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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

RICHARD M. GILMAN, et al.,  
Plaintiffs,  
v.  
EDMUND G. BROWN, JR., et al.,  
Defendants.

No. CIV. S-05-830 LKK/CKD

**ORDER**

Plaintiffs in this certified class action are inmates in California state prisons who are serving terms of life imprisonment with the possibility of parole. Plaintiffs assert that Propositions 9 and 89 have retrospectively increased their punishments, in violation of the Ex Post Facto Clause of the U.S. Constitution.

Proposition 9 amended California law to, among other things, increase the time between parole hearings. 2008 Cal. Legis. Serv. Prop. 9 (West), amending in pertinent part, Cal. Penal Code § 3041.5(b)(3) (extending deferral periods) and (b)(4) and (d) (advance hearings). The class challenging this Proposition consists of "all California state prisoners who have been

1 sentenced to a life term with the possibility of parole for an  
2 offense that occurred before November 4, 2008.'" ECF No. 340  
3 ¶ 1.

4 Proposition 89 amended the California Constitution to grant  
5 the Governor the authority to review parole decisions of  
6 California's Board of Parole Hearings (the "Board"), regarding  
7 parole decisions of prisoners convicted of murder. 1988 Cal.  
8 Legis. Serv. Prop. 89 (West), amending Cal. Const. Art. V, § 8.  
9 The class challenging this Proposition consists of "'all  
10 California state prisoners who have been sentenced to a life term  
11 with possibility of parole for an offense that occurred before  
12 November 8, 1988.'" ECF No. 340 ¶ 2.

13 The matter came on for trial before the undersigned from  
14 June 27, 2013 through July 2, 2013. For the reasons that follow,  
15 the court finds that both Propositions, as implemented, have  
16 violated the ex post facto rights of the class members.

17 **I. THE EX POST FACTO CLAUSE**

18 "The Constitution prohibits both federal and state  
19 governments from enacting any 'ex post facto Law.'" Peugh v.  
20 U.S., 569 U.S. \_\_\_, 133 S. Ct. 2072, 2081 (2013).<sup>1</sup> For purposes  
21 of this case, an "ex post facto" law is one "'that changes the  
22 punishment, and inflicts a greater punishment, than the law  
23 annexed to the crime, when committed.'" Id., 133 S. Ct. at 2078  
24 (quoting Calder v. Bull, 3 Dall. 386, 390, 1 L. Ed. 648 (1798)).  
25 "The key ex post facto inquiry is the actual state of the law at

26 \_\_\_\_\_  
27 <sup>1</sup> U.S. Constitution, Art. I, Sec. 10, cl. 1 ("No State shall ...  
28 pass any ... ex post facto Law"); U.S. Constitution, Art. I,  
Sec. 9, cl. 3 ("No ... ex post facto Law shall be passed").

1 the time the defendant perpetrated the offense." Watson v.  
2 Estelle, 886 F.2d 1093, 1096 (9th Cir. 1989). Accordingly, as  
3 relevant to this case, the Ex Post Facto Clause is violated if  
4 either Proposition, as implemented by the decision-maker - the  
5 Board in the case of Proposition 9, or the Governor in the case  
6 of Proposition 89 - creates a "significant risk" that its  
7 retroactive application to the class would result in "a longer  
8 period of incarceration" for them than they would have received  
9 under the law in effect when their crimes were committed. See  
10 Garner v. Jones, 529 U.S. 244, 255 (2000); see also, Peugh, 133  
11 S. Ct. at 2084 (a "retrospective increase in the [Sentencing]  
12 Guidelines range applicable to a defendant creates a sufficient  
13 risk of a higher sentence to constitute an ex post facto  
14 violation").

15 **II. PROPOSITION 9: INCREASED TIME BETWEEN PAROLE HEARINGS**

16 The focus of this court's inquiry is fairly narrow, thanks  
17 to a substantial body of law on the effect of the Ex Post Facto  
18 Clause on retrospective changes in the availability of parole  
19 hearings.

20 In California Dept. of Corrections v. Morales, 514 U.S. 499  
21 (1995), the Supreme Court rejected an ex post facto challenge to  
22 a 1981 amendment to Cal. Penal Code § 3041.5. The amendment  
23 abolished mandatory annual parole hearings for prisoners  
24 convicted of more than one homicide, even when annual hearings  
25 were mandatory when the crimes were committed. Instead, the  
26 enactment authorized the parole board to defer subsequent  
27 suitability hearings for up to three years if the Board found  
28 that it was "not reasonable to expect that parole would be

1 granted at a hearing during the following years." Morales, 514  
2 U.S. at 503.

3 Morales teaches that the mere fact that parole hearings are  
4 less frequent than they were when a prisoner's crime was  
5 committed, is not, by itself, sufficient to establish an ex post  
6 facto violation. Rather,

7 the controlling inquiry ... was whether  
8 retroactive application of the change in  
9 California law created "a sufficient risk of  
increasing the measure of punishment attached  
to the covered crimes."

10 Garner, 529 U.S. at 250 (quoting Morales, 514 U.S. at 509);

11 Gilman v. Schwarzenegger, 638 F.3d 1101, 1106 (9th Cir. 2011)

12 ("[a] retroactive procedural change violates the Ex Post Facto  
13 Clause when it 'creates a significant risk of prolonging [an  
14 inmate's] incarceration'").

15 Similarly, in Garner, the Supreme Court rejected an ex post  
16 facto challenge to the Georgia parole board's decision to do away  
17 with mandatory parole hearings every three (3) years. That board  
18 amended its rules so that it could defer parole hearings for up  
19 to eight (8) years. "[T]he Board's stated policy is to provide  
20 for reconsideration at 8-year intervals 'when, in the Board's  
21 determination, it is not reasonable to expect that parole would  
22 be granted during the intervening years.'" Garner, 529 U.S. at  
23 254. However, the Board "could have shortened the interval" had  
24 it wished to do so. Id. at 248.

25 Garner teaches that no ex post facto violation will be found  
26 where parole hearings can be at longer intervals than was the  
27 case when the prisoner's crime was committed, but the parole  
28 board has the discretion to conduct hearings at the same interval

1 it could when the prisoner's crime was committed.

2 Plaintiffs correctly point out that Morales and Garner are  
3 not directly on point, because the challenged law changes  
4 involved in those cases only authorized a longer deferral period,  
5 and only when the Board determined that parole was not likely to  
6 be granted in the intervening years. Proposition 9, on the other  
7 hand, does away with the previously authorized annual parole  
8 hearings in all cases, even if the prisoner conclusively showed  
9 that he would be suitable for parole in a year. See Gilman, 638  
10 F.3d at 1108 ("Proposition 9 eliminated the Board's discretion to  
11 set a one-year deferral period, even if the Board were to find by  
12 clear and convincing evidence that a prisoner would be suitable  
13 for parole in one year").

14 In Gilman, the Ninth Circuit made clear that

15 Plaintiffs cannot succeed on the merits of  
16 their ex post facto claim unless  
17 (1) Proposition 9, on its face, created a  
18 significant risk of increasing the punishment  
19 of California life-term inmates, or (2)  
20 Plaintiffs can "demonstrate, by evidence  
drawn from [Proposition 9's] practical  
implementation ..., that its retroactive  
application will result in a longer period of  
incarceration than under the [prior law]."

21 Gilman, 638 F.3d at 1106 (quoting Garner, 529 U.S. at 255).

22 The Ninth Circuit reversed this court's grant of a preliminary  
23 injunction for plaintiffs, finding that even if plaintiffs could  
24 show that there was a significant risk of longer incarceration  
25 under Proposition 9, plaintiffs failed to establish that the  
26 "advance hearing" procedure did not avoid that problem.

27 In a recent case addressing the Sentencing Guidelines, the  
28 Supreme Court made clear that it meant what it said in Garner,

1 that is, a law that creates a sufficient risk of retrospectively  
2 increasing a prisoner's sentence is a violation of the Ex Post  
3 Facto Clause. Peugh, 133 S. Ct. at 2084.

4 **A. Increased Deferral Periods: Findings.**

5 1. On November 4, 2008, California voters approved  
6 "Proposition 9," also known as "the Victims' Bill of Rights Act  
7 of 2008: Marsy's Law." See In re Vicks, 56 Cal. 4th 274, 278  
8 (2013).

9 2. The law became effective "immediately,"<sup>2</sup> and was  
10 made expressly applicable "to all proceedings held after" its  
11 effective date. 2008 Cal. Legis. Serv. Prop. 9, § 10 (West). The  
12 board, however, did not instantaneously implement the new law.  
13 Rather, the Board implemented the law - that is, started using  
14 Proposition 9 to determine the deferral periods - on December 15,  
15 2008. Exh. 1 (ECF No. 259-1) at 7 (Exhibit A to Exh. 1).

16 3. As relevant here, Proposition 9 "amended  
17 section 3041.5 [of the California Penal Code] to increase the  
18 time between parole hearings." Vicks, 56 Cal. 4th at 283.

19 4. Before Proposition 9, life prisoners received annual  
20 parole suitability hearings, as required by the prior versions of  
21 Cal. Penal Code § 3041.5, unless the Board found that it was not  
22 reasonable to expect that parole would be granted during the  
23 following year. In those cases, the Board deferred the next

24 \_\_\_\_\_  
25 <sup>2</sup> According to Vicks, the law became effective "immediately."  
26 Vicks, 56 Cal. 4th at 278. The California Constitution provides  
27 that amendments effected by initiative become effective "the day  
28 after the election unless the measure provides otherwise." Cal.  
Const. Art. XVIII, § 4; Californians For An Open Primary v.  
McPherson, 38 Cal. 4th 735, 743 (2006) (same).

1 parole hearing for up to two years, and for up to five years for  
2 prisoners convicted of murder, as authorized by the old law. See  
3 1994 Cal. Legis. Serv. Ch. 560, § 1 (S.B. 826) (West), amending  
4 Cal. Penal Code § 2041.5(b)(2)(A).

5 5. All the crimes for which Proposition 9 class members  
6 were convicted occurred before Proposition 9.<sup>3</sup> ECF No. 340 ¶ 1.

7  
8 <sup>3</sup> The court notes that crimes that could result in life terms  
9 that were committed at different times were covered by different  
10 versions of the parole hearings law. No party has suggested, or  
11 directed the court to evidence suggesting, that any class  
12 member's crime was committed at a time when there was no right to  
13 periodic review of parole hearings, or when the deferral periods  
14 were longer than those provided for in Proposition 9.

15 Before 1972, California prisoners had a right, established by  
16 case law, to "periodic" review of parole decisions, although  
17 there does not appear to have been any particular time period  
18 within which the review had to occur. See In re Jackson, 39  
19 Cal. 3d 464, 469-70 (1985).

20 Between 1972 and July 1, 1977, California prisoners were  
21 entitled, by policy of the parole board, to annual parole  
22 reconsideration, "'except in certain extreme cases where  
23 reconsideration of parole may be postponed for two or three  
24 years.'" See Jackson, 39 Cal. 3d at 470.

25 On July 1, 1977, the California Determinate Sentencing Law  
26 ("DSL") went into effect. Watson, 886 F.2d at 1094 (citing  
27 Jackson, 39 Cal. 3d at 467). Under this enactment, all inmates  
28 incarcerated on or after that date were statutorily entitled to  
annual parole hearings, without exception. Id.

29 In 1981, California enacted an exception to the annual parole  
30 review requirement, permitting the Board to defer the next parole  
31 hearing for three years if the prisoner had been convicted of  
32 "more than one offense which involves the taking of a life," and  
33 the Board found, stating its bases in writing, that it was "not  
34 reasonable to expect that parole would be granted at a hearing  
35 during the following years." Watson, 886 F.2d 1093.

36 In 1990, California amended Section 3041.5 to "permit the Board  
37 to schedule the next hearing no later than 5 years after any  
38 hearing at which parole is denied if the prisoner has been

1 The class members were all convicted and sentenced to life in  
2 prison with the possibility of parole, before Proposition 9.  
3 After Proposition 9, all Proposition 9 class members remained  
4 sentenced to life in prison with the possibility of parole. See  
5 Undisputed Facts ("UF"), Final Pretrial Order (ECF No. 473)  
6 ¶ III(2) (hereinafter "UF ¶ 2").

