

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA

3
4 HABEAS CORPUS RESOURCE CENTER and
5 THE OFFICE OF THE FEDERAL PUBLIC
6 DEFENDER FOR THE DISTRICT OF
7 ARIZONA,

8 Plaintiffs,

9 v.

10 UNITED STATES DEPARTMENT OF
11 JUSTICE and ERIC H. HOLDER, in
12 his official capacity as United
13 States Attorney General,

14 Defendants.

15 No. C 13-4517 CW
16 ORDER GRANTING
17 PRELIMINARY
18 INJUNCTION

19 _____/

20 On October 18, 2013, the Court issued an order to show cause
21 why a preliminary injunction should not issue and a temporary
22 restraining order enjoining Defendants until November 1, 2013 from
23 putting into effect the rule entitled, "Certification Process for
24 State Capital Counsel Systems," published at 78 Fed. Reg. 58,160
25 (Sept. 23, 2013). The order was issued ex parte. Due to the
26 lapse in appropriations, Defendants had filed a request for a stay
27 and had not yet filed an opposition. On October 23, 2013, the
28 parties submitted a stipulation for an extended briefing schedule
29 in which they agreed to extend the temporary restraining order for
30 an additional fourteen days. Plaintiffs Habeas Corpus Resource
31 Center (HCRC)¹ and the Office of the Federal Public Defender for

32 _____

33 ¹ HCRC is an entity in the Judicial Branch of the State of
34 California that, among other things, provides legal representation
35 to men and women under sentence of death in state and federal
36 habeas corpus proceedings. Complaint ¶ 16.

1 the District of Arizona (FDO-Arizona)² seek a preliminary
2 injunction. Defendants United States Department of Justice (DOJ)
3 and United States Attorney General Eric H. Holder oppose the
4 motion.³ The motion was heard on November 14, 2013. Having
5 considered oral argument and the papers submitted by the parties,
6 the Court GRANTS Plaintiffs' motion.

7 BACKGROUND

8 I. The 2013 Final Rule

9 The Antiterrorism and Effective Death Penalty Act (AEDPA) of
10 1996 added chapter 154 of Title 28 of the United States Code.
11 Chapter 154 provides expedited procedures in federal capital
12 habeas corpus cases when a state is able to establish that it has
13 provided qualified, competent, adequately resourced and adequately
14 compensated counsel to death-sentenced prisoners. Under the
15 AEDPA, federal courts were responsible for determining whether
16 states were eligible for the expedited federal procedures. The
17 USA Patriot Improvement and Reauthorization Act of 2005, Pub. L.
18 No. 109-174, 120 Stat. 192 (2005), amended chapter 154 to shift
19 the eligibility determination from the federal courts to the
20 Attorney General.

21 _____
22 ² FDO-AZ is a Federal Defender organization that operates
23 under the authority of the Criminal Justice Act of 1964, 18 U.S.C.
24 § 3006A(g). Among other things, FDO-AZ provides legal
25 representation to indigent men and women sentenced to death.
26 Complaint ¶ 17.

27 ³ On November 22, 2013, the Court granted Marc Klaas's motion
28 to file a brief as amicus curiae. The Court has reviewed the
brief, Plaintiffs' response to it and amicus's reply. The Court
finds that the amicus brief does not alter the Court's assessment
of the motion.

1 In December 2008, the Attorney General published a final rule
2 to implement the procedure prescribed by chapter 154. On January
3 20, 2009, the Court granted a preliminary injunction, enjoining
4 Defendants from putting the regulation into effect without first
5 providing an additional comment period of at least thirty days and
6 publishing a response to any comments received during such a
7 period. Habeas Corpus Resource Ctr. v. United States Department
8 of Justice, 2009 WL 185423, *10 (N.D. Cal.). On February 5, 2009,
9 Defendants solicited further public comment on its proposed
10 certification process. Defendants thereafter proposed to retract
11 the 2008 regulation pending the completion of a new rulemaking
12 process. See 75 Fed. Reg. 29,217 (May 25, 2010). On November 23,
13 2010, the Defendants published a final rule retracting the 2008
14 regulations. See 75 Fed. Reg. 71,353 (Nov. 23, 2010).

15 On March 3, 2011, the DOJ published a notice of proposed
16 rulemaking for a new certification process. 76 Fed. Reg. 11,705.
17 The comment period closed on June 1, 2011. On February 13, 2012,
18 the DOJ then published a supplemental notice soliciting public
19 comments on five contemplated changes. 77 Fed. Reg. 7559. The
20 comment period closed on March 14, 2012. On September 2013, the
21 Final Rule was published.

