May 15, 2026

Submitted via www.regulations.gov

Acting Attorney General Todd Blanche
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, D.C. 20530

Re: Comment Regarding "Certification Process for State Capital Counsel Systems" Proposed Rule, Docket No. OAG198, A.G. Order No. 6678-2026, 91 Fed. Reg. 12525 (Mar. 16, 2025)

Dear Acting Attorney General Todd Blanche:

Governing for Impact ("GFI") submits this comment on a proposed rule, "Certification Process for State Capital Counsel Systems" (the "proposed rule"), issued by the Department of Justice ("DOJ").[1] GFI is a regulatory policy organization dedicated to ensuring that the federal government operates more effectively for everyday working Americans.[2] The proposed rule would remove any meaningful review in the state-certification process authorized by chapter 154 of Title 28 of the U.S Code, which allows states to bypass the typical federal habeas review process for capital cases. Under the statute, the Attorney General can determine if a state has "established a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State postconviction proceedings brought by indigent prisoners who have been sentenced to death."[3] Once a state is certified, the state can impose a 180-day statute of limitations on habeas applicants and, subject to certain requirements, no federal court would have the authority to enter a stay of execution.[4]

We oppose the proposed rule in part because, if finalized, it would violate the Administrative Procedure Act. First, the proposed rule's provisions removing the requirement for state applications to be published for comment is contrary to law. Next, the proposed rule is arbitrary and capricious under the APA because it is based on a misinterpretation of the underlying statute, fails to engage in reasoned decisionmaking, and ignores serious reliance interests. Finally, DOJ must disclose any use of artificial intelligence in this rulemaking. We request that DOJ withdraw the proposed rule.

I. *If finalized as proposed, the rule's removal of the requirement to publish state applications would be contrary to law.*

The proposed rule would remove regulations requiring the Attorney General to publish state applications for certification in the *Federal Register* for public comment.[5] This provision is contrary to

[1] 91 Fed. Reg. 12525 (Mar. 16, 2026).
[2] Governing for Impact, https://governingforimpact.org/.
[3] 28 U.S.C. § 2265(a).
[4] 28 U.S.C. §§ 2262–66.
[5] 91 Fed. Reg. at 12528 (proposing to rescind 28 C.F.R. § 26.23(b)).

law under the APA[6] because certifications under chapter 154 are legislative rules subject to the APA's notice-and-comment requirements.[7]

Legislative rules subject to notice-and-comment requirements are those that "'purport[] to impose legally binding obligations or prohibitions on regulated parties'" and "have the force and effect of law."[8] When distinguishing legislative rules from adjudications, courts have found that "most legislative rules are generally applicable" and "have only future effect," while adjudications "immediately bind parties by retroactively applying law to their past actions."[9] A state certification under chapter 154 is a legislative rule, not an adjudication. First, a certification has general applicability because it would establish new legal requirements for *all* death row litigants in the certified state—including a shorter timeframe to file a federal habeas petition, limited ability to amend such a petition, and a prohibition from bringing an ineffective counsel claim against the state.[10] Second, these are *future* effects, and even if a state certification was backdated to some time in the past, the effect is forward-looking because it "deals with what the law will be" in subsequent habeas petitions in the state.[11]

With no analysis and only citations back to prior rulemakings, the proposed rule states that the "certification process is an adjudication, not a rulemaking."[12] Courts have rejected this argument specifically and others like it. In 2014, a district court rejected DOJ's argument that chapter 154 certifications are adjudications and not rules.[13] There, the court found that certifications were rules because each certification affects every death-penalty prisoner in the certified state and certification decisions are based on policies adopted by the state, not the application of those policies to specific cases.[14] More recently, the D.C. Circuit found that another agency's "across-the-board establishment of new, legally binding requirements…is a legislative rule," regardless of the agency's contention that the action was an adjudicative order.[15] Indeed, the Supreme Court has emphasized that reviewing courts must look "to the *contents* of the agency's action, not the agency's self-serving *label*" when deciding whether notice-and-comment requirements apply.[16] Regardless of how DOJ describes the state certification process, it seeks to determine whether state policy and practice on the whole qualify the state to bypass normal federal habeas procedures—it "affects the rights of broad classes

