ANDREW S. BIRRELL
President

PUBLIC COMMENT

May 15, 2026

Levi Lall
Office of Legal Policy
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530

Re: Comment on Proposed Rule, *Certification Process for State Capital Counsel Systems*, RIN 1105–AB80, 91 Fed. Reg. 12525 (Mar. 16, 2026)

Dear Regulations Docket Clerk:

Statement of Interest

The National Association of Criminal Defense Lawyers (NACDL) is a professional bar association with many thousands of direct members, and 90 state, provincial, and local affiliate organizations totaling up to 40,000 attorneys, including private criminal defense attorneys, public defenders, military defense counsel, law professors, and judges. NACDL seeks to promote the proper administration of criminal justice, particularly in those cases in which the government seeks to take the life of the accused.

NACDL is deeply concerned about the myriad injustices facing those condemned to death, including the persistent absence of truly competent counsel, chronic underfunding of defense services, the pervasive influence of racial factors in capital charging and sentencing, and the progressive erosion of meaningful federal post-conviction review. In this context, NACDL has serious reservations about the Department of Justice's proposed rule (the "Proposed Rule"), which would remove procedural safeguards from the Chapter 154 certification process that are necessary to ensure states genuinely provide competent counsel with adequate resources before obtaining the benefits of expedited federal habeas review.

NACDL submits these comments to identify specific deficiencies in the Proposed Rule that demonstrate it is not in conformity with the statutory text or intent, controlling precedent, constitutional requirements, and the Administrative Procedure Act ("APA"). The Department's ostensible goal of implementing Chapter 154 in a manner that is faithful to the statutory text is a laudable one. But faithfulness to the statute requires, at a minimum, that the certification process include the definitional clarity, evidentiary rigor, and public accountability that the APA and due process demand. The Proposed Rule does not provide these essential components and should therefore be sent back to the drawing board.

I. THE PROPOSED RULE FAILS TO DEFINE CRITICAL TERMS, RENDERING THE CERTIFICATION STANDARD IMPERMISSIBLY VAGUE AND ARBITRARY

A threshold defect in the Proposed Rule is its failure to define the key statutory terms upon which every certification determination depends. The five terms most critical to a certification decision—"competent counsel," "standards of competency," "mechanism," "reasonable litigation expenses," and "appointment"—are either defined only in circular terms that provide no meaningful guidance or left wholly undefined. Additional terms that have generated substantial litigation under Chapter 154, including "offer," "indigent," and "accepted," are similarly unaddressed. Together, these omissions render the Proposed Rule's certification standard impermissibly vague.[1]

The proposed regulations must include minimum standards and criteria so that the Attorney General's certification determination is fairly applied and is not arbitrary. The APA requires implementing regulations to supply sufficient criteria or definitional content to guide agency action. *See, e.g.*, *Pearson v. Shalala*, 164 F.3d 650, 660 (D.C. Cir. 1999) ("It simply will not do for a government agency to declare—without explanation—that a proposed course of private action is not approved. . .. To refuse to define the criteria it is applying is equivalent to simply saying no without explanation."); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("[T]he agency must . . . articulate a satisfactory explanation for its action . . .."). The failure to define operative terms "invites arbitrary and unequal application" of the statute. *South Terminal Corp. v. EPA*, 504 F.2d 646, 670 (1st Cir. 1974). And where implementing regulations leave regulated parties "utterly without guidance," they violate the APA. *Id.*

A. "Competent Counsel" and "Standards of Competency"

The Proposed Rule defines "competent counsel" to mean simply "counsel meeting state standards of competency." Proposed § 26.21. The Proposed Rule offers no definition of "standards of competency." Thus, the definition of "competent counsel" is circular. It tells neither States seeking certification nor the public what constitutes adequate competency standards. Chapter 154's core statutory bargain—expedited federal review in exchange for genuine access to competent counsel in state postconviction proceedings—is rendered meaningless if "competent counsel" means whatever any state defines it to mean, regardless of how minimal that definition is.