22 Section 26.22 of the Final Rule prescribes the standards a
23 state must meet in order to earn certification under 28 U.S.C.
24 §§ 2261 and 2265. The Final Rule provides:

25 § 26.22 Requirements.

26 The Attorney General will certify that a State meets the
27 requirements for certification under 28 U.S.C. 2261 and
28 has established a mechanism for the appointment of

1 counsel for indigent prisoners under sentence of death
2 in State postconviction proceedings that satisfies the
3 following standards:

4 . . .
5 (b) The mechanism must provide for appointment of
6 competent counsel as defined in State standards of
7 competency for such appointments.

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

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

20 (ii) Appointment of counsel meeting qualification
21 standards established in conformity with 42 U.S.C.
22 14163(e)(1) and (2)(A), if the requirements of 42
23 U.S.C. 14163(e)(2)(B), (D), and (E) are also
24 satisfied.

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

78 Fed. Reg. at 58,183. The "standards established in conformity
with 42 U.S.C § 14163(e)(1) and (2)(A)" referred to in section
26.22(b)(1)(ii) are provisions of the Innocence Protection Act
(IPA). They call for maintenance of a roster of qualified
attorneys, specialized training programs for attorneys providing
capital case representation, monitoring of the performance of
attorneys who are appointed and their attendance at training
programs, and removal from the roster of attorneys who fail to

1 deliver effective representation, engage in unethical conduct, or
2 do not participate in required training. 42 U.S.C.
3 §§ 14163(e)(2)(B), (D), and (E).

4 Section 26.23 of the Final Rule provides the process for a
5 state's certification:

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

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

12 (1) Indicating that the State has requested
13 certification;

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

17 (3) Soliciting public comment on the request.

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

24 (d) A certification by the Attorney General
25 reflects the Attorney General's determination that the
26 State capital counsel mechanism reviewed under paragraph
27 (c) of this section satisfies chapter 154's
28 requirements. A State may request a new certification
by the Attorney General to ensure the continued
applicability of chapter 154 to cases in which State

1 postconviction proceedings occur after a change or
2 alleged change in the State's certified capital counsel
3 mechanism. Changes in a State's capital counsel
4 mechanism do not affect the applicability of chapter 154
5 in any case in which a mechanism certified by the
6 Attorney General existed throughout State postconviction
7 proceedings in the case.

8 (e) A certification remains effective for a period
9 of five years after the completion of the certification
10 process by the Attorney General and any related judicial
11 review. If a State requests re-certification at or
12 before the end of that five-year period, the
13 certification remains effective for an additional period
14 extending until the completion of the re-certification
15 process by the Attorney General and any related judicial
16 review.

17 78 Fed. Reg. at 58,184.

18 II. The Impact of the 2013 Final Rule

19 Once a state is certified, the statute of limitations for
20 federal habeas corpus proceedings is "fast-tracked." First, the
21 statute of limitations for filing a habeas petition in federal
22 court is shortened from one year to 180 days. 28 U.S.C.
23 § 2263(a). Second, tolling of the statute of limitations is
24 altered to exclude (1) the period of time between the finality of
25 direct review in state court to the filing of a petition for writ
26 of certiorari in the United States Supreme Court and (2) the
27 filing of exhaustion or successive state habeas petitions. 28
28 U.S.C. § 2263(b). Third, a petitioner's ability to amend a
petition is limited. 28 U.S.C. § 2266(b)(3)(B). Fourth, a
federal district court must enter final judgment on a habeas
petition within 450 days of the filing of the petition, or sixty
days after it is submitted for decision--whichever is earlier. 28
U.S.C. § 2266(b). Finally, the certification is retroactive,
reaching back to the date the qualifying mechanism is found to

1 have been established. 28 U.S.C. § 2265(a)(2) ("The date the
2 mechanism described in paragraph 1(A) was established shall be the
3 effective date of the certification under this subsection.").

4 LEGAL STANDARD

5 It is appropriate to issue a preliminary injunction if the
6 moving party establishes either (1) a combination of probable
7 success on the merits and the possibility of irreparable injury,
8 or (2) that serious questions are raised and the balance of
9 hardships tips sharply in favor of the moving party. Stuhlberg
10 Intern. Sales Co. v. John D. Brush and Co., 240 F.3d 832, 839-840
11 (9th Cir. 2001). "These formulations are not different tests, but
12 represent two points on a sliding scale in which the degree of
13 irreparable harm increases as likelihood of success on the merits
14 decreases." Associated Gen. Contractors of Calif. v. Coalition
15 for Economic Equity, 950 F.2d 1401, 1410 (9th Cir. 1991)
16 (citations omitted). Under either formulation of the test, a
17 party seeking a preliminary injunction always must show that a
18 significant threat of irreparable harm exists. American Passage
19 Media Corp. v. Cass Communications, Inc., 750 F.2d 1470, 1473 (9th
20 Cir. 1985). In addition, in the Ninth Circuit, the Court must
21 also consider the public interest when it assesses the propriety
22 of issuing an injunction. Sammartano v. First Judicial District
23 Court, 303 F.3d 959, 973 (9th Cir. 2002).

