoin the regulations and order Defendants to correct these deficiencies in any future regulations implementing Chapter 154.

JURISDICTION AND VENUE

18. This Court has jurisdiction over this action and venue is proper in this district under 28 U.S.C. § 1331, 28 U.S.C. § 1391, and 5 U.S.C. § 703.

PARTIES

19. Plaintiff Steve Boggs was convicted of three counts of first-degree murder in Maricopa County Superior Court and was sentenced to death on May 12, 2005. After pursuing a direct appeal and postconviction relief in the Arizona state courts, Plaintiff Boggs filed a petition for writ of habeas corpus in this Court on September 4, 2015. *See Boggs v. Ryan*, No. 14-CV-2165 (Snow, J., presiding). Plaintiff Boggs is currently represented in that habeas proceeding by Plaintiff FDO-AZ.

20. Plaintiff Mike Gallardo was convicted of first-degree murder in Maricopa County Superior Court and was sentenced to death on June 30, 2009. After pursuing a direct appeal and postconviction relief in the Arizona state courts, Plaintiff Gallardo filed a petition for writ of habeas corpus in this Court on April 26, 2019. *See Gallardo v. Ryan*, No. 18-CV-1500 (Logan, J., presiding). Plaintiff

Gallardo is currently represented in that habeas proceeding by Plaintiff FDO-AZ.

21. Plaintiff Rodney Hardy was convicted of two counts of first-degree murder in Maricopa County Superior Court and was sentenced to death on August 20, 2009. After pursuing a direct appeal and postconviction relief in the Arizona state courts, Plaintiff Hardy filed a petition for writ of habeas corpus in this Court on July 12, 2019. *See Hardy v. Ryan*, No. 18-CV-2494 (Tuchi, J., presiding). Plaintiff Hardy is currently represented in that habeas proceeding by Plaintiff FDO-AZ.

22. Plaintiff Alvie Kiles was convicted of three counts of first-degree murder in Yuma County Superior Court and was sentenced to death in 1990. Following vacation of his conviction and sentence, Plaintiff Kiles was again convicted on July 20, 2000. Plaintiff Kiles was sentenced to death on June 13, 2006. After pursuing direct appeal and postconviction relief in the Arizona state courts, Plaintiff Kiles filed a petition for writ of habeas corpus in this Court on September 26, 2018. *See Kiles v. Ryan*, No. 17-CV-4092 (Snow, J., presiding). Plaintiff Kiles is currently represented in that habeas proceeding by Plaintiff FDO-AZ.

23. Plaintiff Pete Rogovich was convicted of four counts of first-degree murder in Maricopa County Superior Court and was sentenced to death on June 9, 1995. After pursuing direct appeal and state postconviction relief,[5] Plaintiff Rogovich filed a petition for habeas corpus in this Court on October 5, 2000 and amended the petition on June 4, 2001. The petition was denied on July 14, 2008, and the Ninth Circuit Court of Appeals affirmed the denial on October 10, 2013. Plaintiff Rogovich filed a petition for writ of certiorari, which was denied by the United States Supreme Court. Plaintiff Rogovich was represented in federal habeas proceedings by Plaintiff FDO-AZ. FDO-AZ's representation continues for

[5] Postconviction counsel for Plaintiff Rogovich was appointed after the 1998 establishment of the appointment mechanism upon which Arizona has based its application for certification.

the purposes of post-habeas and clemency proceedings.

24. Plaintiff Sammantha Allen was convicted of first-degree murder in Maricopa County Superior Court and was sentenced to death on August 8, 2017. Plaintiff Allen is currently pursuing a direct appeal in the Arizona state courts.

25. Plaintiff Johnathan Burns was convicted of first-degree murder in Maricopa County Superior Court and was sentenced to death on February 28, 2011. Plaintiff Burns pursued a direct appeal and then postconviction relief in the Arizona state courts. Plaintiff Burns has filed a petition for review of the denial of postconviction relief.

26. Plaintiff Alan Champagne was convicted of first-degree murder in Maricopa County Superior Court and was sentenced to death on September 7, 2017. Plaintiff Champagne pursued a direct appeal and his conviction was affirmed by the Supreme Court of Arizona on August 7, 2019. Plaintiff Champagne's Motion to Reconsider was filed on August 20, 2019, and was denied on September 6, 2019. Plaintiff Champagne is currently awaiting the appointment of postconviction counsel.

27. Plaintiff Andre Leteve was convicted of two counts of first-degree murder in Maricopa County Superior Court and was sentenced to death on December 19, 2012. Plaintiff Leteve pursued a direct appeal and then postconviction relief in the Arizona state courts. Plaintiff Leteve's postconviction proceeding is still ongoing.

28. Plaintiff Steven Parker was convicted of two counts of first-degree murder in Maricopa County Superior Court and was sentenced to death on May 24, 2010. Plaintiff Parker pursued a direct appeal and then postconviction relief in the Arizona state courts. Plaintiff Parker's postconviction proceeding is still ongoing.

29. Plaintiff Wayne Prince was convicted of first-degree murder in Maricopa County Superior Court and was sentenced to death in 2000. After

vacation of that sentence on appeal and a subsequent mistrial, Plaintiff Prince was convicted of first-degree murder and sentenced to death on January 15, 2009. Plaintiff Prince pursued a second appeal and then postconviction relief in the Arizona state courts. Plaintiff Prince's postconviction proceeding is still ongoing.

30. Plaintiff FDO-AZ is a Federal Defender organization that operates under the authority of the Criminal Justice Act of 1964, 18 U.S.C. § 3006A(g). FDO-AZ provides legal representation to indigent men and women, including those sentenced to death. FDO-AZ represents a significant number of death-sentenced state prisoners in their federal habeas proceedings, including proceedings before this Court. A key mission of FDO-AZ is ensuring the right to the effective assistance of counsel guaranteed by the Sixth Amendment and the Criminal Justice Act.

31. The Defendant Department of Justice is an agency of the Executive Branch of the United States government, within the meaning of 5 U.S.C. § 552(f)(1).