The United States Supreme Court has long looked to American Bar Association guidelines as "guides to determining what is reasonable" for capital counsel performance. *Strickland v. Washington*, 466 U.S. 668, 688 (1984); *see also Wiggins v. Smith*, 539 U.S. 510, 522 (2003); *Rompilla v. Beard*, 545 U.S. 374, 387 (2005). Congress enacted Chapter 154 with the understanding that "[c]entral to the efficacy of this scheme is the development of standards governing the competency of counsel chosen to serve in this specialized and demanding area of

[1] Canons of statutory interpretation require that every clause and word of a statute should be given effect if possible. *See, e.g.*, *United States v. Menasche*, 348 U.S. 528, 538-39 (1995) (citing *Inhabitants of the Township of Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883)). The failure to define critical terms is contrary to the statutory directive to implement the certification procedure.

litigation." Powell Committee Report, 135 Cong. Rec. S13483. By refusing to define or apply any minimum competency standard, the Proposed Rule nullifies Chapter 154's core requirement.

At a minimum, the regulations must specify that competency standards require: (1) experience in capital litigation;[2] (2) experience in post-conviction proceedings;[3] (3) a minimum of five years of general legal experience and three years of postconviction experience in the relevant jurisdiction;[4] (4) a duty to conduct a thorough independent investigation of all potentially meritorious claims;[5] and (5) a duty to identify and present all grounds for relief.[6] The failure to include these elements is particularly troubling given the well-documented history of inadequate state capital post-conviction representation that led Congress to condition the benefits of Chapter 154 on meaningful competency assurances in the first place.

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[2] *See Wright v. Angelone*, 944 F. Supp. 460, 466-67 (E.D. Va. 1996) (holding that Virginia did not qualify for the benefits of Chapter 154 because its 1995 standards of competency would permit an attorney with no experience with capital cases to serve as counsel in state habeas proceedings); ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES (rev. ed. 2003) (hereinafter "ABA Guidelines") §§ 3.1, 5.1(B), 31 HOFSTRA L. REV. 913, 961-62 (2003).

[3] *See Wright*, 944 F. Supp. at 467 (holding that Virginia's standards were inadequate because they did not require state habeas corpus experience); *Austin v. Bell*, 927 F. Supp. 1058, 1062 (D. Tenn. 1996) (finding Tennessee's standards of competency insufficient because "[t]hat an attorney has passed the Tennessee bar examination does not mean that the attorney is competent to handle a habeas petition in a capital case"); *Colvin-El v. Nuth*, No. Civ.A. AW 97-2520, 1998 WL 386403, *6 (D. Md. 1998) (unpublished) (holding that standards that required experience participating in at least two capital cases at the trial level would be insufficient because, "[g]iven the extraordinarily complex body of law and procedure unique to post-conviction review, an attorney must, at a minimum, have some experience in that area before he or she may be deemed 'competent'"); 18 U.S.C. § 3599(d) (determining qualifications necessary to "properly represent" a defendant after judgment requires giving "due consideration to the seriousness of the possible penalty and to the unique and complex nature of the litigation").

[4] *See, e.g.*, 18 U.S.C. § 3599(c) (in federal cases, appointed counsel must have been admitted to practice in the court of appeals for no less than five years and have three years of experience before the appointing court); *Spears v. Stewart*, 283 F.3d 992, 1015 (9th Cir. 2002) (holding the Arizona state mechanism facially compliant with the provisions of Chapter 154 in part because it required at least three years of experience in capital post-conviction or appellate work).

[5] *See* ABA Guidelines § 10.7(A), 31 HOFSTRA L. REV. at 1015 (duties of postconviction counsel include an "obligation to conduct thorough and independent investigation relating to issues of both guilt and penalty"); ABA Guidelines § 10.7, Commentary, 31 HOFSTRA L. REV. at 1021 ("Counsel's duty to investigate and present mitigating evidence is now well established. The duty to investigate exists regardless of the expressed desires of the client."); ABA Guidelines § 10.15.l(E), 31 HOFSTRA L. REV. at 1085 ("[C]ollateral counsel cannot rely on the previously compiled record but must conduct a thorough, independent investigation."); *Wiggins*, 539 U.S. at 524-25 (counsel's failure to comply with the "well-defined norms" for mitigation investigation established in the ABA Guidelines rendered counsel's assistance unreasonable and ineffective).

[6] *See* Powell Committee Report, 135 Cong. Rec. at S13482.

