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11 Attorneys for Plaintiffs
12 RICHARD M. GILMAN, et al.

13 IN THE UNITED STATES DISTRICT COURT
14 FOR THE EASTERN DISTRICT OF CALIFORNIA
15

16 RICHARD M. GILMAN, JAMES
MASONER, RICHARD W. BROWN,
17 CHRIS FOWLER, EDWARD
STEWART, MARIO MARQUEZ,
18 RICHARD LEWIS, and GLORIA
OLSON, on their own behalf and on
19 behalf of those similarly situated,

20 Plaintiffs,

21 v.

22 ARNOLD SCHWARTZENEGGER,
Governor of California, in his official
23 capacity; ROBERT DOYLE,
Chairman, Board of Parole Hearings, in
24 his official capacity; All
Commissioners of the Board of Parole
25 Hearings, in their official capacity; All
Deputy Commissioners of the Board of
26 Parole Hearings Who Hear Lifer Cases,
in their official capacity,

27 Defendants.
28

No. Civ. S 05-830 LKK GGH

**[CORRECTED] FOURTH AMENDED/
SUPPLEMENTAL COMPLAINT FOR
DECLARATORY AND INJUNCTIVE
RELIEF – CLASS ACTION**

I. INTRODUCTION

1
2 1. Plaintiffs Richard M. Gilman, James Masoner, Richard W. Brown, Chris Fowler,
3 Edward Stewart, Mario Marquez, Richard Lewis, and Gloria Olson, respectfully submit
4 this Fourth Amended/Supplemental Complaint for Declaratory and Injunctive Relief.
5 Plaintiff Gilman originally filed this action as an individual complaint for Declaratory and
6 Injunctive relief. This Fourth Amended/Supplemental Complaint pleads additional causes
7 of action and allegations supporting a motion for class certification and motion for
8 preliminary injunction.

9 2. Plaintiffs are all California state prisoners convicted of murder and sentenced to
10 prison terms that include the possibility of parole. They are all eligible for parole, and
11 have been denied parole on one or more occasion. Their parole denials have been based
12 substantially on static factors, such as the circumstances of their commitment offenses, or
13 their conduct prior to imprisonment.

II. JURISDICTION AND VENUE

14
15 3. Plaintiffs bring this action to redress the deprivation of rights secured to them by the
16 Due Process Clause and *Ex Post Facto* Clause of the United States Constitution.

17 4. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331 and 1343,
18 and 42 U.S.C. § 1983.

19 5. Venue is proper in this judicial district under 28 U.S.C. § 1391 because the
20 defendants are employed in the County of Sacramento, which is in this judicial district.

III. THE PARTIES

21
22 **A. Plaintiffs**

23 6. Plaintiffs Richard M. Gilman, James Masoner, Richard W. Brown, Chris Fowler,
24 Edward Stewart, Mario Marquez, Richard Lewis, and Gloria Olson, are California state
25 prisoners with convictions for murder and sentences that include the possibility of parole.

26 **B. Defendants**

27 7. Defendant ARNOLD SCHWARZENEGGER is the Governor of the State of
28 California. He is authorized to affirm, modify, or reverse any decision by the Board

1 granting or denying parole to a prisoner convicted of murder. He is sued in his official
2 capacity only.

3 8. Defendant ROBERT DOYLE is Chairman of the Board of Parole Hearings. He is
4 sued in his official capacity only.

5 9. The remaining defendants are all the Commissioners of the Board of Parole
6 Hearings, and all Deputy Commissioners of the Board of Parole Hearings who conduct
7 parole consideration hearings for life inmates.

8 IV. FACTS APPLICABLE TO ALL CAUSES OF ACTION

9 10. All California prisoners with life sentences for murder are eligible for parole after
10 serving a minimum number of years, although that minimum number of years varies from
11 seven to twenty-five. Once a life prisoner is eligible for parole, it is up to the Board of
12 Parole Hearings in the first instance and the Governor in the second instance to determine
13 if he is “suitable” for parole. The first hearing to determine suitability occurs a year before
14 eligibility. Cal. Pen. Code § 3041(a). The statute provides that the Board “shall normally
15 set a parole release date” at that first hearing. *Id.*

16 11. The standard for setting parole release dates is set forth in subsection (b) of section
17 3041 of the California Penal Code:

18 The panel or board shall set a release date unless it determines that the gravity
19 of the current convicted offense or offenses, or the timing and gravity of
20 current or past convicted offense or offenses, is such that consideration of the
21 public safety requires a more lengthy period of incarceration for this
22 individual, and that a parole date, therefore, cannot be fixed at this meeting.

