# NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

## COMMENTS OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS ON THE DEPARTMENT OF JUSTICE'S PROPOSED REGULATIONS

## OJP DOCKET NO. 1464

### Statement of Interest

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with more than 13,000 members nationwide and 28,000 affiliate members in fifty states, including private criminal defense attorneys, public defenders, and law professors. The NACDL seeks to promote the proper administration of justice, particularly when the sovereign seeks to take the life of the accused.

NACDL is deeply concerned about the myriad injustices facing those sentenced to death. These injustices include the absence of competent counsel, the failure to properly fund defense services, the pervasive influence of racial factors, and the evisceration by Congress of the critical fail-safe mechanism of federal post-conviction review. Consequently, NACDL is troubled by the evident intent of the regulations promulgated here to speed use of the death penalty without concurrent commitment to eradicating the failures that lead to wrongful convictions and death sentences.

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") added Chapter 154 to Title 28 of the United States Code. Chapter 154 provides expedited procedures and limitations on federal review in states that guarantee death-sentenced prisoners the appointment of competent counsel and the litigation resources necessary to develop constitutional claims in state habeas proceedings. Since the enactment of the AEDPA, Chapter 154 has generated a substantial body of law interpreting the requirements of the statute and its potential application to numerous state provisions. The proposed regulations, which seek to implement the amendments to Chapter 154 contained in the USA PATRIOT Improvement and Reauthorization Act of 2005, require careful consideration in light of the substantial case law interpreting Chapter 154, the Administrative Procedures Act ("APA"), and constitutional principles. Accordingly, we offer the following comments:

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## I.

## THE ATTORNEY GENERAL HAS FAILED TO MAKE COMMENTS AVAILABLE TO THE PUBLIC.

The Attorney General is required to make public information available "in an efficient, effective, and economical manner." 44 U.S.C. § 3506(d)(1)(C); *see also id.* at § 3506(d)(1) (each agency shall "ensure that the public has timely and equitable access to the agency's public information."). The failure to make comments available to the public during the comment period, deprives interested persons of relevant information necessary for meaningful public comment. *See 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.").

For a substantial portion of the comment period, the Attorney General has failed to make any comments available, either electronically or in hard copy. During several weeks of the period, the regulations.gov website did not function correctly and submitted comments were unavailable for public viewing. In addition, there were periods during which the website was unavailable for submitting public comments. Moreover, the Attorney General apparently made no provisions to make comments available in its reading room during the comment period. Even if comments were made available in the reading room, such limited availability deprives the public of adequate access to the comments, particularly given the unique circumstances of the many interested persons who are incarcerated.

The failure of the Attorney General to ensure that comments were available for public viewing and for viewing by incarcerated persons should cause these proposed regulations to be withdrawn.

## II.

## THE PROPOSED REGULATIONS FAIL TO DEFINE CRITICAL TERMS AND THE ATTORNEY GENERAL'S USE OF EXAMPLES FAILS TO CLARIFY THE APPROPRIATE STANDARD FOR MAKING A CERTIFICATION DECISION.

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 provide sufficient criteria or "definitional content" for the statutory terms used to guide an agency's action. *Pearson v. Shalala*, 164 F.3d 650, 660 (D.C. Cir. 1999) (noting that "this proposition is squarely rooted in the prohibition under the APA that an agency not engage in arbitrary and capricious action"); *see also Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (agency action is arbitrary and capricious if agency is not able to "articulate a satisfactory explanation for its action."); *United States v. Atkins*, 323 F.2d 733, 742 (5th Cir. 1963) ("uniform objective standards" are necessary "to furnish a rejected applicant a definite basis upon which to seek proper judicial review ... [and to] furnish reviewing courts something definite to act upon in ascertaining whether [the applicant

has] been arbitrarily or unjustly denied); *South Terminal Corp. v. Environmental Protection Agency*, 504 F.2d 646, 670 (1st Cir. 1974) (vague standard invited arbitrary and unequal application). In addition, the requirements for certification must include minimum standards and criteria so that states wishing to invest in a mechanism to comply with Chapter 154 have sufficient guidance to do so. *See, e.g., South Terminal Corp. v. Environmental Protection Agency*, 504 F.2d 646, 670 (1st Cir. 1974) (vague standard left the prospective applicants "utterly without guidance."). Finally, the failure to define the standards and criteria that will apply to certification determinations deprives interested persons of sufficient information about the manner in which the Attorney General intends to implement the certification procedures and permit meaningful public comment. *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.").

Rather than provide clear definitions of the requirements of 28 U.S.C. section 2261-2265, the proposed regulations provide limited and cursory examples that do not provide sufficient guidance and that allow for arbitrary and standardless certification determinations. *See, e.g.,* 72 FR 31218 (Section by Section Analysis for Section 26.22) ("examples are provided in the text of mechanisms that would be deemed sufficient to comply, but do not preclude States with other mechanisms from meeting the requirements for certification."). Among the statutory terms critical to a certification determination and for which the regulations must define are the following: "mechanism"; "appointment"; "compensation"; "reasonable litigation expenses"; "competent counsel"; "standards of competency"; "offer"; "upon"; "indigent"; "accepted"; "understanding of ... legal consequences"; and "expressly request." As is evident from the extensive case law resolving the application of Chapter 154, these terms are critical to a determination of whether a State mechanism qualifies for the benefits of Chapter 154 and the regulations should be amended to include definitions in accordance with the relevant statutes.

## III.

## THE USE OF "EXAMPLES" IN THE PROPOSED REGULATIONS EVIDENCES THE ATTORNEY GENERAL'S PREJUDGMENT OF WHETHER EXISTING STATE MECHANISMS QUALIFY UNDER CHAPTER 154.

More problematic, the use of "examples" in the proposed regulations reflect an inappropriate prejudgment of whether existing sate mechanisms qualify for certification. Indeed, many of the examples are similar or equivalent to the mechanism in place in states such as Arizona that have indicated an intent to apply for certification. Such prejudgment in unlawful. *See, e.g., Gibson v. Berryhill*, 411 U.S. 564, 587 (1973) (unconstitutional prejudgment in board responsible for hearing licensing revocations, where board goal was to put particular license holders out of business); *Lopez-Umanzor v. Gonzales*, 405 F.3d 1049, 1056-57 (9th Cir. 2005) (preconceived views of immigration judge were evidence that unconstitutional prejudgment caused the judge to limit evidence presented); *Antoniu v. S.E.C.*, 877 F.2d 721 (8th Cir. 1989) (due process violated where SEC commissioner said in speech that Anoniu had been permanently barred from acting as a securities broker-dealer when that issue was in fact currently pending before the commission).

## IV.

## THE USE OF "EXAMPLES" OF COMPLYING MECHANISMS THAT CONTAIN PROVISIONS COURTS PREVIOUSLY HAVE FOUND INADEQUATE FOR COMPLIANCE WITH CHAPTER 154 EXCEEDS THE ATTORNEY GENERAL'S STATUTORY AND CONSTITUTIONAL POWER.

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, N.Y. v. FCC*, 992 F.2d 420 (2nd Cir. 1993) (citing 5 U.S.C. § 706(2)(B)); *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 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, including the following:

### A. Examples 1 and 2 of section 26.22 (a).

These examples involve the application of the appointment of counsel requirement, but they do not include a requirement for timely appointment of counsel. Prior court rulings held that a mechanism is not in compliance with Chapter 154 without this requirement. *See, e.g., 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) (concluding that California was not in compliance with Chapter 154, inter alia, because counsel had not been appointed for "over 130 of the condemned California inmates," and "that counsel often is not appointed until years after a prisoner accepts the offer of counsel"); *Hall v. Luebbers*, 341 F.3d 706, 712 (8th Cir. 2003) (holding that Missouri procedure did not comply with Chapter 154 because statute only offered the appointment of counsel after "a Rule 29.15 post-conviction relief motion is filed and indigency is determined. Professional legal advice may be critical in the early post-conviction relief decisionmaking process and the preparation of a Rule 29.15 motion."); *Ashmus v. Calderon*, 935 F. Supp. 1048, 1074-75 (N.D. Cal. 1996) ("The failure to appoint counsel after an indigent prisoner has accepted such an offer contravenes the express requirement of § 2261(c), as incorporated by § 2265(b), ... see also 1991 Analysis, 137 Cong.Rec. at S3220 ('At a minimum, the immediate benefits to defendants would include the requirement that states electing these procedures actually appoint counsel for the collateral proceedings ...')."); *Hill v. Butterworth*, 941 F. Supp. 1129, 1147 (N.D. Fla. 1996), vacated for lack of case or controversy by 147 F.3d 1333 (11th Cir. 1998) ("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, *3 (N.D. Miss. Mar. 12, 2003) (unpublished order) ("The timely appointment of counsel at the conclusion of direct review is an essential requirement in the opt-in structure. . . Without a requirement for the timely appointment of counsel, the system is not in compliance.").

## B. Examples 1 and 2 of section 26.22 (a).

These examples involve the application of the appointment of counsel requirement, but do not require that the competency standards are applied at the time of appointment. Prior court rulings held that a mechanism is not in compliance with Chapter 154 without this requirement. *See, e.g., Ashmus v. Woodford*, 202 F.3d 1160, 1168 n.13 (9th Cir. 2000) (California must abide by its competency standards when appointing counsel); *Baker v. Corcoran*, 220 F.3d 276, 286 (4th Cir. 2000) (Maryland did not qualify for Chapter 154 provisions because the state's competency standards were not applied in the appointment process and stating that "[c]ompetency standards are meaningless unless they are actually applied in the appointment process"); *Tucker v. Catoe*, 221 F.3d 600, 604-05 (4th Cir. 2000) (South Carolina did not qualify for Chapter 154 provisions and stating that, "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); *Wright v. Angelone*, 944 F. Supp. 460, 467 (E.D. Va. 1996) (holding Virginia did not qualify to opt-in to Chapter 154 because "there is no mechanism built into the standards which assure that appointed counsel meet the specified qualifications"); *Booth v. State of Md.*, 940 F. Supp. 849, 854 (D. Md. 1996), *rev'd on other grounds*, 112 F.3d 139 (4th Cir. 1997) (granting preliminary injunction and finding that Maryland would not qualify to opt-in to Chapter 154, inter alia, because appointment requirements were not applied).