24 DISCUSSION

25 I. Likelihood of Success on Procedural Issues

26 The APA "requires an agency conducting notice-and-comment
27 rulemaking to publish in its notice of rulemaking 'either the
28 terms or substance of the proposed rule or a description of the

1 subjects and issues involved.'" Long Island Care at Home, Ltd. v.
2 Coke, 551 U.S. 158, 174 (2001) (quoting 5 U.S.C. § 553(b)(3)).
3 Because the Attorney General's promulgation of the Final Rule
4 constitutes administrative rulemaking, it must comply with the
5 rulemaking provisions of the APA. See 5 U.S.C. § 553. To
6 determine compliance, courts inquire whether "the notice fairly
7 apprise[s] the interested persons of the subjects and issues
8 before the Agency.'" Louis v. U.S. Dep't of Labor, 419 F.3d 970,
9 975 (9th Cir. 2005).

10 The Court finds that Plaintiffs are likely to succeed on
11 their claim that the Attorney General failed to provide adequate
12 notice under the APA because he stated, for the first time in the
13 Final Rule, that the certification decisions are not subject to
14 the rulemaking provisions of the APA. 78 Fed. Reg. 58,174 ("[T]he
15 Attorney General's certifications under chapter 154 are orders
16 rather than rules for purposes of the Administrative Procedure Act
17 (APA). They are accordingly not subject to the APA's rulemaking
18 provisions, see 5 U.S.C. § 553[.]"). Interested parties may have
19 been denied an opportunity to comment on the Attorney General's
20 view. When an agency fails to notify interested parties of its
21 position, its notice of proposed rulemaking has not "provide[d]
22 sufficient factual detail and rationale for the rule to permit
23 interested parties to comment meaningfully." Honeywell Int'l.,
24 Inc. v. EPA, 372 F.3d 441, 445 (D.C. Cir. 2004) (citation
25 omitted).

26 Defendants respond that the retracted 2008 rule provided
27 sufficient notice under the APA because the current Attorney
28 General adhered to the position of his predecessor. Defendants'

1 argument is unpersuasive. The Attorney General published a notice
2 of a new proposed rule that resembled the 2008 rule, but omitted
3 its characterization of certification decisions as adjudications,
4 not rules. Far from alerting the public to the fact that the
5 Attorney General adhered to this position taken by his
6 predecessor, it is more likely that the notice of the new rule led
7 interested parties to presume that the Attorney General
8 intentionally removed this characterization. See, e.g., Keene
9 Corp. v. United States, 508 U.S. 200, 208 (1993) (“Where Congress
10 includes particular language in one section of a statute but omits
11 it in another . . . , it is generally presumed that Congress acts
12 intentionally and purposely in the disparate inclusion or
13 exclusion.”) (citation and internal quotation marks omitted).

14 Defendants additionally contend that certification decisions
15 are self-evidently adjudications, and thus that they were not
16 required to provide notice of their view. Scarce authority exists
17 for such a contention. As Plaintiffs note, the Attorney General’s
18 certification determinations are unlike typical APA adjudications
19 that are individualized, including Social Security and Medicare
20 benefits claims. Rather, this particular certification decision
21 “affects the rights of broad classes” of individuals and impacts
22 such persons “after the [decision] is applied.” Yesler Terrace
23 Cmty. Council v. Cisneros, 37 F.3d 442, 448 (9th Cir. 1994).

24 Further, the 2011 Proposed Rule and 2012 Supplemental Notice
25 included indicia of rulemaking, e.g. publication and a notice and
26 comment period. Defendants thus have not provided authority for
27 their claim that certification is self-evidently an adjudication.

28

1 Accordingly, Plaintiffs are likely to succeed in
2 demonstrating that Defendants were obliged to provide notice of
3 their view that rulemaking procedures would not apply to the
4 certification decision. See Louis, 419 F.3d at 976 (finding
5 notice that omitted "potentially controversial subject matter"
6 insufficient); Habeas Corpus Res. Ctr. v. U.S. Dept. of Justice,
7 2009 WL 185423, at *8 (N.D. Cal.) (holding that notice was
8 inadequate when public commenters did not reflect any
9 understanding of DOJ's controversial interpretation and likely
10 would have disputed it had they been provided notice).