32. Defendant William P. Barr is the United States Attorney General and is head of the United States Department of Justice. The Attorney General is responsible for the Department's compliance with the laws of the United States and corresponding agency regulations, including the laws and regulations at issue in this case.

PLAINTIFFS' INTERESTS IN THE REGULATIONS

33. Plaintiffs have a critical interest in the regulations and the pending decision whether to certify Arizona through the process the regulations create. Plaintiffs Boggs, Gallardo, Hardy, Kiles, Rogovich, Allen, Burns, Champagne, Leteve, Parker, and Prince are individuals who have been sentenced to death by the State of Arizona. The Department's certification of Arizona's mechanism would mean those individuals who have not yet filed their habeas petitions may be faced

with significantly less time to investigate, prepare, and file their federal habeas petitions due to Chapter 154's shortened deadlines and narrowed tolling provisions. Those individuals and prisoners who have already filed their federal habeas petitions may also face limits on their ability to amend their habeas petitions, other limits on the scope of federal review, and limits on stays of execution. The individual Plaintiffs therefore face substantial deprivations of their rights.

34. Plaintiffs Allen and Champagne and other individuals sentenced to death that are currently pursuing direct appeals of their convictions and sentences or have recently concluded direct review may have meritorious arguments relating to their trials that could be raised in a petition for writ of certiorari or in postconviction proceedings, but must be cautious of the possibility that a fulsome preparation of a petition for a writ of certiorari or a petition for postconviction relief could foreclose federal habeas review if the statute of limitations under Chapter 154 runs during that preparatory phase.

35. Plaintiffs Leteve, Parker, and Prince and other individuals sentenced to death that are currently in postconviction proceedings in state court face a potential bar on filing of future habeas petitions should Arizona be certified based upon delays in appointment of postconviction counsel and filing petitions for postconviction relief.

36. Plaintiffs Burns and other individuals sentenced to death that have completed postconviction proceedings and are seeking review in the Arizona Supreme Court must also be concerned about the running of the statute of limitations on future habeas petitions during the course of state proceedings and about the possibility of an abbreviated timeline for filing a federal habeas petition at the conclusion of the state proceedings.

37. Plaintiffs Boggs, Gallardo, Hardy, and Kiles and other individuals sentenced to death that are currently in federal habeas proceedings run the risk

that the rules governing those proceedings, including those related to timing and the ability to amend a petition, will suddenly change midstream if Arizona is certified and state postconviction counsel for those individuals was appointed through the approved mechanism.

38. Plaintiff Rogovich and other individuals sentenced to death that have completed federal habeas proceedings may suddenly lose the ability to seek a stay of execution.

39. In each case, there is substantial uncertainty regarding the rules that will govern federal habeas proceedings if and when the state's certification triggers retroactive application of the more restrictive provisions of Chapter 154. The regulations' creation of this uncertainty pending a decision on the State of Arizona's application continuously prejudices the individual Plaintiffs in their preparation and pursuit of their legal remedies and imposes substantial hardship on them and their counsel, including Plaintiff FDO-AZ. Moreover, each individual Plaintiff faces the threat created by the regulations that his or her rights and remedies will change without warning if the Department certifies Arizona and the provisions of Chapter 154 are immediately and retroactively applied to their cases.

40. Plaintiff FDO-AZ represents Arizona capital prisoners, including some of the individual Plaintiffs here, in federal habeas proceedings. The office stands to be severely affected by the Department's certification of Arizona pursuant to the defective regulations. As an initial matter, FDO-AZ expended significant time and resources in submitting numerous extensive comments during the two rounds of rulemaking and in connection with the certification application on behalf of itself, the clients that it represents, and all Arizona death-sentenced prisoners and their attorneys. FDO-AZ currently represents 77 indigent death-row prisoners in their federal habeas or related proceedings, including 51 prisoners sentenced to death by Arizona. If Arizona is certified and the regulations and that certification decision are upheld, it would substantially affect the office. In some cases, Chapter 154 will

shorten the amount of time that defenders have to immediately triage cases and file habeas petitions and it will force defenders to litigate whether cases are subject to Chapter 154's provisions. Given the office's resources, certification will require defenders to redirect resources to litigating the application of the Department's certification decision to individual cases while also preparing habeas petitions on shortened deadlines. Certification will require the office to seek additional resources.

41. Plaintiffs Boggs, Gallardo, Hardy, Kiles, Rogovich, Allen, Burns, Champagne, Leteve, Parker, Prince, and FDO-AZ have additionally been harmed by the Department's failure to consider and respond to comments submitted by them or on their behalf during the comment period that preceded publication of the Final Rule, in violation of the APA provisions governing rulemaking.

STATEMENT OF FACTS

The following facts are relevant to all counts:

PROCEDURAL AND LITIGATION HISTORY

A. History of Chapter 154

42. In 1996, Congress passed the Antiterrorism and Effective Death Penalty Act (AEDPA). Chapter 153 of AEDPA limited federal habeas relief in both capital and non-capital cases. It did so most notably by imposing a one-year statute of limitations for federal habeas petitions and prohibiting relief unless a state court's decision was factually or legally unreasonable or contrary to federal law.

43. Chapter 154 of AEDPA further limits federal habeas review in certain capital cases when a state has created and established a mechanism to guarantee the provision of timely appointed, competent, and adequately resourced counsel for indigent prisoners in state postconviction proceedings. Chapter 154 was enacted largely in response to the Powell Committee Report that highlighted the

need to balance expeditious federal habeas review in capital cases with the "pressing need for qualified counsel to represent inmates in [state] collateral review" of capital convictions. Powell Committee Report at S13482.

44. When Chapter 154 applies, federal habeas review is abridged in significant ways. The statute of limitations for filing a habeas petition in federal court is cut in half—from one year to 180 days. 28 U.S.C. § 2263(a). The 180-day deadline may be tolled in limited circumstances. Chapter 154 also expressly limits a petitioner's ability to raise procedurally defaulted claims and strictly limits a petitioner's ability to amend his or her habeas petition and to obtain a stay of execution from a federal court. 28 U.S.C. § 2264(a); 28 U.S.C. § 2266(b)(3)(B); 28 U.S.C. § 2262(c).