B. "Mechanism" for Appointment, Compensation, and Reasonable Litigation Expenses

The Proposed Rule also fails to define "mechanism" as that term is used in 28 U.S.C. § 2265(a)(1)(A). Decades of judicial decisions interpreting Chapter 154 have given the concept of a qualifying "mechanism" specific and substantial content. *See Tucker v. Catoe*, 221 F.3d 600, 604 (4th Cir. 2000) ("a state must not only enact a 'mechanism' and standards for post-conviction review counsel, but those mechanisms and standards must in fact be complied with before the state may invoke" Chapter 154); *Baker v. Corcoran*, 220 F.3d 276, 286 (4th Cir. 2000) ("[c]ompetency standards are meaningless unless they are actually applied in the appointment process"). The Proposed Rule ignores this body of law entirely and does so without an adequate explanation.

Similarly, "compensation" and "reasonable litigation expenses" must be defined. For example, compensation at a rate so inadequate that no or few qualified attorneys would accept appointment does not satisfy the statute. Expenses that exclude investigators, mitigation specialists, and expert witnesses do not satisfy the statute. The regulations must define these terms with sufficient precision to give the certification standard meaning and to provide interested parties with the information necessary to participate meaningfully in the comment process.

II. THE PROPOSED RULE UNLAWFULLY ELIMINATES THE REQUIREMENT THAT STATES BEAR THE BURDEN OF PROVING ENTITLEMENT TO CHAPTER 154 CERTIFICATION.

The Proposed Rule requires states to do no more than submit a written request to obtain certification. Under Proposed § 26.22(a), an appropriate state official need only "request in writing" that the Attorney General make a determination of whether the State meets certification requirements. Under Proposed § 26.22(c), the Attorney General must make a certification determination within 90 days of receiving a request. No regulatory provision requires states to submit any documentary evidence of compliance, describe the actual operation of their capital counsel mechanisms, or demonstrate that their competency standards are being applied, enforced, or monitored in practice.

This approach is contrary to the basic legal principle that an applicant seeking the benefit of a government program bears the burden of demonstrating entitlement. *See, e.g.*, *Lavine v. Milne*, 424 U.S. 577, 584 (1976) (observing there is a "normal assumption that an applicant is not entitled to benefits unless and until he proves his eligibility"). Courts that adjudicated Chapter 154 certification eligibility before the 2006 amendments consistently held that states bear the burden of making an affirmative, strict showing of compliance. *See Ashmus v. Calderon*, 31 F. Supp. 2d 1175, 1182–83 (N.D. Cal. 1998) ("as the party seeking to obtain the benefit of Chapter 154's expedited review provisions, the burden is properly placed on the state to demonstrate that all of the qualifying procedures have been established" and that it is "entirely the states' decision whether to opt-in—by so choosing the states are properly allocated the burden of proving compliance"); *Satcher v. Netherland*, 944 F. Supp. 1222, 1245 (E.D. Va. 1996) ("strict interpretation" of opt-in requirements "is necessary in order to meaningfully effectuate the quid pro quo arrangement which lies at the core of Chapter 154"); *Zuern v. Tate*, 938 F. Supp. 468, 472 (S.D. Ohio 1996) ("Congress did not write § 2261 in terms of substantial compliance" but instead "mandatory language").

When Congress did not alter the statutory language in 2006, it incorporated these established judicial interpretations. *See Keene Corp. v. United States*, 508 U.S. 200, 212 (1993) (canons of statutory interpretation include the presumption that Congress is aware of prior judicial interpretations and enacts legislation in conformity with them); *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989) (prior judicial interpretations have "special force" in stances of statutory interpretation where Congress leaves statutory language unchanged despite "remain[ing] free to alter" what the courts have done).[7] The primacy of judicial interpretations has taken on additional force in light of the Supreme Court's landmark decision in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 400 (2024), which held that "[i]t therefore makes no sense to speak of a 'permissible' interpretation that is not the one the court, after applying all relevant interpretive tools, concludes is best. In the business of statutory interpretation, if it is not the best, it is not permissible." *Loper Bright* effectively requires the agency to attempt to adopt the best interpretation of the statute possible, and simultaneously "makes clear that agency interpretations of statutes . . . are *not* entitled to deference." *Id.* at 392 (emphasis in original).

Any adequate regulation would at the least require that a state requesting certification submit: (1) a complete description of its capital counsel mechanism, including the statutes, regulations, and court rules that comprise it; (2) documentation demonstrating the actual operation of the mechanism, including data on appointment timing, enforcement of competency standards, compensation rates paid, and litigation expenses provided in relevant cases; (3) a certification by the appropriate state official that the competency standards have been applied in all appointments; and (4) a description of the standards used to determine counsel qualifications. The Attorney General should not grant certification without independently assessing this evidence against the requirements of Chapter 154.