## C. Examples 1 and 2 of section 26.22 (d).

These examples involve the application of state competency standards, but they do not require counsel to have postconviction experience. Prior court rulings held that a mechanism is not in compliance with Chapter 154 without this requirement. *See, e.g., Hill v. Butterworth*, 941 F. Supp. 1129, 1142 (N.D. Fla. 1996) (holding Florida did not qualify to opt-in to Chapter 154 because it did not require appointed counsel to "have any degree of specialization or skill in the arena of habeas proceedings"); *Colvin-El v. Nuth*, No. Civ.A. AW 97-2520, 1998 WL 386403, at *8 (D. Md. July 6, 1998) (holding Maryland did not qualify to opt-in to Chapter 154 because it did not require appointed counsel "to be even minimally competent in post-conviction practice"); *Wright v. Angelone*, 944 F. Supp. 460, 467 (E.D. Va. 1996) (holding Virginia did not qualify to opt-in to Chapter 154 because it did not "require[] counsel to have experience and demonstrated competence in bringing habeas petitions"); *Stenson v. Lambert*, No. C01-252P, at 7 (W.D. Wash. May 1, 2001) (Order on Respondent's Motion Regarding 28 U.S.C. § 2261) (holding Washington did not qualify to opt-in to Chapter 154 because it did not require appointed counsel to be "versed in the law of state collateral attack and/or habeas proceedings"); *Brown v. Lambert*, No. C01-715C, at 5 (W.D. Wash. Sept. 6, 2001) (Order) (holding Washington did not qualify to opt-in to Chapter 154 because it did not require appointed counsel to be "specifically trained or experienced in post-conviction relief").

## D. Example 1 of section 26.22 (d).

This example involves the application of state competency standards, but does not require that counsel to have experience litigating capital cases. At least one prior court ruling held that a mechanism is not in compliance with Chapter 154 without this requirement. *See Wright v.*

*Angelone*, 944 F. Supp. 460, 466-67 (E.D. Va. 1996) (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).

### E. Example 2 of section 26.22 (d).

This example involves the application of state competency standards, but it addresses only public defender attorneys and does not provide any competency standards for conflict counsel. At least one prior court ruling determined that such a mechanism is not in compliance with Chapter 154. *See Hill v. Butterworth*, 941 F. Supp. 1129, 1142 (N.D. Fla. 1996) (holding state competency standards did not comply with Chapter 154, inter alia, because applicable standards were for the Capital Collateral Representative and there were no standards applicable to substitute counsel in the event that CCR conflicted out of a case).

## V.

## THE DEFINITION OF POST-CONVICTION PROCEEDINGS IN THE PROPOSED REGULATIONS IS INCORRECT.

The proposed regulations contain a definition of "postconviction" proceedings that includes unitary review schemes within the scope of Chapter 154. 72 FR 31218 (Section by Section Analysis for section 26.21), 31219, § 26.21. This definition is contrary to congressional intent, violates the APA, and exceeds the Attorney General's statutory authority. Congress explicitly recognized a difference between "post-conviction" and "unitary review" proceedings when it enacted Chapter 154 in the AEDPA by distinguishing between the two proceedings in former sections 2261 and 2265. The amendments to Chapter 154 eliminated former section 2265, which addressed the application of the chapter to states with unitary review. 28 U.S.C. § 2265 (1996) (providing, among other things, that "This chapter shall apply, as provided in this section, in relation to a State unitary review procedure."). The elimination of language defining a statute's application reflects congressional intent that the statute no longer shall apply in that manner. *See e.g., Duncan v. Walker*, 533 U.S. 167, 173 (2001) ("It is well settled that where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (internal quotation and brackets omitted); *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 258-59 (2004) ("When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect."); *Damato v. Hermanson,* 153 F.3d 464, 471 (7th Cir. 1998) (interpreting statute by giving meaning to Congress removing prior restriction on statute's application to a limited category of administrative proceedings); *Gonzalez-Gonzalez v. Ashcroft*, 390 F.3d 649, 653 (9th Cir. 2004) (interpreting statute by determining that when Congress eliminates language from a statute pertaining to its application, it demonstrates congressional intent that the statute no longer apply in the manner defined by deleted language).

The Section-by-Section Analysis accompanying the proposed regulations incorrectly states that the changes enacted by the recent amendments, "are worded broadly enough to permit chapter 154 certification both for States with bifurcated direct and collateral review systems and for

States with unitary review systems. Compare current 28 U.S.C. 2261(b) and 2265 with former 28 U.S.C. 2261(b) and 2265." 72 FR 31218. In addition to impermissibly construing statutory authority, this inaccuracy deprives interested persons of relevant information necessary for meaningful public comment. *See 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."), and violates the requirements of the Data Quality Act, 44 U.S.C. § 3516.

The clear terms of the former statute demonstrate that "State postconviction proceedings" do not include unitary review proceedings. Former section 2261(b) provided that the chapter provisions applied if a state established a mechanism for the appointment and compensation of competent counsel in "State post-conviction proceedings brought by indigent prisoners whose capital convictions and sentences have been upheld on direct appeal to the court of last resort in the State or have otherwise become final for State law purposes." 28 U.S.C. § 2261(b) (1996). Former section 2265 separately provided that the chapter provisions also applied if a state established the mechanism for the appointment and compensation of competent counsel "in the unitary review proceedings." 28 U.S.C. § 2265(a) (1996). The term "State post-conviction proceedings" in the former statute thus was not a broad term that encompassed unitary review, as the Department now claims, but a narrow one that excluded it. By retaining the term "State postconviction proceedings," 28 U.S.C. § 2265(a)(1)(A), and "postconviction proceedings", 28 U.S.C. § 2261(b), and deleting application of the chapter to unitary review schemes, Congress made clear its intention to prohibit the application of Chapter 154 to unitary review schemes.

Furthermore, application of Chapter 154 to unitary review schemes is not in keeping with the proposition that compliance with Chapter 154 allows for the complete development of all habeas claims in state court such that a single opportunity for federal review is justified. In a unitary review system, it is not possible to raise some meritorious claims in time for federal review when the direct appeal and the habeas petition are resolved simultaneously. *See, e.g., Murray v. Giarratano*, 492 U.S. 1, 24-25 (1989) ("Claims that trial or appellate counsel provided constitutionally ineffective assistance, for instance, usually cannot be raised until this [postconviction] stage. Furthermore, some irregularities, such as prosecutorial misconduct, may not surface until after the direct review is complete. Occasionally, new evidence even may suggest that the defendant is innocent. Given the irreversibility of capital punishment, such information deserves searching, adversarial scrutiny even if it is discovered after the close of direct review."); *Ashmus v. Woodford*, 202 F.3d 1160, 1163 (9th Cir. 2000) (noting that Chapter 154 "recognized ... that if there were to be only a single opportunity for federal review, the procedure would have to provide the prisoner in question new safeguards, safeguards that do not now exist.").

Failing to accurately limit the definition of postconviction proceeding to collateral proceedings in capital cases is contrary to congressional intent, is an impermissible interpretation of the statute, and fails to ensure that information disseminated to the public is accurate, clear, and unbiased.

## VI.

## THE PROPOSED REGULATIONS FAIL TO ADDRESS THE FULL INQUIRY REQUIRED OF A QUALIFYING MECHANISM. "MECHANISM" UNDER 2265 MUST BE GIVEN THE MEANING THAT CONGRESS INTENDED, WHICH INCLUDES THE REQUIREMENTS OF 2261(C) AND (D).

Following numerous court rulings giving meaning to the requirements of a complying mechanism according to the terms of section 2261, Congress did not elect to change that statutory language to create different requirements, but left the language intact, thus incorporating the meaning of prior judicial determinations. Canons of statutory interpretation include the presumption that when Congress enacts new legislation, it is aware of prior judicial interpretations and expects its legislation to be interpreted in conformity therewith. *See, e.g., Keene Corp. v. United States*, 508 U.S. 200, 212 (1993); *Cannon v. Univ. of Chicago*, 441 U.S. 677, 699 (1979). Prior judicial interpretations have "special force" in statutory interpretation because Congress remains free to alter statutory language if courts incorrectly interpret legislative intent. *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989); *see also Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977) ("we must bear in mind that considerations of stare decisis weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation."); *Cottage Sav. Ass'n v. Comm'r*, 499 U.S. 554, 562 (1991) (the canons of statutory interpretation presume that Congress will use a clear language if it intends to alter an established understanding about what a law means).

The Attorney General's regulations must provide uniform definitions and guidelines for the certification determination that are consistent with existing case law interpreting Chapter 154. The failure of the proposed regulations to do so deprives interested parties from commenting meaningfully upon them, renders the certification determination upon these critical matters vague and arbitrary, and conflicts with congressional intent and constitutional limitations on the Attorney General's authority.

