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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).¹ 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 ¹ 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,"² 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 ² 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 9.³ ECF No. 340 ¶ 1.

7
8 ³ 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.⁴ Therefore, it is

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 ⁴ 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

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

1 granted in approximately 17 percent of the cases.⁵ 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 ¶ 6.⁶

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. 51.⁷ 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.⁸

15 ⁵ 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 ⁶ 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 ⁷ 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.

⁸ 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.⁹ "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.'"

26
27 ⁹ 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.

27 ////

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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).¹⁰ 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”) ¶ 2.¹¹

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

22
23 ¹⁰ Petitioner Lugo was substituted in as class representative
24 after Rutherford’s death. Id., at 1532.

25 ¹¹ 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,"¹² 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

23 ¹² 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.¹³ 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

22 ¹³ 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,¹⁴ (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).¹⁵ Parole was
17 granted in 43 of those cases. Exh. 54 (admitted at RT 32).¹⁶ As
18

19 ¹⁴ 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 ¹⁵ 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 ¹⁶ 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.¹⁷ 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 ¹⁷ 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.¹⁸ 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.¹⁹ 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 ¹⁸ An additional fourteen of these prisoners stipulated to 7-year
24 deferrals under Proposition 9, and so their deferrals were
25 reduced, by agreement, to 2-year old-law deferrals, or 3-year
26 old-law deferrals if their convictions were for murder. See
Exhibit A, ¶ 10.

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

1 under the old law,²⁰ (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

24
25 ²⁰ 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.²¹

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

25 ²¹ 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).²²

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 ²² 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 9.²³

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 9.²⁴

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

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

22 ²⁴ Similar results obtain for 42 other life prisoners identified
23 by plaintiffs, namely, I. Kegler, R. Anderson, Curry, M. Arthur,
S. Law, P. Syzmore, D. James, R. Hamilton, C. Henderson,
24 G. Zavala, R. Perez, R. Stewart, O. Boone, C. Salgado, G. Rounds,
G. Counts, A. Saucedo, A. Marin, E. Reams, B. Barnard,
25 T. Pacheco, B. Jackaway, J. Anderson, J. Moreno, J. Acosta,
B. Weatherly, T. Davis, J. Masoner, D. Cordar, A. Harrell,
26 C. Racca, M. Gaona, D. Schlappi, H. Oropeza, A. Garcia, E.
27 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 9.²⁵

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.²⁶ See
11 Exh. 58 (binder) (all columns except the last two admitted at RT

12 ²⁵ 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.

²⁶ 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).²⁷ 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

25 ²⁷ 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.²⁸ 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 ²⁸ 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.²⁹

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

27 ²⁹ 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,³⁰ 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 ³⁰ 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.³¹ (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 ³¹ 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
27 or offenses, is such that consideration of
28 the public safety requires a more lengthy
period of incarceration for this individual.

Cal. Penal Code § 3041(b).

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 9.³²

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

23 ³² See, e.g., R. Evans (petition to advance granted, denied
24 parole), UF ¶ 8; L. Gooseberry (petition to advance granted, and
25 parole granted after some voluntary deferrals), UF ¶ 9;
26 J. Martinez (petition to advance granted, parole granted), UF
27 ¶ 10; R. Singh (petition to advance granted after prisoner
28 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."³³ These examples tend to show that

24 ³³ 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).

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").

29 This is a different matter than if the decision-maker were to
30 simply rely on the prior panel's determination that more time is
31 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.³⁴ 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 ³⁴ 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.³⁵

23 ³⁵ 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.³⁶ 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 ³⁶ 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
15 panel and will be at next hearing. All other
16 areas continue to be positive.

17 Id. at 19164.³⁷

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

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

27 ³⁷ Similar denials occurred in the other cases: K.E. Woods
28 (Exh. 80 at Y 25932) (last panel's concerns must be evaluated "by
a future panel"); K. Blackman (Exh. 80 at Y 11362) ("the
[panel's] concerns that not enough time has elapsed since his
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.³⁸

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 ³⁸ 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.³⁹

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

23 ³⁹ 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).⁴⁰
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 ⁴⁰ 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. 67.⁴¹

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

25
26 ⁴¹ 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
7 in a longer period of incarceration than
8 under the [prior law]."

9 Gilman, 638 F.3d at 1106 (quoting Garner, 529 U.S. at 255).⁴²

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

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

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

28 ⁴² See Gilman, 2013 WL 1904424 at *15-15 (plaintiffs are still
entitled to go to trial so that they could make an "as-applied"
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
29 that such an analysis is now foreclosed in a Section 1983 case.

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

31 Turning to the evidence presented at trial, it is clear that
32 Proposition 89, in actual practice, is not the "neutral" transfer
33 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 89.⁴³

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.

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LAWRENCE K. KARLTON
SENIOR JUDGE
UNITED STATES DISTRICT COURT

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24 ⁴³ 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.