III. THE PROPOSED RULE FAILS TO REQUIRE THAT STATES DEMONSTRATE ACTUAL IMPLEMENTATION OF THEIR CAPITAL COUNSEL MECHANISMS.

Closely related to the burden-of-proof problem is the Proposed Rule's disregard for the distinction between having a capital counsel mechanism on paper and having one that operates in practice as the paper purports. Chapter 154 does not reward states merely for enacting a qualifying statute; it requires a functioning mechanism that in practice provides competent counsel with adequate resources to identify and litigate a capital client's claim fully in postconviction proceedings.

[7] An agency action is invalid under the APA if the agency exceeds its constitutional power by "refusing to recognize the conclusive effect of the judgment [of an Article III court]" and "insisting that it is entitled to decide anew questions decided by the courts." *Town of Deerfield, NY v. FCC,* 992 F.2d 420 429-30 (2nd Cir. 1993); *see also Marine Shale Processors, Inc. v. EPA,* 81 F.3d 1371, 1377 (5th Cir. 1996) (recognizing prohibition on agency action that seeks "to review or alter the decision in the district court, to reverse the district court's findings, or to interfere with the judiciary's ability to issue a binding decision"); *Ma v. Reno,* 208 F.3d 815, 821 n.13 (9th Cir. 2000) (noting that the then-existent usual deference to agency's interpretation of a statute is not owed where the interpretation raises a substantial constitutional question). This basic principle is violated by the proposed regulation's interpretations of Chapter 154 requirements that conflict with controlling judicial decisions.

Courts have consistently held that paper compliance is insufficient. *See Baker*, 220 F.3d at 286 (state's competency standards "are meaningless unless they are actually applied in the appointment process"); *Tucker*, 221 F.3d at 604 ("mechanisms and standards must in fact be complied with"); *Wright*, 944 F. Supp. at 467 (E.D. Va. 1996) ("there is no mechanism built into the standards which assure that appointed counsel meet the specified qualifications"). However, the Proposed Rule provides no mechanism whatsoever for assessing actual implementation. There is no requirement that states submit proof or data addressing how the mechanism has operated. There is no opportunity for review of whether counsel are actually qualified or being compensated adequately. There is no process for evaluating whether litigation expenses provided in practice have been sufficient to allow development of all potentially meritorious claims. And—as discussed below—there is no procedure through which the condemned prisoners most directly affected by these mechanisms can present evidence of their inadequacy.

This gap is particularly significant because the "appropriate state official" responsible for submitting a certification request is typically the state attorney general—a party who, as an advocate for the state in post-conviction and federal habeas proceedings, has an incentive to obtain certification regardless of the mechanism's actual performance. The state attorney general is also often not privy to the confidential funding and appointment decisions that determine whether the mechanism functions adequately in practice.

The Proposed Rule must be amended to require that the certification decision be based on evidence of actual implementation, and that the Attorney General consider data on appointment practices, compensation rates, and litigation expense approvals before making a certification determination.

IV. CHAPTER 154 AND CONTROLLING PRECEDENT REQUIRE TIMELY APPOINTMENT OF COUNSEL; THE PROPOSED RULE'S ELIMINATION OF THAT REQUIREMENT IS UNLAWFUL.

The Proposed Rule rescinds the 2013 Regulations' requirement that counsel be appointed "in a manner that is reasonably timely." The Department argues that this requirement is an extra-statutory addition to Chapter 154 that Congress did not authorize. This argument is wrong for two independent reasons.

A. Timely Appointment Is Required by the Statute Itself

The text of 28 U.S.C. § 2261(c)(1) requires that a qualifying state mechanism provide for "the entry of an order by a court of record . . . appointing one or more attorneys as counsel to represent the prisoner upon a finding that the prisoner is indigent and accepted the offer." The word "upon" necessarily implies promptness—appointment following the acceptance of the offer, not after a delay. Every court to have considered the issue has reached this conclusion. *See, e.g.*, *Ashmus*, 935 F. Supp. 1048, 1074–75 (N.D. Cal. 1996) (rev'd on other grounds) ("[t]he failure to appoint counsel after an indigent prisoner has accepted such an offer contravenes the express requirement of § 2261(c)"; *Hill v. Butterworth*, 941 F. Supp. 1129, 1146 (N.D. Fla. 1996) (rev'd on other grounds) ("any offer of counsel pursuant to Section 2261 must be a meaningful offer. That is, counsel must be immediately appointed after a capital defendant accepts the state's offer of post-conviction counsel"); *Brown v. Puckett*, 2003 WL 21018627, at *3 (N.D. Miss. Mar. 12,

2003) ("[t]he timely appointment of counsel at the conclusion of direct review is an essential requirement in the opt-in structure. Because the abbreviated 180-day statute of limitations begins to run immediately upon the conclusion of direct review, time is of the essence. Without a requirement for the timely appointment of counsel, the system is not in compliance").