7           6. In the two-year period before Proposition 9 was  
8 implemented, January 2007 through December 2008, the Board held  
9 approximately 6,550 parole suitability hearings for life  
10 prisoners. Parole was granted in approximately 6.4% of the  
11 hearings. Of the cases in which parole was denied, two-thirds  
12 resulted in one- or two-year deferrals; approximately 34.7  
13 percent resulted in one-year deferrals and approximately 31.5  
14 percent resulted in two-year deferrals. UF ¶ 5.

15           7. The deferrals for those years were governed by the  
16 1994 amendments to Cal. Penal Code § 3041.5. 1994 Cal. Legis.  
17 Serv. 560 (SB 826) (West). Under that law, the Board was  
18 required to hold annual parole hearings unless "the Board finds  
19 that it is not reasonable to expect that parole would be granted  
20 at a hearing during the following year." Id.<sup>4</sup> Therefore, it is

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21 convicted of more than 2 murders." 1990 Cal. Legis. Serv. 1053  
22 (SB 560) (West).

23 In 1994, California amended Section 3041.5 to "require that the  
24 hearing be held no later than up to 5 years after the hearing  
25 denying parole if the prisoner has been convicted of murder."  
1994 Cal. Legis. Serv. 560 (SB 826) (West).

26 <sup>4</sup> The court is aware of the evidence in the record indicating  
27 that some prisoners agree that they are not currently suitable  
28 for parole, and "stipulate" to a deferral period of, say, one  
year. Neither side has directed the court's attention to any  
evidence that in such cases the Board agrees to such a



1 a reasonable inference that the parole board found that for the  
2 life prisoners whose parole hearings came before them during that  
3 time, it was reasonable to expect that parole would be granted  
4 for 35% of them after one year.

5 8. Under the same law, where the Board found that an  
6 annual review was not warranted, it was required to impose a  
7 deferral of two years, unless "the Board finds that it is not  
8 reasonable to expect that parole would be granted at a hearing  
9 during the following years [up to five years for prisoners  
10 convicted of murder]." Id. Therefore, it is a reasonable  
11 inference that the Board found that for the 32% of life prisoners  
12 whose parole hearings resulted in two year deferrals during that  
13 time, it was reasonable to expect that parole would be granted  
14 for them after two years. Otherwise, the deferral periods would  
15 have been 3, 4 or 5 years pursuant to the statute.

16 9. It is, further, a reasonable inference that of all  
17 the inmates who had parole hearings during the two years prior to  
18 implementation of Proposition 9, about two-thirds of them were  
19 determined by the Board to be ready for parole within one or two  
20 years.

21 10. In the two-year period after Proposition 9 was  
22 implemented, January 2009 through December 2010, the Board held  
23 approximately 6,100 hearings. At those hearings, parole was

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24 stipulation even when it is not reasonable to expect that parole  
25 would be granted during that year. Nor has either side directed  
26 the court's attention to evidence showing what percentage of  
27 these 6,550 deferrals were stipulated. Accordingly, the court  
28 does not, for these purposes, distinguish between stipulated  
deferrals and those imposed by the Board.

1 granted in approximately 17 percent of the cases.<sup>5</sup> Of the cases  
2 in which parole was denied, approximately 48.4 percent resulted  
3 in the lowest deferral possible under Proposition 9, three years.  
4 UF ¶ 6.<sup>6</sup>

5 11. For the period 2007 to 2008, before the passage of  
6 Proposition 9, the average deferral period for all life prisoners  
7 who were denied parole at their hearing, was 2.3 years. See  
8 Plaintiffs' Exh. 51.<sup>7</sup> Approximately 35% of those deferrals were  
9 for the minimum period allowed by law, one year. An additional  
10 32% of the deferrals were for two years. UF ¶ 5.

11 12. Following the passage of Proposition 9, the average  
12 deferral periods for all life prisoners decided under the new law  
13 were as follows: 4.84 years in 2009; 5.11 years in 2010; 5.08  
14 years in 2011; 4.42 years in 2012. See Defendants' Exh. U.<sup>8</sup>

15 <sup>5</sup> Neither side offers an explanation for why the parole rate  
16 almost trebled. With no evidence on it, there is no way for the  
17 court to consider this fact except to speculate. For example,  
18 the Board may have been reluctant to impose a 3-year deferral on  
19 someone it believed would be ready for parole within the year,  
20 and therefore granted parole immediately. Or, there could simply  
21 have been a backlog of inmates ready for parole. However, this  
22 is entirely speculation, and plays no part in the court's  
23 decision.

24 <sup>6</sup> The parties included a recounting of several cases, in which  
25 the prisoners requested advanced hearings. To the degree the  
26 cases seem relevant to an issue in the case, they are discussed  
27 or footnoted below.

28 <sup>7</sup> This number is the weighted average of the deferral periods  
disclosed in Plaintiffs' Exhibit 51. The average is a little  
fuzzy, because Exhibit 51 does not specify what dates in 2007 to  
2008 are included.

<sup>8</sup> These numbers are the weighted averages of the deferral periods  
disclosed in Defendants' Exhibit U.

1 Almost 56% of those deferrals were for the minimum period then  
2 allowed by law, three years. See Defendants' Exh. U.

3 **B. Increased Deferral Periods: Conclusions.**

4 The evidence shows that the average deferral times for  
5 Proposition 9 class members has increased since the  
6 implementation of that law. The Ninth Circuit cautioned however,  
7 that it was not correct simply to assume that "more frequent  
8 parole hearings produce more frequent grants of parole rather  
9 than more frequent denials of parole." Gilman, 638 F.3d at 1108  
10 n.6 (emphasis in text).

11 The evidence adduced at trial shows however, that the  
12 increased deferral periods did not happen randomly, or only to  
13 those prisoners least likely to be granted parole. Rather, the  
14 evidence shows that in the two years prior to Proposition 9, the  
15 Board imposed deferral periods of one or two years on two-thirds  
16 of all the prisoners who were denied parole. These are the  
17 prisoners who are the most likely to be paroled within a year or  
18 two. That is because the statute in effect at the time  
19 contemplated that the Board would grant deferrals of one or two  
20 years only when there was a reasonable expectation that the  
21 prisoner would be ready for parole within that time. See 1994  
22 Cal. Legis. Serv. 560 (West).

23 Of course, those prisoners were under no guarantee of  
24 release on parole. However, if the statute had any meaning, and  
25 the Board applied the statute as written, then it is a reasonable  
26 inference that there existed a reasonable expectation that those  
27 prisoners would be paroled within the following year or two, if  
28 they could get to a parole hearing during that time. Yet, under

1 Proposition 9, these same prisoners cannot get to a hearing  
2 before at least three years, the new minimum deferral period.  
3 Cal. Penal Code § 3041.5(b)(3)(C). It follows that since there  
4 was a reasonable expectation that these prisoners would be  
5 paroled within one or two years, but Proposition 9 prevents them  
6 from getting to a hearing before three years, there is a  
7 significant risk that their incarcerations are being lengthened  
8 by Proposition 9.

9 Even as to those prisoners who received deferral periods of  
10 three, four or five years under the old law, Proposition 9 has  
11 created a significant risk of longer incarceration. Under the  
12 old law, deferrals of three or four years would be imposed if the  
13 Board determined that there was a reasonable expectation that the  
14 prisoner would be paroled during that time. In other words, at  
15 the time their crimes were committed, these prisoners'  
16 incarcerations (beyond a minimum term), were to continue only as  
17 long as the Board found that the prisoner was not suitable for  
18 parole.

19 Under Proposition 9 however, the prisoner's incarceration  
20 would continue indefinitely, unless the Board found "clear and  
21 convincing evidence" that he was suitable for parole in 3, 5, 7  
22 or 10 years.<sup>9</sup> "Clear and convincing evidence," the Proposition 9  
23 standard, refers to a quantum and quality of evidence that "could  
24 place in the ultimate factfinder an abiding conviction that the  
25 truth of its factual contentions are 'highly probable.'"

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26  
27 <sup>9</sup> No particular showing is required, under Proposition 9, to get  
28 a hearing after a 15-year deferral.

1 Colorado v. New Mexico, 467 U.S. 310, 316 (1984) (emphases  
2 added).

3 Since the old law and Proposition 9 are thus governed by  
4 these two completely different standards, it is quite possible  
5 that a prisoner could satisfy the old-law standard, but never  
6 satisfy the Proposition 9 standard.

7 Indeed, this logically seems to be at greatest risk when  
8 dealing with those subjected to the longest deferral periods,  
9 those deferred for 3, 4 or 5 years under the old law. Such  
10 prisoners, independently of how often they could get to a parole  
11 hearing, would have little chance of ever giving the Board an  
12 "abiding conviction" that it was "highly probable" that they were  
13 suitable for parole.

14 The court therefore concludes that Proposition 9 has created  
15 a significant risk of imposing a longer incarceration on the  
16 class than was the case when their crimes were committed. This  
17 conclusion is drawn from the evidence presented at trial, and the  
18 reasonable inferences arising from it. However, the plaintiffs  
19 further attempted to buttress their case by presenting actual  
20 accounts of prisoners whose incarcerations, they assert, were  
21 lengthened by Proposition 9. It is to that showing that court  
22 now turns, keeping in mind that at the preliminary injunction  
23 stage, the Ninth Circuit found that plaintiffs had, to that date,  
24 "produced no evidence to support a finding that more frequent  
25 parole hearings result in more frequent grants of parole."  
26 Gilman, 638 F.3d at 1108 n.6.

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1           **C. The Rutherford Litigation: Findings.**

2           A somewhat detailed description of the Rutherford litigation  
3 is useful because plaintiffs argue that a subset of the class  
4 certified in In re Rutherford (Cal. Super. Ct., Marin County, No.  
5 SC135399A), is representative of the Proposition 9 class  
6 certified in this case, while defendants argue that there is  
7 insufficient evidence to conclude that the Rutherford subset is  
8 representative. Describing how the Rutherford class and subset  
9 came into being is helpful in determining whether the Rutherford  
10 subset is representative of the Proposition 9 class in this case.

11           13. On February 25, 2003, California life prisoner  
12 Jerry Rutherford was denied parole, and given a one-year deferral  
13 until his next hearing, pursuant to Cal. Penal Code § 3041.5, as  
14 it then existed. See In re Lugo, 164 Cal. App. 4th 1522, 1529  
15 (1st Dist. 2008).<sup>10</sup> However, the Board failed to provide  
16 Rutherford a parole hearing during the next year, although  
17 required to do so by the law in effect at the time. Exh. 53  
18 (admitted, over objection, at RT 30) (ECF No. 343-9) ("Stipulated  
19 Testimony of Thomas Master") ¶ 2.<sup>11</sup>

20           14. On May 26, 2004, Rutherford filed a petition for  
21 habeas corpus in California state court, In re Rutherford (Cal.

22  
23 <sup>10</sup> Petitioner Lugo was substituted in as class representative  
24 after Rutherford's death. Id., at 1532.

25 <sup>11</sup> The parties stipulated that, if called to testify, Thomas  
26 Master would testify as described in Exhibit 53. ECF No. 343-9.  
27 At trial, with Master on the stand, defendants objected to the  
28 Stipulated Testimony on hearsay grounds. RT 30. The objection  
was overruled because Master was on the stand and was available  
to be cross-examined on the Stipulated Testimony. Id.

1 Super. Ct., Marin County, No. SC135399A), challenging the delay  
2 in his parole hearing. Lugo, 164 Cal. App. at 1529.

3 15. On November 29, 2004, the California Superior Court  
4 hearing Rutherford certified a class of "all prisoners serving  
5 indeterminate terms of life with the possibility of parole who  
6 have approached or exceeded their minimum eligible parole dates  
7 without receiving their parole hearings within the time required  
8 by sections 3041 and 3041.5." Lugo, 164 Cal. App. at 1530.

9 16. After the Rutherford class was certified, "the  
10 Board stipulated that it was not providing timely parole  
11 consideration hearings as required by the Penal Code." Lugo, 164  
12 Cal. App. at 1530.

13 17. On March 22, 2006, the parties agreed to a remedial  
14 plan intended to reduce the backlog of parole hearings. Lugo,  
15 164 Cal. App. at 1532.

16 18. When Proposition 9 was implemented, on December 15,  
17 2008, life prisoners were still having their parole hearings  
18 delayed beyond the dates when they should, by law, have occurred.  
19 Because of this general timeliness problem the Board was having,  
20 there arose a subset of the Rutherford class ("the Rutherford  
21 subset"), who should have had their parole hearings conducted  
22 under the old law, before Proposition 9's implementation, but who  
23 in fact did not (or would not) receive their hearings until after  
24 implementation. See Exh. 1, Exhibit A (Rutherford Stipulation)  
25 (ECF No. 259-1) at 7 (admitted over objection at RT 26). Their  
26 hearings were (or were scheduled to be) conducted under  
27 Proposition 9.