23 12. Thus, state law mandates that the prisoner is suitable for parole and must have a
24 release date set unless the evidence shows that his release would be a risk to public safety:
25 that is, he is a current risk to the community. *In re Lawrence*, 44 Cal.4th 1181 (2008).

26 13. California life prisoners have a liberty interest in parole. That liberty interest is
27 protected by due process. Due process includes the right to a fair hearing, a determination
28 made by an impartial and unbiased decisionmaker, an opportunity to be heard, a statement
of reasons to support a denial of parole and to guide the prisoner as to how he can gain
parole, and evidence to support the denial of parole. California life prisoners also have the

1 right to be free of any law, regulation, practice or policy that increases punishment from
2 what it was at the time of the commission of their offenses.

3 14. The grant of parole to a California life prisoner is governed by statute and
4 regulation. As noted, the statute creates a presumption of suitability once a prisoner
5 reaches his minimum eligibility date; and it allows for the denial of parole only if release
6 of the prisoner jeopardizes public safety. The Board has established regulatory criteria for
7 guiding its determination of current risk. 15 C.C.R. §§ 2280 *et seq.*, & 2400 *et seq.* The
8 factors set forth in the regulations, however, are for guidance only; the actual decision of
9 whether the prisoner is suitable for parole must be premised on the sole statutory criterion:
10 whether he is a current risk to public safety. The Governor is bound by the same
11 guidelines and same statutory determination as is the Board.

12 15. For many years, the process of determining suitability for parole for life prisoners
13 was a reasonably fair one, and approximately ten percent of the prisoners who came before
14 the Board each year would be found suitable and given parole dates. In 1990, however,
15 the process became highly politicized, and the number of life prisoners found suitable for
16 parole plummeted, in some years to under one percent. And the few prisoners found
17 suitable for parole would often (in some years, always) have their parole grants reversed
18 by the Governor. The result has been that while the number of life prisoners eligible for
19 parole has grown to more than 10,000, and three to four thousand are considered each year
20 for parole, only a few prisoners ever actually achieve parole. That is in sharp contrast to
21 the statutory presumption that the Board “shall normally” set parole release dates for these
22 prisoners.

23 16. There are several unconstitutional practices and policies that underlie this situation,
24 and these are the bases of Plaintiffs’ claims in this lawsuit.

25 17. Defendants’ policies, practices, conduct, and acts alleged herein have resulted and
26 will continue to result in irreparable injury to Plaintiffs and Plaintiff Class, including but
27 not limited to violations of their constitutional rights. Plaintiffs and Plaintiff Class have
28 no plain, adequate or complete remedy at law to address the wrongs described herein.

1 Defendants will continue to conduct unconstitutional parole consideration hearings unless
2 enjoined by this Court.

3 18. An actual controversy exists between Plaintiffs and Defendants in that Plaintiffs
4 contend that the policies, practices, and conduct of Defendants alleged herein are unlawful
5 and unconstitutional, whereas Plaintiffs are informed and believe that Defendants contend
6 that said policies, practices, and conduct are lawful and constitutional. Plaintiffs seek a
7 declaration of rights with respect to this controversy.

8 **V. CLASS ALLEGATIONS**

9 19. Plaintiffs bring this action on behalf of themselves and all other persons similarly
10 situated pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(2). The class, as
11 proposed by Plaintiffs, consists of all California state prisoners who: (1) have been
12 sentenced to a life term that includes the possibility of parole; (2) are eligible for parole;
13 and, (3) have been denied parole on one or more occasions.

14 20. The requirements of Federal Rules of Civil Procedure 23(a) and 23(b)(2) are met
15 because the class is so numerous that joinder of all members is impracticable.

16 21. There are questions of law and fact common to the proposed class that predominate
17 over questions affecting only the individually named Plaintiffs.

18 22. The claims of the named Plaintiffs are typical of the claims of the proposed class.

