

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

HABEAS CORPUS RESOURCE CENTER AND
THE OFFICE OF THE FEDERAL PUBLIC
DEFENDER FOR THE DISTRICT OF
ARIZONA,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF
JUSTICE AND ERIC H. HOLDER, IN
HIS OFFICIAL CAPACITY AS UNITED
STATES ATTORNEY GENERAL,

Defendants.

No. C 13-4517 CW

ORDER GRANTING
PLAINTIFFS'
APPLICATION FOR A
TEMPORARY
RESTRAINING ORDER
AND ORDER TO SHOW
CAUSE WHY
PRELIMINARY
INJUNCTION SHOULD
NOT ISSUE
(DOCKET NO. 7)

United States District Court
For the Northern District of California

On September 30, 2013, Plaintiffs Habeas Corpus Resource Center (HCRC) and the Office of the Federal Public Defender for the District of Arizona (FDO-AZ) brought an action for injunctive relief to set aside the September 23, 2013 Final Rule regarding Certification Process for State Capital Counsel System, 78 Fed. Reg. 58,160. The Final Rule was issued by Defendants United States Department of Justice (DOJ) and United States Attorney General Eric Holder on September 23, 2013 and will become effective on October 23, 2013. On October 4, 2013, Plaintiffs moved for (1) a temporary injunction enjoining Defendants from putting into effect the Final Rule pending a ruling on a preliminary injunction, and (2) order to show cause for a preliminary injunction hearing. Docket No. 7. Due to the lapse

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1 in appropriations, Defendants did not respond to Plaintiffs'
2 motion and moved for a stay in litigation.¹ Docket No. 13.

3 BACKGROUND

4 A. Chapter 154

5 The Antiterrorism and Effective Death Penalty Act (AEDPA) of
6 1996 added chapter 154 of Title 28 of the United States Code.
7 Chapter 154 provides expedited procedures in federal capital
8 habeas corpus cases when a state is able to establish that it has
9 provided qualified, competent, adequately resourced and adequately
10 compensated counsel to death-sentenced prisoners. Under the
11 AEDPA, federal courts were responsible for determining whether
12 states were eligible for the expedited federal procedures. The
13 USA Patriot Improvement and Reauthorization Act of 2005, Pub. L.
14 No. 109-174, 120 Stat. 192 (2005), amended chapter 154 to shift
15 the eligibility determination from the federal courts to the
16 Attorney General.

17 In December 2008, the Attorney General published a final rule
18 to implement the procedure prescribed by chapter 154. On January
19 20, 2009 this Court granted a preliminary injunction, enjoining
20 Defendants from putting into effect the regulation without first
21 providing an additional comment period of at least thirty days and
22 publishing a response to any comments received during such a
23 period. See Habeas Corpus Resource Ctr. v. United States
24 Department of Justice, 2009 WL 185423 (N.D. Cal.) at *10. The
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26 _____
27 ¹ The lapse in appropriations has now ended. Accordingly,
28 the Court DENIES Defendants' motion to stay as moot. Docket No.
13.

1 regulation did not go into effect. In November 2010, Defendants
2 published a final rule removing the regulation.

3 The DOJ published a new proposed rule on March 3, 2011. 76
4 Fed. Reg. 11,705. The comment period closed on June 1, 2011. The
5 DOJ then published a supplemental notice of proposed rulemaking on
6 February 13, 2012. 77 Fed. Reg. 7559. The comment period closed
7 on March 14, 2012. On September 2013, the Final Rule was
8 published.

9 Section 26.22 of the Final Rule prescribes the standards a
10 state must meet in order to earn certification under 28 U.S.C.
11 §§ 2261 and 2265. Section 26.22(b) prescribes three different
12 ways a state may meet the requirements for providing competent
13 counsel. The first two are based on statutory criteria. The
14 third allows a state to be certified if the competency standards
15 "reasonably assure a level of proficiency appropriate for State
16 post-conviction litigation in capital cases." 78 Fed. Reg.
17 58,182.