28 19. To avoid having their hearings decided under

1 Proposition 9, the Rutherford subset sought a preliminary  
2 injunction enjoining the Board from implementing Proposition 9 as  
3 to them. See id., Exhibit A at 7.

4 20. The preliminary injunction proceeding was settled  
5 with a stipulation. Prisoners who qualified for the stipulation  
6 were those prisoners in the Rutherford subset whose pre-  
7 Proposition 9 hearings were delayed until after Proposition 9,  
8 because of reasons attributable to the State, or because of  
9 "exigent circumstances,"<sup>12</sup> and those whose hearings commenced  
10 before Proposition 9, but which were continued to a date after  
11 Proposition 9. Exh. 1, Exhibit A at pp. 9-10 ¶ 4(a)-(d); Exh. 53  
12 at ¶ 6. Excluded from this stipulation were those Rutherford  
13 subset members who were granted parole or who elected to waive or  
14 postpone their hearings through no fault of the Board or exigent  
15 circumstances. Exh. 53 ¶ 6.

16 21. Under the stipulation, all qualifying Rutherford  
17 subset members who should have had their parole hearings  
18 conducted before December 15, 2008 under the old law, were  
19 granted hearings governed by the old law, even if those hearings  
20 occurred after the implementation of Proposition 9. Master Decl.  
21 (Exh. 1) ¶ 5. Further, in the event the life prisoner's delayed  
22

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23 <sup>12</sup> Exigent circumstances are (a) natural disaster, (b) institution  
24 security or medical lockdown/quarantine, (c) illness or emergency  
25 of an essential party, (d) power outage or equipment failure,  
26 (e) prisoner medically or psychiatrically unavailable,  
27 (f) attorney not prepared to proceed or became unavailable after  
28 hearing was scheduled. Exhibit A at p.9 ¶ 4(c) & p.14. This  
group includes prisoners who postponed their hearings to a date  
before Proposition 9, but the hearing was not provided before  
Proposition 9.



1 hearing had already been conducted under Proposition 9, and  
2 parole had been denied, the Board agreed to re-calculate the  
3 deferral period using the old law. Id.<sup>13</sup> In other words, the 3-,  
4 5-, 7-, 10- and 15-year deferrals under Proposition 9 would be  
5 recalculated to 1-, 2-, 3-, 4- or 5-year deferrals under the old  
6 law.

7 22. The parties in Rutherford stipulated that 442 such  
8 prisoners, identified at Exh. 20 (admitted per PTO), were covered  
9 by the stipulation. UF ¶ 14; (RT 26-29, Master testimony).

10 23. Of the 442 prisoners who received the  
11 modifications, 305 had, as of March 2011, received their  
12 subsequent hearings after the modifications; of those 305  
13 prisoners, 51 (16.7%) were granted parole at their hearings. UF  
14 ¶ 15.

15 24. In addition to the 442 prisoners who received  
16 modifications of their Proposition 9 deferrals to old-law  
17 deferrals due to the Rutherford litigation, there were 408 other  
18 prisoners who had been entitled to their hearings before  
19 Proposition 9 but had not yet had their hearings at the time  
20 Proposition 9 was implemented; pursuant to a stipulation in the  
21

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22 <sup>13</sup> Some covered prisoners chose to stipulate to a deferral period,  
23 rather than go forward with their delayed, Proposition 9 parole  
24 hearing. In those cases, all the new, old-law deferral periods  
25 were set by agreement. Master Decl. ¶ 10. For those convicted  
26 of murder: all 3-year stipulations were converted to 1-year, 5-  
27 year stipulations to 2-years, 7-years to 3-years, 10-years to 4-  
28 years, and 15-years to 5-years. Master Decl. ¶ 10. For those  
not convicted of murder: all 3-year stipulations were converted  
to 1-year (identically with those convicted of murder), and all  
other stipulated deferrals (5-, 7-, 10- and 15-year deferrals),  
were converted to 2-year deferrals. Id.

1 Rutherford case, those prisoners' first post-Proposition 9  
2 hearings were to be governed by the old law. As of April 6,  
3 2011, of those 408 prisoners, 247 were denied parole and given  
4 old-law (one- to five-year) deferrals. As of April 6, 2011, 88  
5 of the 247 had reached their next hearing (because they had  
6 received only one- or two-year deferrals at their first post-  
7 Proposition 9 hearings), and 25 (28 percent) were granted parole  
8 at their hearings. UF ¶ 16.

9 25. Of the 240 prisoners in the Rutherford subset who  
10 received or stipulated to the minimum 3-year deferral under  
11 Proposition 9, (a) 102 had their deferral dates reduced to the  
12 minimum 1-year deferral in a hearing under the old law,<sup>14</sup> (b) 60  
13 had their deferral dates reduced to a 2-year deferral (the  
14 second-shortest deferral) in new hearings under the old law, and  
15 (c) none had their deferral dates stay the same or get increased  
16 using the old law. Exh. 20 (admitted per PTO).<sup>15</sup> Parole was  
17 granted in 43 of those cases. Exh. 54 (admitted at RT 32).<sup>16</sup> As  
18

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19 <sup>14</sup> An additional 78 stipulated to parole unsuitability for 3 years  
20 at their Proposition 9 hearings. Exh. 20 at 43-49 (entries with  
21 "S" in the decision column are these stipulations). In that  
22 case, the old-law deferral period was reduced to one year by  
agreement, apparently without the need for a new hearing  
conducted under the old law. Exh. 1 at 10 ¶ 10.

23 <sup>15</sup> Exhibit 20 is a chart of the prisoners covered by the  
24 Rutherford stipulation. It includes a column that shows the  
25 original deferral date calculated under Proposition 9 ("Original  
26 Hearing Info / Result Length"), and a column that shows the new  
deferral date, calculated under the old law ("Modified Hearing  
Info / Length"). See RT 27-28.

27 <sup>16</sup> Exhibit 54 is a summary chart showing parole grants after the  
28 Rutherford modifications.

1 noted above, the Board's decision to defer a parole hearing for  
2 only one or two years is made when there is a reasonable  
3 expectation that the prisoner will be granted parole during the  
4 next year or two. The conclusion appears to be inescapable,  
5 then, that for most of those 240 prisoners (that is, 162 of them,  
6 which excludes those subject to the agreed-to deferrals), there  
7 was a reasonable expectation that they would be granted parole in  
8 one or two years. Yet, if their Proposition 9 deferrals had  
9 stood, they would have been unable to even get to a parole  
10 hearing for three years.

11           26. Of the 104 prisoners in the Rutherford subset who  
12 received or stipulated to a five (5) year deferral under  
13 Proposition 9, seventy-four of them had their deferral periods  
14 re-calculated under the old law.<sup>17</sup> As a result, (a) one had the  
15 deferral reduced to the 1-year minimum, (b) forty-eight had their  
16 deferrals reduced to two years, the next-shortest available,  
17 (c) seventeen had their deferrals reduced to 3 years, and  
18 (d) eight had their deferrals reduced to 4 years in new hearings  
19 conducted under the old law. None had their deferrals stay the  
20 same, and it was not possible to get a greater deferral under the  
21 old law. Exhs. 20 & 54. Therefore, for most of these prisoners  
22 (74, which excludes those subject to agreed-to deferrals), there  
23 was a reasonable expectation that they would be granted parole in  
24 one to four years. Yet, if their Proposition 9 deferrals had

---

25  
26 <sup>17</sup> An additional thirty of these prisoners stipulated to 5-year  
27 deferrals under Proposition 9, and so their deferrals were  
28 reduced to 2-year old-law deferrals by agreement. See Exhibit A,  
¶ 10.

1 stood, they would have been unable to even get to a parole  
2 hearing for five years.

3 27. Of the 53 prisoners in the Rutherford subset who  
4 received or stipulated to a seven (7) year deferral under  
5 Proposition 9, thirty-nine had their deferral periods re-  
6 calculated under the old law.<sup>18</sup> As a result, (a) none received  
7 either the 1-year minimum or the 5-year maximum deferral, (b) six  
8 had the deferral reduced to 2 years, the next shortest deferral  
9 under the old law, (c) seventeen had their deferrals reduced to  
10 three (3) years, and (d) 16 had their deferrals reduced to 4  
11 years. Exhs. 20 & 54. It was not possible to get an equal or  
12 longer deferral under the old law. Therefore, for most of these  
13 prisoners, there was a reasonable expectation that they would be  
14 granted parole in one to four years. Yet, if their Proposition 9  
15 deferrals had stood, they would have been unable to even get to a  
16 parole hearing for seven (7) years.

17 28. The 31 prisoners in the Rutherford subset who  
18 received a ten (10) year deferral (the next-to-longest deferral  
19 possible) under Proposition 9, all had their deferrals re-  
20 calculated under the old-law.<sup>19</sup> As a result, (a) none received  
21 the 1-year minimum deferral, (b) somewhat surprisingly, six (6)  
22 had the deferral reduced to 2 years, the next shortest deferral

23 \_\_\_\_\_  
24 <sup>18</sup> An additional fourteen of these prisoners stipulated to 7-year  
25 deferrals under Proposition 9, and so their deferrals were  
26 reduced, by agreement, to 2-year old-law deferrals, or 3-year  
old-law deferrals if their convictions were for murder. See  
Exhibit A, ¶ 10.

27 <sup>19</sup> According to Exh. 20, none of these prisoners stipulated to  
28 deferrals under Proposition 9.

1 under the old law,<sup>20</sup> (c) 20 had their deferrals reduced to four  
2 (4) years and (d) 5 had their deferrals reduced to 5 years, the  
3 maximum deferral under the old law. Exhs. 20 & 54. It was not  
4 possible to get an equal or longer deferral under the old law.

5 29. Therefore, for the majority of these prisoners (26  
6 out of 31), there was a reasonable expectation that they would be  
7 granted parole in one to four years. Yet, if their Proposition 9  
8 deferrals had stood, they would have been unable to even get to a  
9 parole hearing for ten (10) years.

10 30. Of the 14 prisoners in the Rutherford subset who  
11 received the maximum, 15-year deferral under Proposition 9,  
12 (a) none received the 1-year minimum deferral, (b) somewhat  
13 remarkably, five (5) had the deferral reduced to 2 years, the  
14 next shortest deferral under the old law, (c) none had their  
15 deferrals reduced to 3 years, (d) one had the deferral reduced to  
16 four (4) years and (d) eight (8) had their deferrals reduced to 5  
17 years, the maximum deferral under the old law. Exhs. 20 & 54.  
18 It was not possible to get an equal or longer deferral under the  
19 old law.

20 31. Thus, most of those who received the maximum, 15-  
21 year, deferral under Proposition 9, also received the maximum, 5-  
22 year, deferral under the old law. The law thus imposed an  
23 irrebutable presumption on these prisoners that they would not be

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24  
25 <sup>20</sup> This is the old-law deferral these six would have received by  
26 agreement, if they had stipulated to deferrals under  
27 Proposition 9, and if their commitment offenses were other than  
28 murder. Without this agreement, it seems surprising that their  
next-to-longest deferrals would be re-calculated to the next-to-  
shortest level.

1 suitable for parole for 15-years, removing the old-law  
2 possibility that at least every five years, the prisoner could  
3 demonstrate suitability.

4 32. As for the five prisoners whose deferrals dropped  
5 from 15 years under Proposition 9 to 2 years under the old law,  
6 the reduction seems remarkable because having received the  
7 maximum, 15-year deferral under Proposition 9, these five  
8 prisoners received the next shortest deferral available under the  
9 old law. It is a reasonable inference from this that in December  
10 2008 and January 2009, the Board did not have "clear and  
11 convincing evidence" that those prisoners would be ready for  
12 release for the next 15 years. Yet, making the calculation under  
13 the old law about three months later (in March and April 2009),  
14 the Board concluded that these same prisoners would be ready for  
15 release within 2 years. Exh. 20.