In *Ashmus v. Calderon*, 123 F.3d 1199, 1204, 1208 (9th Cir. 1997), *rev'd for lack of a case or controversy*, 523 U.S. 740 (1998), the Ninth Circuit found California non-compliant with Chapter 154 in part because counsel had not been appointed for "over 130 of the condemned California inmates" and "counsel often is not appointed until years after a prisoner accepts the offer of counsel." In *Hall v. Luebbers*, 341 F.3d 706, 712 (8th Cir. 2003), the Eighth Circuit held that Missouri failed to comply because counsel was offered only "after a Rule 29.15 post-conviction relief motion is filed," when "[p]rofessional legal advice may be critical in the early post-conviction relief decisionmaking process."

These prior judicial rulings underscore what is clear from the text itself: counsel must be appointed immediately after the requisite finding that a prisoner is indigent and has accepted the offer of counsel. The Proposed Rule's elimination of a timely-appointment requirement contravenes the statutory text and Congress's intent.

B. Eliminating the Timeliness Requirement Enables States to Subvert Chapter 154's Quid Pro Quo.

Chapter 154 rests on a fundamental bargain: states give prisoners genuine access to competent representation in state post-conviction proceedings; in exchange, federal habeas review is compressed and expedited. A state that nominally offers counsel but does not ensure appointment until after many days have ticked off the federal statute of limitations has not delivered on its side of the bargain. Under the Proposed Rule, however, such a state could obtain Chapter 154 certification and gain all the benefits of expedited federal review while never actually providing counsel in time to fulfill the duties Chapter 154 entails.

The work that must be done by competent counsel in state post-conviction proceedings is time-consuming, complex, and demanding. *See, e.g.*, ABA Guidelines § 1.1, Commentary, 31 HOFSTRA L. REV. at 932-35; *see also id.* at § 5.1, Commentary, 31 HOFSTRA L. REV. at 967 ("Studies have consistently found that defending capital cases requires vastly more time and effort by counsel than noncapital matters."); *id.* § 10-15.1, Commentary, 31 HOFSTRA L. REV. at 1085 ("providing high quality legal representation in collateral review proceedings in capital cases requires enormous amounts of time, energy, and knowledge. The field is increasingly complex and ever-changing."). As noted above, time is of the essence. Considering Congress's intent to promote fair state processes, conditioning the possibility of a truncated 180-day federal statute of limitations for the filing of a habeas petition on the provision of competent state post-conviction counsel only makes sense if counsel is appointed immediately.[8] Delays in appointment could by themselves undermine the ability of a counsel to perform competently.

[8] *See, e.g.*, Michael A. Mello & Donna Duffy, *Suspending Justice: The Unconstitutionality of the Proposed Six-Month Time Limit on the Filing of Habeas Corpus Petitions by State Death Row Inmates*, 18 N.Y.U. REV. L. & SOC. CHANGE 451, 489-96 (1991).

The Proposed Rule argues that Congress prohibited a timeliness requirement through 28 U.S.C. § 2265(a)(3)'s statement that "[t]here are no requirements for certification or for application of this chapter other than those expressly stated in this chapter." But the timeliness requirement flows directly from the statutory text of 28 U.S.C. § 2261(c), as courts have consistently held. It is not an extra-statutory addition; it is the only interpretation of the statute consistent with its text, intent, and purpose. The Proposed Rule must restore the requirement that appointment be reasonably timely.

V. THE PROPOSED RULE'S ELIMINATION OF MANDATORY PUBLIC NOTICE AND COMMENT ON STATE CERTIFICATION APPLICATIONS IS UNLAWFUL AND SHOULD BE REVERSED.

The Proposed Rule eliminates the requirement—maintained in both the 2008 and 2013 Regulations—that the Attorney General publish notice of every state certification request in the Federal Register and receive public comment before making a certification determination. In its place, the Proposed Rule grants the Attorney General unfettered discretion to decide whether any public input is "necessary or helpful" in any given case. This change is both legally and practically indefensible, and NACDL urges the Department to retain mandatory notice and comment for all certification applications.