[6] 5 U.S.C. § 706(2)(A).
[7] 5 U.S.C. § 553(b), (c).
[8] *Perez v. Mortg. Bankers Ass'n,* 575 U.S. 92, 122–23 & n.4 (2015) (quoting *National Mining Ass'n v. McCarthy*, 758 F.3d 243, 251–52 (D.C. Cir. 2014)).
[9] *Safari Club Int'l v. Zinke*, 878 F.3d 316, 332–33 (D.C. Cir. 2017) (internal quotation marks omitted); *accord Providence Yakima Med. Ctr. v. Sebelius*, 611 F.3d 1181, 1188 (9th Cir. 2010).
[10] 28 U.S.C. §§ 2261(e), 2263(a), 2266(b)(3)(B).
[11] *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 222 (1988) (Scalia, J., concurring) ("Adjudication deals with what the law was; rulemaking deals with what the law will be.").
[12] 91 Fed. Reg. at 12528. Both the 2013 and 2008 rules stated a similar conclusion, arguing that the certifications were orders rather than rules for APA purposes, but still required state applications to go through a public comment period, and for the Attorney General to consider such comments. Office of the Attorney General; Certification Process for State Capital Counsel Systems, 78 Fed. Reg. 58160, 58174 (Sep. 23, 2013); *see also* Office of the Attorney General; Certification Process for State Capital Counsel Systems, 73 Fed. Reg. 75327, 75333 (Dec. 11, 2008).
[13] *Habeas Corpus Res. Ctr. v. United States Dep't of Just.*, No. C 13-4517 CW, 2014 WL 3908220, at *9 (N.D. Cal. Aug. 7, 2014), *vacated on jurisdictional grounds,* 816 F.3d 1241 (9th Cir. 2016).
[14] *Id.* at *8.
[15] *City of Billings v. Transportation Sec. Admin.*, 153 F.4th 46, 54 (D.C. Cir. 2025).
[16] *Azar v. Allina Health Servs.*, 587 U.S. 566, 575 (2019) (emphasis in original); *see Am. Airlines, Inc. v. Dep't of Transp.*, 202 F.3d 788, 798 (5th Cir. 2000) (noting that while the court "accord[s] significant deference to an agency's characterization of its own action," it ultimately "look[s] to the product of the agency action").

of unspecified individuals"—on a forward-looking basis, and does not "resolve disputes among specific individuals in specific cases."[17]

A certification is a legislative rule. The proposed rule's deletion of regulations requiring publication of states' certification applications would therefore allow the Attorney General to bypass the APA's notice-and-comment requirements, rendering this provision contrary to law.

II. *The proposed rule, if finalized, would be arbitrary and capricious because it is based on a misinterpretation of the law.*

The APA requires courts to set aside agency actions that are "arbitrary [or] capricious."[18] As specifically relevant here, courts have set aside agency decisions that were based on "an erroneous view of the law."[19] Because the proposed rule is based on a misinterpretation of chapter 154, it would be arbitrary and capricious if finalized.

As background, chapter 154 authorizes the Attorney General to "determine": (1) "whether the State has established a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State postconviction proceedings brought by indigent prisoners who have been sentenced to death;" (2) the date when the mechanism was established; and (3) "whether the State provides standards of competency for the appointment of counsel" in post-conviction death-penalty cases.[20] Finally, the statute states that "[t]here are no requirements for certification or for application of this chapter other than those expressly stated in this chapter."[21]

The statute allows DOJ to issue regulations interpreting minimum state standards that qualify for chapter 154 certification. First, in *Loper Bright Enterprises v. Raimondo*, the Supreme Court recognized that Congress can and does delegate discretion to agencies, including when the statute authorizes the agency "to regulate subject to the limits imposed by a term or phrase that leaves agencies with flexibility... such as 'appropriate' or 'reasonable.'"[22] Like a statute that instructs an agency to add entities to a regulated program when "appropriate and necessary," chapter 154 requires the Attorney General to "*determine* . . . whether" a state has "established a mechanism for," among other things, the "payment of *reasonable* litigation expenses of *competent* counsel,"[23] and to "*determine* . . . whether" a state "provides standards of competency for the appointment of" such counsel.[24] These are the types of capacious terms that imbue the Attorney General with discretion—they "naturally and traditionally include[] consideration of all the relevant factors."[25] According to Black's Law Dictionary, a "determination" means "[t]he act of deciding something officially."[26] Thus, "to 'determine'" something "inherently require[s] some exercise of discretion."[27] And determining whether something is "reasonable" was the example *Loper Bright* itself used as a term signifying