16 33. These five prisoners may thus have played out the  
17 disturbing scenario mentioned earlier, namely that prisoners who  
18 would be paroled under the old law could never show with the  
19 "clear and convincing evidence" required by Proposition 9, that  
20 they were ready for parole.<sup>21</sup>

21 34. There exists a separate group of 408 prisoners who  
22 also had post-Proposition 9 deferrals decided under the old law.  
23 Exh. 56 (ECF No. 343-12) (admitted at RT 117). Of the 247  
24 prisoners in that group who were denied parole, 91 received the

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25 <sup>21</sup> These five (Ambers, Pinell, Storey, Case and Martin) are not  
26 recorded as having stipulated to a deferral. See Exhibit 20.  
27 Had they stipulated, and if their crimes were other than murder,  
28 then the deferral would have dropped from 15 years to 2 years  
under the Rutherford agreement.

1 minimum one-year deferrals, and 22 of them were granted parole.  
2 Id. Of the group, 87 received 2 year deferrals (the next  
3 shortest under the old law), and 2 of them were granted parole.  
4 Id.

5 35. The actual effect of Proposition 9 on a sample  
6 group of life prisoners affected by the Rutherford litigation is  
7 set forth below. See Exh. 20 & 55 (binder) (all columns except  
8 the last two admitted at RT 222-23).<sup>22</sup>

9 a. Life prisoner A. Taylor (Exh. 20 ¶ 300)  
10 received a Proposition 9 parole hearing in January 2009. Taylor  
11 was denied parole, and given the minimum deferral permitted under  
12 Proposition 9, three years, on January 2012. However, because  
13 the prisoner was covered by the Rutherford litigation, the Board  
14 re-calculated the deferral, using the old law. Using the old  
15 law, the Board deferred Taylor's hearing two (2) years, or until  
16 January 2011. This meant that the Board believed that there was  
17 a reasonable chance that the prisoner would be granted parole in  
18 two years (otherwise, it was required by the old law to defer the  
19 hearing 3, 4 or 5 years). In fact, the Board granted Taylor  
20 parole at the January 2011 hearing, and the prisoner was released  
21 on parole in June 2011. Thus, Taylor was released under the old  
22 law before a parole hearing could even have occurred under  
23

24 \_\_\_\_\_  
25 <sup>22</sup> The court determined that the last two columns, although not  
26 admitted as evidence, represented what the witness, Monica Knox,  
27 would have testified to, if the court were inclined to drag out  
28 the trial. RT 222-23. Defendant was granted the opportunity to  
cross-examine the witness on those columns as if she had so  
testified in court.

1 Proposition 9.<sup>23</sup>

2           b. Life prisoner H. Tuey (Exh. 20 ¶ 152) received  
3 a Proposition 9 parole hearing in December 2008. Tuey was denied  
4 parole, and given the minimum 3-year deferral permitted under  
5 Proposition 9, to December 2011. However, because the prisoner  
6 was covered by the Rutherford litigation, the Board re-calculated  
7 the deferral under the old law. Using the old law, the Board  
8 gave Tuey the minimum 1-year deferral, to December 2009. This  
9 meant that the Board believed that there was a reasonable chance  
10 that Tuey would be granted parole the following year (otherwise,  
11 it was required by the old law to defer the hearing 2, 3, 4 or 5  
12 years). In fact, the Board granted Tuey parole at the  
13 December 2009 hearing, and the prisoner was released on parole in  
14 May 2010. Thus, Tuey was released under the old law one and one-  
15 half years before the next parole hearing could even have  
16 occurred under Proposition 9.<sup>24</sup>

17           c. Life prisoner A. Flores (Exh. 20 ¶ 302)  
18 received a Proposition 9 parole hearing in December 2008, but  
19 was denied parole, and given a seven (7) year deferral, to

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20 <sup>23</sup> Similar results obtain for seven (7) other life prisoners  
21 identified by plaintiffs, namely, P. Guerrero, J. Morales,  
22 R. Willis, R. Morton, R. DeCid, N. Powell and G. Balaoing.

23 <sup>24</sup> Similar results obtain for 42 other life prisoners identified  
24 by plaintiffs, namely, I. Kegler, R. Anderson, Curry, M. Arthur,  
25 S. Law, P. Syzmore, D. James, R. Hamilton, C. Henderson,  
26 G. Zavala, R. Perez, R. Stewart, O. Boone, C. Salgado, G. Rounds,  
27 G. Counts, A. Saucedo, A. Marin, E. Reams, B. Barnard,  
28 T. Pacheco, B. Jackaway, J. Anderson, J. Moreno, J. Acosta,  
B. Weatherly, T. Davis, J. Masoner, D. Cordar, A. Harrell,  
C. Racca, M. Gaona, D. Schlappi, H. Oropeza, A. Garcia, E.  
Russell, Kwitkowski, J. Bonilla, R. Espinola, J. Crespo, F. Hill  
and A. Hanna.



1 December 2015. Under Proposition 9, this deferral is given when  
2 the Board finds "by clear and convincing evidence" that the  
3 prisoner need not be incarcerated for more than seven additional  
4 years. Under this circumstance, the Board had the choice of  
5 deferring for 3, 5 or 7 years. Because the prisoner was covered  
6 by the Rutherford litigation, the Board re-calculated the  
7 deferral under the old law. Using the old law, the Board gave  
8 Flores a 3-year deferral, to December 2011. This meant that the  
9 Board believed that there was a reasonable chance that Flores  
10 would be granted parole in three years, (otherwise, it was  
11 required by the old law to defer the hearing 4 or 5 years). In  
12 fact, the Board granted Flores parole at the November 2011  
13 hearing, and the prisoner was released on parole in May 2012.  
14 Thus, Flores was released under the old law three years before  
15 the next parole hearing that had been granted under  
16 Proposition 9.

17 d. Life prisoner C. Orduna (Exh. 55 ¶ 19)  
18 received a Proposition 9 parole hearing in March 2009. Orduna  
19 was denied parole, and given a five (5) year deferral, to March  
20 2014. Under Proposition 9, this deferral is given when the Board  
21 finds "by clear and convincing evidence" that the prisoner need  
22 not be incarcerated for more than five (5) additional years.  
23 Under this circumstance, the Board had the choice of deferring  
24 for 3, 5 or 7 years. Because the prisoner was covered by the  
25 Rutherford litigation, the Board re-calculated the deferral under  
26 the old law. Using the old law, the Board gave Orduna a 2-year  
27 deferral, to 2011. This meant that the Board believed that there  
28 was a reasonable chance that Orduna would be granted parole in

1 two years, (otherwise, it was required by the old law to defer  
2 the hearing 3, 4 or 5 years). In fact, the Board granted Orduna  
3 parole at the April 2010 hearing, and the prisoner was released  
4 on parole in October 2010.

5 Thus, Orduna was released under the old law before the  
6 earliest date the next parole hearing could even have occurred  
7 under Proposition 9.<sup>25</sup>

8 36. An additional group of 24 life prisoners had their  
9 3-year Proposition 9 deferrals (the minimum permitted under  
10 Proposition 9), reduced through individual court orders.<sup>26</sup> See  
11 Exh. 58 (binder) (all columns except the last two admitted at RT

12 <sup>25</sup> Similar results obtain for 4 other life prisoners identified by  
13 plaintiffs, namely, C. Luong, J. Barrigan, M. Luna and M. Bunney.

14 The court rejects, however, Knox's testimony of what is the  
15 "earliest release" date under Proposition 9 for several  
16 prisoners. See Exh. 55. According to Knox's testimony, this was  
17 the earliest release date if the prisoner "had gotten the  
18 shortest Prop 9 deferral possible." RT 219. The shortest  
19 deferral possible under Proposition 9 was three (3) years. See  
20 Cal. Penal. Code § 3041.5(b)(3)(C) (defer for 3, 5, or 7 years if  
21 prisoner does not require incarceration for more than seven  
22 additional years). However, it appears that Knox used the actual  
23 deferral given under Proposition 9 rather than the "shortest"  
24 deferral possible, in her calculation.

25 This apparent error was avoided in the calculation for J.  
26 Alvarez, but repeated for J. Coleman, B. Jimenez, C. Luong, B.  
27 Martinez, J. Barrigan, C. Escobar, M. Luna, P. Velazquez, M.  
28 Bunney and G. Tuzon. However, even correcting these errors,  
Orduna, Luong, Barrigan, Luna and Bunney were released under the  
old law sooner that they could even have gotten a parole hearing  
under Proposition 9.

<sup>26</sup> L. Garcia, A. Marcelo, A. Criscione, A. Bics, S. Murphy, R.  
Young, J. Powell, M. Fairfax, E. Juarez, R. Hudson, J. Alexander,  
D. Kurtzman, R. DeLaBarcena, M. Berger, I. Sepulveda, M. Barajas,  
O. Willis, H. Rosales, A. Aguilar, S. Contreras, E. Estrada, J.  
Portillo, H. Jimenez and L. Liftee. Exh. 58.

1 222-23).<sup>27</sup> Each of these life prisoners received parole hearings  
2 earlier than would have been permitted under Proposition 9, and  
3 each was released on parole before they even could have had a  
4 parole hearing under Proposition 9. Id.

5 37. Dr. Barry Krisberg was qualified to testify as an  
6 expert on criminology, sociology and statistics. (RT 73-74.)  
7 Dr. Krisberg opined that there was no systematic bias in the  
8 Rutherford subset that would make it different from the class in  
9 this case. (RT 76.)

10 38. According to Dr. Krisberg, "comparing the outcomes  
11 of the Rutherford Group to the class as a whole is a valid  
12 research design to determine the effect of the new law."  
13 (RT 85.)

14 39. Dr. Stephen Klein was qualified to testify as an  
15 expert in statistics. (RT 100.) Dr. Klein opined that "it's too  
16 soon to know what the effects of Proposition 9 are." (RT 101.)  
17 Dr. Klein disagreed with Dr. Krisberg that the Rutherford subset  
18 was unbiased, or was representative of the plaintiff class as a  
19 whole. Dr. Klein believed that Dr. Krisberg erred by not  
20 "controlling" the Rutherford subset for "case characteristics."

21 40. Dr. Klein identified two factors that, he opined,  
22 defeated Dr. Krisberg's assertion that the Rutherford subset was  
23 an unbiased "natural experiment," and was therefore  
24 representative of the class as a whole. The first is Dr. Klein's

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25 <sup>27</sup> Once again, the court found that the last two columns  
26 represented what the witness, Monica Knox, would have testified  
27 to, if the court were inclined to drag out the trial. Defendant  
28 was granted the opportunity to cross-examine the witness on those  
columns as if she had so testified in court.

1 assertion that the hearing mandated by the Rutherford litigation  
2 "could be two years" after the initial post-Proposition 9  
3 hearing. RT 106. Neither Dr. Klein nor defendants' counsel ever  
4 identified any document or other evidence from which he drew this  
5 "two years" figure.

6 41. The other factor Dr. Klein identified is that "the  
7 people doing the second hearing may or may not have known the  
8 outcome of the first hearing, and that could be affecting  
9 things." (RT 106.) Dr. Klein does not identify any law,  
10 document or other evidence indicating that the decision-makers in  
11 the second hearing knew the outcome of the first hearing.<sup>28</sup> Nor  
12 does he identify any document or evidence showing that knowing  
13 the prior outcome would make any difference to the second  
14 decision-makers.

15 42. Dr. Klein opined that in order for Dr. Krisberg's  
16 "natural experiment" to be valid, "[w]hat you'd want to do is you  
17 want to get the characteristics of the Rutherford Group and the  
18 characteristics of the non-Rutherford group in the larger  
19 population to see whether those characteristics are the same."  
20 (RT 108-09.) Dr. Klein concluded that because Dr. Krisberg did  
21 not do this, his "natural experiment" was not valid. Dr. Klein  
22 did not identify any case characteristics between the two groups  
23 that were different, or that could affect the outcome.

24 \_\_\_\_\_  
25 <sup>28</sup> Under Proposition 9, the Board is expressly directed to  
26 consider the findings and conclusions "reached in a prior parole  
27 hearing," although it is not binding. Even assuming a similar  
28 direction applied under the old law or regulations, it is not  
clear that the vacated hearings in Rutherford would qualify as a  
prior parole hearing.

1           **D. The Rutherford Litigation: Conclusions.**

2           The court finds that Dr. Klein's testimony does not really  
3 bear on the question before the court, namely, whether  
4 Proposition 9 created a "significant risk" of longer  
5 incarceration. This is not the same as waiting to see what the  
6 different lengths of incarceration are, years from now, and  
7 looking back to see whether they were longer after Proposition 9  
8 passed. The question is whether, looking forward, there is a  
9 significant risk of increased incarceration. If the court were  
10 to rely upon Dr. Klein's testimony, this court could not reach  
11 any conclusion about the constitutionality of Proposition 9 until  
12 some time in the indefinite future when all the class members had  
13 either been released or died.