A. Mandatory Public Notice Is Necessary to Permit Meaningful Participation by Those Most Affected

The persons most directly affected by a state's Chapter 154 certification are the death-sentenced prisoners who are litigating or will litigate in that state's post-conviction system. If a state is certified and its capital counsel mechanism proves inadequate in practice, it is these individuals who bear the consequences in the form of compressed and curtailed federal habeas review. Yet, under the Proposed Rule, these prisoners—who are incarcerated and have no independent ability to meaningfully monitor administrative proceedings—have no guaranteed right to know that a certification request has been filed, much less to submit information regarding the actual operation of the mechanism.

The APA's notice requirements reflect the basic principle that rulemaking and related procedures having general applicability to a class of individuals or interested parties must enable their participation in the process. *See, e.g.*, *American Medical Ass'n v. United States*, 887 F.2d 760, 767 (7th Cir. 1989) (interested persons must be able to "participate in the rulemaking in a meaningful and informed manner"); *Natural Res. Def. Council v. EPA*, 279 F.3d 1180, 1186 (9th Cir.2002) (the test for sufficiency of the notice is whether the notice "fairly apprise[s] interested persons of the subjects and issues before the Agency" (internal quotation omitted)). An agency's failure to make information available to the directly impacted individuals deprives interested parties of relevant information necessary for meaningful public comment. These concerns are especially acute in capital cases, where errors may be irreversible and the stakes could not be higher.

Condemned prisoners and their counsel are frequently the only parties with firsthand knowledge of how a state's capital counsel mechanism actually operates: whether counsel are appointed promptly, whether appointees are genuinely qualified, whether litigation expenses are

provided in practice, and whether the mechanism's formal requirements are enforced or ignored. Federal Register publication of every certification request and a meaningful comment period is the only procedural mechanism that reliably ensures this information reaches the Attorney General before a certification determination is made. The failure to provide for notice and comment violates both the APA and due process.

In addition, the Proposed Rule's denial of any opportunity for condemned prisoners or their counsel to participate in the Attorney General's certification proceeding contravenes Chapter 154 itself. In Chapter 154, Congress authorized de novo review of certification decisions in the D.C. Circuit "as provided under chapter 158 of [title 28]." *See* 28 U.S.C. § 2265(c)(1). Chapter 158 is commonly known as the Hobbs Act. "Under the Hobbs Act, only a 'party' aggrieved by the [relevant] proceeding may seek judicial review." *Nuclear Regulatory Comm'n v. Texas*, 605 U.S. 665, 675 (2025). And to be a "party aggrieved," a person must have participated in the underlying agency proceeding. *Id.* at 675-76. Congress's decision to mandate Hobbs Act review of petitions challenging the Attorney General's certification decisions necessarily means that the Chapter 154 proceedings must be structured so that at "least some persons may acquire party status" to ensure "both that the order will be directly appealable and that the petitioner will present its arguments first to the deciding agency." *Simmons v. ICC*, 716 F.2d 40, 43 (D.C. Cir. 1983) (explaining that "where appropriate" courts will assure that these conditions are satisfied).[9]

The Proposed Rule, however, tries to make it impossible for anyone other than the requesting state to become a party to a Chapter 154 certification proceeding by cutting out notice and comment and claiming[10] that the Attorney General can't revoke or reconsider a certification once it has been granted. But if the requesting state were really the only party to a Chapter 154 proceeding, no one could petition the D.C. Circuit under § 2265(c) for review of the Attorney General's decision to grant a state's request for Chapter 154 certification. This is the opposite of the pre-enforcement review scheme that Congress prescribed. After all, Congress mandated de novo review of certification decisions in the D.C. Circuit—not no review.[11]

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[9] *See also* 28 U.S.C. § 2347(c) (authorizing the reviewing court in a Hobbs Act proceeding to order the agency to take and consider additional evidence if that evidence is material and "there were reasonable grounds for failure to adduce the evidence before the agency").

[10] This claim is badly mistaken. Nothing in the statute commands the extraordinary result that the Attorney General could not, for instance, withdraw a certification if the circumstances that supported the certification were no longer present. Were it otherwise, a state could obtain certification based on a mechanism for appointing and compensating counsel that it later discontinued. And it is no answer for the Department to point to a floor statement from Senator Kyl to support this extra-textual limitation on the Attorney General's authority. *See, e.g.*, *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 457 (2002) ("Floor statements from two Senators cannot amend the clear and unambiguous language of a statute.").