11 The Court concludes that the Final Rule likely did not give
12 adequate notice of the Attorney General's view of the
13 certification process. Accordingly, Plaintiffs are likely to
14 succeed on the merits of this claim.

15 II. Likelihood of Success on the Challenges to the Final Rule

16 A. Standing

17 Defendants assert Plaintiffs lack standing to pursue their
18 challenge to the substance of the Final Rule and thus cannot
19 satisfy Article III's "case or controversy requirement." A
20 plaintiff "has the burden of establishing the three elements of
21 Article III standing: (1) he or she has suffered an injury in fact
22 that is concrete and particularized, and actual or imminent;
23 (2) the injury is fairly traceable to the challenged conduct; and
24 (3) the injury is likely to be redressed by a favorable court
25 decision." Salmon Spawning & Recovery Alliance v. Gutierrez, 545
26 F.3d 1220, 1225 (9th Cir. 2008). "Article III standing requires
27 an injury that is actual or imminent, not conjectural or
28

1 hypothetical." Cole v. Oroville Union High School Dist., 228 F.3d
2 1092, 1100 (9th Cir. 2000) (internal quotation marks omitted). "A
3 plaintiff may allege a future injury in order to comply with this
4 requirement, but only if he or she 'is immediately in danger of
5 sustaining some direct injury as the result of the challenged
6 official conduct and the injury or threat of injury is both real
7 and immediate, not conjectural or hypothetical.'" Scott v.
8 Pasadena Unified School Dist., 306 F.3d 646, 656 (9th Cir. 2002)
9 (quoting City of Los Angeles v. Lyons, 461 U.S. 95, 102 (1983)).

10 Defendants first incorrectly state that the Court has found
11 that Plaintiffs lack standing with regard to substantive claims.
12 Defs.' Resp. at 14-15. In the prior litigation, substantive
13 standing issues were not before this Court, because Plaintiff HCRC
14 raised only procedural deficiencies. See HCRC's Reply Br. to Opp.
15 to Mot. for Preliminary Inj., Docket No. 71, Case No. 08-cv-02649,
16 at 6. Accordingly, in the prior case the Court made no finding as
17 to substantive standing issues and found that HCRC had standing to
18 challenge procedural defects. Habeas Corpus Res. Ctr., 2009 WL
19 185423, at *5.

20 Defendants contend that Plaintiffs lack standing because
21 their injuries are speculative and not imminent. According to
22 Defendants, Plaintiffs' injuries will occur only if California or
23 Arizona are certified. Plaintiffs respond that "the harmful
24 consequences of permitting the flawed rule to go into effect are
25 not contingent on whether California will be certified, but rather
26 upon the inability to predict whether California qualifies for
27 chapter 154's benefits[.]" Supplemental Declaration of Michael
28 Laurence ¶ 3. It is Defendants' position that the retroactive

1 effect of the Final Rule reaches back to the date at which the
2 state mechanism went into effect. In other words, were the DOJ to
3 certify a state and deem a state's mechanism to have gone into
4 effect at a prior date, the deadline for a habeas petitioner's
5 application may have come and gone without his knowing it. The
6 confusion caused by the claimed retroactive effect forces
7 Plaintiff HCRC to make urgent decisions regarding its litigation,
8 resources, and strategy.

9 Arizona has already applied for certification. If Arizona is
10 certified, under Defendants' interpretation of the Final Rule,
11 Arizona's certification will reach back to the date when the
12 mechanism is found to have been established. The uncertainty
13 caused by the retroactive effect of the Final Rule curtails and
14 disrupts FDO-Arizona's capacity to counsel its clients
15 meaningfully. Declaration of Dale Baich ¶¶ 10-12. Accordingly,
16 the present injury alleged by Plaintiffs is actual and
17 particularized, and the future injury is predictable and imminent.
18 As the Court has found previously, there can be little doubt that
19 the legal uncertainty of the retroactive effect of the new
20 limitations period will severely harm Plaintiffs, leaving them in
21 protracted legal limbo. Docket No. 26, TRO Order at 8.
22 Defendants have articulated no persuasive response to suggest
23 otherwise.

24 Defendants argue next that Plaintiffs lack standing to raise
25 substantive claims because they do not meet the second and third
26 elements of Article III standing. Defendants' argument fails.
27 Plaintiffs can trace their actual or future injuries to the
28 implementation of the Final Rule. The implementation "will result

1 in known, predictable consequences" that constitute concrete
2 injury. City of Sausalito v. O'Neill, 386 F.3d 1186, 1199 (9th
3 Cir. 2004) (finding that plaintiff's harm was traceable to the
4 implementation of defendant's proposed plan, and "because
5 Sausalito's asserted injuries will not occur if the Plan is not
6 implemented, Sausalito has alleged injury that can be redressed by
7 a decision blocking implementation of the Plan."). Because
8 Plaintiffs' injuries will not occur if the Final Rule is not
9 implemented, Plaintiffs have alleged injury that can be redressed
10 by a decision blocking implementation of the Final Rule as
11 written. Id.