14           Even if Dr. Klein's testimony were pertinent, the court  
15 rejects it. Dr. Klein opines that there is no way for Dr.  
16 Krisberg to know that the Rutherford subset is representative of  
17 the class as a whole. The basis for this opinion is that  
18 Dr. Krisberg did not "control" for case characteristics. Because  
19 of this, Dr. Klein opines, there is no way to know whether  
20 something other than the accident of calendaring -- such as  
21 individual case characteristics, or some biasing factor that  
22 caused the "accident" of calendaring - distinguishes the  
23 Rutherford subset from the class here.

24           There are several problems with this assertion. First,  
25 neither the defendants nor Dr. Klein offer any evidence of any  
26 case characteristics that would distinguish the Rutherford subset  
27 from the class. Defendants have access to all the prisoners'  
28 central files, and yet they have not identified any of the

1 differences that Dr. Klein speculates might possibly exist. The  
2 court infers from this failure to produce any such evidence, that  
3 there is none.

4 Second, the evidence before the court plainly shows that  
5 there is no overall difference that would make a difference  
6 between the Rutherford subset and the class. Dr. Klein  
7 identifies two possible differences in case characteristics. He  
8 asserts that "the time between the two hearings could be two  
9 years, things could happen that would be affecting whether  
10 somebody got a parole grant during that two-year period."

11 RT 106.

12 This basis is flatly contradicted by the evidence.  
13 Exhibit 20 is the defendants' own compilation of every member of  
14 the Rutherford subset. It shows that in almost every single  
15 case, the time between the two hearings for the Rutherford  
16 prisoners is just under one month (e.g., Tilford), to just under  
17 five (5) months (e.g., Hill), with the overwhelming majority  
18 being about 3 or 4 months apart. Exhibit 20. In only two cases  
19 that the court was able to identify, namely, Harrell (11 months)  
20 and Moore (10 months), was the time difference greater than 5  
21 months.

22 If Dr. Klein's assertion had been based upon actual evidence  
23 in the case, the court would consider it, since the time between  
24 hearings, and possibility of changes in case characteristics that  
25 could occur during that time, most notably "institutional  
26 behavior," is pertinent to whether parole would be granted. See  
27 Cal. Admin. Code, tit. 15, § 2281(d)(9) (finding of suitability  
28 for release is better when "[i]nstitutional activities indicate

1 an enhanced ability to function within the law upon release").  
2 Since Dr. Klein's assertion was based upon an apparently made-up  
3 number of "years" between the initial Proposition 9 hearing and  
4 the old-law hearing gained through the Rutherford litigation, the  
5 court must discard Dr. Klein's opinion, as to this factor.

6 Finally, the evidence before the court tends to show that  
7 the relevant case characteristics were not different between the  
8 two groups. This conclusion can be inferred from the fact that  
9 the case characteristics that matter are set forth in the  
10 regulations governing the determination of parole suitability,  
11 id. § 2281(b)-(d), and the fact that both groups wound up with  
12 the full range of outcomes. In other words, the case  
13 characteristics are inferable from the outcome. If the  
14 Rutherford subset was, for example, crowded with multiple  
15 murderers who showed no remorse, there would be few among them  
16 receiving the minimum deferral, and many receiving the maximum.  
17 But defendants have identified no such skewing in the  
18 distribution of outcomes in the record.

19 The court finds that the Rutherford subset is representative  
20 of the Proposition 9 class as a whole. The evidence submitted on  
21 this matter shows that the Rutherford subset is distinguished  
22 from the Proposition 9 class only by the accident of when their  
23 parole hearings were scheduled on the calendar. There is no  
24 evidence that the case characteristics are different between the  
25 two groups. There is no evidence that something about the  
26 accident of calendaring was anything other than an accident of  
27 the calendar.

28 For example, there is no evidence that only those most or

1 least likely to be paroled moved into the Rutherford subset.  
2 Rather, the evidence is clear that the Rutherford subset came  
3 into existence because the Board had a backlog that applied to  
4 all life prisoners, not any particular subset of them based upon  
5 any case characteristics. Dr. Klein's speculation on possible  
6 differences in case characteristics is therefore a red herring,  
7 especially since Dr. Klein, who presumably had access to the  
8 central files of the class as well as the Rutherford group, did  
9 not identify a single case characteristic that distinguished the  
10 two groups.

11 The court therefore finds that plaintiffs have properly  
12 buttressed their showing that Proposition 9 actually did create a  
13 significant risk that their incarcerations would be lengthened.  
14 In addition to the inferences to be drawn from how the Board  
15 imposes deferral periods, the Rutherford subset shows that in  
16 fact, some members of the class had their incarcerations  
17 lengthened by Proposition 9, but were rescued from that result by  
18 the Rutherford stipulation.

19 The experience of the Rutherford subset thus shows that  
20 while it is true that more frequent parole hearings result in  
21 more frequent denials for some, it is also true that they result  
22 in more frequent grants of parole for others.

### 23 III. PROPOSITION 9: THE "ADVANCED HEARING" PROCESS

#### 24 A. Findings.

25 43. A life prisoner who has been denied parole may  
26 request that the Board exercise its discretion to advance a  
27 hearing to an earlier date. See UF ¶ 4.

28 44. From the passage of Proposition 9 through April 6,



1 2011, when a full review of a petition to advance was ordered,  
2 the review was conducted by a Board employee at the prison where  
3 the prisoner was housed so that the prisoner's entire file could  
4 be reviewed. The prisoners were not present or represented by  
5 counsel when their files were reviewed. UF ¶ 13.

6 45. During the period from January 1, 2009 through  
7 December 31, 2010, there were 119 petitions to advance filed by  
8 prisoners. Of those, 114 (approximately 96%) were denied; 106  
9 (approximately 93%) were summarily denied and eight  
10 (approximately 7%) were denied following a full review. UF ¶ 7.

11 46. From 2009 to June 2012, the Board has not exercised  
12 its discretion to advance a hearing absent a prisoner filing a  
13 petition to advance. UF ¶ 26.

14 47. Although the procedure for making this request does  
15 not appear to be reflected in the Board's official regulations,  
16 the Board's Executive Officer, Jennifer Shaffer, testified about  
17 the Board's process for determining whether an expedited hearing  
18 is warranted for a particular inmate. (RT 263-95.)

19 48. The prisoner starts this process by completing Form  
20 1045, Exhibit 35 (ECF No. 341-3), entitled "State of California /  
21 Board of Parole Hearings / Petition To Advance Hearing Date."  
22 (RT 265.) The form instructs the prisoner to list the changed  
23 circumstances or new information that "show a reasonable  
24 likelihood that consideration of the public and victim's safety  
25 does not require the additional period of incarceration" that was  
26 set at the last parole suitability hearing. Exh. 35 at BPH-44.  
27 The prisoner is also instructed to submit with the petition all  
28

1 supporting documents. Id.<sup>29</sup>

2 49. Prior to March 1, 2014, the submitted petition was  
3 first given a "preliminary review." See Exh. 35 at BPH-45. At  
4 this stage, according to Exhibit 35, the petition could be  
5 "Summarily Denied" if (1) the prisoner was seeking to advance the  
6 wrong type of hearing, (2) the petition was not timely or (3) the  
7 petition contained "[n]o evidence of new information or a change  
8 in circumstances warranting further review." Id. The first two  
9 reasons were plainly jurisdictional, in that such petitions were  
10 not within the statute. See Exh. 38 at BPH-12 (BPH training  
11 material) (admitted at RT 210).

12 50. As for the third issue, the training provided to  
13 the decision-makers states that the prisoner first had to assert  
14 that there was "new information" or a "change in circumstances"  
15 without regard to any showing or assertion of suitability. See  
16 Exh. 38 at BPH-14. In other words, a mere showing of suitability  
17 was not sufficient to warrant an advance hearing; there had to  
18 be, in addition, some "new information" or "change in  
19 circumstances." See also Exh. 40 (admitted at RT 211) (ECF  
20 No. 341-8) at BPH-36 (defendants' explanation of "preliminary  
21 review" states that "[m]inimally, the prisoner must make a valid  
22 assertion of a change in circumstances or new information in  
23 order to avoid the BPH summarily denying the petition").

24 51. In addition to that assertion (of changed  
25 circumstances or new evidence), the prisoner then had to  
26

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27 <sup>29</sup> The form was amended on March 1, 2014, although it appears that  
28 prisoners still fill out Exhibit 35. However, the decision-  
makers now use Exhibit 2B instead. (RT 265-66.)

1 establish, still in the "preliminary review" stage, that there  
2 was a "reasonable likelihood" that the prisoner no longer  
3 required additional incarceration. See Exh. 38 at BPH-15. The  
4 petition would be "Summarily Denied" if "other evidence shows"  
5 that the prisoner was "unsuitable for parole despite the change  
6 in circumstances" or "new information." Id.

7 52. The "full review" required the prisoner to again  
8 establish "a reasonable likelihood," considering the safety of  
9 the public and victim, that the prisoner no longer required  
10 incarceration. See Exh. 38 at BPH-17.

11 53. After March 1, 2014, the decision-making process  
12 was changed. Instead of a "preliminary review" followed by a  
13 "full review," there is now a "jurisdictional review," followed  
14 by a "full review." (RT 272) (Shaffer Testimony).

15 54. The jurisdictional review is conducted by legal  
16 analysts, and determines only whether to screen out petitions  
17 where (1) the prisoner was seeking to advance the wrong type of  
18 hearing,<sup>30</sup> or (2) the petition was not timely. (RT 272-73.)

19 55. The jurisdictional review does not involve any  
20 determination on the merits. (RT 276.) This is in contrast to  
21 the pre-March 1, 2014 procedure, in which the "preliminary  
22 review" included a merits determination on whether the prisoner  
23 had shown a change of circumstances warranting further review.  
24 See, e.g., Exh. 38 of BPH-145.

25 56. If the petition survives the jurisdictional review,

26 \_\_\_\_\_  
27 <sup>30</sup> For example, there are medical parole suitability hearings,  
28 documentation hearings and progress hearings, none of which are  
included in the advance hearing process. (RT 275.)

1 it moves to a "full review," which is a merits review conducted  
2 by a Commissioner or Deputy Commissioner. (RT 277-83.) This  
3 review is conducted based upon documents, possibly including the  
4 prisoner's "central file," or some portion of it, and does not  
5 include a hearing. (RT 284-308.)

6 57. The standard for advancing a hearing is whether  
7 there is a "reasonable likelihood that additional incarceration,  
8 after consideration of the public safety and the [victim's]  
9 safety, is no longer necessary." (RT 284.) It is not the  
10 suitability standard.<sup>31</sup> (RT at 288.)

11 58. When the PTA is submitted, the Board places a hold  
12 on a hearing date 9 months from that date, in order to ensure  
13 that a hearing date will be available if the PTA is granted.  
14 (RT 277-78.) Accordingly, a prisoner who wishes to have a new  
15 hearing in a year must file the PTA immediately, but in any  
16 event, no later than 3 months from the date of the parole denial.  
17 Thus, the inmate can use at most 3 months worth of "changed  
18 circumstances" or "new information" to convince the decision-  
19 maker to grant him an advance hearing. Accordingly, whatever  
20

---

21 <sup>31</sup> The standard for suitability is:

22 The panel or the Board, sitting en banc,  
23 shall set a release date unless it determines  
24 that the gravity of the current convicted  
25 offense or offenses, or the timing and  
26 gravity of current or past convicted offense  
or offenses, is such that consideration of  
the public safety requires a more lengthy  
period of incarceration for this individual.

27 Cal. Penal Code § 3041(b).  
28

1 work the inmate does in the subsequent 9 months is not  
2 considered.

3 59. The inmate may file a new petition to advance no  
4 sooner than three years after the last petition to advance was  
5 denied. (RT 274-75.)

6 60. Although the Board has the authority to grant an  
7 advanced hearing sua sponte, it has never done so, because until  
8 recently, there has been no process for doing so. See RT 297.

9 61. Post-Vicks, the Board is apparently implementing a  
10 procedure to implement sua sponte reviews. (RT 289-95). The  
11 board is currently conducting sua sponte reviews, although as of  
12 the date of Shaffer's testimony, none had ever been granted.  
13 (RT 289-95, 297-98.)