19 23. The named Plaintiffs will fairly and adequately represent the interests of all
20 members of the proposed class because they seek relief on behalf of the class as a whole
21 and have no interests antagonistic to other members of the class. The named Plaintiffs are
22 represented by counsel from the U.C. Davis Civil Rights Clinic and the Office of the
23 Federal Defender for the Eastern District of California. Counsel for Plaintiffs have
24 extensive experience in civil rights, prisoner rights, and class action litigation. Finally, the
25 Defendants have acted on grounds generally applicable to the class, thereby making
26 appropriate preliminary and final injunctive relief with respect to the class as a whole.

1 **The Named Plaintiffs**

2 **Mr. Richard M. Gilman**

3 24. Plaintiff RICHARD M. GILMAN (CDC # C-47508) was convicted of first degree
4 murder in 1982, and sentenced to 25 years to life. His victim, his former fiancée, died
5 after being assaulted by persons hired by Mr. Gilman.

6 25. Mr. Gilman became eligible for parole in 1995. He has had eight subsequent parole
7 consideration hearings at which parole was denied; his most recent denial was in 2006.
8 The Board relied primarily on the circumstances of the commitment offense and what it
9 perceived to be Mr. Gilman's limited programming and lack of insight and remorse to
10 deny parole and defer reconsideration for two years.

11 26. Mr. Gilman's psychological reports evaluate him as a low or relatively low risk to
12 others if granted parole.

13 27. Mr. Gilman has received favorable evaluations of his work in prison and has
14 engaged in numerous rehabilitation efforts, including participation in various self-help and
15 therapy programs. He has never been violent while incarcerated, nor has he ever incurred
16 a CDC 115 (Rule Violation Report).

17 **Mr. James Masoner**

18 28. Plaintiff JAMES MASONER (CDC # D-76481) was convicted of second degree
19 murder in 1987, and sentenced to 15 years to life. His conviction arose out of a fatal
20 accident he caused when driving while drunk.

21 29. He became eligible for parole in 1997, when parole was denied and reconsideration
22 deferred for three years. All subsequent denials of parole have been with reconsideration
23 deferrals of one year.

24 30. The Board granted Mr. Masoner parole in 2004 and 2007. Both grants were
25 reversed by the governor based on the circumstances of the offense and Mr. Masoner's
26 purported incomplete acceptance of responsibility.

27 31. Mr. Masoner's psychiatric reports consistently evaluate him as posing no risk to the
28 public if released on parole as long as he remains sober, which most reports say is not a

1 concern for him.

2 32. Mr. Masoner's record is replete with evidence of post-conviction rehabilitation,
3 including active and continuous participation in Alcoholics Anonymous since he entered
4 prison, over 20 years ago.

5 **Mr. Richard W. Brown**

6 33. Plaintiff RICHARD W. BROWN (CDC # C-20036) was convicted of second degree
7 murder in 1980, and sentenced to 15 years to life. He shot and killed the victim after a
8 dispute arising out of a gambling debt.

9 34. He became eligible for parole in 1987. He has been denied parole many times
10 receiving reconsideration deferrals of no more than two years; beginning in 1999, he has
11 received only one-year deferrals.

12 35. The Board granted Mr. Brown parole in 2004 and 2006. These grants were
13 reversed by the governor based on the circumstances of the offense, Mr. Brown's prior
14 record, and a 20-year-old non-violent disciplinary history.

15 36. Mr. Brown's psychological reports consistently evaluate him as posing no greater
16 risk than that of the average citizen if released on parole.

17 37. Mr. Brown has participated in substance abuse, anger management and other self-
18 help and therapeutic programs throughout his incarceration and completed numerous
19 vocational programs.

20 **Mr. Chris Fowler**

21 38. Plaintiff CHRIS FOWLER (CDC # C-96996) was convicted of second degree
22 murder in 1984, and sentenced to 15 years to life. He struck and killed his then-
23 girlfriend's son.

24 39. He became eligible for parole in 1993. He has been denied parole at every hearing
25 but never received a reconsideration deferral of more than two years, and most recent
26 deferrals have been for only one year. In 2007, the parole consideration hearing resulted
27 in a tie vote. The commissioner who voted to deny parole did so due to the commitment
28 offense and what he perceived to be Mr. Fowler's lack of insight and an insufficient

1 relapse plan.