[17] *Providence Yakima Med. Ctr.*, 611 F.3d at 1188 (quotation omitted).
[18] 5 U.S.C. § 706(2)(A).
[19] *Prill v. NLRB*, 755 F.2d 941, 947 (D.C. Cir. 1985); *see, e.g.*, *United States v. Ross*, 848 F.3d 1129, 1134 (D.C. Cir. 2017); *Safe Air for Everyone v. EPA*, 488 F.3d 1088, 1101 (9th Cir. 2007).
[20] 28 U.S.C. § 2265(a).
[21] 28 U.S.C. § 2265(a)(3).
[22] 603 U.S. 369, 395 (2024) (quotation omitted).
[23] 28 U.S.C. § 2265(a)(1)(A) (emphasis added).
[24] *Id.* § 2265(c) (emphasis added).
[25] *Michigan v. EPA*, 576 U.S. 743, 752 (2015) (quotation omitted).
[26] *Determination*, *Black's Law Dictionary* (12th ed. 2024).
[27] *Stacy S. v. Boeing Co. Emp. Health Benefit Plan (Plan 626)*, 344 F. Supp. 3d 1324, 1337 (D. Utah 2018).

agency "flexibility."[28] Finally, determinations concerning mechanisms and standards with respect to "competency" also invoke judgment calls.

Congress's choice of these terms makes sense; their "'literal reading' also comport[s] with the statute's structure and purpose."[29] It would be counterintuitive to think that Congress expected the Attorney General to rubber-stamp state applications, without meaningful review, while at the same time empowering the Attorney General to "promulgate regulations to implement the certification procedure"[30] and make the determinations described above. If Congress intended for the Attorney General's review of a state's counsel competency standards to begin and end with the state's submission, it could have done so by simply applying chapter 154's provisions to states that self-certify. It did not. Instead, Congress empowered the Attorney General to implement the certification process and make determinations bestowing an "array of procedural benefits."[31]

In its 2013 rulemaking, which the proposed rule would largely rescind, DOJ interpreted chapter 154 to allow the Attorney General to "define within reasonable bounds the chapter's requirements for certification, and to evaluate whether a State's mechanism is adequate for purposes of ensuring that it will result in the appointment of competent counsel."[32] As explained above, DOJ's 2013 interpretation accords with the statute's text and purpose. Consistent with that interpretation, the 2013 rule provided "benchmark" competency standards that would qualify a state for certification, while also allowing states to adopt other standards that at least met the benchmark.[33]

Now, in the proposed rule, DOJ argues that the 2013 regulations "exceeded the Attorney General's statutory authority by" including "federal standards on counsel competency, appointment, and compensation, in addition to other atextual requirements."[34] Specifically, the agency argues that the statute only allows the Attorney General to determine *whether* a State has established a mechanism to ensure standards of competency,[35] not to set regulations around what those standards are or whether or not the mechanism established has actually created access to competent postconviction counsel in the State. For the reasons explained above, DOJ misconstrues chapter 154 in general. DOJ also argues that § 2265(a)(1)(C) constrains the Attorney General's review of standards defined in (a)(1)(A).[36] While § 2265(a)(1)(C) directs the Attorney General to determine if a state has provided standards of competency for proceedings described in § 2265(a)(1)(A), this does not mean that the Attorney General is bound by the state's own determination of sufficient standards. Quite the opposite: while states, under the statute, are free to develop their own standards for counsel competency and compensation, the Attorney General must determine whether the standards provided by the state under § 2265(a)(1)(C) meet the requirements set by § 2265(a)(1)(A). Again, Congress could have restricted the Attorney General's review to determine whether a state has developed *any* standards of competence, but instead chose to expressly define the Attorney General's review of the state standards by the requirements set in § 2265(a)(1)(A).