14 **B. Advance Hearing Examples.**

15 The parties have directed the court's attention to several  
16 examples of the petition to advance process. Some of the  
17 examples point to cases where advanced hearings were granted or  
18 denied, and appear to show that the advance hearing process can  
19 afford prisoners an opportunity to avoid the ex post facto  
20 problems associated with Proposition 9.<sup>32</sup>

21 Other examples show the Petition to Advance ("PTA") process  
22 identifying prisoners whose PTAs apparently ought to be denied.

23 \_\_\_\_\_  
24 <sup>32</sup> See, e.g., R. Evans (petition to advance granted, denied  
25 parole), UF ¶ 8; L. Gooseberry (petition to advance granted, and  
26 parole granted after some voluntary deferrals), UF ¶ 9;  
27 J. Martinez (petition to advance granted, parole granted), UF  
28 ¶ 10; R. Singh (petition to advance granted after prisoner  
stipulated to 3-year deferral, parole denied), UF ¶ 11;  
D. Vanlandingham (petition to advance granted, parole granted,  
Governor reversed, parole again granted), UF ¶ 12.

1 For example, T. Faatiliga's advance hearing petition made it past  
2 the preliminary review stage. See Exh. 80, Vol. 2, at BPH-22042  
3 (full review ordered on April 5, 2011). At the full review  
4 stage, the petition was denied, for the following reasons:

5 Although the inmate has remained disciplinary  
6 free, earned 6 laudatory chronos, and  
7 provided a letter regarding insight and  
8 remorse, he has only participated in 2  
9 additional self help programs since his last  
10 review. He attended a one day program on  
11 victim recognition, reflection and healing on  
12 11-10-10 and has continued his participation  
13 in the YAPP program. The transcripts  
14 indicate the panel would like him to  
15 participate in an anger management program as  
16 well and to continue self help that would  
17 further improve his level of insight.

18 Id. This advance petition denial appears to squarely address the  
19 issue presented, that is, whether the inmate should get an  
20 advance hearing. The decision-maker denied the petition because  
21 the prisoner had not done what the last panel indicated he should  
22 do before he could be ready for release, namely, "participate in  
23 an anger management program."<sup>33</sup> These examples tend to show that

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24 <sup>33</sup> Similar examples are: D. Washington (Exh. 80 at Y 25025)  
25 (prisoner failed to address issues identified at the last parole  
26 hearings); D. Plata (Exh. 80 at Y 20560) (same); T. Porter  
27 (Exh. 80 at Y 33758) (prisoner failed to document participation  
28 in a program apparently); S. Mendoza (Exh. 80 at Y 18391) (denial  
fully explained, addressed relevant factors); M. Heller (Exh. 80  
at Y 18481) (level of insight is improving but "still deemed  
inadequate"); R. Holguin (Exh. 80 at Y 30144) (recent  
disciplinary incidents); B. Werner (Exh. 80 at Y 25063)  
(continued failure of "insight"); T. Cobos (Exh. 80 at Y 12776)  
(continued failure of "insight," superficial comments to the  
contrary are not enough); A. Monteon (Exh. 80 at Y 18674) (inmate  
was untruthful in evaluation); M. Loveless (Exh. 80 at Y 17242)  
(petition failed to address concerns of last panel); R. Elam  
(Exh. 80 at Y 13861) (inmate failed to update parole plans, as  
asked for by prior panel).

29 Plaintiffs have identified several examples where they disagree

1  
2 substantively with the decision-maker, even though they do not  
3 identify any structural problem with the decision. See, e.g., E.  
4 Sanders (Exh. 48 (binder) at BPH-3499) (plaintiffs assert that  
5 the decision-maker "discounts" prior panel's comments that the  
6 prisoner is close to suitability); F. Salas (Exh. 47 (binder) at  
7 BPH-1491) (plaintiffs say that the decision-maker denied PTA even  
8 though prisoner completed relevant courses and was a great  
9 student); and Dawn Ayres (Exh. 80 at Y 10180) (plaintiffs  
10 apparently feel that the inmate's 400 pages of documentation  
11 should have resulted in a grant of parole).

12 However, this court does not sit to review individual parole  
13 decisions. The question here is not whether the decision-makers  
14 reached the correct decision or not. The question is whether the  
15 system in which they make their decisions is enough to rescue  
16 Proposition 9 from its ex post facto problems.

17 In the case of J. Barajas (Exh. 80 at Y 10820), plaintiffs  
18 complain that the petition was denied because the decision-maker  
19 determined that "more time" is needed. This court knows of no  
20 reason that the decision-maker cannot independently determine  
21 that more time is needed, as apparently was the case here. The  
22 same applies to: T. Tuvalu (Exh. 80 at Y 24699) ("[a]nything less  
23 than three years would be insufficient"); J. Stephen (Exh. 80 at  
24 Y 15973) ("additional time is needed to evaluate [inmate's  
25 recent] gains/knowledge and understanding in this area"); S.  
26 Seviar (Exh. 80 at Y 23514) (not enough time has elapsed for  
27 prisoner to work on his anger); I. Verdugo (Exh. 80 at Y 35615)  
28 ("[a]llthough his programming is positive a longer period of time  
to participate and fully understand and use the concepts is  
needed"); A. Cook (Exh. 80 at Y 28003) ("[w]hile his ongoing  
participation in self help is commendable, the extent and length  
of his involvement remains inadequate in light of the prior  
panel's comments as to lack of insight and remorse"); J. Kuhnke  
(Exh. 80 at Y 31650) ("[i]t is believed that Mr. [Kuhnke] needs  
more time to continue on this positive path to lay a stronger  
foundation to insure that he is not a public safety risk when  
released into the free community"); and L. Haynes (Exh. 80  
at Y 17145) ("it is still an inadequate amount of time in terms  
of ongoing participation in these self-help groups") (the court  
notes that he was also denied because his parole plans were  
"barely adequate, and does not mention a plan for staying out of  
the gang lifestyle").

This is a different matter than if the decision-maker were to  
simply rely on the prior panel's determination that more time is  
needed.

1 the PTA system works at denying petitions that ought to be  
2 denied. The remaining question is whether it grants petitions  
3 that ought to be granted.

4 Several examples show that even when the Board decides a  
5 case under an apparently reasonable interpretation of  
6 Proposition 9 and the implementing regulations, the advance  
7 hearing process can be rendered meaningless or illusory. The  
8 most profound failure of this process is in the Board's apparent  
9 interpretation of the statute authorizing advance petitions. The  
10 statute provides that the inmate may request an advance hearing  
11 by submitting a petition that sets forth "the change in  
12 circumstances or new information that establishes a reasonable  
13 likelihood that consideration of the public safety does not  
14 require the additional period of incarceration of the inmate."  
15 Cal. Penal Code § 3041.5(d)(1). A sensible interpretation of  
16 this authorization is that the "change in circumstances or new  
17 information" is tied to the question of suitability for parole.

18 However, some examples identified by plaintiffs show that  
19 the Board has interpreted the authorization in a way that  
20 separates the "change in circumstances or new information" from  
21 the question of suitability. Rather, the Board requires a  
22 showing of "change in circumstances or new information" before it  
23 will even consider the question of suitability for parole. This  
24 is a problem first because the most fundamental change in  
25 circumstances would be a move from unsuitability to suitability.  
26 But as the examples show, that is apparently not a change in  
27  
28



1 circumstance that will satisfy the Board. Second, when this  
2 requirement is spun off from the suitability requirement, it  
3 imposes an additional, substantive burden on the prisoner's  
4 ability to obtain parole.

5 This is not a harmless procedural change. This is a change  
6 that says that the prisoner must now show something that he never  
7 had to show before, namely, this amorphous "change in  
8 circumstances or new information." At the time the crime was  
9 committed, the sentence was incarceration until such time as the  
10 Board determined that the prisoner was suitable for parole.  
11 Under Proposition 9, it is incarceration indefinitely, unless the  
12 Board finds clear and convincing evidence of (a) a change in  
13 circumstances or new information, and separately,  
14 (b) suitability.

15 **(1) M. Brodheim: Change in Circumstances or New**  
16 **Evidence.**

17 Plaintiffs have directed the court's attention to the  
18 case of M. Brodheim as an example of the advance hearing process  
19 in action.<sup>34</sup> At a parole hearing on June 4, 2009, the Board  
20 denied parole for Brodheim, and deferred his next hearing for the  
21 minimum 3-year period allowed under Proposition 9. See  
22 Exhibit 80, Vol. 2 at BPH-21458. On November 1, 2010, this court  
23 granted Brodheim's habeas corpus petition on the ground that the  
24 record did not contain "some evidence" of Brodheim's current or

---

25 <sup>34</sup> There appear to be over 40,000 pages of advance hearing  
26 documents in Plaintiffs' Exhibit 80 (submitted on two CD's). It  
27 is not practical for the court to review them all, so the court  
28 considers only the documents specifically brought to its  
attention by the parties.

1 future dangerousness. Id. at BPH 21468. This court ordered  
2 Brodheim released within 45 days unless the Board conducted a new  
3 suitability hearing in accordance with Due Process and the  
4 court's order. Id. The board scheduled the new hearing for  
5 December 1, 2010. At that hearing, the Board found that Brodheim  
6 was suitable for parole. Id. at BPH 21567. However, on March  
7 15, 2011, the Ninth Circuit reversed this court's order, citing  
8 the intervening authority of Swarthout v. Cooke, 562 U.S. \_\_\_\_,  
9 131 S. Ct. 859 (2011) (per curiam). Id. at BPH-21459-60. Even  
10 though the Board had already found Brodheim suitable for parole,  
11 it immediately (March 18, 2011) vacated its decision, solely  
12 because the earlier-than-planned - but already conducted -  
13 December 2010 hearing was no longer legally required. Id. at BPH  
14 21458. Id. The board re-instated the 3-year deferral of the  
15 original hearing. Id. The board did not state or otherwise  
16 indicate that it had substantively changed its view, or had  
17 decided that Brodheim was no longer suitable for parole. Rather,  
18 the decision was vacated solely because it was held at an earlier  
19 date than was found to be legally required.

20 On April 20, 2011, Brodheim filed a petition to advance his  
21 hearing. Id. at BPH 21462. Brodheim relied, among other things,  
22 upon the transcript from the December 10, 2011 hearing at which  
23 the Board had already found that he was suitable for parole. Id.  
24 On May 11, 2011, the Board "Summarily Denied" Brodheim's  
25 petition, on the boilerplate grounds that there was "[n]o  
26 evidence of new information or a change in circumstances  
27 warranting further review." Id. at BPH 21463.

28 From the Brodheim example, the court infers that the

1 Advanced Hearing process requires the inmate to make a showing  
2 beyond simple "suitability" for parole. Rather, the inmate must,  
3 in addition, show "new information or a change in circumstances"  
4 from the last parole denial.

5 The inference is supported by the Board's training manual  
6 and instructions to decision-makers. See Exhibit 40 (ECF  
7 No. 341-8). The manual makes clear that in order to pass  
8 "preliminary review," the prisoner must make the assertion that  
9 there are "changed circumstances" or "new information." Id., at  
10 BPH-36. Only once this assertion has been made does the petition  
11 survive summary denial, and the Board go on to determine whether  
12 those changed circumstances or new information establish whether  
13 additional incarceration is required. See id.

14 Examples of the "change in circumstances" or "new  
15 information" that would enable a prisoner to avoid summary denial  
16 are having updated or stable parole plans, job offers, vocational  
17 or educational certificates, completion of self help and/or drug  
18 or other treatment programs, or changed outcome of disciplinary  
19 actions. See Exhibit 42 (ECF No. 341-10) at BPH-33. Although  
20 this list is stated to be not exclusive, it does appear to  
21 consist of things in a different category than, for example, the  
22 mere passage of an additional year of incarceration.<sup>35</sup>

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23 <sup>35</sup> As another example, J. Kyne was denied parole on June 18, 2009.  
24 Exh. 45 (binder). On August 9, 2010, he filed a PTA. Submitted  
25 with the PTA was a large volume of documentation that, even under  
26 the most skeptical and jaundiced eye, clearly presents new  
27 information and changed circumstances that addressed his  
28 suitability for parole (although of course, they do not compel a  
conclusion one way or another). His PTA was summarily denied, on  
the grounds that it failed to present new information or changed  
circumstances. There is no other explanation for the summary

1                   **(2) T. Nguyen: The Next Panel Should Decide.**

2           In another set of examples, the decision-maker made no  
3 finding on whether the prisoner had shown a reasonable likelihood  
4 that further incarceration was not needed, and therefore the next  
5 parole hearing should be advanced, even though that was the only  
6 question he had to decide.<sup>36</sup> Rather, they determined that this  
7 was a question for the next parole review panel. Yet, the  
8 decision-maker denied the prisoner the opportunity to get to the  
9 next review panel until the original deferral period had elapsed.  
10 These examples tend to show that some PTA decision-makers viewed  
11 \_\_\_\_\_  
12 denial.