45. Apart from the effect on habeas petitioners, Chapter 154 places additional burdens on the judiciary. Under the chapter, a federal district court must enter final judgment on a habeas petition either within 450 days of the filing of the petition or 60 days after it is submitted for decision—whichever is earlier. 28 U.S.C. § 2266(b)(1)(A). A federal court of appeals must then hear and render a final determination of any appeal brought under Chapter 154 not later than 120 days after the filing date of the appellant's reply brief or, if no reply is filed, the appellee's answering brief. 28 U.S.C. § 2266(c)(1)(A).

46. Until 2005, federal district courts decided whether a state appointment mechanism met the Chapter 154 requirements for appointing, compensating, and paying reasonable expenses of competent counsel. The courts uniformly found that states either did not have such a mechanism or had failed to appoint counsel pursuant to the designated mechanism. *See* Casey C. Kannenberg, *Wading Through the Morass of Modern Federal Habeas Review of State Capital Prisoners' Claims*, 28 Quinnipiac L. Rev. 107, 130–38 (2009) (collecting cases).

47. The 2005 USA PATRIOT Improvement and Reauthorization Act of 2005 ("Patriot Act") amended Chapter 154 to vest the United States Attorney

General with authority to determine a state's compliance with Chapter 154's requirements and further required the Department of Justice to promulgate regulations to govern the certification process. The amended Chapter 154 directs the Attorney General, upon request by an appropriate State official, to determine "whether the State has established a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State postconviction proceedings brought by indigent prisoners who have been sentenced to death." 28 U.S.C. § 2265(a)(1)(A). The amended Chapter 154 further requires the Attorney General to determine the date on which that mechanism was established, *id.* § 2265(a)(1)(B), and provides that the date the mechanism for appointment of counsel was established "shall be the effective date of the certification under this subsection," *id.* § 2265(a)(2).

48. The amended Chapter 154 requires the Attorney General to promulgate regulations to govern certification determinations. *Id.* § 2265(b).

B. <u>2007-2008 Rulemaking</u>

49. The Department first published proposed regulations to govern certification determinations in 2007. *See* Certification Process for State Capital Counsel Systems, Notice of Proposed Rulemaking, 72 Fed. Reg. 31,217 (June 6, 2007). Numerous commenters challenged the regulations' substance during the rulemaking. They pointed out, for instance, that the proposed regulations failed to adequately define key terms, failed to provide adequate notice to interested parties, failed to assure that states actually provide competent and adequately resourced counsel to death-sentenced prisoners, failed to put states to their burden to demonstrate compliance with Chapter 154's requirements, and failed to incorporate existing judicial interpretations of Chapter 154, among other serious defects.

50. On May 27, 2008, the Habeas Corpus Resource Center ("HCRC"), an agency of the Judicial Branch of the State of California that provides legal

representation to indigent capital prisoners in federal habeas proceedings, sued the Department and the Attorney General in the Northern District of California, seeking to enjoin the implementation of the regulations and asserting claims under the APA and the Freedom of Information Act based upon the failure to respond to record requests and the resulting deprivation of notice and an opportunity to meaningfully participate in the rulemaking process. Compl., *Habeas Corpus Resource Ctr. v. U.S. Dep't of Justice*, No. 08-cv-2649 (N.D. Cal. May 27, 2008).

51. The Department published the final regulations while the lawsuit was pending, on December 11, 2008. Shortly thereafter, HCRC amended its complaint to also address the final regulations, alleging, among other things, that the regulations violated the Constitution and APA. First Am. Compl., *Habeas Corpus Resource Ctr. v. U.S. Dep't of Justice*, No. 08-cv-2649 (N.D. Cal. Dec. 23, 2008).

52. In January 2009, the district court granted a preliminary injunction prohibiting enforcement of the regulations without the Department's first providing an additional comment period of at least thirty days and publishing a response to any comments received during such period. *See Habeas Corpus Resource Ctr. v. U.S. Dep't of Justice*, Case No. 08-cv-02649, 2009 WL 185423, at *10 (N.D. Cal. Jan. 20, 2009).

53. After entry of the preliminary injunction, the Department held a second public comment period on the regulations. The Department subsequently proposed in May 2010 to withdraw the regulations altogether pending a new rulemaking process and ultimately published a final rule withdrawing the regulations. 75 Fed. Reg. 71,353 (Nov. 23, 2010).

C. <u>2011-2013 Rulemaking</u>

54. On March 3, 2011, the Department published a new notice of proposed rulemaking for the certification regulations. 76 Fed. Reg. 11,705.

55. The notice provided a sixty-day public comment period from March 3, 2011, to June 1, 2011. During that time, FDO-AZ and numerous others submitted

voluminous written comments detailing the myriad significant deficiencies with the proposed regulations. FDO-AZ submitted its comments on behalf of itself, its clients, individuals on death row in Arizona, and those who may become clients of FDO-AZ, including individual Plaintiffs in this suit. *See* Ex. A, Letter from Jon Sands, Federal Public Defender, to DOJ Regulations Docket Clerk (June 1, 2011) at 2. The commented-on deficiencies included those alleged in this complaint. *See id.*; *see also* Ex. B, Letter from HCRC to DOJ Regulations Docket Clerk (June 1, 2011) (making similar critiques).

56. On February 13, 2012, the Department published a supplemental notice, soliciting additional comments on five potential changes to the proposed rule, including changes related to competency standards for counsel, the requirement of timely appointments, and the renewal of certifications. 77 Fed. Reg. 7559. FDO-AZ and others commented on the supplemental notice, raising issues, including those alleged in this complaint, regarding the woeful deficiencies in these and other aspects of the proposed regulations. Ex. C, Letter from Jon Sands, Federal Public Defender, to DOJ Regulations Docket Clerk (Mar. 14, 2012); *see also* Ex. D, Letter from HCRC to DOJ Regulations Docket Clerk (Mar. 14, 2012).