2 40. Mr. Fowler's psychological reports consistently state that he presents a low or very
3 low risk to re-offend.

4 41. Mr. Fowler has a significant record of rehabilitation, including an exemplary prison
5 work record and participation in and completion of numerous self-help and substance
6 abuse programs.

7 **Mr. Edward Stewart**

8 42. Plaintiff EDWARD STEWART (CDC # C-33018) was convicted of second degree
9 murder in 1981, and sentenced to 15 years to life. While drunk, Mr. Stewart shot and
10 killed the victim, whom he believed had assaulted his mother.

11 43. He became eligible for parole in 1989. He has been denied parole many times and
12 never received a reconsideration deferral of more than two years. Beginning in 2000, he
13 has received only one-year reconsideration deferrals.

14 44. The Board granted Mr. Stewart parole in 2002. The governor reversed the grant
15 based on the circumstances of the offense, Mr. Stewart's prior criminal record, his
16 purported inability to accept responsibility for the crime and a perceived need for more
17 participation in alcohol and drug abuse programs and therapy.

18 45. Since 1994, psychologists have assessed Mr. Stewart's potential for violence as low
19 or very low if he abstains from alcohol and drugs.

20 46. Mr. Stewart has actively and consistently participated in Alcoholics Anonymous or
21 Narcotics Anonymous throughout his incarceration. He attended anger management
22 classes, completed a vocational program, and engaged in other rehabilitative efforts.

23 **Mr. Mario Marquez**

24 47. Plaintiff MARIO MARQUEZ (CDC # C-24523) was convicted of second degree
25 murder with use of a knife in 1980 and sentenced to 16 years to life. While drunk, he
26 stabbed and killed his wife following an unsuccessful attempt at reconciliation.

27 48. Mr. Marquez became eligible for parole in 1990. He was found suitable for parole
28 at his initial hearing but for reasons that are not apparent from the record, the 1989 grant

1 of parole did not result in his release.

2 49. He has never received a reconsideration deferral of more than two years.

3 50. The Board granted Mr. Marquez parole in 1999 and 2002. The 1999 grant was
4 disapproved by the review committee, while the 2002 grant was reversed by the governor,
5 based on the circumstances of the offense and a purported lack of acceptance of full
6 responsibility for the crime.

7 51. Mr. Marquez's psychological reports consistently evaluate him as posing a low risk
8 of violence if released on parole.

9 52. Mr. Marquez has almost two decades of consistent and full participation in
10 Alcoholics Anonymous and other rehabilitation programs.

11 **Mr. Richard Lewis**

12 53. Plaintiff RICHARD LEWIS (CDC # C-39447) was convicted of first-degree murder
13 with a firearm enhancement in 1981. Mr. Lewis was sentenced to serve a term of 25 year
14 to life, with two consecutive years for the firearm enhancement. Mr. Lewis shot and killed
15 the victim after learning that he had allegedly made advances toward Mr. Lewis's then-
16 girlfriend.

17 54. Mr. Lewis became eligible for parole in 1998. At Mr. Lewis's first two parole
18 hearings in 1997 and 2001, he was denied parole given four-year and two-year
19 reconsideration deferrals, respectively.

20 55. The Board granted parole in 2004, 2006, and 2008. These grants were reversed by
21 the governor based on the circumstances of the offense and sometimes on Mr. Lewis'
22 purported minimization of his responsibility for the crime.

23 56. Mr. Lewis has been evaluated by psychologists as posing a low risk of violence if
24 released on parole.

25 57. Mr. Lewis has participated in an array of self-help programs and therapy and
26 completed significant vocational training.

27 **Ms. Gloria Olson**

28 58. Plaintiff GLORIA OLSON (CDC # W-14430) was convicted of two first degree

1 murders in 1979, and sentenced to 25 to life for each murder, to be served concurrently.
2 The murders occurred over a year apart, and appear to be unrelated in circumstance, but
3 both related to Ms. Olson's underlying mental health issues.

4 59. Ms. Olson has gone through several parole hearings. In 2007, she was denied
5 parole. The Board at that time based its deferral on the commitment offense, as well as the
6 need for a new psychological evaluation for specific issues. In January of 2008, the Board
7 granted Ms. Olson parole. The governor reversed, relying primarily on the circumstances
8 of the commitment offenses. He also questioned whether Ms. Olson accepted full
9 responsibility for her role in the murders, and he asserted that Ms. Olson's versions of
10 events surrounding the offenses has change significantly over the years.