18 Section 26.23 provides the certification process. A state
19 must "request in writing" a certification that it meets the
20 requirements of § 26.22. Upon receiving the state's request, the
21 Attorney General will make the request publicly available on the
22 Internet; publish a notice in the Federal Register, identifying
23 the Internet address at which the public may view the state's
24 request; and solicit public comments. The Attorney General will
25 review the state's request and public comments, and will publish
26 the certification in the Federal Register if the certification is
27 granted. A certification remains effective for a period of five
28 years after the completion of the certification process by the

1 Attorney General and any related judicial review. 78 Fed. Reg.
2 58,184.

3 LEGAL STANDARD

4 Temporary restraining orders are governed by the same
5 standard applicable to preliminary injunctions. See Dumas v.
6 Gommerman, 865 F. 2d 1093, 1095 (9th Cir. 1989). To qualify for a
7 preliminary injunction, the moving party must demonstrate "(1) a
8 likelihood of success on the merits; (2) a significant threat of
9 irreparable injury; (3) that the balance of hardships favors the
10 applicant; and (4) whether any public interest favors granting an
11 injunction." Raich v. Ashcroft, 352 F.3d 1222, 1227 (9th Cir.
12 2003). "[T]he required showing of harm varies inversely with the
13 required showing of meritoriousness." Indep. Living Ctr. of S.
14 Cal., Inc. v. Shewry, 543 F.3d 1047, 1049 (9th Cir.2008) (citation
15 omitted).

16 DISCUSSION

17 I. Likelihood of Success on the Merits

18 A. Adequacy of Notice

19 The APA "requires an agency conducting notice-and-comment
20 rulemaking to publish in its notice of rulemaking 'either the
21 terms or substance of the proposed rule or a description of the
22 subjects and issues involved.'" Long Island Care at Home, Ltd. v.
23 Coke, 551 U.S. 158, 174 (2001) (quoting 5 U.S.C. § 553(b)(3)).
24 Because the Attorney General's promulgation of the Final Rule
25 constitutes administrative rulemaking with notice in the Federal
26 Register and public comment, it must comply with the rulemaking
27 provisions of the APA. See 5 U.S.C. § 553. To determine whether
28 the Attorney General complied, this Court inquires whether "the

1 notice fairly apprise[s] the interested persons of the subjects
2 and issues before the Agency.'" Louis v. U.S. Dep't of Labor, 419
3 F.3d 970, 975 (9th Cir. 2005).

4 Here, Plaintiffs are likely to succeed on their claim that
5 the Attorney General failed to provide adequate notice under the
6 APA because he stated, for the first time in the final rule, that
7 the certification decisions are not subject to the rulemaking
8 provisions of the APA. 78 Fed. Reg. 58,174 ("[T]he Attorney
9 General's certifications under chapter 154 are orders rather than
10 rules for purposes of the Administrative Procedure Act (APA).
11 They are accordingly not subject to the APA's rulemaking
12 provisions, see 5 U.S.C. 553, much less to the APA's requirements
13 for rulemaking or adjudication required to be made or determined
14 on the record after opportunity for an agency hearing[.]").
15 Notice was likely inadequate because it did not reveal the
16 Attorney General's view that certification determinations
17 constitute orders, not rules, and therefore are not subject to the
18 APA requirements governing rulemaking. Interested parties thus
19 may have been denied an opportunity to comment on the Attorney
20 General's view. When an agency fails to notify interested parties
21 of its position, its notice of proposed rulemaking has not
22 "provide[d] sufficient factual detail and rationale for the rule
23 to permit interested parties to comment meaningfully." Honeywell
24 Int'l., Inc. v. EPA, 372 F.3d 441, 445 (D.C. Cir. 2004) (citation
25 omitted).

26 The Court concludes that the Final Rule likely did not give
27 adequate notice of the Attorney General's view of the
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1 certification process. Accordingly, Plaintiffs have a likelihood
2 of success on the merits of this claim.

3 B. Deficient Certification Process

4 Final regulations are arbitrary and capricious when they fail
5 to provide "definitional content" for terms guiding agency action
6 implementing a statute. Pearson v. Shalala, 164 F.3d 650, 660
7 (D.C. Cir. 1999). An agency is "obliged under the APA" to give
8 content to statutory standards it is tasked with implementing.
9 Id. at 661. An agency cannot leave a prospective applicant
10 "utterly without guidance as to what he must prove, and how." S.
11 Terminal Corp. v. EPA, 504 F.2d 646, 670 (1st Cir. 1974).