13 Similar results are: J. Ferioli (Exh. 80 at Exh Y 29405 (at full  
14 review, the sole reason for denying the PTA was that, while the  
15 prisoner was doing well, "there is insufficient reason/change of  
16 circumstances to warrant advancing the date of the suitability  
17 hearing, as such"); C. Chruniak (Exh. 80 at Y 27915) (at full  
18 review, decision-maker denies PTA because although the prisoner  
19 is doing well, he demonstrated "neither new information nor  
20 changed circumstances").

21 <sup>36</sup> In denying the petition, the decision-maker checks the box next  
22 to the following paragraph:

23           Denied, after conducting a review of the case  
24 factors and considering the new information  
25 of change in circumstances, the prisoner did  
26 not establish a reasonable likelihood that  
27 consideration of the public and victim's  
28 safety does not require the additional  
incarceration.

29 See, e.g. Exh. 80 at Exh Y 25932. However, the Board appears to  
30 concede that this boilerplate language does not actually give the  
31 reason the advance petition was denied. See RT 267 ("a lot of  
32 decisions were going back to inmates ... saying summarily denied,  
33 and it didn't give enough reason to explain our decision ... [s] we  
34 expanded that"). The actual reason is given in the "Comments"  
35 section.

1 certain issues as categorically exempt from the PTA process, and  
2 therefore could only be decided by panels after the deferral  
3 period imposed by the last panel. In fact, there is no such  
4 categorical exemption in the law or regulations. In such cases,  
5 the PTA process was illusory.

6 T. Nguyen's advance hearing petition, for example, made it  
7 past the preliminary review stage. See Exh. 80 at Exh Y 19163  
8 (full review ordered on February 21, 2012). At the full review  
9 stage, the petition was denied. Id. (April 25, 2012). The  
10 reason for the denial was:

11 Prior panel's primary factor that tend to  
12 show unsuitability ... was his past and present  
13 mental state and attitude towards the crime.  
14 These concerns need to be address[ed] by the  
panel and will be at next hearing. All other  
areas continue to be positive.

15 Id. at 19164.<sup>37</sup>

16 **(3) M. Killingsworth: Comprehensive Risk Assessment.**

17 A structural barrier to a meaningful PTA process is the  
18 Comprehensive Risk Assessment ("CRA"). The CRA is one factor the  
19 decision-maker must consider in determining whether to grant an  
20 advance hearing petition (RT 284). The CRA is completed every  
21 five (5) years. Cal. Code Regs. tit. 15, § 2240(b). A  
22 Subsequent Risk Assessment ("SRA") can be made before any  
23 regularly scheduled hearing. There are two problems here.  
24 First, the SRA "will not include an opinion regarding the

25 <sup>37</sup> Similar denials occurred in the other cases: K.E. Woods  
26 (Exh. 80 at Y 25932) (last panel's concerns must be evaluated "by  
27 [panel's] concerns that not enough time has elapsed since his  
28 last CDC 115 and counseling chronos has not changed").

1 inmate's potential for future violence because it supplements,  
2 but does not replace, the Comprehensive Risk Assessment." Id.,  
3 § 2240. Second, there is no authorization for the CRA or the SRA  
4 to be issued for a PTA. Under the regulations, these reports are  
5 prepared in advance of a hearing, not a request for a hearing.  
6 Plaintiffs therefore argue that "any prisoner who is denied  
7 parole in part because of the CRA has no chance of obtaining an  
8 advanced hearing." Plaintiff's Summation (ECF No. 517) at 25  
9 n.37.

10 The undisputed examples identified by plaintiffs support  
11 this assertion. For example, M. Killingsworth's advance hearing  
12 petition made it past the preliminary review stage. See Exh. 80  
13 at Exh Y 17970 (full review ordered on June 28, 2011). At the  
14 full review stage, the petition was denied, for the following  
15 reasons:

16 I/M Killingsworth is to be commended for his  
17 additional/continued participation in self  
18 help programming and disciplinary free  
19 behavior. The panel's concerns with the  
20 psychiatric evaluation completed by Dr. Smith  
21 in August 2008 indicating that P presents a  
22 moderate risk of violence are still valid.

23 Id. at 17971. This denial does appear to address squarely the  
24 question presented, that is, whether considerations of public and  
25 victim safety indicate that the prisoner should be granted an  
26 advanced hearing. The decision-maker denied the petition,  
27 finding that the concerns about the prisoner's "moderate risk of  
28 violence" were still valid.

29 However, the psychiatric evaluation it relies upon,  
30 addressing risk assessment, is completed only every five years,  
31 so there would appear to be no way for the prisoner to show that

1 circumstances have changed. Moreover, since this is only a  
2 request for a hearing, the prisoner does not even have the right  
3 to obtain a supplemental risk assessment report.<sup>38</sup>

4 **(4) A. Mendoza: Translation Services Unavailable.**

5 Another structural barrier to making the PTA anything other  
6 than an illusory benefit is the apparent inability of the  
7 decision-makers to get documents translated in time for them to  
8 rule on the petition. For example, A. Mendoza's advance hearing  
9 petition made it past the preliminary review stage. See Exh. 80  
10 at Exh Y 32900 (full review ordered on June 28, 2011). At the  
11 full review stage, the petition was denied because some of the  
12 documents the prisoner submitted were in Spanish, and the  
13 decision-maker therefore could not determine whether the standard  
14 had been met until the documents were translated. Id. at Y  
15 32901.

16 This situation appears to contradict the testimony that  
17 prisoners who need assistance receive such assistance in  
18 preparing their petitions to advance. (See RT 273.) If in fact,  
19 no translation services are provided at the PTA stage, then the  
20 PTA process is illusory for those prisoners who communicate only

---

21 <sup>38</sup> Other examples of this result are: V. Pleitez (Exh. 80 at  
22 Y 20606) (at full review, decision-maker states, "[i]f new CRA is  
23 found reschedule inmate for full review"); W. Crawford (Exh. 80  
24 at Y 13359) (at full review, decision-maker states the prisoner  
25 "submitted nothing to document any change in these important  
26 areas" identified in the CRA); B. Jimenez (Exh. 80 at Y 11616)  
27 (at full review, decision-maker states "[a] new psychiatric  
28 evaluation has not been completed; hereby reflecting no change to  
the major reasons for the unsuitability determination," namely,  
the risk assessment); J. Stevenson (Exh. 80 at Y 24063) (at full  
review, advance hearing is denied based upon "unresolved issues"  
identified by the CRA).

1 in Spanish.<sup>39</sup>

2 **C. Conclusions.**

3 The evidence shows that the advance hearing process  
4 sometimes works and sometimes does not work. It certainly  
5 appears to deny advance hearings where there is good cause to  
6 deny them.

7 However, the PTA appears to deny advance hearings even to  
8 those who facially appear to deserve them. The evidence shows  
9 that the Board interprets Proposition 9 to impose a substantive  
10 new "changed circumstances or "new information" requirement on  
11 prisoners, separate and apart from the requirement that they show  
12 suitability. The PTA decision-makers rely on CRA's to determine  
13 whether to even grant an advance hearing, even though no new CRA  
14 can be done earlier than five years from the last one, and no SRA  
15 is available for a hearing request, like the PTA. The board  
16 apparently fails to provide translation services for the PTA  
17 process. Finally, the PTA decision-makers from time to time,  
18 simply rely on the last panel's assessments about whether the  
19 prisoner is ready for parole, and deny advance hearings because  
20 they think another panel should decide the question.

21 Thus, these PTA process's failings appear to be built in to  
22 the PTA system, rather than simply resulting from occasional

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23 <sup>39</sup> Plaintiffs also complain that inmates are denied parole because  
24 of "classification scores." ECF No. 517 at 28-29. However, this  
25 appears to have no bearing on the value of the PTA process.  
26 Classification scores apparently arise from the inmate's behavior  
27 in prison. If a prisoner is denied parole because he has spent  
28 the first 20 years in prison conducting gang activities, and is  
classified pursuant to those activities, that is a matter  
unrelated to the validity of the PTA process.



1 errors. The PTA process is structured such that it fails, in  
2 many cases, to afford inmates a fair opportunity to obtain an  
3 advance hearing. All told, the PTA process is not sufficient to  
4 protect inmates from the ex post facto problems inherent in  
5 Proposition 9.

6 **III. PROPOSITION 89**

7 **A. Findings of Facts.**

8 62. On November 4, 1988, California voters approved  
9 Proposition 89, which granted the Governor the ability to reverse  
10 the decisions of the parole board regarding prisoners convicted  
11 of murder. 1988 Cal. Legis. Serv. Prop. 89 (West).

12 63. Proposition 89 is neutral on its face, allowing the  
13 Governor to reverse parole grants and denials alike. Id.

14 64. However, its intent was stated to be to give the  
15 Governor "the power to block the parole of convicted murderers."  
16 Exh. 72 (ECF No. 428-9) (Proposition 89 Ballot Pamphlet (Argument  
17 in Favor of Proposition 89)) at 46 (admitted per PTO).<sup>40</sup>  
18 Intending to "correct a weakness in the state's parole system,"  
19 Proposition 89 would, according to its proponents, "provide an  
20 extra measure of safety to law-abiding citizens by giving the

21 \_\_\_\_\_  
22 <sup>40</sup> In California, "[b]allot summaries ... in the Voter Information  
23 Guide" are recognized sources for determining the voters'  
24 intent.'" Perry v. Brown, 671 F.3d 1052, 1090 n.25 (9th Cir.),  
25 vacated on standing grounds sub nom., Hollingsworth v. Perry, 570  
26 U.S. \_\_\_\_, 133 S. Ct. 2652 (2013); Hodges v. Superior Court, 21  
27 Cal. 4th 109, 114 & 115-18 (1999) ("the voters should get what  
28 they enacted, not more and not less. In this matter, therefore,  
we are obliged to interrogate the electorate's purpose, as  
indicated in the ballot arguments and elsewhere").

1 Governor the authority to block the parole of criminals who still  
2 pose a significant threat to society.” Exh. 72 at 47 (Rebuttal  
3 to Argument Against Proposition 89).

4 65. In 2007, Governor Schwarzenegger reviewed 172  
5 decisions by the Board granting parole; the Governor reversed 115  
6 (66.9%) of those decisions, he referred 18 (10.5%) to the Board  
7 to review the cases en banc, he modified 2 decisions (1.1%), and  
8 he declined to review 37 decisions (21.5%). In 2008, Governor  
9 Schwarzenegger reviewed 170 decisions by the Board granting  
10 parole; the Governor reversed 81 (47.6%) of those decisions, he  
11 referred 33 (19.4%) to the Board to review the cases en banc, he  
12 affirmed 1 decision (0.6%), and he declined to review 55  
13 decisions (32.4%). In 2009, the former Governor reviewed 454  
14 decisions by the Board granting parole, the Governor reversed 285  
15 (62.8%) of those decisions, he referred 49 (10.8%) to the Board  
16 to review the cases en banc, he modified 2 decisions (0.4%), and  
17 he declined to review 118 decisions (26%). In 2010, the former  
18 Governor reviewed 503 decisions by the Board granting parole, the  
19 Governor reversed 290 (57.7%) of those decisions, he referred 58  
20 (11.5%) to the Board to review the cases en banc, he modified 3  
21 decisions (0.6%), and he declined to review 152 decisions  
22 (30.2%). UF ¶ 17.

23 66. Between January 2007 and December 2010, the  
24 Governor referred 158 cases in which the Board had granted parole  
25 to the prisoner back to the Board for en banc consideration;  
26 following the referral for en banc consideration, 153 (97%) of  
27 the cases resulted in the prisoners' release, either because the  
28 en banc Board affirmed the grant of parole or the en banc Board

1 sent the matter to rescission but the panel voted not to rescind.  
2 UF ¶ 18.