[11] To be clear, as *Simmons* indicates, even if the proposal were finalized as proposed, the D.C. Circuit has tools to ensure that certifications can be challenged under the Hobbs Act. Moreover, Congress's provision of pre-enforcement review of certification decisions in the D.C. Circuit under the Hobbs Act does not limit an individual habeas petitioner's ability to challenge a certification determination when a state seeks to apply that determination against that petitioner. *See McLaughlin Chiropractic Associates, Inv. v. McKesson Corp.*, 606 U.S. 146, 162 (2025) ("The Hobbs Act dictates

Nothing in Chapter 154's text suggests that Congress went to the trouble of requiring de novo Hobbs Act review of the Attorney General's determination "regarding whether to certify a State," if that review would be unavailable any time the Attorney General grants the certification. Indeed, one of the sponsors of the amended version of Chapter 154 pointed to the availability of D.C. Circuit review of the Attorney General's grant as a basis to justify the retroactive effect of Chapter 154 certifications. *See, e.g.*, 151 Cong. Rec. E2640 (Dec. 22, 2005) (statement of Rep. Flake) (explaining that both the "Attorney General and the DC Circuit" would need to "conclude" that a state "met chapter 154 standards"). Moreover, such a conclusion would fly in the face of "the 'strong presumption' in favor of judicial review that [courts] apply when [they] interpret statutes." *Cuozzo Speed Techs., LLC v. Lee*, 579 U.S. 261, 273 (2016).

In sum, the text and structure of Chapter 154 mandate that the Attorney General must use a certification procedure that ensures both that grants of certifications "will be directly appealable" and that interested parties "present [their] argument first" to the Attorney General, and not the D.C. Circuit. *See Simmons*, 716 F.2d at 43.

B. Discretionary Notice Is an Insufficient Substitute for Mandatory Process.

The Proposed Rule's assurance that the Attorney General retains "discretion" to seek public input when "judged necessary or helpful" provides no reliable protection. The Proposed Rule also imposes a 90-day decision clock and is expressly designed to streamline certification. These features create strong institutional pressure to proceed without soliciting public comment. A party that bears no procedural obligation to open a comment period will, in the ordinary course, decline to do so—particularly under time pressure.

Moreover, discretionary notice does nothing for prisoners who are unaware that a certification request has been filed. The 2007 public comment process for the predecessor rule demonstrated that even when notice is published, incarcerated persons face substantial obstacles to participation. Those obstacles are only heightened when notice itself is optional. NACDL therefore urges the Department to amend the Proposed Rule to: (1) retain the mandatory Federal Register publication requirement for every state certification request; (2) provide a public comment period of no fewer than 60 days following publication; (3) require the Attorney General to consider and respond to all substantive comments before issuing a certification determination; and (4) eliminate or amend the 90-day decision rule to be tolled during the period of notice-and-comment and the time it takes for the AG to respond to submitted comments. These requirements add modest procedural burdens while providing the evidentiary foundation necessary for a legally defensible certification decision.

CONCLUSION

The Proposed Rule in its current form falls short of the legal requirements that a valid certification process must satisfy. NACDL therefore urges the Department to amend the Proposed Rule to: (1) define critical statutory terms—including "standards of competency," "mechanism,"

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how, when, and in what court a party can challenge a new agency order before enforcement. The Act does not purport to address, much less preclude, district court review in enforcement proceedings.").

"compensation," "reasonable litigation expenses," and "appointment"—with sufficient specificity to provide a non-arbitrary and reviewable basis for certification decisions; (2) require states to make an affirmative, documented showing of strict compliance with Chapter 154, consistent with controlling judicial precedent establishing that the burden lies with the applicant state; (3) require evidence of actual implementation of the state mechanism, not merely a description of its formal components; (4) restore and enforce the requirement of timely appointment of counsel, which flows directly from the text of 28 U.S.C. § 2261(c) and has been consistently required by courts interpreting Chapter 154; and (5) reinstate mandatory Federal Register publication of and public comment on all state certification requests, with a comment period of no fewer than 60 days.

Respectfully submitted,

Andrew S. Birrell
President

Lisa M. Wayne
Executive Director