57. Prior to the publication of the final regulations in the spring of 2013, Arizona and Texas submitted applications for Chapter 154 certification. The Arizona application consisted of a three-and-a-half-page letter from the state's Attorney General, which purported to outline Arizona's procedures for appointing counsel in postconviction proceedings. FDO-AZ learned of this submission through a press release and promptly requested notice of any further communications between Arizona and the Department. Ex. E, Letter from Dale A. Baich, Supervisor, Office of the Fed. Pub. Def. for the Dist. of Ariz., to Eric H. Holder, Jr., Att'y Gen. of the United States (June 4, 2013). Nonetheless, the Department responded privately to Arizona on July 16, 2013, stating in an ex parte

letter that it would begin reviewing the state's application immediately to "help speed up the ultimate determination of the certification," despite the fact that the rulemaking process was still ongoing and the Final Rule establishing application procedures had not issued. Ex. F, Letter from Alexa Chappell, Intergovernmental Liaison, U.S. Dep't of Justice, to Tom Horne, Att'y Gen. of Ariz. (July 16, 2013).

58. On September 23, 2013, after years of failed attempts to create valid implementing regulations, the Department published the final regulations, dismissing or simply ignoring most of the serious issues raised with the proposed rule in both rounds of public comment. *See* 78 Fed. Reg. 58,160. In the Final Rule, the Attorney General revealed for the first time that he intended to treat certification decisions as orders not subject to the APA's rulemaking provisions. 78 Fed. Reg. 58,160, 58,174 (dismissing comments regarding inadequacy of procedure because "the Attorney General's certifications under chapter 154 are orders rather than rules for purposes of the Administrative Procedure Act (APA)"); *cf.* Proposed Rule, Certification Process for State Capital Counsel Systems, 76 Fed. Reg. 11,705 (Mar. 3, 2011); Supplemental Notice of Proposed Rulemaking, Certification Process for State Capital Counsel Systems, 77 Fed. Reg. 7559 (Feb. 13, 2012). The publication of the Final Rule marked the conclusion of the Department's administrative process establishing the capital counsel certification regime.

59. As relevant to this action, the regulations provide the following standards for certifying whether a state mechanism for appointment of postconviction counsel meets the Chapter 154 requirements:

> **28 C.F.R. § 26.22 Requirements.**
>
> The Attorney General will certify that a State meets the requirements for certification under 28 U.S.C. 2261 and 2265 if the Attorney General determines that the State has established a mechanism for the appointment of counsel for indigent prisoners under sentence of death in State postconviction proceedings that satisfies the following standards:

(a) As provided in 28 U.S.C. 2261(c) and (d), the mechanism must offer to all such prisoners postconviction counsel, who may not be counsel who previously represented the prisoner at trial unless the prisoner and counsel expressly requested continued representation, and the mechanism must provide for the entry of an order by a court of record—

(1) Appointing one or more attorneys as counsel to represent the prisoner upon a finding that the prisoner is indigent and accepted the offer or is unable competently to decide whether to accept or reject the offer;

(2) Finding, after a hearing if necessary, that the prisoner rejected the offer of counsel and made the decision with an understanding of its legal consequences; or

(3) Denying the appointment of counsel, upon a finding that the prisoner is not indigent.

(b) The mechanism must provide for appointment of competent counsel as defined in State standards of competency for such appointments.

(1) A State's standards of competency are presumptively adequate if they meet or exceed either of the following criteria:

(i) Appointment of counsel who have been admitted to the bar for at least five years and have at least three years of postconviction litigation experience. But a court, for good cause, may appoint other counsel whose background, knowledge, or experience would otherwise enable them to properly represent the petitioner, with due consideration of the seriousness of the penalty and the unique and complex nature of the litigation; or

(ii) Appointment of counsel meeting qualification standards established in conformity with 42 U.S.C. 14163(e)(1) and (2)(A), if the requirements of 42 U.S.C. 14163(e)(2)(B), (D), and (E) are also satisfied.

(2) Competency standards not satisfying the benchmark criteria in paragraph (b)(1) of this section will be deemed adequate only if they otherwise reasonably assure a level of proficiency appropriate for State postconviction litigation in capital cases.

. . .

60. The regulations further set forth a procedure for certification of state capital counsel mechanisms:

28 C.F.R. § 26.23 Certification process.

(a) An appropriate State official may request in writing that the Attorney General determine whether the State meets the requirements for certification under § 26.22 of this subpart.

(b) Upon receipt of a State's request for certification, the Attorney General will make the request publicly available on the Internet (including any supporting materials included in the request) and publish a notice in the FEDERAL REGISTER—

(1) Indicating that the State has requested certification;

(2) Identifying the Internet address at which the public may view the State's request for certification; and

(3) Soliciting public comment on the request.

(c) The State's request will be reviewed by the Attorney General. The review will include consideration of timely public comments received in response to the FEDERAL REGISTER notice under paragraph (b) of this section, or any subsequent notice the Attorney General may publish providing a further opportunity for comment. The certification will be published in the FEDERAL REGISTER if certification is granted. The certification will include a determination of the date the capital counsel mechanism qualifying the State for certification was established.

(d) A certification by the Attorney General reflects the Attorney General's determination that the State capital counsel mechanism reviewed under paragraph (c) of this section satisfies

> chapter 154's requirements. A State may request a new certification by the Attorney General to ensure the continued applicability of chapter 154 to cases in which State postconviction proceedings occur after a change or alleged change in the State's certified capital counsel mechanism. Changes in a State's capital counsel mechanism do not affect the applicability of chapter 154 in any case in which a mechanism certified by the Attorney General existed throughout State postconviction proceedings in the case.
>
> (e) A certification remains effective for a period of five years after the completion of the certification process by the Attorney General and any related judicial review. If a State requests re-certification at or before the end of that five-year period, the certification remains effective for an additional period extending until the completion of the re-certification process by the Attorney General and any related judicial review.