[28] 608 U.S. at 395 (quotations omitted).
[29] *Pinson v. U.S. Dep't of Justice*, 964 F.3d 65, 72 (D.C. Cir. 2020) (quotation omitted).
[30] 28 U.S.C. § 2265(b).
[31] 152 Cong. Rec. 2446 (Mar. 2, 2006)(statement of sponsor Sen. Kyl).
[32] 78 Fed. Reg. at 58161.
[33] *Id.*
[34] 91 Fed. Reg. at 12527.
[35] *Id.*
[36] *Id.*

DOJ argues that its new, narrow interpretation is supported by the statute's statement, in § 2265(a)(3), that "[t]here are no requirements for certification or for application of this chapter other than those expressly stated in this chapter."[37] In this respect, too, DOJ errs. DOJ's current conclusion is inconsistent with the plain meaning of § 2265(a)(3). While § 2265(a)(3) does limit the Attorney General's review to requirements "expressly stated" in the chapter, § 2265(a)(1) provides the Attorney General with requirements to consider as his or her determination is made: if the State provides for the appointment, compensation, and payment for reasonable litigation expenses, and if the State provide such access and payment to competent counsel.[38] Limiting *what* factors the Attorney General may consider does not limit *how* the Attorney General considers those factors. And it certainly does not undercut the discretion inherent in requiring the Attorney General to make a determination—discretion that the statute also authorizes the Attorney General to guide by regulation.

The proposed rule is premised on a legal error: DOJ's new conclusion that chapter 154 does not provide the Attorney General with discretion or authorize the Attorney General to promulgate regulations guiding that discretion. Because an agency decision "may not stand if the agency has misconceived the law,"[39] if DOJ repeats its errors in any final rule, that rule will be arbitrary and capricious.

III. *If finalized as proposed, the rule would be arbitrary and capricious because it advances inconsistent positions.*

The APA requires that agency action "be reasonable and reasonably explained."[40] This means that an agency's "reasoning cannot be internally inconsistent."[41] DOJ states that one of its primary goals in this rulemaking is to "expedite and strengthen the certification process."[42] However, its proposed policy—essentially reverting back to the 2008 regulations—would not further that goal. As DOJ implicitly acknowledges, while those regulations were in place, until 2013, the Attorney General did not certify a single state.[43] If the agency's aim is to further Congress's goal of "expediting federal habeas review of state capital convictions,"[44] it is illogical for it to choose to essentially re-adopt the 2008 policy, which failed to produce any successful state applications under the program.

IV. *The proposed rule violates the change-in-position doctrine because it fails to consider serious reliance interests in the current policy.*

When an agency changes an existing policy, as DOJ proposes to do here, it "must show that there are good reasons for the new policy."[45] As explained above, DOJ has failed to do so by relying on a misinterpretation of chapter 154 and by advancing inconsistent positions. DOJ has also failed to provide the "more detailed justification" that is required when, as is also the case here, an agency's "prior policy has engendered serious reliance interests."[46] This is true even when, once again, as

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[37] 28 U.S.C. § 2265(a)(3).
[38] 28 U.S.C. § 2265(a)(1)(A).
[39] *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943).
[40] *FCC v. Prometheus Radio Project,* 592 U.S. 414, 423 (2021).
[41] *ANR Storage Co. v. FERC*, 904 F.3d 1020, 1024 (D.C. Cir. 2018).
[42] 91 Fed. Reg. at 12526.
[43] *Id.*
[44] *Id.* at 12527.
[45] *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).
[46] *Id.*; *see also Food & Drug Admin. v. Wages & White Lion Invs., L.L.C.*, 604 U.S. 542, 570 (2025).