Thus, the requirement that a mechanism for the appointment and compensation of competent counsel "offer counsel to all State prisoners under capital sentence," 28 U.S.C. § 2261(c), must be applied in a manner consistent with previous court interpretations, which include the following:

1. The proposed regulations must require that the state's offer of counsel is affirmative, and does not depend on the actions or initiative of an individual prisoner or counsel. *See, e.g., Hall v. Luebbers*, 341 F.3d 706, 712 (8th Cir. 2003) (holding that Missouri procedure did not comply with the "offer component" of Chapter 154 because statute only offered the appointment of counsel "to indigent prisoners under a capital sentence who file a petition for post-conviction relief, not all prisoners under a capital sentence"); *Zuern v. Tate*, 938 F. Supp. 468, 471 (S.D. Ohio 1996) (among the reasons Ohio failed to qualify for Chapter 154 was failure to "offer" counsel as required because "a prisoner might well have to prepare his or her own § 2953.21 petition and hope for appointment thereafter, yet preparation of the petition itself is

subject to important technical pleading requirements under Ohio case law"); *Satcher v. Netherland*, 944 F. Supp. 1222, 1243-44 (E.D. Va. 1996), *rev'd in part on other grounds by* 126 F.3d 561 (4th Cir. 1997) (among the reasons Virginia failed to qualify for Chapter 154 was that it "did not require the State affirmatively to offer counsel to all prisoners, and ... [t]hus, the Virginia statutory scheme provided no protection to prisoners who either did not know how to go about obtaining counsel for state habeas proceedings").

2. The proposed regulations must require that the state's offer of counsel be "meaningful," in that it actually results in the immediate appointment of counsel. *See, e.g., Hill v. Butterworth*, 941 F. Supp. 1129, 1147 (N.D. Fla. 1996), *vacated for lack of case or controversy by* 147 F.3d 1333 (11th Cir. 1998) ("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 postconviction counsel. The present backlog of unrepresented capital defendants who are in a position to seek post-conviction review, demonstrates that Florida has not made the requisite meaningful offer of counsel").

3. The proposed regulations must require that strict, rather than substantial compliance with the requirement that the state offer counsel to all prisoners. *See Satcher v. Netherland*, 944 F. Supp. 1222, 1242, 1244-45 (E.D. Va. 1996) ("strict interpretation" of the opt-in requirements is not "mere formalism," but rather is necessary in order to meaningfully effectuate the quid pro quo arrangement which lies at the core of Chapter 154."); *id.* ("If Congress had intended to afford the States the very significant benefits conferred by Chapter 154 on the basis of a finding of substantial compliance based on past performance, it could have done so. However, it elected not to do *Zuern v. Tate*, 938 F. Supp. 468, 472 (S.D. Ohio 1996) ("Congress did not write § 2261 in terms of substantial compliance"); *Ashmus v. Calderon*, 31 F. Supp. 2d 1175, 1183 (N.D. Cal. 1998) ("the language of the qualifying procedures and the quid pro quo structure of Chapter 154 demand strict rather than substantial compliance with all preconditions").

Similarly, the proposed regulations must require that the state mechanism for the appointment of counsel "upon a finding that the prisoner is indigent," provides timely appointment of counsel. *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) (concluding that California was not in compliance with Chapter 154, inter alia, because counsel had not been appointed for "over 130 of the condemned California inmates," and "that counsel often is not appointed until years after a prisoner accepts the offer of counsel"); *Ashmus v. Calderon*, 935 F. Supp. 1048, 1074-75 (N.D. Cal. 1996) ("The failure to appoint counsel after an indigent prisoner has accepted such an offer contravenes the express requirement of § 2261(c), ... see also 1991 Analysis, 137 Cong.Rec. at S3220 ('*At a minimum*, the *immediate* benefits to defendants would include the requirement that states electing these procedures *actually appoint* counsel for the collateral proceedings ...').") (emphasis added in original); *Hill v. Butterworth*, 941 F. Supp. 1129, 1147 (N.D. Fla. 1996) ("counsel must be immediately appointed after a capital defendant accepts the state's offer of postconviction counsel"); *Mills v. Anderson*, 961 F. Supp. 198, 201 n.4 (S.D. Ohio 1997) (observing that the timing of appointment of counsel, where Ohio statute provided for appointment of counsel after the post-conviction petition had been filed, "might well" preclude

the application of Chapter 154); *Brown v. Puckett*, 2003 WL 21018627, *3 (N.D. Miss. Mar. 12, 2003) (unpublished order) ("The 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.").

The proposed regulations also must require that a "finding, ... that the prisoner rejected the offer of counsel ... with an understanding of its legal consequences," 28 U.S.C. § 2261(c)(2), includes case-specific findings sufficient to establish a knowing, intelligent, and sufficiently informed decision. *See, e.g., United States v. Ruiz*, 536 U.S. 622, 629 (2002) (waiver of rights must be knowing, intelligent, and "with sufficient awareness of the relevant circumstances and likely consequences."); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (determining the sufficiency of a waiver "will depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused."); *Iowa v. Tovar*, 541 U.S. 77, 89 (2004) ("The information a defendant must possess in order to make an intelligent election ... will depend on a range of case-specific factors, including the defendant's education or sophistication, the complex or easily grasped nature of the charge, and the stage of the proceedings").

Finally, the proposed regulations must require the prohibition of the appointment of counsel for postconviction proceedings who has represented the prisoner at trial or on direct appeal "unless the prisoner and counsel expressly request continued representation," 28 U.S.C. § 2261 (d), include an opportunity for the prisoner to make a knowing and intelligent determination regarding trial counsel's conflict, and have a full understanding of the potential conflict, and the assistance of independent counsel to explain the risks of the conflict. *See, e.g., United States v. Allen*, 831 F.2d 1487, 1501-02 (9th Cir. 1987); *United States v. Martin*, 965 F.2d 839, 843 (10th Cir. 1992); *United States v. Kliti*, 156 F.3d 150, 153 n.4 (2d Cir. 1998).

## VII.

## THE PROPOSED REGULATIONS IMPROPERLY OMIT THE REQUIREMENT THAT THE MECHANISM APPLY TO THE APPOINTMENT, COMPENSATION, AND PROVISION OF REASONABLE EXPENSES OF COMPETENT COUNSEL.

The regulations must give meaning to the term "competent counsel" as used in the requirement for "a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel." 28 U.S.C. § 2265(a)(1)(A). 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 this critical term is contrary to the statutory directive to implement the certification procedure.

Congressional intent makes it clear that defining a minimum national standard for "competent counsel" is necessary to give meaning to the requirement for a "mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel," 28 U.S.C. §

2265, because at the time it enacted the amendments to Chapter 154, Congress was well aware that in recent years the United States Supreme Court has relied on standards set forth by the American Bar Association to evaluate the effectiveness of attorney performance. *See, e.g., Rompilla v. Beard*, 545 U.S. 374, 387 (2005) (citing approvingly to the ABA standards in place at the time of petitioner's trial and noting that they describe trial counsel's duty to conduct a prompt investigation "in terms no one could misunderstand."); *Florida v. Nixon*, 543 U.S. 175, 191 (2004) (citing to 2003 ABA Guidelines 10.9.1 and 10.9.2); *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (evaluating the performance of counsel using the standards set forth in the ABA Guidelines, noting that they are "standards to which we have long referred as 'guides to determining what is reasonable.'"); *Williams v. Taylor*, 529 U.S. 362, 396 (2000) (citing to the commentary to the ABA standards in place at the time of petitioner's trial to in support of its finding that counsel clearly failed to fulfill their obligation to conduct a thorough investigation that included gathering and presenting mitigating evidence); *Strickland v. Washington*, 466 U.S. 668 (1984) (referring to the ABA Guidelines as "guides to determining what is reasonable" and holding that attorney performance should be measured by "reasonableness under prevailing professional norms."). Canons of statutory interpretation include the presumption that when Congress enacts new legislation, it is aware of prior judicial interpretations and expects its legislation to be interpreted in conformity therewith. *See, e.g., Keene Corp. v. United States*, 508 U.S. 200, 212 (1993); *Cannon v. Univ. of Chicago*, 441 U.S. 677, 699 (1979). The recognition by the United States Supreme Court and Congress that the ABA guidelines provide the standard of care required by all attorneys appointed to represent death-row inmates is consistent with the Guidelines stated intent "to set forth a national standard of practice for the defense of capital cases." ABA Guidelines § 1.1, 31 Hofstra L. Rev. at 919.

Furthermore, Congress relied on the ABA Guidelines in forming its definition of an effective system for competent legal representation in the Innocence Protection Act of 2004. *See* Sen. Comm. on the Judiciary, The Innocence Protection Act of 2002, S. Rep. No. 107-315, at 25-26 (2002). In the Innocence Protection Act of 2004, Congress made grants available to states "to establish, implement, or improve an effective system for providing competent legal representation" for capital defendants. 42 U.S.C. § 14163 (West 2007). With the expectation that states would develop a set of separate qualifications to ensure competent representation, Congress defined an "effective system" in an effort to provide "reasonable minimum standards of competence" and identify the "key parameters" of an effective system. S. Rep. 107-315, at 21, 24, 25, 30.

The need for national standards similarly is reflected in the purpose of Chapter 154, which Congress enacted 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 litigation." Powell Committee Report, 135 Cong. Rec. at S13483.

Thus, the regulations must define a minimum national standard of competence in order to provide uniform application of Chapter 154 requirements to every state. "In the absence of a plain indication to the contrary, ... it will be assumed when Congress enacts a statute that it does not intend to make its application dependent on state law." *Jerome v. United States*, 318 U.S.

101, 104 (1943); *see also Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43-44 (1989) (citing *Jerome,* and noting that "[o]ne reason for this rule of construction is that federal statutes are generally intended to have uniform nationwide application. Accordingly, the cases in which we have found that Congress intended a state-law definition of a statutory term have often been those where uniformity clearly was not intended.").