D. <u>The Northern District of California Litigation</u>

61. On September 30, 2013, FDO-AZ and HCRC brought a new action in the Northern District of California to set aside the final regulations based upon violations of the APA and the United States Constitution, arguing that the regulations were arbitrary and capricious, were promulgated in violation of the APA, and were unconstitutional. Compl., *Habeas Corpus Res. Ctr. v. U.S. Dep't of Justice,* No. C 13-4517 CW (N.D. Cal. Sept. 30, 2013). The district court granted a temporary restraining order and, subsequently, a preliminary injunction enjoining the final regulations' taking effect, finding that the plaintiffs were likely to succeed on the merits of their complaint and would suffer irreparable harm absent preliminary relief. Order Granting Pls.' Appl. for TRO, *Habeas Corpus Res. Ctr. v. U.S. Dep't of Justice*, No. C 13-4517 CW, 2013 WL 5692031 (N.D. Cal. Oct. 18, 2013); Order Granting Prelim. Inj., *Habeas Corpus Res. Ctr. v. U.S. Dep't of Justice*, No. C 13-4517 CW, 2013 WL 6326618 (N.D. Cal. Dec. 4, 2013).

62. On August 7, 2014, the district court granted in part the plaintiffs' motion for summary judgment permanently enjoining the Final Rule and ordering

that the "[d]efendants must remedy the defects identified in this order in any future efforts to implement the procedure prescribed under chapter 154." *Habeas Corpus Res. Ctr. v. U.S. Dep't of Justice*, No. C 13-4517 CW, 2014 WL 3908220, at *13 (N.D. Cal. Aug. 7, 2014) ("*HCRC I*"), *vacated and remanded*, 816 F.3d 1241 (9th Cir. 2016) ("*HCRC II*"), *cert. denied*, 137 S. Ct. 1338 (2017).

63. The Department appealed to the United States Court of Appeals for the Ninth Circuit. A panel of the Ninth Circuit vacated the district court's decision after finding that the dispute was not justiciable. The court reasoned that the plaintiffs lacked standing to challenge the regulations and, in the absence of an actual certification decision, the claims were not yet ripe. *See Habeas Corpus Resource Ctr. v. U.S. Dep't of Justice*, 816 F.3d 1241 (9th Cir. 2016). The panel did not address the merits of the district court's opinion striking down the regulations. On January 27, 2017, the United States Supreme Court denied the plaintiffs' motion to stay the Ninth Circuit mandate, thereby allowing the regulations to take effect. The Supreme Court denied certiorari on March 20, 2017.

PENDING CAPITAL COUNSEL CERTIFICATION APPLICATIONS

E. The State of Arizona's Certification Application

64. In March and April 2013, Arizona and Texas became the first states in the nation to apply for Chapter 154 certification. In November 2017, the Department publicly announced that it was processing Arizona and Texas's applications for certification under the final regulations. That certification process has been highly irregular and confirms many of the regulatory deficiencies found by the district court and described further below.

65. The Department published notice of Arizona's application on November 16, 2017, beginning a sixty-day period for public comment. 82 Fed. Reg. 53,529. The application is the same one that Arizona first filed prematurely on April 18, 2013—a mostly cursory, three-and-a-half-page letter that the Arizona Attorney General did not renew or update prior to its 2017 publication by the

Department. Simultaneous with publishing Arizona's application, the Department sent a letter to the Arizona Attorney General asking that he "confirm that the materials [Arizona] previously submitted are still current." Ex. G, Letter from Stephen E. Boyd, Ass't Att'y Gen., Office of Leg. Affairs, U.S. Dep't of Justice to Hon. Mark Brnovich, Att'y Gen., Ariz. (Nov. 16, 2017). The Department asked Arizona to respond within 30 days. *Id.* FDO-AZ was not copied on this letter, and the Department did not disclose the letter on its public website until November 28, 2017—twelve days into the sixty-day comment period.

66. On November 21, 2017, FDO-AZ requested that the Department (1) extend the comment period by 120 days to a total of 180 days, (2) follow notice-and-comment rulemaking procedures, (3) provide procedural protections consistent with other administrative decisions reviewable under the Hobbs Act, and (4) disclose all information on which the Department was relying in evaluating Arizona's application. *See* Ex. H, Letter from Elizabeth R. Moulton, Att'y for Office of the Fed. Pub. Def. for D. of Ariz. to Laurence Rothenberg, Office of Legal Policy, Dep't of Justice (Nov. 21, 2017).

67. Arizona responded to the Department's November 16 letter and acknowledged that "Arizona's system for providing postconviction counsel in capital cases" had undergone "a few minor changes" since the state's 2013 application. Ex. I, Letter from Lacey Stover Gard, Chief Counsel, Capital Litigation Section, Office of Ariz. Att'y Gen., to Stephen E. Boyd, Ass't Att'y Gen., Office of Leg. Affairs, U.S. Dep't of Justice (Nov. 27, 2017). However, the original application had inaccurately described Arizona's then-current mechanism and the 2017 update inaccurately characterized the changes in Arizona's mechanism over time. The Arizona Attorney General's Office provided a courtesy copy of its letter to FDO-AZ on the same day, but the Department did not publish the letter for public review for several weeks.

68. On December 18, 2017, FDO-AZ sent a second letter to the

Department, again requesting an extension of time for comments. Ex. J, Letter from Elizabeth R. Moulton, Att'y for Office of the Fed. Pub. Def. for D. of Ariz. to Laurence Rothenberg, Office of Legal Policy, U.S. Dep't of Justice (Dec. 18, 2017). FDO-AZ pointed out that the public needed time to comment on Arizona's yet-to-be-published supplemental letter and the important changes in Arizona's mechanism revealed in the letter. *Id.*

69. On December 21, 2017, the Department finally published Arizona's supplemental letter. On December 27, 2017, the Department extended the comment period by forty days to February 26, 2018—a substantially shorter extension than FDO-AZ had requested. *See* 82 Fed. Reg. 61,329.

70. On February 22, 2018, FDO-AZ submitted its comment opposing the state's application. Ex. K, FDO-AZ Comment Opposing Arizona's Application (Feb. 22, 2018). Considering the state's failure to provide accurate and comprehensive information about Arizona's mechanism for appointing capital postconviction counsel, FDO-AZ undertook the burden of investigating that mechanism and explaining why it failed to meet the Chapter 154 certification requirements. FDO-AZ was required to review the changes to Arizona's mechanism from 1998 to 2018, request public records regarding the process for screening and appointing postconviction attorneys, and investigate the work of postconviction attorneys, among other efforts. FDO-AZ's investigation revealed serious and compelling inadequacies in Arizona's appointment mechanism.