11 60. Ms. Olson's psychological evaluations indicate that her overall level of risk for
12 future violence in the community is in the low range and that, if released, she would be no
13 more dangerous than the average citizen.

14 61. Ms. Olson has an extensive record of post-conviction rehabilitation, having become
15 a certified paralegal assistant and nursing assistant, as well as completing several
16 vocational training courses in skilled labor. Ms. Olson has participated in Alcoholics
17 Anonymous, Narcotics Anonymous, and several self-help and therapy programs, and has
18 volunteered in outreach programs to abused women.

19 **VI. CAUSES OF ACTION**

20 **FIRST CAUSE OF ACTION**

21 62. Plaintiffs reallege and incorporate by reference paragraphs 1 through 61 of this
22 complaint as though fully set forth herein.

23 63. The Board of Parole Hearings and the Governor make parole decisions for life
24 prisoners pursuant to a practice of not seriously considering the prisoner's suitability for
25 parole until he has served an arbitrary number of years that the Board members and/or the
26 Governor believe is sufficient punishment for his offense ("the practice").

27 64. Defendants have thereby violated the rights of Plaintiffs and Plaintiff Class to due
28 process under the Fourteenth Amendment to the United States Constitution.

1 **SECOND CAUSE OF ACTION**

2 65. Plaintiffs reallege and incorporate by reference paragraphs 1 through 64 of this
3 complaint as though fully set forth herein.

4 66. The practice has increased the term of imprisonment that applied at the time of the
5 prisoners' offense, retroactively increasing the punishment for the crime for which they
6 were sentenced in violation of the *Ex Post Facto* Clause of the United States Constitution.

7 **THIRD CAUSE OF ACTION**

8 67. Plaintiffs reallege and incorporate by reference paragraphs 1 through 66 of this
9 complaint as though fully set forth herein.

10 68. The practice results in Board members and the Governor applying their own biases
11 as to how many years a life prisoner should serve in custody before he will be paroled, in
12 violation of the Due Process Clause of the Fourteenth Amendment to the United States
13 Constitution.

14 **FOURTH CAUSE OF ACTION**

15 69. Plaintiffs reallege and incorporate by reference paragraphs 1 through 68 of this
16 complaint as though fully set forth herein.

17 70. The Board and Governor rely on static factors -- primarily the commitment offense
18 and any prior criminal history -- to support the denial of parole despite clear evidence of
19 rehabilitation and thus lack of risk to public safety. This systematic denial of parole
20 violates the Due Process Clause of the Fourteenth Amendment to the United States
21 Constitution.

22 **FIFTH CAUSE OF ACTION**

23 71. Plaintiffs reallege and incorporate by reference paragraphs 1 through 70 of this
24 complaint as though fully set forth herein.

25 72. The statement of reasons given to defer or deny parole is insufficient because: (1) it
26 does not connect the reasons to risk to public safety; and, (2) it does not provide
27 meaningful guidance to the prisoner about what he must do to obtain parole. The
28 inadequacy of the statement deprives Plaintiffs and Plaintiff Class due process of law.

SIXTH CAUSE OF ACTION

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2 73. Plaintiffs reallege and incorporate by reference paragraphs 1 through 72 of this
3 complaint as though fully set forth herein.

4 74. It is common for the Board to make its decision based on practices and biases
5 unrelated to current risk to public safety and then to justify its decision by the use of the
6 regulatory criteria or statements purporting to show insufficient remorse, insight, or
7 acceptance of responsibility.

8 75. The regulations setting forth the criteria to guide the Board's and the Governor's
9 discretion in determining suitability are in fact not used to guide discretion but used only
10 to justify the decision arbitrarily made without consideration of the regulatory criteria.

11 76. It is also common for the Board to deny parole based on reasons of insufficient
12 remorse, insufficient insight, or insufficient acceptance of responsibility by pointing to
13 limited items of evidence in the record that are inconsistent with the record as a whole.
14 This is a violation of due process.

SEVENTH CAUSE OF ACTION

15
16 77. Plaintiffs reallege and incorporate by reference paragraphs 1 through 76 of this
17 complaint as though fully set forth herein.