A minimum national standard for competent counsel, as reflected by congressional intent, includes the following characteristics:

1. Counsel must have experience related to capital litigation. *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) ("ABA Guidelines") §§ 3.1, 5.1(B), 31 Hofstra L. Rev. 913, 961-62 (2003) (experience relevant to competent capital representation includes an understanding of the relevant law governing capital cases, skill in management and conduct of complex litigation, legal research, analysis, drafting of documents, oral advocacy, use of experts, investigation, preparation, presentation of mental health and mitigation evidence, and the elements of trial advocacy). The legislative history of the Innocence Protection Act of 2004, 42 U.S.C. § 14163, recommends excluding lawyers "with no capital or even criminal law experience" from the definition of competent counsel. S. Rep. No. 107-315, at 23 (noting that individuals on trial for their lives should not have to be represented by such counsel).

2. Counsel must have experience related to post-conviction litigation. *See Wright v. Angelone*, 944 F. Supp. 460, 467 (E.D. Va. 1996) (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, "That 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. AQ 972520, 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, "Given 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").

3. Counsel must have a minimum of five years experience as an attorney and three years experience in post-conviction litigation in the relevant jurisdiction. The legislative history of the Innocence Protection Act of 2004 recommends excluding lawyers "with only a few years or months at the bar" from the definition of competent counsel. S. Rep. No. 107-315, at 23 (noting that individuals on trial for their lives should not have to be represented by such counsel); *see also* 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) (The Arizona state mechanism held to be facially compliant with the provisions of Chapter 154 required at least three years of experience in capital post-conviction or appellate work).

4. Counsel has a duty to conduct a thorough investigation. Congress intended for Chapter 154 to apply to States in which all potential meritorious claims are developed, presented, and resolved in state habeas corpus proceedings. This understanding is evident from the statute itself, which limits the statute of limitation tolling provisions to the first state petition. Thus, Chapter 154 requires that counsel appointed to represent death-sentenced inmates in habeas proceedings be required by the State mechanism to undertake a thorough investigation of all potential claims. *See also* 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 § 10.15.1(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 v. Smith*, 539 U.S. 510, 524-25 (2003) (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); Legislative history of the Innocence Protection Act of 2004, S. Rep. No. 107-315 at 21-22, 25 (identifying inadequate investigation as among the problems to be corrected by the Act); Ad Hoc Committee on Federal Habeas Corpus in Capital Cases Committee Report, 135 Cong. Rec. S13471-04, S13483 (1989) ("Powell Committee Report") (report recommendations adopted by Congress noting that "the focus of review in capital cases often shifts to collateral proceedings," and urging that such a review be careful and deliberate forming the basis); id. (further stating that in "habeas corpus proceedings[,] fairness requires that a defendant be provided a searching and impartial examination of his claims."); 18 U.S.C. § 3599(a)(1)(2) (providing for "investigative, expert, or other reasonably necessary services"); see also H.R. Conf. Rep. No. 109-333 at 102 (2005), reprinted in 2006 U.S.C.C.A.N. 184 (legislative history of section 3599 indicating that provision of investigative services is mandatory to "any death penalty eligible defendant who is or becomes financially unable to obtain" such services).

5. The scope of the appointment must include counsel's duty to develop and present all relevant grounds for relief. Chapter 154 was developed with the purpose of promoting finality in capital cases in which petitioners were afforded competent counsel. Powell Committee Report, 135 Cong. Rec. at S13482. The Powell Committee proposed competent counsel for petitioners for the purpose of "ensuring fairness and protecting the constitutional rights of capital litigants." *Id.* The legislative history reflects Congress's intent to prevent prisoners from waiving or not exhausting serious constitutional claims. *Id.* (stating, "Prisoners acting pro se rarely present promptly or properly exhaust their constitutional challenges in the state forum.... The end result is often appointment of qualified counsel only when an execution is imminent. But at this stage, serious constitutional claims may have been waived"). Congress was of the belief that state post-conviction counsel appointed pursuant to Chapter 154 would present all claims in the first state habeas petition such that no claims would be unexhausted at

the federal level. *Id.* at S13482-83 (stating, "[w]ith the counsel provided by the statute, there should be no excuse for failure to raise claims in state court."). Implicit in these statements is the assumption that competent appointed counsel will present promptly, properly exhaust, and protect the constitutional claims of their clients by pleading all relevant claims for relief. Counsel's duty at the state post-conviction level therefore includes pleading all arguably meritorious issues and endeavoring to preserve claims for subsequent review, and performance standards should reflect this duty.

The duty to investigate, develop, and present all potentially meritorious claims explicitly is recognized in the ABA guidelines. *See also* ABA Guidelines § 10.8(A), 31 Hofstra L. Rev. at 1028 (requires counsel at every stage of a capital case to consider all available legal claims, thoroughly investigate the basis for each potential claim and evaluate each potential claim in light of the uniqueness of death penalty law, the importance in guarding against later assertions that claims have been waived, defaulted, or not exhausted, and other "professionally appropriate costs and benefits."); *id.* § 10.8(B), 31 Hofstra L. Rev. at 1028-29 (Claims should be presented as forcefully as possible and in a manner specific to the facts particular to the client's case and counsel should consider asserting newly discovered legal claims and supplementing previously made claims with additional facts or law);

6. Counsel must demonstrate the experience and performance necessary to competently perform all duties included in "postconviction proceedings." 28 U.S.C. § 2265 (a mechanism must provide for the "appointment, ... of competent counsel in State postconviction proceedings."). As the regulations define "postconviction proceedings" as "State collateral proceedings," 72 FR 31219, § 22.61, counsel's qualifications and performance must be sufficient to provide competent representation in recognized collateral proceedings such as competency to be executed, *see Murray v. Giarratano*, 492 U.S. 1, 9-10 (1989), motions for DNA testing, *see, e.g., McDonald v. Smith*, No. 02-CV-6743 (JBW), 03-MISC-0066 (JBW), 2003 WL 22284131, *5- 6 (E.D.N.Y. Aug. 21, 2003) (unpublished order), and other potentially specialized areas in which counsel must be proficient.

## VIII.

## THE PROPOSED REGULATIONS FAIL TO REQUIRE THAT THE STATE MECHANISM SATISFY THE APPROPRIATE STANDARDS FOR APPOINTMENT OF COUNSEL, INCLUDING A NEUTRAL APPOINTING ENTITY, TIMELY APPOINTMENT OF COUNSEL, AND APPOINTMENT OF SECOND COUNSEL.

A critical feature of the state's obligations under Chapter 154 is the existence of an adequate procedure that ensure the timely selection and appointment of appropriate counsel, monitoring appointed counsel's performance, and assurance that counsel will adequately complete the representation. The proposed regulations fail to address the requirements previous identified by Congress and courts as critical to the determination of whether a state mechanism qualifies under Chapter 154, including the following:

1. The proposed regulations must require that the appointment mechanism provides for appointments to be made by an independent entity, free of political pressure. *See* Innocence Protection Act of 2004, 42 U.S.C. § 14163(e)(1) (an effective system of capital representation

must assign responsibility for appointment of competent defense counsel in capital cases to an independent entity that is "composed of individuals with demonstrated knowledge and expertise in capital cases, except for individuals currently employed as prosecutors," is a public defender program, or is a judge who selects qualified counsel from a roster prepared by a "State or regional selection committee"); Legislative history of the Innocence Protection Act, S. Rep. No. 107-315, at 25 ("The Committee defined the term 'effective system' with great care. ... [S]uch a system must include an entity to identify and appoint capital defense lawyers, and that entity must carry out its core functions independently of State government"); id. ("meaningful reform of capital indigent defense systems must include functional independence from the elected branches of government for the entity that appoints capital defense lawyers"); ABA Guidelines § 3.1, 31 Hofstra L. Rev. at 945 (appointment responsibility should go to a "Responsible Agency" that is either a jurisdiction-wide capital trial, appellate, or post-conviction defender office or an independent authority managed by defense attorneys "with demonstrated knowledge and expertise in capital representation"); id. § 3.1, Commentary, 31 Hofstra L. Rev. at 948 (emphasizing independence to ensure that capital defense "remains free from political influence").

2. The proposed regulations must require that the state appointment mechanism provide for the timely appointment of counsel. Several courts previously have concluded that such a requirement is a prerequisite for a qualifying mechanism. *See 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) (concluding that California was not in compliance with Chapter 154, inter alia, because counsel had not been appointed for "over 130 of the condemned California inmates," and "that counsel often is not appointed until years after a prisoner accepts the offer of counsel"); *Ashmus v. Calderon*, 935 F. Supp. 1048, 1074-75 (N.D. Cal. 1996) ("The failure to appoint counsel after an indigent prisoner has accepted such an offer contravenes the express requirement of § 2261(c), ... see also 1991 Analysis, 137 Cong.Rec. at S3220 ('*At a minimum*, the *immediate* benefits to defendants would include the requirement that states electing these procedures *actually appoint* counsel for the collateral proceedings ...')."") (emphasis added in original); *Hill v. Butterworth*, 941 F. Supp. 1129, 1147 (N.D. Fla. 1996) ("counsel must be immediately appointed after a capital defendant accepts the state's offer of postconviction counsel"); *Mills v. Anderson*, 961 F. Supp. 198, 201 n.4 (S.D. Ohio 1997) (observing that the timing of appointment of counsel, where Ohio statute provided for appointment of counsel after the post-conviction petition had been filed, "might well" preclude the application of Chapter 154); *Brown v. Puckett*, 2003 WL 21018627, *3 (N.D. Miss. Mar. 12, 2003) (unpublished order) ("The 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.").