71. Given the concerns that FDO-AZ and others raised, the Department requested that the Arizona Attorney General's Office provide additional information in support of its application. *See* Ex. L, Letter from Jessica Hart, Office of Legislative Affairs, Intergovernmental Affairs and Public Liaison, Dep't of Justice, to Hon. Mark Brnovich, Attorney General, Office of Ariz. Att'y Gen. (June 29, 2018).

72. On October 16, 2018, the Arizona Attorney General's Office submitted an 11-page letter with mostly cursory assertions that did not meaningfully dispute

any of the facts painstakingly detailed in those comments. Ex. M Letter from Lacey Stover Gard, Chief Counsel, Capital Litigation Section, Office of Ariz. Att'y Gen., to Jessica Hart, Office of Legislative Affairs, Intergovernmental Affairs and Public Liaison, Dep't of Justice (Oct. 16, 2018).

73. The Department announced a new six-week period for public comment regarding the supplemental information provided by the Arizona Attorney General's Office. 83 Fed. Reg. 58,786 (Nov. 21, 2018).

74. FDO-AZ then submitted a supplemental comment responding to Arizona's letter and explaining why certification remained inappropriate. Ex. N, FDO-AZ Supplemental Comment (Jan. 7, 2019).

75. On June 27, 2019, the Department updated its public website regarding the certification process to add correspondence from January 2019 from the Arizona Attorney General providing corrected financial data from Pima County. The website has not been updated since, nor has the Department provided any public update regarding its consideration of Arizona's application for certification. *See* https://www.justice.gov/olp/pending-requests-final-decisions (last visited Sept. 18, 2019). Other than the sporadic posting of communications to the website and short periods of public comment, the Department has provided little information to the public about the status of its consideration of the application, the information it is considering, the factors it deems significant in assessing the application, or its progress toward a determination, all of which underscores the facial deficiencies of the process created by the regulations, discussed in detail below.

F. <u>The State of Texas' Certification Application</u>

76. At the same time that it has been considering the Arizona application, the Department has been evaluating the application from the State of Texas. The most recent document posted to the Department's public website is a letter from the Department to the Texas Attorney General dated June 19, 2018. *Id.*

DEFICIENCIES IN THE REGULATIONS AND CERTIFICATION PROCESS

77. On their face and in practice, the final regulations are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). As a district court has already found, the certification process they create is both procedurally and substantively defective, violating the APA. This Court should set them aside.

G. Defective Certification Process

78. Seven procedural defects in the certification process render the regulations invalid.

79. ***First***, the regulations wrongly characterize certification decisions as orders rather than rules and thus do not provide the notice-and-comment rulemaking procedures and protections required by the APA. That is plainly erroneous. "[A]djudications resolve disputes among specific individuals in specific cases, whereas rulemaking affects the rights of broad classes of unspecified individuals." *Yesler Terrace Cmty. Council v. Cisneros*, 37 F.3d 442, 448 (9th Cir. 1994). As the Northern District of California has already found, "because certification decisions will 'affect[ ] the rights of broad classes' of individuals and impact such persons 'after the [decision] is applied,' … they are more properly characterized as rules rather than orders. Accordingly, certification decisions must comply with all procedural requirements of the APA, including notice regarding the decisions." *HCRC I*, 2014 WL 3908220, at *9. Indeed, "each certification will create a presumption that Chapter 154 applies to the habeas proceedings of every condemned prisoner in the relevant state and accordingly affects the litigation strategy of each of those individuals." *Id.* A certification decision therefore requires notice-and-comment rulemaking.

80. ***Second***, the regulations require insufficient information from states seeking certification. That deprives the public of the ability to make informed comments and deprives the Attorney General of essential information needed to

make an informed determination. The regulations only require a state seeking certification to submit a "request in writing that the Attorney General determine whether the State meets the requirements for certification." 28 C.F.R. § 26.23(a). The state is not required to submit any information in support of the application, nor is it required to take any affirmative steps to prove eligibility for certification, such as comparing its mechanism to the benchmarks provided in the regulations or providing any relevant facts about the timely appointment of counsel, state competency standards, compensation, payment of litigation expenses, and the functioning of those required features in practice. *See HCRC I*, 2014 WL 3908220, at *9 (finding "the rule as written requires only a barebones request" and does not require a state "submit data demonstrating its record of compliance with its mechanism" nor "demonstrate that its procedures are adequate"). And the Department has not offered any rational explanation for why it failed to require states to make an affirmative and detailed showing of how their mechanisms meet the individual requirements for certification to enable the Attorney General to determine whether the state mechanisms in fact satisfy the standards of Chapter 154. By permitting applications without adequate content, the regulations are arbitrary and capricious because they "entirely fail[] to consider an important aspect of the problem," *id.* (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29 (1983)), i.e., how to provide for effective public comment and reasoned decision making.

81. ***Third***, by failing to require the state to show that it complies with Chapter 154's requirements, the regulations improperly shift the burden of proof to interested parties to independently investigate, present the Department with relevant information about a state's appointment mechanism, and demonstrate that the State has not met Chapter 154's requirements. This is contrary to the structure, history, and purpose of Chapter 154. *See HCRC I*, 2014 WL 3908220, at *9 (noting that without data from applicant states, "the burden will necessarily

fall on the public's comments"). A state applying for certification must bear the burden of demonstrating that it meets the statute's requirements, as Congress clearly intended, but the regulations improperly leave it to the public to demonstrate that the state does not.

82. ***Fourth***, the regulations do not provide actual notice to those most directly affected by the certification decisions—death-sentenced prisoners. "[P]arties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004). The regulations require publication of a state's application in the Federal Register and on the internet, but many death-sentenced prisoners have no access, or no timely access, to the Federal Register or internet. For instance, Arizona death-row prisoners have no access to the internet and "[t]he Federal Register is not provided or made available to inmates." Ex. O, Email from Arizona Dep't of Corrections to Elizabeth Moulton, Att'y for FDO-AZ (Nov. 24, 2017). If prisoners would like to comment, they must rely on "a family member, friend or an outside vendor" to notify them, provide them with relevant materials, and then submit comments on their behalf. *Id.* The regulations' failure to ensure notice to death-sentenced prisoners is unlawful, arbitrary, and capricious.