3 67. During the review process, the chief counsel (or  
4 designee) prepares a written report ("Executive Case Summary" or  
5 "ECS") on each case in which parole has been granted, which  
6 includes: (1) an overview of the prisoner's central prison files  
7 as well as the evidence and the findings from the hearing that  
8 resulted in a parole grant; (2) information about the prisoner's  
9 term as set by the panel that granted parole; and (3) the  
10 calculated release date for the prisoner based on that term. UF  
11 ¶ 3.

12 68. The evidence presented at trial shows that  
13 Proposition 89 was carried out consistent with its intent.  
14 Plaintiffs' Exhibit 67 (admitted over objection at RT 164), is a  
15 summary listing of all grants of parole during the years 1999 to  
16 2011, to life prisoners. RT 164-68. "Release now" means that by  
17 the time the parole grant came through, the inmate had already  
18 served his life term, and could be paroled immediately, that is,  
19 after finalization (120 days) and gubernatorial review (30 days).  
20 Id.

21 69. Exhibit 68 (admitted over objection at RT 170), is  
22 a summary of Exhibit 67, without the names and individual  
23 information. Exhibit 69 (admitted at RT 205), is a summary of  
24 the governor's modifications of life parole grants. Exhibit 77  
25 (admitted at RT 175), is a summary of every parole decision that  
26 the Governor reviewed.

27 70. Executive Case Summaries are prepared when the  
28 parole board grants parole to a life prisoner. RT 206 (Knox

1 testimony). Exhibit 71 (admitted over objection at RT 207), is  
2 an example of such a summary.

3 71. In 1991, the Governor requested that all parole  
4 grants involving murder convictions be forwarded to the  
5 Governor's office for review. Exh. 75 (admitted at RT 176).  
6 There is no evidence that the governor requested the review of  
7 any parole denials, nor that there was any process to get such  
8 decisions to the governor for review.

9 72. Of the parole grant reversals, most were of  
10 prisoners who were already beyond their "life terms," so that but  
11 for Proposition 89 and the Governor's reversal, they would have  
12 been released already. See Exh. 67.<sup>41</sup>

13 73. The Executive Reports on Parole Review Decisions  
14 reflect that, for the 21-year period from 1991 through 2011, the  
15 Governor reported reviewing only three decisions denying parole,  
16 affirming all three denials. UF ¶ 23. See Exh. A at 383 (D.  
17 Sanders, Nov. 2002, Gov. Davis), 517 (P. Agrio, Apr. 2003, Gov.  
18 Davis), 893 (M. Lindley, Dec. 2003, Gov. Schwarzenegger).

19 74. The Governor fulfills the reporting mandate of  
20 Proposition 89 by annually filing the "Executive Report on Parole  
21 Review Decisions for the State of California." UF ¶ 24.

22 75. The Executive Reports show that in the twenty-year  
23 period from 1991 through 2010, the Governor reversed more than 70  
24 percent of the grants of parole made to prisoners with murder

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25  
26 <sup>41</sup> Plaintiffs say 90% were beyond their release dates (ECF No. 517  
27 at 42), a percentage defendant does not dispute. The court has  
28 not done the count and calculation, but the raw numbers are  
available in Exhibit 67.

1 convictions. UF ¶ 25.

2 **B. Conclusions**

3 The facts are essentially undisputed. The court reviews,  
4 once again, the law of ex post facto, but in light of this  
5 evidence. The inquiry for the court is whether Proposition 89  
6 has created a "significant risk" of longer incarceration for life  
7 prisoners whose crimes were committed before the law's passage.  
8 I find that it does.

9 **1. Is plaintiffs' challenge foreclosed by Biggs?**

10 Defendants assert that plaintiffs' ex post facto challenge  
11 to Proposition 89 fails as a matter of law. ECF No. 516 at 18.  
12 They argue that Supreme Court and Ninth Circuit precedent  
13 forecloses plaintiffs' challenge. This court has already  
14 rejected defendants' argument to the degree it is based upon  
15 Collins v. Youngblood, 497 U.S. 37 (1990), Mallett v. North  
16 Carolina, 181 U.S. 589 (1901), Dobbert v. Florida, 432 U.S. 282  
17 (1977), Garner v. Jones, 529 U.S. 244 (2000), and Johnson v.  
18 Gomez, 92 F.3d 964 (9th Cir. 1996), cert. denied, 520 U.S. 1242  
19 (1997). See Gilman v. Brown, 2013 WL 1904424 at \*11-\*15 (E.D.  
20 Cal. 2013) (Karlton, J.). Reviewing those cases in light of the  
21 evidence presented at trial, the court sees no basis for changing  
22 its views.

23 This court concluded that under Johnson v. Gomez, no facial  
24 challenge to Proposition 89 can succeed in light of the cited  
25 cases, as the new law "simply removes final parole decision-  
26 making authority from the BPT and places it in the hands of the  
27 governor." Johnson v. Gomez, 92 F.3d at 967. The facial  
28 challenge was only one route plaintiffs had available to

1 challenge Proposition 89. The Ninth Circuit has made clear that  
2 plaintiffs could nevertheless succeed on the merits of their  
3 challenge if they:

4 can "demonstrate, by evidence drawn from  
5 [Proposition 9's] practical implementation ...,  
6 that its retroactive application will result  
in a longer period of incarceration than  
under the [prior law]."

7 Gilman, 638 F.3d at 1106 (quoting Garner, 529 U.S. at 255).<sup>42</sup>

8 Defendants argue that the possibility of an "as-applied"  
9 challenge, expressly recognized by the Ninth Circuit in Gilman,  
10 has now been foreclosed, as matter of law, by Biggs v. Secretary  
11 of the California Dept. of Corrections and Rehabilitation, 717  
12 F.3d 678 (9th Cir. 2013), a habeas case decided under the  
13 Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28  
14 U.S.C. § 2254(d). Defendants' argument appears wrong on several  
15 levels.

16 First, the argument simply assumes that Biggs overruled  
17 Gilman. In fact, panels of the Ninth Circuit do not overrule  
18 each other, at least not in the absence of intervening Supreme  
19 Court, en banc or statutory authority. Montana v. Johnson, 738  
20 F.2d 1074, 1077 (9th Cir. 1984). This court knows of no such  
21 intervening authority. Second, Biggs does not even purport to  
22 overrule Gilman. Indeed, its only reference to Gilman is to  
23 reiterate that:

24 in Gilman v. Schwarzenegger, we said that the  
25 plaintiffs could succeed on their Ex Post

26 <sup>42</sup> See Gilman, 2013 WL 1904424 at \*15-15 (plaintiffs are still  
27 entitled to go to trial so that they could make an "as-applied"  
28 challenge to the law, "based upon the 'actual effect' of  
Proposition 89 on this class of plaintiffs") (citing Garner).

1           Facto Clause claim through an evidentiary  
2           demonstration that retroactive application of  
3           the change in law in question would result in  
          increased incarceration time, citing Garner.  
          638 F.3d 1101, 1106 (9th Cir. 2011).

4           Biggs, 717 F.3d at 692. Third, Biggs distinguishes Gilman on the  
5           very point that defendants say is of "no moment," namely, that  
6           Biggs is an AEDPA case, while Gilman is a Section 1983 case. Id.  
7           ("But Gilman was a § 1983 case, id. at 1105, and thus contained  
8           no holding about clearly established federal law"). Because  
9           Biggs was an AEDPA case, the question presented was not whether  
10          plaintiff could make an "as-applied" challenge to Proposition 89.  
11          The question was whether the California Supreme Court had failed  
12          to apply "clearly established federal law" by not subjecting  
13          Proposition 89 to an as-applied analysis. Biggs found that no  
14          such analysis was required by clearly established Supreme Court  
15          law:

16                   The Supreme Court did not clearly establish  
17                   in Garner that an as-applied analysis of the  
18                   significance of the risk of increased  
19                   punishment is required with regard to the  
20                   retroactive application of a change in law  
21                   like California's gubernatorial review of  
22                   parole board decisions. The California  
23                   Supreme Court's decision in Rosenkrantz was  
24                   thus not an unreasonable application of  
25                   clearly established federal law, and neither  
26                   was the Superior Court's decision in Biggs'  
27                   case that relied on it.

28           Biggs, 717 F.3d at 693. That is not at all the same as saying  
          that such an analysis is now foreclosed in a Section 1983 case.

29                   **2. Proposition 89 violates the Ex Post Facto Clause.**

30           Turning to the evidence presented at trial, it is clear that  
31           Proposition 89, in actual practice, is not the "neutral" transfer  
32           of final decision-making authority from one decision-maker to

1 another. In practice the governors have used it to tip the  
2 scales against parole. Every governor since passage of  
3 Proposition 89 has done this, and there is no evidence that this  
4 practice has stopped. Thus, while the governors could use the  
5 law to review parole decisions to ensure that they are accurate  
6 and fair, they appear to have no such concern about decisions  
7 that deny parole.

8 Prior to the new law, the sentence faced by class members  
9 was life with the possibility of parole. The parameters for  
10 determining the grant or denial of parole was fixed in the  
11 statutes, and the length of the "life term" was fixed in the  
12 Board's regulations. The new law was passed in order to lengthen  
13 the amount of time class members would spend in prison by  
14 creating a new mechanism for withholding parole, namely, the  
15 governor's veto. True to the law's intentions, California  
16 governors have used the new law to withdraw the possibility of  
17 parole from most class members. In short, the voters did not  
18 simply switch the final decision-making authority from the Board  
19 to the Governor. They switched it with an instruction that the  
20 Governor should put his finger on the scale to correct a  
21 "weakness" they perceived to exist when the Board made the final  
22 decision, namely, too many murderers being paroled, too soon.  
23 The governors have carried out the people's will by putting their  
24 fingers on the scale and reversing 70% of parole grants for these  
25 class members.

26 There is no evidence presented here that the plaintiffs were  
27 ever entitled to a liberal application of the parole rules.  
28 However, they have always been entitled to a neutral



1 interpretation of those rules. That is, whether the Board made  
2 the final decision, or the governor, or anyone else, they are  
3 required to apply the rules as directed by the statute and the  
4 California Constitution. When the governors put their fingers on  
5 the scale to obtain a result of longer prison sentences,  
6 regardless of the inmate's showing of suitability, they failed to  
7 apply the statute in a neutral manner. Whether or not this is a  
8 violation of California law is not for this court to say.  
9 However, it is a plain violation of the ex post facto clause as  
10 to those to inmates whose crimes were committed before  
11 Proposition 89.

12 There is no claim here that California cannot instruct the  
13 Governor to keep certain people in prison longer, or to place his  
14 finger on the scale when deciding the question. In general,  
15 states are free to experiment with parole however they see fit.  
16 However they may not experiment in such a way as to increase the  
17 quantum of punishment for those who committed their crimes before  
18 the new punishment went into effect.

#### 19 IV. REMEDY

20 Plaintiffs' surviving requests are for (a) a declaration  
21 that defendants have denied plaintiffs' rights under the Ex Post  
22 Facto Clause of the U.S. Constitution, and (b) injunctive relief.

23 The court accordingly **DECLARES** that Proposition 9, as  
24 implemented by the Board, violates the ex post facto rights of  
25 the class members.

26 The court further **DECLARES** that Proposition 89, as  
27 implemented by the governors of California, violates the ex post  
28 facto rights of the class members.

1 The court orders injunctive relief as follows:

2 1. Going forward, the Board shall apply Cal. Penal Code  
3 § 3041.5, as it existed prior to Proposition 9, to all class  
4 members. That is, all class members are entitled to a parole  
5 hearing annually, unless the Board finds, under former  
6 Section 3041.5(b) that a longer deferral period is warranted.

7 2. The Governor of California shall refrain from imposing  
8 longer sentences on class members than are called for by  
9 application of the same factors the Board is required to  
10 consider, as provided for by Proposition 89.<sup>43</sup>

11 This order is stayed for 31 days, and goes into effect  
12 immediately thereafter, unless a timely appeal is filed.


13 IT IS SO ORDERED.

14 DATED: February 27, 2014.

15

16

17

  
LAWRENCE K. KARLTON  
SENIOR JUDGE  
UNITED STATES DISTRICT COURT

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24 <sup>43</sup> Defendants assert that no injunction is warranted because there  
25 is no evidence that the current Governor is violating the Ex Post  
26 Facto Clause, or that future governors will do so. The only  
evidence before the court however, is what all governors thus far  
have done, and there is no evidence of any change.

27 All other requests for relief are denied as moot (because based  
28 upon dismissed claims), or are beyond the power of this court to  
grant.