3. The proposed regulations must require that the appointment mechanism provides for the removal of counsel for failure to comply with performance standards in order to avoid frustrating the purpose of Chapter 154. *See* Powell Committee Report, 135 Cong. Rec. at S13484 ("[t]he effectiveness of state and federal post-conviction counsel is a matter that can and must be dealt with in the appointment process"); Innocence Protection Act of 2004, 42 U.S.C. § 14163(e)(2)(E) (defining an effective system of capital representation to include a provision for

the removal of individuals from the roster of qualified attorneys upon a showing of failure to provide effective representation, unethical conduct, non-compliance with training requirements, or sanctioning by the bar association or a court for ethical misconduct in a criminal case within the past five years); Chuck Lindell, *Death Row Lawyers Put on Notice*, Austin American-Statesman, Dec. 12, 2006 (Under the new rules adopted by the Texas Court of Criminal Appeals, judges are empowered to remove attorneys from the court's list of habeas attorneys for writs demonstrating substandard proficiency, unethical or unprofessional behavior, or based on a finding of poor legal representation in a criminal case).

4. The proposed regulations must require that the appointment mechanism provides for the appointment of second counsel. *See* Innocence Protection Act of 2004, 42 U.S.C. § 14163(e)(2)(C) (procedure for appointing competent counsel must "assign 2 attorneys from the roster to represent an indigent in a capital case, ... provided that, in any case in which the State elects not to seek the death penalty, a court may find, subject to any requirement of State law, that a second attorney need not remain assigned to represent the indigent to ensure competent representation"); ABA Guidelines § 4.1, 31 Hofstra L. Rev. at 952 (providing that at every stage of a capital case, a defendant should be represented by at least two attorneys).

5. The proposed regulations must require that the appointment mechanism provides for specialized training programs for capital post-conviction litigation. *See* Innocence Protection Act of 2004, 42 U.S.C. § 14163(e)(2)(D)-(E) (defining an effective system for providing competent legal representation to require the appointing entity to conduct, sponsor, or approve specialized training programs and monitor attendance); ABA Guidelines §§ 5.1, 8.1, 31, Hofstra L. Rev. at 961, 976 (the Responsible Agency for appointment must ensure that every attorney representing a capital defendant has completed a "comprehensive training program" including "relevant state, federal, and international law; pleading and motion practice; pretrial investigation, preparation, and theory development regarding guilt/innocence and penalty; jury selection; trial preparation and presentation, including the use of experts; ethical considerations particular to capital defense representation; preservation of the record and of issues for post-conviction review; counsel's relationship with the client and his family; postconviction litigation in state and federal courts; the presentation and rebuttal of scientific evidence, and developments in mental health fields and other relevant areas of forensic and biological science" and after completing this program, attorneys wishing to remain on the roster of qualified attorneys must complete a separate training program approved by the Agency relating to capital case defense every two years).

6. The proposed regulations must require that the appointment mechanism assures that the standard of care required for competent representation is enforced in practice. *See Ashmus v. Woodford*, 202 F.3d 1160, 1168 n.13 (9th Cir. 2000) (California must abide by its competency standards when appointing counsel); *Baker v. Corcoran*, 220 F.3d 276, 286 (4th Cir. 2000) (Maryland did not qualify for Chapter 154 provisions because the state's competency standards were not applied in the appointment process and stating that "[c]ompetency standards are meaningless unless they are actually applied in the appointment process"); *Tucker v. Catoe*, 221 F.3d 600, 604-05 (4th Cir. 2000) (South Carolina did not qualify for Chapter 154 provisions and stating that, "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).

7. The proposed regulations must require that the appointment mechanism provides that appointment encompasses counsel's responsibility to develop all potential claims. *See, e.g., 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) (state mechanism that limits counsel's responsibility fails to comply with Chapter 154); *see also* ABA Guidelines § 10.8(A), 31 Hofstra L. Rev. at 1028 (requires counsel at every stage of a capital case to consider all available legal claims, thoroughly investigate the basis for each potential claim and evaluate each potential claim in light of the uniqueness of death penalty law, the importance in guarding against later assertions that claims have been waived, defaulted, or not exhausted, and other "professionally appropriate costs and benefits."); *id.* § 10.8(B), 31 Hofstra L. Rev. at 1028-29 (Claims should be presented as forcefully as possible and in a manner specific to the facts particular to the client's case and counsel should consider asserting newly discovered legal claims and supplementing previously-made claims with additional facts or law); Powell Committee Report, 135 Cong. Rec. at S13482 (stating, "Prisoners acting pro se rarely present promptly or properly exhaust their constitutional challenges in the state forum.... The end result is often appointment of qualified counsel only when an execution is imminent. But at this stage, serious constitutional claims may have been waived"); id. at S13482-83 (stating, "[w]ith the counsel provided by the statute, there should be no excuse for failure to raise claims in state court.").

## IX.

## THE PROPOSED REGULATIONS FAIL TO REQUIRE THAT THE STATE MECHANISM SATISFY THE APPROPRIATE STANDARDS FOR COMPENSATION OF COUNSEL.

The proposed regulations fail to require that a state mechanism compensate counsel for actual time worked without caps. *See* 18 U.S.C. § 3599 (providing for payment of attorneys in federal capital cases, including in post-conviction proceedings, with compensation at an hourly rate for actual time worked, with no flat fees or lump sum contracts, no cap on compensation, and no distinction between in-court and out-of-court time); Innocence Protection Act, 42 U.S.C. § 14163(e)(2)(F)(II) (defining an effective system of capital representation as one in which defense attorneys are "compensated for actual time and service, computed on an hourly basis"); ABA Guidelines § 9.1(B), 31 Hofstra L. Rev. at 981 (discouraging payment of attorneys through flat fees or lump sum contracts and setting caps on attorney compensation, and recommending that no distinction be made between time spent in or out of court); *Spears v. Stewart*, 283 F.3d 992, 1014 (9th Cir. 2002) (finding compensation scheme adequate where "the 200-hour threshold in no way limited the amount of compensation that post-conviction counsel could receive. By the plain terms of the statute, the court was required to compensate a lawyer for hours worked beyond 200, provided only that it did not find them unreasonable"); *Booth v. Maryland*, 940 F. Supp. 849, 855 (D. Md. 1996), *rev'd on other grounds*, 112 F.3d 139 (4th Cir. 1997) ("it is obviously unreasonable not to reimburse a lawyer anything at all for photocopying expenses or (at least in light of the meager hourly rate and cap on attorney compensation) for computerized legal research"); *Zuern v. Tate*, 938 F. Supp. 468, 471 (D. Ohio 1996) (holding Ohio's standards for funding attorney compensation inadequate and concluding that most counties "have extremely low caps on the amounts to be spent"); *Mills v. Anderson*, 961 F. Supp. 198 (S.D.

Ohio 1997) (same; finding lack of minimum compensation rates and "unreasonably low" caps).

The proposed regulations fail to require that a state mechanism compensate counsel at an hourly rate comparable to the federal rate. *See* 18 U.S.C. § 3599(g)(1) (setting hourly rate of compensation at $125 per hour, with provisions made for periodic increases by the Judicial Council in accordance with the General Schedule) (The current rate is $166 per hour); Guidelines for the Administration for the Criminal Justice Act § 6.02(B)(1) (addressing the hourly rate set by the presiding judicial officer, who is "urged to compensate counsel at a rate and in an amount sufficient to cover appointed counsel's general office overhead and to ensure adequate compensation for representation provided"); legislative history of the Innocence Protection Act, S. Rep. No. 107-315, at 25 (equating "reasonable" with the Federal rate: "In an effective system, defense attorneys will be compensated at a reasonable rate comparable to the Federal rate for compensating capital defense lawyers"); *Booth v. Maryland*, 940 F. Supp. 849, 855 (D. Md. 1996), *rev'd on other grounds*, 112 F. 3d 139 (4th Cir. 1997) (finding Maryland compensation scheme inadequate and noting that federal counsel "may be paid up to $125 per hour and fee awards in six figures are not uncommon"); *Baker v. Corcoran*, 220 F.3d 276, 285-86 (4th Cir. 2000) (same).

The proposed regulations fail to require that a state mechanism compensate counsel at an hourly rate comparable to the market rate. *See* Innocence Protection Act, 42 U.S.C. § 14163(F)(ii)(I) (defense attorneys in a public defender system should "be compensated according to a salary scale that is commensurate with the salary scale of the prosecutor's office in the jurisdiction"); *see also id.* at § 14163(F)(ii)(II) (attorneys to be compensated at a rate reasonable "in light of the qualifications and experience of the attorney and the local market for legal representation" in cases of similar complexity and level of responsibility); legislative history of the Innocence Protect Act, S. Rep. No. 107-315, at 24 (observing that "The crisis in postconviction proceedings is particularly grave. The failure of many States to provide adequate compensation and reimbursement of costs in capital postconviction cases has resulted in a chronic shortage of qualified counsel"); ABA Guidelines § 9.1(B)(2), 31 Hofstra L. Rev. at 981 (attorneys who are employed by state defender organizations should be compensated commensurate with the salary scale used by the prosecutor's office); *see also id.* at § 9.1(B)(3), 31 Hofstra L. Rev. at 981 (recommending that appointed counsel be compensated at an hourly rate "commensurate with the prevailing rates for similar services"); *Booth v. Maryland*, 940 F. Supp. 849, 855 (D. Md. 1996), *rev'd on other grounds*, 112 F. 3d 139 (4th Cir. 1997) (evaluating Maryland compensation scheme, in part, by calculating cost of firm overhead and subtracting that from compensate rate to determine that scheme was inadequate given the actual cost of legal services); *Baker v. Corcoran*, 220 F.3d 276, 285-86 (4th Cir. 2000) (same).

The proposed regulations fail to require that a state mechanism compensate counsel for work performed in all "postconviction proceedings." 28 U.S.C. § 2265 (a mechanism must provide for the "compensation, ... of competent counsel in State postconviction proceedings."), which include all "State collateral proceedings." 72 FR 31219, § 22.61. Thus, a state mechanism must compensate counsel for representation in such collateral proceedings as those involving issues such as competency to be executed, *see Murray v. Giarratano*, 492 U.S. 1, 9-10 (1989), and motions for DNA testing, *see, e.g., McDonald v. Smith*, No. 02-CV-6743 (JBW), 03-MISC- 0066 (JBW), 2003 WL 22284131, *5-6 (E.D.N.Y. Aug. 21, 2003) (unpublished order).