18 78. Defendants have repeatedly deferred parole reconsideration for some Plaintiffs and
19 members of Plaintiff Class for more than one year based on reasons that are not
20 reasonably connected to the length of the deferral, in violation of the right of Plaintiffs and
21 Plaintiff Class to due process.

EIGHTH CAUSE OF ACTION

22
23 79. Plaintiffs reallege and incorporate by reference paragraphs 1 through 78 of this
24 complaint as though fully set forth herein.

25 80. Pursuant to laws in effect when Plaintiffs Gilman, Brown, Stewart, Marquez, Lewis,
26 and Olson committed their offenses, the law provided for only annual reconsideration
27
28

1 hearings absent convictions for multiple murders.¹

2 81. Subsequent amendments extended the permissible period of parole deferral, first to
3 two years (by amendment in 1982), and then to five years (by amendment in 1994).

4 82. The Board could order a deferral for more than one year only if it found that it was
5 not reasonable to expect that parole would be granted at a hearing during the intervening
6 period, and it was required to state in writing the bases for such a finding.

7 83. If a Board deferred parole for five years, the prisoner's central file would be
8 automatically reviewed within three years by a deputy commissioner who could direct that
9 a hearing be held within one year.

10 84. On November 4, 2008, the California electorate passed the Victims' Bill of Rights
11 Act of 2008, also known as Marsy's Law, through a ballot initiative designated
12 Proposition 9. Section 5.1 of the proposition amends Section 3041.5 of the California
13 Penal Code in ways that, when applied retroactively, create a significant risk of increasing
14 the measure of punishment attached to the original crime. Specifically, the proposition:

- 15 (a) Changes the default deferral period between parole hearings from one year to
16 15 years;
- 17 (b) Raises the minimum possible deferral period between parole hearings from
18 one year to three years, eliminating all Board discretion to set the deferral
19 period at one or two years;
- 20 (c) Increases the possible deferral periods from one, two, three or five years, to
21 three, five, seven, ten or 15 years;
- 22 (d) Changes the standard for and alters the Board's ability to set the deferral
23 period from a presumption of *minimum* deferral period (one year) unless the
24 Board finds "it is not reasonable to expect that parole would be granted at" an
25 earlier hearing to a presumption of *maximum* deferral period (15 years),
26 unless the Board finds by clear and convincing evidence "that consideration
27 of the public's and victim's safety does not require a more lengthy period of
28 incarceration for the prisoner" than the next shortest deferral period possible;
and,
- (e) Changes the process and possibility of an earlier review following imposition
of a lengthy deferral period from an automatic review if a five-year deferral
period has been imposed to a review available only if the prisoner makes a

¹ At the time Plaintiffs Masoner and Fowler committed their offenses, the presumption was for annual hearings but for cause and upon specific findings could be extended to two years before reconsideration.

1 request (which he may do only once every three years) and establishes
2 changed circumstances or new information.

3 85. Proposition 9 thereby violates the *Ex Post Facto* Clause of the United States
4 Constitution, and denies Plaintiffs and Plaintiff Class due process of law.

5 **NINTH CAUSE OF ACTION**

6 86. Plaintiffs reallege and incorporate by reference paragraphs 1 through 85 of this
7 complaint as though fully set forth herein.

8 87. Prior to November 1988, Board decisions regarding parole of prisoners convicted of
9 murder were final and not reviewable by the Governor. At that time, the Board found
10 approximately ten percent of life prisoners suitable for parole at their initial suitability
11 hearings and approximately fifteen percent of life prisoners suitable for parole at
12 subsequent hearings. Once found suitable for parole, those prisoners were released on
13 reaching their parole dates without their dates being subject to review or reversal by the
14 Governor.

15 88. In 1988, the California electorate passed Proposition 89, which added Section 8(b)
16 to Article V of the California Constitution. This constitutional provision authorizes the
17 Governor to affirm, modify, or reverse the Board's parole decisions with respect to
18 prisoners convicted of murder based on the same criteria the Board considers. The stated
19 purpose of Proposition 89 was to grant to the Governor, for the first time, the power to
20 "block" the parole of convicted murders.