here, the agency's basis for changing its policy position is its purported illegality.[47] In *Department of Homeland Security v. Regents*, the Court noted that even if an agency determines a prior position was illegal, "nothing about that determination" precludes the agency from "accommodating particular reliance interests."[48] Similarly here, even if the agency is rescinding the prior regulations because it has determined that the 2013 rule was unauthorized—a conclusion that, as explained above, is incorrect—DOJ must still contend with the serious reliance interests engendered by that rule. Nowhere in the proposed rule does DOJ even attempt to consider the reliance interests of state capital prisoners who would be directly affected by the proposed rule. It is difficult to imagine a more serious interest than a person's life, which their right to competent counsel protects. The current regulations protect that interest—endowing capital prisoners with reliance interests in those regulations—by requiring the Attorney General to exercise the discretion chapter 154 bestows on him or her; the proposed rule, by contrast, would effectively require the Attorney General to rubber-stamp states' applications for certification. Nowhere in the proposed rule does DOJ contend with how such rubber-stamping would hinder prisoners' serious reliance interests in competent counsel and "full and fair" review of their claims that the current regulations help secure.[49]

Serious reliance interests include even those where the underlying statute "confer[s] no substantive rights" on the affected parties.[50] In *Regents*, for example, the Court found that DHS's reversal of its nonenforcement policy against certain immigrants was arbitrary and capricious in part because the agency did not consider their serious reliance interests, including with respect to education, workforce participation, and economic effects.[51] Similarly here, capital, postconviction state prisoners have serious reliance interests in the Attorney General's review of state mechanisms and standards concerning the competency of counsel.

Additionally, states and capital prisoners have serious reliance interests in the 2013's rule's public participation requirements, which the proposed rule would rescind (as described above). Without public participation, states' applications would not benefit from prisoners' or advocates' analyses of a state's post-conviction counsel environment, which can provide helpful context and may include historical trends that states' applications may lack. Conversely, prisoners and other interested parties would also not have an opportunity to rebut states' assertion of competent legal representation if their analysis misrepresents the availability of competent counsel for indigent prisoners.

States and capital prisoners also have serious reliance interests in the current regulations' provision authorizing DOJ to revoke a prior certification, which the proposed rule would also rescind.[52] The proposed rule would allow DOJ to approve a state application, without any meaningful review, and back-date that approval with no procedure for revoking or reconsidering that approval in the future. This would essentially mean that a state that implemented any mechanism for competent counsel—which the state itself defines—at any point could seek an indefinite bypass of federal

[47] *See*, *e.g., A.C.R. v. Noem*, 809 F. Supp. 3d 103, 121 (E.D.N.Y. 2025), *reconsideration denied*, No. 25-CV-3962 (EK) (TAM), 2026 WL 102611 (E.D.N.Y. Jan. 14, 2026).
[48] 591 U.S. 1, 33 (2020).
[49] *See*, *e.g*., Alexander Brock, *When Death Becomes an Option: How AEDPA's Opt-in Provisions Will Violate the Constitutional Rights of Habeas Corpus,* 27 J. L. & Pol'y 377, 400–404 (2019), https://brooklynworks.brooklaw.edu/jlp/vol27/iss2/2?utm_source=brooklynworks.brooklaw.edu%2Fjlp%2Fvol27%2Fiss2%2F2&utm_medium=PDF&utm_campaign=PDFCoverPages.
[50] *Regents,* 591 U.S. at 30 (quotation omitted).
[51] *Id.*
[52] 91 Fed. Reg. at 12529. DOJ argues that revocability is not specifically authorized by the statute. *Id.*

habeas review. The availability of revocation ensures that states can re-assess their ability to provide competent counsel, and that DOJ can make an independent determination that the state is either not following its approved mechanisms or it made an error in certifying the state in the first place. Prisoners subject to a state's certification also have an interest in challenging a state's certification, if, for example, either the state or DOJ finds deficiencies in the state's mechanism sometime after initial approval. Without a possibility of revocation, a state that is initially certified but later falls below the standards set in chapter 154 has no incentive under the statute to continue providing competent counsel, and neither DOJ or the state has any recourse to re-assess the certification.

Because the proposed rule fails to address a range of serious reliance interests, it would violate the change-in-position doctrine if finalized.