## X.

## THE PROPOSED REGULATIONS FAIL TO REQUIRE THAT THE STATE MECHANISM SATISFY THE APPROPRIATE STANDARDS FOR THE PROVISION OF ADEQUATE EXPENSES.

Congress intended for states to provide indigent petitioners with the financial resources to investigate and develop potentially meritorious claims in postconviction proceedings. Thus, the state mechanism must provide expenses for investigators, experts, and mitigation specialists. *See* 18 U.S.C. § 3599(a)(2) (identifying investigative and expert expenses as "reasonably necessary services" that must be funded in federal post-conviction proceedings); Innocence Protection Act, 42 U.S.C. § 14163(F)(ii)(III) (identifying "investigators, mitigation specialists, and experts" as "[n]on-attorney members of the defense team"); ABA Guidelines § 9.1(C), 31 Hofstra L. Rev. at 981-82 (providing that investigators, mitigation specialists, and experts should be funded). This includes providing expenses for persons with specialized skills required in capital cases. *See* Innocence Protection Act, 42 U.S.C. § 14163(F)(ii)(III) (an "effective system" requires that "non-attorney members of the defense team, including investigators, mitigation specialists, and experts, shall be compensated at a rate that reflects the specialized skills needed by those who assist counsel with the litigation of death penalty cases"); ABA Guidelines § 9.1(C), 31 Hofstra L. Rev. at 981 (recommending that non-attorney members of the defense team be compensated at a rate "commensurate with the provision of high quality legal representation and [that] reflects the specialized skills" needed by those who work on capital cases); *Caro v. Woodford*, 280 F.3d 1247 (9th Cir. 2002) (granting penalty phase relief on ineffective assistance of counsel, where prejudice for failure to consult specialized expert on neurotoxins was established on habeas through such specialized consultation); *Mayfield v. Woodford*, 270 F.3d 915 (9th Cir. 2001) (en banc) (same; failure to consult experts in endocrinology or toxicology).

In addition to authorizing the use of such expenses, the state mechanism must provide expenses commensurate to those of the private sector. *See* ABA Guidelines § 9.1(C)(1), 31 Hofstra L. Rev. at 981-82 (recommending that investigators at public defender officers be paid on a salary scale "commensurate with the salary scale of the prosecutor's office" and that mitigation specialists and experts should be compensated at rate "commensurate with the salary scale for comparable expert services in the private sector"); *id.* (recommending that non-attorneys assisting appointed counsel should be paid on hourly rate "commensurate with prevailing rates paid by retained counsel in the jurisdiction for similar services, with no distinction between rates for services performed in or out of court"); ABA Guidelines § 9.1(C), Commentary, 31 Hofstra L. Rev. at 985 (noting that jurisdictions should be mindful of the fact that the prosecution has access at no cost to a number of services at for which the defense must pay and therefore "should provide funding for defender services that maintains parity between the defense and the prosecution with respect to workload, salary, and resources necessary to provide quality legal representation").

The expenses must be sufficient to cover all "postconviction proceedings." 28 U.S.C. § 2265 (a mechanism must provide for the "reasonable litigation expenses of competent counsel in State postconviction proceedings."). As "postconviction proceedings" include "State collateral proceedings," 72 FR 31219, § 22.61, a qualified mechanism must provide reasonable litigation

expenses for proceedings involving competency to be executed, *see Murray v. Giarratano*, 492 U.S. 1, 9-10 (1989), and motions for DNA testing, *see, e.g., McDonald v. Smith*, No. 02-CV-6743 (JBW), 03-MISC- 0066 (JBW), 2003 WL 22284131, *5-6 (E.D.N.Y. Aug. 21, 2003) (unpublished order).

## XI.

## THE EXAMPLES OF QUALIFYING STATE COMPETENCY STANDARDS FAIL TO REFLECT THE REQUIREMENTS OF CHAPTER 154.

Chapter 154 requires a state mechanism to appoint, compensate, and pay reasonable litigation expenses of "competent counsel," 28 U.S.C. § 2265(a)(1)(A), and a state provide "standards of competency for the appointment" of such counsel, 28 U.S.C. § 2265(a)(1)(C). As evident in the discussion in section VIII, above, Congress sought to ensure not only that states adopt a national minimum standard of competency but also to require that the attorneys appointed pursuant to the state mechanism were actually "competent."

Contrary to the clear statutory mandate, the proposed regulations fail to define minimum, nationally recognized "standards of competency" and instead provide examples of state competency standards that either are lower than the minimum national standards of competency necessary to give proper meaning to Chapter 154 requirements or lack critical elements necessary for such standards. *See* 72 FR 31220, § 26.23(d). Without adequately defining the requirements of such standards, the proposed regulations fail to guide the Attorney General's certification determination or inform the public as to the relevant criteria and permits the certification of state mechanisms whose competency "standards" fall below the minimum national requirements, "a result [that] would not only run counter to the decisions of [the United States Supreme] Court, but would also frustrate the congressional purpose [of the statutory section at issue]." *Harris v. Reed*, 489 U.S. 255, 270 (1989) (J. O'Connor, concurring) (internal citation omitted); *see also Transcontinental Gas Pipe Line Corp. v. State Oil and Gas Bd. of Mississippi*, 474 U.S. 409, 423-24 (1986) (rejecting state rule that "disturbs the uniformity of the federal scheme" and "frustrates the federal goal"); *Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013, 1028 (9th Cir. 2005) (no deference is due to "an agency interpretation that frustrates the policy that Congress sought to implement"); *cf. California Federal Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 281 (1987) (state law is preempted by federal law when it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.").

## XII.

## THE PROPOSED REGULATIONS FAIL TO PLACE THE BURDEN ON THE STATE TO ESTABLISH ENTITLEMENT TO CHAPTER 154.

The proposed regulations impose virtually no requirements on a state seeking certification. Indeed, under the proposed regulations, a state official need submit only a request containing two attestations: that the person submitting the request for certification is the "appropriate state official" and that notice of the request has been provided to "the chief justice to the State's highest court." 72 FR 31220, § 26.23(b). There is no requirement that the state official provide any information about the state mechanism or even why the state official believes that the mechanism qualifies under Chapter 154. Thus, the proposed regulations fail to place any burden

on the state to establish its entitlement to the benefits of Chapter 154. This failure is compounded by the lack of any criteria that the Attorney General will use in making the certification determination.

By failing to require a state requesting certification to make an affirmative showing of compliance with Chapter 154, the regulations are contrary to congressional intent. Prior judicial interpretations of Chapter 154 eligibility require the state seeking eligibility to bear the burden of demonstrating compliance with Chapter 154 and make an affirmative showing of strict compliance with the statute's requirements. *See, e.g., See Satcher v. Netherland*, 944 F. Supp. 1222, 1242, 1244-45 (E.D. Va. 1996) ("strict interpretation" of the opt-in requirements is not "mere formalism," but rather is necessary in order to meaningfully effectuate the quid pro quo arrangement which lies at the core of Chapter 154."); *id.* ("If Congress had intended to afford the States the very significant benefits conferred by Chapter 154 on the basis of a finding of substantial compliance based on past performance, it could have done so. However, it elected not to do so."); *Zuern v. Tate*, 938 F. Supp. 468, 472 (S.D. Ohio 1996) ("Congress did not write § 2261 in terms of substantial compliance"); *Ashmus v. Calderon*, 31 F. Supp. 2d 1175, 1182-83 (N.D. Cal. 1998) (stating that "Congress chose to confer those benefits [of Chapter 154] *only if* the State made an *affirmative, institutionalized, formal commitment* to provide a post-conviction review system which Congress considered to be 'crucial to ensuring fairness and protecting the constitutional rights of capital litigants.' Powell Committee Report at 3240." and that "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. As the Powell Committee Report commented, it is entirely the states' decision whether to opt-in – by so choosing the states are properly allocated the burden of proving compliance."); *see also Lavine v. Milne*, 424 U.S. 577, 584 (1976) (there is a "normal assumption that an applicant is not entitled to benefits unless and until he proves his eligibility."). Absent clear language in the statute to the contrary, the Attorney General's regulations must implement the certification process in keeping with these prior judicial interpretations. *See, e.g., Keene Corp. v. United States*, 508 U.S. 200, 212 (1993); *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989); *Cannon v. Univ. of Chicago*, 441 U.S. 677, 699 (1979); *Cottage Sav. Ass'n v. Comm'r*, 499 U.S. 554, 562 (1991).

## XIII.

## THE CERTIFICATION PROCEDURES FAIL TO PROVIDE ADEQUATE NOTICE OF ALL INFORMATION ABOUT THE STATE'S MECHANISM THAT WILL BE CONSIDERED FOR THE CERTIFICATION DETERMINATION.

The failure to provide public notice of all information upon which a certification determination will be made deprives interested persons the opportunity to participate in the certification determination in a meaningful and informed manner and violates due process. *See Home Box Office, Inc. v. FCC*, 567 F.2d 9, 56-57 (D.C. Cir. 1977) (failure to disclose ex parte communications regarding proposed regulation violated due process); *American Medical Ass'n v. United States*, 887 F.2d 760, 767 (7th Cir. 1989) (notice must apprise "interested parties of the issues to be addressed in the rule-making proceeding with sufficient clarity and specificity to allow them to participate in the rulemaking in a meaningful and informed manner."); *Louis v. U.S. Dep't of Labor*, 419 F.3d 970, 975 (9th Cir. 2005) (notice that omitted "potentially

controversial subject matter" was insufficient; "an interested member of the public should be able to read the published notice ... and understand the essential attributes of the [proposed rule] and should not have to guess the agency's true intent.").