12 The Court finds that the certification process is likely
13 arbitrary and capricious in several ways. First, the Final Rule
14 fails to provide substantive criteria as to how a state may
15 satisfy the requirements of chapter 154. Section 26.22(b) allows
16 a state to be certified if the competency standards "reasonably
17 assure a level of proficiency appropriate for State post-
18 conviction litigation in capital cases." 78 Fed. Reg. 58,162.
19 This catch-all exception is broad and vague. Second and
20 relatedly, the Final Rule fails to indicate whether the Attorney
21 General's certification decision will be guided by the body of law
22 interpreting the requirements of chapter 154 prior to its
23 amendment, including the applicable standards established by the
24 United States Supreme Court. Last, the Final Rule fails to
25 address the nature and effect of ex parte communication between
26 Attorney General Holder and the state officials. As Plaintiffs
27 note, even before the Final Rule went into effect, Attorney
28 General Holder and the Arizona Attorney General commenced a

1 process of certification without notifying interested parties.
2 Baich Dec., Exs. E, F. The Final Rule's failure to articulate
3 transparent and specific parameters governing the Attorney
4 General's ex parte communication with state officials may leave
5 Plaintiffs and the public in the dark, depriving them of the
6 opportunity to offer meaningful opposition.

7 The "agency's failure to state its reasoning or to adopt an
8 intelligible standard" favors a finding that the Final Rule is
9 arbitrary and capricious. Checkosky v. SEC, 139 F.3d 221, 226
10 (D.C. Cir. 1998) (citation omitted). Accordingly, Plaintiffs have
11 a likelihood of success on the merits of their claim that the
12 Final Rule is arbitrary and capricious under the APA.

13 II. Irreparable Harm, Balance of Equities, and the Public
14 Interest

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

24 There can be little doubt that the legal uncertainty of the
25 retroactive effect of the new limitations period will severely
26 harm Plaintiffs, leaving them in protracted legal limbo. Title 28
27 U.S.C. § 2265(a)(2) provides that a state's certification is
28 retroactive to the date on which its mechanism for appointing

1 counsel was established. As certification would shorten the
2 deadline for filing federal habeas petitions from one year to six
3 months, Plaintiffs would be forced "to advise counsel to treat
4 each case as [an] opt-in-case until a federal court rules
5 otherwise" and, as a result, forgo possibly meritorious claims.
6 Baich Dec. ¶ 13.

7 Were the Final Rule to go into effect, Plaintiffs would
8 confront a tumult of critical choices that affect their death-
9 sentenced clients. Plaintiffs do not court hyperbole when they
10 deem the risk of permitting a potentially flawed regulation to
11 proceed an "unconscionable gamble." Laurence Dec. ¶ 16. Compared
12 to the harm faced by Plaintiffs, Defendants stand to face little,
13 if any, harm if the Final Rule does not enter into effect
14 immediately. The Patriot Act amendments were passed in 2005.
15 After removing their proposed rule in 2010, Defendants only
16 recently attempted to revive it. An additional delay pending
17 resolution of this lawsuit will not prejudice them. Public
18 interest likewise favors maintaining the status quo while the
19 legality of Defendants' rule is determined.

20 CONCLUSION

21 For the foregoing reasons, the Court GRANTS Plaintiffs'
22 application for a temporary restraining order and order to show
23 cause why a preliminary injunction should not issue. Defendants
24 are enjoined from putting into effect the rule entitled
25 "Certification Process for State Capital Counsel Systems,"
26 published at 78 Fed. Reg. 58,160 (Sept. 23, 2013). The temporary
27 restraining order shall expire on November 1, 2013.
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1 Unless the parties stipulate to an alternate briefing
2 schedule, including an extension of the temporary restraining
3 order, the schedule on Plaintiffs' motion for a preliminary
4 injunction is as follows. Within six days of the date of this
5 order, Defendants shall file a response to the order to show cause
6 why a preliminary injunction should not issue. Plaintiffs may
7 file a reply within four days thereafter. A hearing will be held
8 at 2:00 on Thursday, October 31, 2013.

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10 IT IS SO ORDERED.

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12 Dated: 10/18/2013

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CLAUDIA WILKEN
United States District Judge

United States District Court
For the Northern District of California