12 The Court concludes that Plaintiffs have standing to
13 challenge the substance of the Final Rule. First, they have
14 alleged harm with sufficient detail to state a "concrete and
15 particularized" injury. Second, the injury can be traced to the
16 proposed implementation of the Final Rule. Third, Plaintiffs have
17 alleged injury that can be redressed by a decision blocking
18 implementation of the Final Rule as written.

19 B. Deficient Certification Process

20 Under § 706(2)(A) of the APA, a reviewing court shall "hold
21 unlawful and set aside agency action, findings, and conclusions
22 found to be arbitrary, capricious, an abuse of discretion, or
23 otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A).
24 Final regulations are arbitrary and capricious when they fail to
25 provide "definitional content" for terms guiding agency action
26 implementing a statute. Pearson v. Shalala, 164 F.3d 650, 660
27 (D.C. Cir. 1999). An agency is "obliged under the APA" to give
28 content to statutory standards it is tasked with implementing.

1 Id. at 661. An agency cannot leave a prospective applicant
2 "utterly without guidance as to what he must prove, and how." S.
3 Terminal Corp. v. EPA, 504 F.2d 646, 670 (1st Cir. 1974). "When
4 an agency utterly fails to provide a standard for its decision, it
5 runs afoul of more than one provision of the Administrative
6 Procedure Act. . . . An agency's failure to state its reasoning or
7 to adopt an intelligible decisional standard is so glaring that we
8 can declare with confidence that the agency action was arbitrary
9 and capricious." Checkosky v. SEC, 139 F.3d 221, 226 (D.C. Cir.
10 1998) (citation omitted).

11 The Court finds that Plaintiffs are likely to succeed in
12 demonstrating that the certification process is arbitrary and
13 capricious in one or more of the multiple ways they posit.

14 1. Substantive Criteria

15 Plaintiffs may succeed in showing that the Final Rule is
16 arbitrary and capricious in that it provides no substantive
17 criteria as to how a state may satisfy the requirements of chapter
18 154. Section 26.22(b) allows a state to be certified if its
19 competency standards "reasonably assure a level of proficiency
20 appropriate for State post-conviction litigation in capital
21 cases." 78 Fed. Reg. 58,162. Plaintiffs argue that this "catch-
22 all" provision is broad and vague. In response, Defendants point
23 to other provisions in section 26.22 and argue that section
24 26.22(b) should not be read "in isolation." But Defendants do not
25 dispute that the Attorney General can base his certification
26 decision on section 26.22(b) alone. Section 26.22(b)'s vague
27 language does not offer meaningful notice as to how certification
28 decisions will be made pursuant to it.

1 Defendants also argue that the catch-all provision gives
2 effect to congressional intent. According to Defendants, Congress
3 intended that states be given "wide latitude to establish a
4 mechanism that complies with [the statutory requirements.]" 78
5 Fed. Reg. 58, 162. But latitude should not be conflated with free
6 rein. See Bd. of Educ. v. Rowley, 458 U.S. 76, 183 (1982) (noting
7 that although the Education of the Handicapped Act gives states
8 the "primary responsibility for developing and executing programs,
9 it imposes significant requirements to be followed in the
10 discharge of that responsibility.").

11 In June 1988, a committee, chaired by retired Supreme Court
12 Justice Lewis Powell, was commissioned by Chief Justice Rehnquist
13 to assess the delay and lack of finality in capital cases. 135
14 Cong. Rec. 24694 (1989), Ad Hoc Committee on Federal Habeas Corpus
15 in Capital Cases Committee Report (Powell Committee Report). The
16 Powell Committee, whose proposal chapter 154 essentially codifies,
17 explained that the "provision of competent counsel for prisoners
18 under capital sentence throughout both state and federal
19 collateral review is crucial to ensuring fairness and protecting
20 the constitutional rights of capital litigants." 135 Cong. Rec.
21 S13471-04, S13481, S13482, Powell Committee Report. In chapter
22 154, Congress provided a quid pro quo design: a state receives
23 expedited federal review in exchange for its guarantee of adequate
24 representation in state habeas corpus proceedings. See Ashmus v.
25 Calderon, 31 F. Supp. 2d 1175, 1180 (N.D. Cal. 1998) aff'd sub
26 nom. Ashmus v. Woodford, 202 F.3d 1160 (9th Cir. 2000) ("As courts
27 have uniformly held, chapter 154 explicitly contemplates a quid
28 pro quo relationship."). The legislative history of chapter 154

1 supports the principle that a regulation pursuant to it must
2 require that a state actually uphold its end of the bargain -- to
3 provide competent representation. The states could be afforded
4 wide latitude in providing for competent representation in a
5 number of specified, equivalent ways, without the latitude of
6 specifying no requirements at all.