83. ***Fifth***, the regulations do not require the Attorney General to respond to public comments, even if they raise significant problems with a state's application. Nor do the regulations require the Attorney General to explain his certification decisions. That makes meaningless the requirement that he "solicit" and "consider" public comments, *see* 28 C.F.R. §§ 26.23(b)(3), (c), and it prevents a reviewing court from determining whether the Attorney General adequately considered comments received. At bottom, the Attorney General is free under the regulations to arbitrarily disregard relevant comments without explanation, thus depriving the public of its right to understand the basis for agency action affecting important legal rights and further frustrating a reviewing court's ability to evaluate

the Attorney General's decisions.

84. ***Sixth***, the regulations improperly permit ex parte communications between the United States Attorney General and state officials. In the Arizona certification proceedings for instance, the Department has engaged in repeated ex parte communications with state officials without timely notice to the public of the fact of those communications or their contents. That practice violates the principle that the public must be fairly apprised of issues before an agency and it violates fundamental notions of fairness.[6] In connection with the Northern District of California litigation, the Department's primary defense regarding the Arizona ex parte communications was based on its erroneous belief that certifications are adjudications and not rulemakings. Opening Br., *Habeas Corpus Res. Ctr. v. U.S. Dep't of Justice*, No. CR14-16928 (9th Cir. Feb. 11, 2015), at 48. As explained above, that is incorrect. And as the court in *HCRC I* stated, "ex parte communications severely interfere with the public's ability to make informed comment on any application for certification." 2014 WL 3908220, at *13.

85. ***Seventh***, the procedures for certification do not address unavoidable conflicts of interest and the appearance of bias. As the chief law enforcement officer for the United States Government, the Attorney General enforces the law of the United States; defends against challenges to federal criminal prosecutions; regularly cooperates with, and provides training, funding, and support for, local law enforcement; and participates directly in joint law enforcement operations with the states. Nevertheless, guidance from the Attorney General dictates that prior to making a certification decision the Department "consult with relevant components, including . . . the Capital Case Section of the Criminal Division." Ex. P, Office of the Att'y Gen., Memo. for the Acting Ass't Att'y Gen, Office of Legal Policy,

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[6] In addition, the regulations require publication only of certification grants, not denials. *See* 28 C.F.R. § 26.23(c). Accordingly, interested parties are left uninformed as to when and why states are being denied certification and how the Department and Attorney General are assessing qualification for certification.

Guidance for Certification of State Capital Counsel Mechanisms (Aug. 22, 2017). No such consultation is required with federal defenders. Given that, the Attorney General's decision making regarding certification inherently involves the risk of bias and the appearance of bias. By failing to protect against or even address that risk, the regulations violate the APA and conflict with the regulations governing the Executive Branch's ethical conduct, 5 C.F.R. §§ 2635.101, 2635.502.

H. <u>Substantively Defective Certification Standards</u>

86. The regulations are also invalid insofar as they establish substantively defective certification standards.

87. ***First***, the regulations insufficiently define what constitutes competent counsel, and they provide the Attorney General with unchanneled discretion to make that determination. Although the regulations describe some concrete benchmarks for when a state's mechanism adequately assures the appointment of competent counsel, the regulations then allow certification of a mechanism that meets *none* of those benchmarks if the Attorney General determines that the state "otherwise reasonably assure[s] a level of proficiency appropriate for State postconviction litigation in capital cases." 28 C.F.R. § 26.22(b)(2). That catch-all provision eviscerates the objective benchmarks and permits entirely subjective certification decisions based solely upon the Attorney General's assessment of what is reasonable and appropriate. Where no objective decisional standard exists, an agency action is arbitrary and capricious.

88. ***Second***, the regulations wrongly permit certification of a state that has an adequate appointment mechanism on paper but does not actually comply with that mechanism in practice. The regulations do not require any finding that a state adheres to whatever mechanism is written. The idea that the Attorney General may certify a state that is not actually in compliance with its mechanism is wholly irrational. That is because Chapter 154 requires that a state mechanism be "established" to qualify for certification, 28 U.S.C. § 2265(a)(1)(A), and a

mechanism cannot be established unless it is actually followed in practice. As the court correctly concluded in *HCRC I*, in order for the Attorney General to certify a state for Chapter 154 purposes, "[c]ommon sense requires that a state must actually comply with its own mechanism, and the history, purpose and exhaustive judicial interpretation of chapter 154 also support this view." 2014 WL 3908220, at *10.

89. ***Third***, the regulations do not require adherence or any deference to prior court decisions interpreting Chapter 154's requirements. Yet prior judicial decisions are critical to determining what the statutory standards mean and whether a state meets them. The district court in *HCRC I* agreed, concluding that the Final Rule "does not in any way address how prior judicial decisions will inform individual certification decisions," even though "traditional tools of statutory construction dictate that judicial precedent is a source for giving content to federal standards." *HCRC I*, 2014 WL 3908220, at *12.

90. ***Fourth***, the regulations impermissibly fail to provide any procedures or standards for the public to seek decertification of a state when the state changes or abandons its certified appointment mechanism. A "[s]tate may request a new certification by the Attorney General to ensure the continued applicability of chapter 154 to cases in which State postconviction proceedings occur after a change or alleged change in the State's certified capital counsel mechanism," 28 C.F.R. § 26.23(d), but the regulations provide no other means to review a state's adherence to the mechanisms certified by the Department or to assess whether any change affects its qualification under Chapter 154. Thus, nothing in the regulations prevents a state from requesting certification of a mechanism and then, upon certification, immediately abandoning it. The regulations also provide that certification is valid for five years, at which time a state can request recertification. 28 C.F.R. § 26.23(e). But within that five-year period, the state may change or abandon its mechanism without losing its "certified" status. Moreover, if a state

requests recertification, the regulations provide that the prior certification will remain effective beyond the initial five years "until the completion of the re-certification process by the Attorney General and any related judicial review." 28 C.F.R. § 26.23(e). If Arizona's initial certification process is any indication, this provision could result in a years-long extension during which the state may have changed or abandoned the mechanism initially approved.