The proposed regulations provide for a state's request for certification to be subject to public notice and comment but do not require any information upon which the certification determination will be made, including ex parte contacts, to be included in the information provided to the public for comment. 72 FR 31220, § 26.23(c). As noted above, the proposed regulations do not require any information upon which the certification determination will be made to be included in the state's request. 72 FR 31220, § 26.23(b). Moreover, the proposed regulations permit ex parte communications between the Attorney General and the state by permitting the certification determination also to be made on the basis of any supplementary information the Attorney General seeks from the state and allows for advice to be given as to what corrections must be made to the state mechanism in order to obtain certification. 72 FR 31220, § 26.23(d).

These procedures violate due process principles and thwart the public's right to participate in a meaningful manner in the comment period or provide relevant information to the certification determination. The proposed regulations do not provide for public notice of information considered in support of a request for certification other than authorities the state chooses to include in a request, *id.* at § 26.23(c)(2), and do not require public notice of the Department's inquiry for supplementary information, the material provided in response to the inquiry, or the information provided by the Department to the state regarding corrections to be made in order to obtain certification. By allowing the Attorney General to engage in ex parte instruction to a requesting state on the manner in which to obtain certification, the proposed regulations deny public notice and comment on the standards and criteria employed by the Attorney General in his certification determination. *See, e.g., Home Box Office, Inc. v. FCC*, 567 F.2d 9, 55 (D.C. Cir. 1977) (requiring "agencies to set out their thinking in notices of proposed rulemaking ... not only allows adversarial critique of the agency but is perhaps one of the few ways that the public may be apprised of what the agency thinks it knows in its capacity as a repository of expert opinion.").

## XIV.

## THE CERTIFICATION PROCEDURES FAIL TO PROVIDE FOR A HEARING TO DETERMINE WHETHER THE STATE IS ADHERING TO THE REQUIREMENTS OF ITS MECHANISM AND WHETHER THE MECHANISM IS IN FACT PROVIDING COMPETENT COUNSEL WITH ADEQUATE RESOURCES TO RAISE ALL POTENTIALLY MERITORIOUS CLAIMS FOR RELIEF

The regulations fail to provide for a formal hearing following a state's certification request where those opposing certification will have an opportunity to contest the state's asserted compliance with Chapter 154's requirements. Such a hearing is necessary to determine whether a state is actually complying with the requirements of its mechanism. *See, e.g., Baker v. Corcoran*, 220 F.3d 276, 286 (4th Cir. 2000) (Maryland did not qualify for Chapter 154 provisions because the state's competency standards were not applied in the appointment process and stating that "[c]ompetency standards are meaningless unless they are actually applied in the appointment

process"); *Tucker v. Catoe*, 221 F.3d 600, 604-05 (4th Cir. 2000) (South Carolina did not qualify for Chapter 154 provisions and stating that, "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); *Wright v. Angelone*, 944 F. Supp. 460, 467 (E.D. Va. 1996) (holding Virginia did not qualify to opt-in to Chapter 154 because "there is no mechanism built into the standards which assure that appointed counsel meet the specified qualifications"); *Booth v. State of Md.*, 940 F. Supp. 849, 854 (D. Md. 1996), *rev'd on other grounds*, 112 F.3d 139 (4th Cir. 1997) (granting preliminary injunction and finding that Maryland would not qualify to opt-in to Chapter 154, inter alia, because appointment requirements were not applied). A hearing on this issue is likely to be especially important because the "appropriate state official" applying for certification in many, if not most, cases will be unaware of the actual qualifications of those being appointed to represent death row inmates in state post-conviction proceedings.

A hearing may also be necessary to determine whether the funding provided to state post-conviction counsel in actuality has permitted death row inmates in state post-conviction proceedings to develop and litigate all potentially meritorious claims for relief or whether the state has procedural requirements that prevent full development of claims. Restrictions on certain types of investigation or stringent page limitations that are regularly enforced, for example, may preclude a death row inmates from the complete development of claims in state court. A hearing must be available for determining whether such impediments to full development exist and their actual impact on post-conviction litigation., Further, that a state promises to compensate counsel for "reasonable" fees and litigation expenses is something that must be tested by reference to actual practice. Again, a formal hearing on this issue will likely be needed in order to adequately test a state post-conviction mechanism in part because the applying "appropriate state official" in many cases will not be privy to confidential fee and funding decisions.

Similarly, in order to satisfy Congress's intent behind Chapter 154, death row inmates must be afforded to opportunity to present evidence showing that the mechanism at issue is failing in practice to provide "competent" state post-conviction counsel. If, for example, filing deadlines are missed in a significant number of cases, or other procedural rules are not being followed by appointed counsel, it cannot be said that the applying state has created a mechanism that qualifies with the requirements of 28 U.S.C. § 2265(a)(1)(A).

## XV.

## THE CERTIFICATION PROCEDURES EXCEED THE ATTORNEY GENERAL'S STATUTORY AUTHORITY BY PERMITTING EX PARTE INSTRUCTION TO A REQUESTING STATE REGARDING HOW TO OBTAIN CERTIFICATION.

The provisions of 28 U.S.C. section 2265 authorize the Attorney General to make three certification determinations. 28 U.S.C. §§ 2265(a)(1)(A)-(C). The statute provides no authority, nor may authority be implied from its provisions, for the Attorney General to engage in ex parte consultations with a state that has requested certification in order to instruct the state on how it may obtain certification as set forth in the proposed regulations. *See* 72 FR 31220, § 26.23(d) ("the Attorney General ... may, at any time, ... advise the State of any deficiencies that would

need to be remedied in order to obtain certification."). An agency must act within the bounds of the enabling statute at issue and when "the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984).

## XVI.

## THE PROPOSED REGULATIONS EXCEED THE ATTORNEY GENERAL'S STATUTORY AUTHORITY BY FAILING TO PROVIDE FOR RECERTIFICATION OR DECERTIFICATION WHEN A STATE'S RELEVANT CIRCUMSTANCES CHANGE.

The Attorney's General failure to provide mandatory procedures mechanism for assessing the State's continued compliance with Chapter 154 conflicts with clear statutory requirements. 72 FR 31220, § 26.23(e) ("such certification is final and will not be reopened"). The plain terms of the enabling statute, 28 U.S.C. section 2261, require a State's ongoing compliance with Section 2261's mandates in order for a State to maintain its certification under Chapter 154. Under the Attorney General's proposed regulations, a State could be out of compliance with Section 2261's mandates and remain certified under Chapter 154. The Attorney General's regulations cannot allow a State to receive Chapter 154's benefits without ensuring that the State meets the certification requirements to do so. Since the enabling statute clearly requires ongoing monitoring of a State's compliance with Chapter 154's requirements, the statute necessarily: (a) includes the decertification of States that fail to comply with the requirements at any point; and (b) gives federal habeas petitioners the right to challenge a state's compliance with certification requirements during the period the statute of limitations was running on their state post-conviction petition and such petition was pending in state court.

## XVII.

## BY PROMULGATING A DEFINITION OF "APPROPRIATE STATE OFFICIAL," THE ATTORNEY GENERAL EXCEEDED HIS AUTHORITY AND UNLAWFULLY ALTERED THE FEDERAL-STATE BALANCE OF POWERS.

The proposed regulations define "appropriate State official" as the "State Attorney General" or the Chief Executive, if the State Attorney General "does not have responsibilities relating to Federal habeas corpus litigation." 72 Fed. Reg. 31,217, 31,219 § 26.21.

This proposed definition is contrary to congressional intent and exceeds the Attorney General's statutory authority. The phrase "appropriate State official" is used by Congress to describe an official designated by the appropriate state law. *See, e.g.*, H.R. Rep. No. 107-479, reprinted in 2002 U.S.C.C.A.N. 827, 830 (2002) (changing the statutory phrase "State officer designated by the appropriate State law to make such certification" to "appropriate state official" in order "to eliminate unnecessary words"). Leaving the designation of this official to state law and policy also is in accordance with the intent of Congress to establish a statutory scheme consistent with "the federal-state balance." Powell Committee Report, 135 Cong. Rec. at S13483.

The Attorney General may not construe the statute to infringe on state power unless Congress makes its intent to alter the usual constitutional balance between States and the Federal

Government "unmistakably clear in the language of the statute." *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991); *see also Parker v. Brown*, 317 U.S. 341, 351 (1943) ("an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress."); *United States v. Bass*, 404 U.S. 336, 349 (1971) ("unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance."); *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 787 (2000).

Because the statutory language in 28 U.S.C. section 2265 does not indicate any intent to interfere in state policy decisions, the Attorney General exceeds his statutory authority by seeking to dictate which state official may apply for certification, preempts state law limitations on the powers of the state Attorney General and/or precludes application by states in which the state Attorney General does not have authority under state law to request certification. Moreover, the proposed regulations create a prohibited conflict by designating the state Attorney General, usually counsel the opposing party to a petitioner's federal habeas litigation, as the official responsible describing the adequacy of the state system for appointing competent counsel and providing adequate compensation and expenses for that same petitioner.

## XVIII.

## THE ATTORNEY GENERAL FAILED TO COMPLY WITH EXECUTIVE ORDER 13132 – FEDERALISM, PRIOR TO ISSUING THE PROPOSED REGULATIONS.

The proposed definition of the "appropriate State official" as the state Attorney General has federalism implications that preempt state law. The Attorney General failed to provide adequate notice of relevant issues for public comment because it did not accurately describe the federalism implications of the proposed regulations and did not comply with the consultation and accounting required by Executive Order 13132. *See American Medical Ass'n v. United States*, 887 F.2d 760, 767 (7th Cir. 1989) (notice must apprise "interested parties of the issues to be addressed in the rule-making proceeding with sufficient clarity and specificity to allow them to participate in the rulemaking in a meaningful and informed manner."); *Louis v. U.S. Dep't of Labor*, 419 F.3d 970, 975 (9th Cir. 2005) (notice that omitted "potentially controversial subject matter" was insufficient; "an interested member of the public should be able to read the published notice ... and understand the essential attributes of the [proposed rule] and should not have to guess the agency's true intent.").