7 2. State's Obligation to Take Affirmative Steps

8 Plaintiffs may also succeed in showing that the Final Rule is
9 arbitrary and capricious because it departs from chapter 154's
10 requirement that a state take affirmative steps to prove its
11 eligibility. One court has explained:

12 "If Congress had intended to afford the States the
13 very significant benefits conferred by Chapter 154
14 on the basis of a finding of substantial compliance
15 based on past performance, it could have done so.
16 However, it elected not to do so; and instead,
17 Congress chose to confer those benefits only if the
18 State made an affirmative, institutionalized,
19 formal commitment to provide a post-conviction
20 review system which Congress considered to be
21 'crucial to ensuring fairness and protecting the
22 constitutional rights of capital litigants.'
23 Powell Committee Report at 3240."

24 Ashmus, 31 F. Supp. 2d at 1183 (quoting Satcher v. Netherland, 944
25 F. Supp. 1222, 1243 (E.D. Va. 1996)). Ashmus found that "a state
26 must establish a system reflecting 'an affirmative,
27 institutionalized, formal commitment' to habeas representation,"
28 and Congress did not intend to permit procedures that "suffer from
incoherence or incompleteness." Ashmus, 31 F. Supp. 2d at 1183.

Defendants respond that the Final Rule is not arbitrary and
capricious because it properly places the burden on states "to
demonstrate that they have established a compliant capital counsel

1 appointment mechanism, and subjects that demonstration to public
2 scrutiny." Defs.' Resp. at 20. Contrary to Defendants'
3 assertion, the rule as written requires only a bare-bones request.
4 Pursuant to the Final Rule, a state desiring certification must
5 submit a "request in writing that the Attorney General determine
6 whether the State meets the requirements for certification under §
7 26.22 of this subpart." 78 Fed. Reg. 58,184. At that point, the
8 burden shifts to the public -- more precisely, to indigent death-
9 sentenced prisoners -- to demonstrate that the state does not
10 comply. A state applicant need not submit data demonstrating its
11 record of compliance with its mechanism. See 78 Fed. Reg. 78,174
12 (stating that certification decision "need not be supported by a
13 data-intensive examination of the State's record of compliance
14 with the established mechanism in all or some significant subset
15 of postconviction cases."). Nor must a state demonstrate that its
16 procedures are adequate. By severely lessening a state's burden
17 to explain how its mechanism qualifies under chapter 154, the
18 Final Rule may depart from chapter 154's requirement that the
19 state take affirmative steps to qualify. See Judulang v. Holder,
20 132 S. Ct. 476 (2011) (finding that the agency's regulation was
21 arbitrary and capricious because it bore little relation to the
22 purpose of the law).

23 3. Actual Compliance with Terms of Submitted Mechanism

24 The Final Rule does not require a state to show that it has
25 actually complied with the terms of its submitted mechanism. The
26 mere existence of state requirements for the appointment,
27 compensation and expenses of competent counsel does not ensure
28 that such requirements are applied and enforced in practice.

1 Indeed, as FDO-Arizona notes, capital prisoners generally wait
2 more than a year and a half after state court affirmance of their
3 convictions and sentences before state post-conviction counsel is
4 appointed. Public Comment of Federal Public Defender--District of
5 Arizona (June 1, 2011), AR 583-84.

6 It is common sense that a state must actually comply with its
7 own mechanism, but the history, purpose and exhaustive judicial
8 interpretation of chapter 154 also support this view. The Fourth
9 Circuit put it most plainly in Tucker v. Catoe, 221 F.3d 600, 604-
10 05 (4th Cir. 2000):

11 We accordingly conclude that a state must not only
12 enact a "mechanism" and standards for post-
13 conviction review counsel, but those mechanisms and
14 standards must in fact be complied with before the
15 state may invoke the time limitations of [chapter
16 154]. Not only is this conclusion consistent with
17 our precedent, but it is also consistent with
18 common sense: It would be an astounding proposition
19 if a state could benefit from the capital-specific
20 provisions of AEDPA by enacting, but not following,
21 procedures promulgated [to meet chapter 154
22 requirements].