V. *Any use of artificial intelligence in this rulemaking must be disclosed.*

We request that DOJ disclose information related to any use of artificial intelligence as part of this rulemaking and, to the extent such use is significant, provide an additional opportunity for public comment.[53] Under the APA's reasoned decisionmaking requirement, "[w]hen an agency uses a computer model, it must explain the assumptions and methodology used in preparing the model."[54] Moreover, the public must have notice of, and an opportunity to comment on, agencies' uses of models and data, AI-enhanced and otherwise, to regulate.[55] Such disclosures are "[t]he safety valves in the use of . . . sophisticated methodology."[56]

Beyond being legally required, disclosure of AI usage is prudent policy. Administrative agencies should uphold the values of transparency and public participation.[57] In particular, the Administrative Conference of the United States has recognized that "[a]gencies' efforts to ensure transparency in connection with their AI systems can serve many valuable goals," and it therefore recommends that "agencies might prioritize transparency in the service of legitimizing its AI systems, facilitating internal or external review of its AI-based decision making, or coordinating its AI-based activities."[58] Among other things, disclosure of AI usage allows the public to confirm that agencies are adhering to relevant laws, apply technical expertise to improve agencies' use of technology, assess the risk that federal policies might be influenced by biased or otherwise faulty methods or products, and learn about an emerging and important field of technology.[59] Indeed, the Office of Management and

[53] We adopt the definition of artificial intelligence at Pub. L. 115-232, § 238(g), 132 Stat. 1697–98.
[54] *Owner-Operator Ind. Drivers Ass'n, Inc. v. Fed. Motor Carrier Safety Admin.*, 494 F.3d 188, 204 (D.C. Cir. 2007) (*quoting U.S. Air Tour Ass'n v. FAA*, 298 F.3d 997, 1008 (D.C. Cir. 2002)) (internal quotation marks omitted).
[55] *See Am. Radio Relay League v. FCC*, 524 F.3d 227, 236 (D.C. Cir. 2008); *Air Transp. Ass'n v. FAA*, 169 F.3d 1, 7 (D.C. Cir. 1999).
[56] *Sierra Club v. Costle*, 657 F.2d 298, 334 (D.C. Cir. 1981).
[57] *See* Attorney General's Manual on the Administrative Procedure Act 9 (1947) (describing the APA's purposes to include "requir[ing] agencies to keep the public currently informed of their organization, procedures, and rules" and "provid[ing] for public participation in the rule making process").
[58] Admin. Conf. of the U.S., Statement #20, Agency Use of Artificial Intelligence, 86 Fed. Reg. 6612, 6616 (Jan. 22, 2021).
[59] *See also*, *e.g.*, ABA: ABA Comm. on Ethics & Pro. Resp., Formal Op. 512, Generative Artifiial Intelligence Tools (July 29, 2024), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/ethics-opinions/aba-formal-opinion-512.pdf.

Budget recently recognized that the government, in using AI, must "provide improved services to the public, while maintaining strong safeguards for civil rights, civil liberties, and privacy."[60]

Consistent with these requirements and principles, we request that DOJ disclose, first, whether it has used or plans to use AI as part of this rulemaking, including to develop substantive policy, produce supporting analysis, or respond to public comments. If so, DOJ must disclose the particular AI product it has used and why it was selected, how that product was procured, whether the product was fine tuned, what prompts or inputs the agency used to elicit responses from the product, and the responses the product produced. DOJ must also disclose how agency staff used AI-produced information, including any quality control, peer review, or other validation performed. And DOJ must disclose what measures it took to ensure that its use of AI complied with applicable data security and privacy requirements. To that end, it must disclose whether and to what extent any persons and entities not employed by the agency developed, modified, provided access to, or used AI in the course of the agency's decisionmaking process. To the extent the disclosed use of AI is significant, DOJ must provide an additional opportunity for public comment.

VI. *Conclusion*

If finalized as proposed, the rule would violate the APA. Its provisions removing notice-and-comment procedures are contrary to law, and it is arbitrary and capricious for multiple reasons: it is predicated on a misinterpretation of chapter 154, it does not exhibit reasoned decisionmaking, and it ignores serious reliance interests. In addition to disclosing any use of artificial intelligence in this rulemaking, DOJ should withdraw the proposed rule.

Sincerely,

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[60] Memorandum for the Heads of Executive Departments and Agencies from Russell T. Vought, Director, Office of Management & Budget 1, M-25-21 (Apr. 3, 2025), *available at* https://www.whitehouse.gov/wp-content/uploads/2025/02/M-25-21-Accelerating-Federal-Use-of-AI-through-Innovation-Governance-and-Public-Trust.pdf.