Prior to releasing any proposed regulations, the Attorney General was required to comply with Executive Order 13132 – Federalism. The Attorney General failed to do so and instead applied the revoked Executive Order 12612 in concluding that "this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment." Such a review fails to comport with current requirements. Executive Order 13132, sec. 6 (b), (c) requires the Attorney General to conduct a federalism summary impact statement under circumstances not covered by Executive Order 12612.

Executive Order 13132, sec. 6 (c) is applicable to regulations with federalism implications that preempt state law. Because in many states a state official may not act to seek the benefits of a federal program unless authorized by the state constitution or legislature, proposed regulations that require the state Attorney General to seek certification preempts those laws. Principles of

federalism dictate that the power of the states to define the duties of their constitutional officers should remain free from interference by the federal government, as such interference "would upset the usual constitutional balance of federal and state powers." *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991) (internal quotations omitted).

Under section 6(c), the Attorney General must submit a federalism summary impact statement, because the proposed definition of "appropriate State official" preempts state law. The federalism summary impact statement must include "a description of the extent of the agency's prior consultation with State and Local officials regarding the impact of the regulation, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of State and local officials have been met; and ... makes available to the Director of the office of management and Budget any written communications submitted to the agency by State and local officials." This information must be provided to the public to allow for meaningful evaluation and comment on the regulations, including their effect on state law and policies.

## XIX.

## THE ATTORNEY GENERAL FAILED TO COMPLY WITH EXECUTIVE ORDER 12988 – CIVIL JUSTICE REFORM, PRIOR TO ISSUING THE PROPOSED REGULATIONS.

Prior to releasing any proposed regulations, the Attorney General was required to comply with Executive Order 12988 – Civil Justice Reform. The Attorney General's conclusion that "This regulation meets the applicable standards set forth in sections 3(a) and 3(b)(2) of [that] order," however, is incorrect and inaccurate and thus fails to provide adequate notice of relevant issues for public comment. *See American Medical Ass'n v. United States*, 887 F.2d 760, 767 (7th Cir. 1989) (notice must apprise "interested parties of the issues to be addressed in the rule-making proceeding with sufficient clarity and specificity to allow them to participate in the rulemaking in a meaningful and informed manner."); *Louis v. U.S. Dep't of Labor*, 419 F.3d 970, 975 (9th Cir. 2005) (notice that omitted "potentially controversial subject matter" was insufficient; "an interested member of the public should be able to read the published notice ... and understand the essential attributes of the [proposed rule] and should not have to guess the agency's true intent.").

The statement of compliance with Executive Order 12988 does not accurately describe the numerous ways in which the proposed regulations are contrary to the requirements of that order, including the following:

- The proposed regulations fail to address or eliminate ambiguity, and, instead create numerous complications in notice and compliance by offering exceedingly brief, vague, and standardless descriptions of the Attorney General's implementation of the certification procedure. Executive Order 12988, § 3(a)(1).
- The proposed regulations fail to "provide a clear legal standard for affected conduct rather than a general standard, and [to] promote simplification and burden reduction." *Id.* at § 3(a)(3); *see also id.* at § 3(b)(2)(C).

- The proposed regulations fail to specify "in clear language the preemptive effect, if any, to be given to the regulation." *Id.* at § 3(b)(2)(A).
- The proposed regulations do not define "key terms, either explicitly or by reference to other regulations or statutes that explicitly define those items." *Id.* at § 3(b)(2)(F).

Furthermore, according to this Order, an agency has the option of declaring that it is unreasonable for the agency regulation to meet the Order standards. *Id.* at § 3(c). The Attorney General does not claim that it is unreasonable to meet the Order's standards, and instead erroneously states that the proposed regulations meet the applicable standards. By misrepresenting the effect of the proposed regulations, the Attorney General deprives interested persons the opportunity for meaningful evaluation and comment on the regulations and their effects.

## XX.

## A STATE ATTORNEY GENERAL WHO IS RESPONSIBLE FOR FEDERAL HABEAS CORPUS LITIGATION HAS AN INTEREST IN OBTAINING THE BENEFITS OF CHAPTER 154 AND SHOULD NOT BE DESIGNATED THE "APPROPRIATE STATE OFFICIAL" FOR PURPOSES OF 28 U.S.C. § 2265(a)(1)

Section 2265(a)(1) provides that certification of a State must be "requested by an appropriate State official." The proposed regulations define "appropriate State official" as "the State Attorney General, except that, in a state in which the State Attorney General does not have responsibility for Federal habeas corpus litigation, it means the Chief Executive thereof." Section 26.21

Where the State Attorney General is responsible for Federal habeas corpus litigation, it will be in his or her interest to receive the benefits of Chapter 154. As an advocate for the State, the State Attorney General will want the expedited review and other procedural advantages conferred by Chapter 154. This interest in the outcome of the certification process makes the State Attorney General precisely the wrong person to be responsible for applying for certification. A State Attorney General will be faced with an impermissible conflict of interest if he or she is aware that the state post-conviction mechanism is failing in practice to provide competent and adequately funded post-conviction counsel to the State's indigent death row inmates but also believes that the mechanism might qualify for certification if one looked only to a description of the mechanism's components. A State Attorney General who is responsible for Federal habeas corpus litigation will also be prone to present the State's post-conviction procedures in a manner most likely to achieve certification irrespective of how the procedures at issue were really intended to function. Because of the State Attorney General's role as an advocate, an unbiased decision about whether to seek certification is impossible. An uninterested State official should be entrusted to make the decision about whether a request for certification is appropriate.

A second reason why the State Attorney General responsible for Federal habeas corpus litigation should not be designated as the "appropriate State official" for purposes of Section 2265(a)(1) is that the State Attorney General's role as a party in Federal habeas corpus litigation oftentimes means that the State Attorney General does not have access to information critical to determining

whether the State's mechanism complies with Chapter 154's qualifying requirements. Funding requests and orders are kept confidential in many state post-conviction proceedings. While some State officials may have access to the information about litigation expenditures, the State Attorney General very well may not. Similarly, State Attorney Generals are likely to be ignorant about the qualifications of the attorneys actually appointed in state post-conviction proceedings given that they are not a party to the appointment process. Without knowledge about whether adequate funding and qualified counsel are being provided in practice, the State Attorney General is ill-suited to be the State official designated to apply for certification.

## XXI.

## THE REGULATIONS MUST ENSURE THAT CERTIFICATION DETERMINATIONS ARE NOT TAINTED OR AFFECTED BY CONFLICTS OF INTEREST, BIAS, AND/OR POLITICAL INFLUENCES.

Due process applies to administrative decision making such as that required of the Attorney General under section 2265. In particular, due process requires the Attorney General's certification decision making to be "impartial and disinterested." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980); *see also Withrow v. Larkin*, 421 U.S. 35, 46-47 (1975) (right to "a fair trial in a fair tribunal" is a basic requirement of due process that applies to administrative decision making) (internal quotation omitted); *Stivers v. Pierce*, 71 F.3d 732, 741 (9th Cir. 1995) (same). In addition to prohibiting actual bias, the Due Process Clause operates "to prevent even the probability of unfairness." *Withrow*, 421 U.S. at 47; *see also Wildberger v. Am. Fed'n of Gov't Employees, AFL-CIO*, 86 F.3d 1188, 1196 (D.C. Cir. 1996) (Due Process Clause prohibits "not just on actual bias, but also on circumstances that could create a significant risk of actual bias."); *Exxon Corp. v. Heinze*, 32 F.3d 1399, 1403 (9th Cir. 1994) ("the Constitution is concerned not only with actual bias but also with 'the appearance of justice'") (quoting In *re Murchison*, 349 U.S. 133, 136 (1955)). In situations in which bias or the appearance of impropriety may infect a decision, procedural protections, such as adversarial proceedings, cross-examination, and insulation from political pressures, are critical. *See, e.g., In re Murchison*, 349 U.S. at 138 (finding bias where judgment was based in part on prior impression, "the accuracy of which could not be tested by adequate cross-examination").

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. Given these roles, the Attorney General's decisionmaking inherently involves the risk of bias. *See, e.g., Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 428 (1995) (under a statute that required the Attorney General to certify plaintiff was injured in the scope of employment – where the result was to shield the government from liability – the Attorney General "[i]nevitably . . . will feel a strong tug to certify, even when the merits are cloudy" and "his interest would certainly bias his judgment") (internal quotation omitted).

Given the Attorney General's inherent conflicting interests and biases, the proposed regulations should be withdrawn and replaced with a mechanism that ensures integrity in the certification

process. As noted in the Comments of Legal Ethics Professors and Professional Responsibility Lawyers, delegating the factfinding and decision making process to the Office of Inspector General is a readily available method for lessening the appearance of impropriety and actual bias. Moreover, withdrawing the proposed regulations will afford the new Attorney General the opportunity to devise and announce appropriate regulations free from the flaws and biases evident in the proposed regulations. *See* 66 Fed. Reg. 7702, Notices: Executive Office of the President, *Memorandum for the Heads and Acting Heads of Executive Departments and Agencies From Andrew H. Card, Jr., Assistant to the President and Chief of Staff* (January 20, 2001) (directing the postponement or withdrawal of pending regulations "[i]n order to ensure that the President's appointees have the opportunity to review any new or pending regulations").

## CONCLUSION

For all the foregoing reasons, the proposed regulations should be withdrawn and revised in accordance with statutory and constitutional requirements and controlling judicial decisions.

NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS
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