23 The Supreme Court noted that AEDPA "creates an entirely new
24 chapter 154 with special rules favorable to the state party, but
25 applicable only if the State meets certain conditions." Lindh v.
26 Murphy, 521 U.S. 320, 326 (1997) (emphasis added). In other
27 words, a state may reap procedural benefits only if it has "done
28 its part to promote sound resolution of prisoners' petitions."
Id. at 330. See also 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 the "[c]ompetency standards are

1 meaningless unless they are actually applied in the appointment
2 process"); Ashmus, 202 F.3d at 1168 (stating that California must
3 abide by its competency standards when appointing counsel and
4 concluding that "a state's competency standards must be mandatory
5 and binding if the state is to avail itself of Chapter 154"); Mata
6 v. Johnson, 99 F.3d 1261, 1267 (5th Cir. 1996), vacated in part on
7 other grounds in 105 F.3d 209 (5th Cir. 1997) (stating that
8 competency standards must be "specific" and "mandatory" in order
9 to satisfy the opt-in requirements). Plaintiffs may succeed in
10 showing that the Final Rule is arbitrary and capricious for this
11 reason.

12 4. Effect of Common Law

13 Plaintiffs may succeed in demonstrating that the Final Rule
14 is arbitrary and capricious because it does not address the effect
15 of judicial interpretation. In spite of the considerable and
16 thoughtful body of law addressing chapter 154, Defendants fail to
17 show with any specificity how the Attorney General's certification
18 decision will be guided by it. For instance, the Texas Attorney
19 General submitted an application on March 11, 2013, seeking
20 certification based on a state mechanism established in 1995.
21 Declaration of Michael Laurence ¶ 12, Ex. B. Yet, the Court of
22 Appeals for the Fifth Circuit in Mata, 99 F.3d at 1267, has held
23 that the mechanism in place at that time did not comply with
24 chapter 154. The Final Rule does not explain whether it will
25 incorporate the standards and rulings of the courts to a state's
26 application.

27 Defendants represent in a footnote in their response brief
28 that the Final Rule will not invalidate prior case law. Defs.'

1 Resp. at 9, n.8. In support of this contention, Defendants cite
2 the Final Rule: “[P]rior judicial interpretation of chapter 154,
3 much of which remains generally informative, supports many
4 features of this rule, as th[e] preamble documents. To the extent
5 the rule approaches certain matters differently from some past
6 judicial interpretations, there are reasons for the differences.”
7 Id. (citing 78 Fed. Reg. 58,164). The Final Rule’s language
8 addressing judicial interpretation does not provide assurance that
9 the Attorney General will be guided by the case law addressing
10 chapter 154 in making his certification decisions.

11 5. Ex Parte Communication

12 Finally, Plaintiffs may succeed in demonstrating that the
13 Final Rule is arbitrary and capricious because it fails to address
14 the nature and effect of ex parte communication between the United
15 States Attorney General and state officials. Even before the
16 Final Rule went into effect, Attorney General Holder and the
17 Arizona Attorney General commenced a process of certification
18 without notifying interested parties. Baich Dec., Exs. E, F. On
19 April 18, 2013, Arizona Attorney General Tom Horne sent a letter
20 to Attorney General Holder requesting certification of Arizona as
21 an “opt-in” state. Baich Dec., Ex. E. FDO-Arizona learned of
22 this letter only through a press release issued by the Arizona
23 Attorney General’s Office. On June 4, 2013, FDO-Arizona wrote a
24 letter to Attorney General Holder, referring to Horne’s letter and
25 formally requesting notification of any correspondence or
26 communication between the DOJ and the Arizona Attorney General’s
27 Office. Baich Dec., Ex. F. On July 16, 2012 -- more than two
28 months prior to the publication of the Final Rule -- the DOJ

1 informed Arizona that it would review the state's application
2 immediately. In its letter to the Arizona Attorney General, the
3 DOJ stated that it would begin reviewing Arizona's application to
4 "help speed up the ultimate determination of the certification."
5 Baich Dec., Ex. G. Plaintiff FDO-Arizona was not copied on the
6 DOJ's response to Arizona and did not receive an acknowledgment of
7 or a response to its letter and. Baich Dec. ¶¶ 7-8.

8 In their brief Defendants appear to contend that their
9 private communications with state attorneys general will be merely
10 "ministerial communications." Defs.' Resp. at 12-13. At oral
11 argument Defendants were asked to explain the meaning of this
12 evidently subjective term. Rather than define "ministerial,"
13 Defendants expanded their position to argue that nothing in the
14 Final Rule prohibits Defendants from engaging in ex parte
15 communication, ministerial or not, with state attorneys general.
16 However, the APA's notice requirements exist to afford interested
17 parties a meaningful opportunity to respond to agency action.
18 Erringer v. Thompson, 371 F.3d 625, 629 (9th Cir. 2004). The
19 Final Rule itself states that all requests will be made publicly
20 available, making no allowance for ex parte communication. 78
21 Fed. Reg. 58,184. Ex parte communication excludes interested
22 parties from offering input regarding the validity and accuracy of
23 the undisclosed documents.