21 89. Since the passage of Proposition 89, Section 8(b) of Article V has never been used
22 by any governor to reverse a decision by the Board finding a prisoner *unsuitable* for
23 parole, but has been used by all governors *exclusively* to reverse decisions by the Board
24 finding prisoners *suitable* for parole.

25 90. Plaintiffs MASONER, BROWN, STEWART, MARQUEZ, LEWIS, and OLSON
26 have been found suitable for parole by the Board on at least one occasion. The Board set
27 terms for these plaintiffs, whose time served at that time exceeded the terms set. Had
28 these plaintiffs not been subjected to Article V, Section 8(b) and the Governor's review,

1 they would have been released immediately upon the setting of their terms. Accordingly,
2 the application of Article V, Section 8(b) to these plaintiffs has not simply created a
3 significant risk of increasing their punishment but has in fact increased their punishment in
4 violation of the *Ex Post Facto* Clause of the United States Constitution.

5 91. The practical implementation of Article V, Section 8(b) has been to increase the
6 terms served by parole-eligible prisoners convicted of murder. Prior to the passage of
7 Article V, Section 8(b), the Board was less conservative and granted parole in a
8 significantly higher percentage of cases than it has granted parole since the passage of
9 Proposition 89. Thus, only the cases of the prisoners most obviously suitable for parole
10 are reviewed by the Governor. The Governor's reversals of the grants of parole in over
11 eighty-five percent of those cases has, at the least, significantly increased the risk of
12 increasing those prisoners' incarceration in violation of the *Ex Post Facto* Clause of the
13 United States Constitution.

14 **IX. RELIEF SOUGHT**

15 WHEREFORE, Plaintiffs and Plaintiff Class seek the following relief:

- 16 1. A declaration that defendants have denied plaintiffs' rights under the Due
17 Process Clause and *Ex Post Facto* Clause of the United States Constitution;
- 18 2. A declaration that California Penal Code Section 3041, subdivision (b), and
19 15 C.C.R. §§ 2280 and 2401 vest parole-eligible California inmates with a constitutionally
20 protected liberty interest in parole;
- 21 3. A preliminary and permanent injunction against application to any Plaintiff or
22 member of Plaintiff Class of the provisions of Proposition 9 that amend California Penal
23 Code section 3041.5(b) and increase the deferral of subsequent parole hearings to
24 (presumptively) 15 years;
- 25 4. A preliminary and permanent injunction requiring the Board to:
 - 26 a. Conduct a new parole consideration hearing for each member of the
27 Plaintiff Class;
 - 28 b. Not rely on static and/or remote factors to deny parole when there is

1 evidence of sustained rehabilitation;

- 2 c. Refrain from deferring parole reconsideration for more than one year
3 unless the reasons for a multiple-year deferral are reasonably connected
4 to the length of the deferral and reasonably related to public safety;
- 5 d. If parole is denied, provide each member of the Plaintiff Class with a
6 statement that could meaningfully serve as a guide for his or her future
7 behavior as it relates to being found suitable for parole;
- 8 e. Not deny parole to members of the Plaintiff Class absent a
9 preponderance of evidence to support a finding of unsuitability based
10 on current risk to public safety; and,
- 11 f. Not deny parole to members of the Plaintiff Class based on reasons of
12 insufficient remorse, insufficient insight, or insufficient acceptance of
13 responsibility by pointing to limited items of evidence in the record
14 that are inconsistent with the record as a whole.

15 5. A preliminary and permanent injunction requiring that the Governor's review
16 of parole decisions be based on the same factors the Board is required to consider, as
17 required by Article V, Section 8(b), of the California Constitution, and Section 3401.2 of
18 the California Penal Code;

19 6. Retain jurisdiction over this case until defendants have fully complied with
20 all orders of this Court, and there is a reasonable assurance that defendants will continue
21 to comply in the future absent continuing jurisdiction;

22 7. Costs and attorneys fees incurred in this action; and

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1 8. Such other and further relief as may be just and proper.

2 Dated: January 28, 2009

3 Respectfully submitted,

4 DANIEL J. BRODERICK
5 Federal Defender

6 /s/ Monica Knox
7 MONICA KNOX
8 Assistant Federal Defender

/s/ Carter C. White
CARTER C. WHITE
Supervising Attorney

9 Attorneys for Plaintiffs
10 RICHARD M. GILMAN, et al.

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