91. ***Fifth***, the regulations permit unconstitutional retroactive application of certification decisions. The regulations provide that the Attorney General's certification is to include the date on which the qualifying capital counsel mechanism was established. That may permit retroactive application of Chapter 154's restrictions to prisoners whose state convictions have become final and whose time to file federal habeas petitions has begun to run. Arizona, for instance, requested certification dating to 1998, more than two decades prior to the yet-to-be-made certification decision. Such retroactive application of Chapter 154's federal habeas limitations strips defendants of their ability to pursue federal habeas claims that would otherwise be timely.

I. <u>Defective Rulemaking Process</u>

92. In addition to the deficiencies in the certification process they create, the regulations were themselves enacted through a defective process in which the Department and Attorney General failed to give the public sufficient notice and an opportunity to comment on a crucial aspect of the regulations and the certification decisions that would be made pursuant to them.

93. In the Final Rule, the Attorney General dismissed comments that had been submitted criticizing the adequacy of the certification procedure because he intended to treat certification decisions as orders not subject to the APA's rulemaking provisions. 78 Fed. Reg. 58,160, 58,174 (dismissing comments regarding inadequacy of procedure because "the Attorney General's certifications under chapter 154 are orders rather than rules for purposes of the Administrative

Procedure Act (APA)"). Neither the initial publication of the proposed rule nor the supplemental notice that followed—the two publications to which the public was given the opportunity to respond—contained any such statement of the Attorney General's approach to his decision making regarding certification. *See* Proposed Rule, Certification Process for State Capital Counsel Systems, 76 Fed. Reg. 11, 705 (Mar. 3, 2011); Supplemental Notice of Proposed Rulemaking, Certification Process for State Capital Counsel Systems, 77 Fed. Reg. 7559 (Feb. 13, 2012).

CAUSES OF ACTION

Count I

Procedurally Deficient Certification Process in Violation of Administrative Procedure Act

94. Plaintiffs repeat and reallege paragraphs 1–93.

95. The procedural deficiencies in the regulations deprive the public of a meaningful opportunity to comment and fail to ensure a reliable, fair, and transparent process in making certification determinations.

96. The regulations impermissibly fail to treat certification proceedings as rulemaking, thereby depriving interested parties of notice-and-comment procedures and protections.

97. The regulations impermissibly fail to require states to provide any information or documentation establishing that the State's mechanism for appointment of counsel satisfies the Chapter 154 requirements, thereby depriving affected parties of a meaningful opportunity to comment.

98. The regulations impermissibly shift the burden to the interested parties to demonstrate that the State has not met Chapter 154's requirements.

99. The regulations impermissibly fail to provide notice of certification proceedings to death-row prisoners who will be directly affected, thereby depriving such individuals of the ability to comment.

100. The regulations impermissibly fail to require the Attorney General to respond to relevant public comments.

101. The regulations impermissibly fail to prohibit or address ex parte communications between the Attorney General and state officials.

102. The regulations impermissibly fail to protect against or address conflicts of interest and the appearance of bias in certification proceedings.

103. Defendants' implementation of the regulations violates the Administrative Procedure Act, 5 U.S.C. §§ 553(b)-(c), § 706(2)(A), and constitutes arbitrary and capricious agency action.

Count II

Substantively Deficient Certification Process in Violation of Administrative Procedure Act

104. Plaintiffs repeat and reallege paragraphs 1–103.

105. Defendants have implemented a certification process that fails to provide adequate substantive criteria to guide determinations of whether a state has complied with the requirements of Chapter 154.

106. The regulations impermissibly fail to adequately define standards of competency.

107. The regulations impermissibly fail to require states to demonstrate that they comply with the Chapter 154 requirements in practice.

108. The regulations impermissibly fail to incorporate or sufficiently address prior judicial interpretations of the Chapter 154 requirements.

109. The regulations impermissibly fail to provide any procedure or standards for decertification of a state that changes or abandons a certified mechanism.

110. The regulations impermissibly fail to prohibit or address retroactive application of Chapter 154's federal habeas restrictions.

111. Accordingly, Defendants have violated the Administrative Procedure

Act, 5 U.S.C. § 706(2)(A), and such action constitutes arbitrary and capricious agency action.

Count III

Procedurally Deficient Rulemaking Process in Violation of Administrative Procedure Act

112. Plaintiffs repeat and reallege paragraphs 1–111.

113. During the rulemaking process, Defendants failed to provide adequate notice to interested parties of the contents of the Final Rule. Among other things, Defendants failed to provide notice that the Attorney General does not consider the certification decision a rule subject to the requirements of the Administrative Procedure Act. Additionally, Defendants failed to provide notice that the Attorney General would privately collect information from state attorneys general via ex parte communications to use in making certification decisions.

114. Defendants' failure to provide interested parties with adequate notice during the rulemaking process violates the Administrative Procedure Act, 5 U.S.C. §§ 706(2), 553(b)(3)–(c), and constitutes arbitrary and capricious agency action.

RELIEF REQUESTED

Wherefore, Plaintiffs pray that this Court:

A. Hold unlawful and set aside Defendants' Certification Process for State Capital Counsel Systems, 28 C.F.R. §§ 26.20–26.23, for failing to comply with the requirements of the Administrative Procedure Act as alleged in the Causes of Action above. There exists an actual, present and justiciable controversy between Plaintiffs and Defendants concerning their rights and duties with respect to Defendants' actions described in those causes of action. Furthermore, this controversy is ripe for judicial decision and declaratory relief is necessary and appropriate. 18 U.S.C. §§ 2201, 2202;

B. Order Defendants to remedy the deficiencies alleged in the Causes of

Action above in any future effort to implement the procedure prescribed by Chapter 154;

C. In the alternative, enjoin the enforcement of the regulations until review of the lawfulness of Defendants' actions is completed, 5 U.S.C. § 705;

D. Award Plaintiffs their costs and reasonable attorney's fees incurred in this action, 28 U.S.C. § 2412(d)(1)(A); and

E. Grant such other relief as the Court may deem just and proper.

Dated: September 20, 2019

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