24 Accordingly, Plaintiffs may succeed in demonstrating that the
25 Final Rule is arbitrary and capricious because it lacks specific
26 guidelines addressing the DOJ's disclosure of ex parte
27 communication with state officials. The Final Rule's failure to
28 articulate transparent and specific parameters governing the

1 Attorney General's ex parte communication with state officials
2 leaves Plaintiffs and the public in the dark, depriving them of
3 the opportunity to offer meaningful opposition.

4 In sum, Plaintiffs may prevail on their claims that the Final
5 Rule does not provide substantive criteria as to how a state may
6 satisfy the requirements of chapter 154; shifts the burden of
7 proof from the state to the condemned to demonstrate that the
8 state mechanism does not qualify under chapter 154; does not
9 require the state to show that it actually complies with the terms
10 of its submitted mechanism; does not show with any specificity how
11 the considerable body of law addressing chapter 154 will guide the
12 Attorney General's certification decision; and does not address
13 the nature and effect of ex parte communication between the
14 Attorney General and state officials. The Court finds that
15 Plaintiffs are likely to succeed on the merits of their claim that
16 the Final Rule is arbitrary and capricious under the APA.

17 III. Irreparable Harm, Balance of Equities, and the Public
18 Interest

19 Plaintiffs have demonstrated a likelihood of irreparable harm
20 sufficient to warrant granting a preliminary injunction. Were the
21 Final Rule to go into effect, the possibility that California
22 could apply for certification at any time or that Arizona, which
23 has already applied for certification, could be certified at any
24 time will "thrust Plaintiffs into uncertainty over the legal
25 framework that applies to state and federal post-conviction
26 remedies already being pursued on behalf of its clients." Habeas
27 Corpus Res. Ctr., 2009 WL 185423, at *9.

1 Defendants' primary argument is that Plaintiffs will not
2 suffer irreparable harm because any harm is "contingent on Arizona
3 or California being certified under the Final Rule." As noted in
4 connection with Plaintiffs' standing argument above, HCRC has
5 explained that "the harmful consequences of permitting the flawed
6 rule to go into effect are not contingent on whether California
7 will be certified, but rather upon the inability to predict
8 whether California qualifies for chapter 154's benefits[.]"
9 Supplemental Laurence Dec. ¶ 3. Because the Final Rule offers few
10 substantive criteria that illuminate whether California will be
11 certified, HCRC is forced to revise its strategy and management of
12 resources in anticipation of potential certification. Similarly,
13 given the fact that Arizona has already applied for certification,
14 FDO-Arizona is forced to prepare for the possibility of
15 drastically expedited federal review procedures. Baich Dec.
16 ¶¶ 10-12.

17 Title 28 U.S.C. § 2265(a)(2) provides that a state's
18 certification is retroactive to the date on which its mechanism
19 for appointing counsel was established. As discussed in the
20 Temporary Restraining Order, the legal uncertainty of the
21 retroactive effect of the new limitations period combined with the
22 possibility that California could apply for certification at any
23 time or that Arizona's pending application for certification could
24 be approved would create serious uncertainty with respect to "the
25 legal framework that applies to state and federal post-conviction
26 remedies already being pursued." Habeas Corpus Res. Ctr., 2009 WL
27 185423 at *9.
28

1 Compared to the harm faced by Plaintiffs, Defendants stand to
2 face little, if any, harm if the Final Rule does not go into
3 effect immediately. The Patriot Act amendments were passed in
4 2005. After retracting their 2008 proposed rule in 2010,
5 Defendants only recently attempted to revive it. An additional
6 delay pending resolution of this lawsuit will not prejudice them.
7 Public interest likewise favors maintaining the status quo while
8 the legality of Defendants' rule is determined.

9 CONCLUSION

10 For the foregoing reasons, the Court GRANTS Plaintiffs'
11 motion for a preliminary injunction. During the pendency of this
12 litigation, Defendants are enjoined from putting into effect the
13 rule entitled, "Certification Process for State Capital Counsel
14 Systems," published at 78 Fed. Reg. 58,160 (Sept. 23, 2013).

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16 IT IS SO ORDERED.

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18 Dated: 12/4/2013

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CLAUDIA WILKEN
United States District Judge