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

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

United States District Court, E.D. California.

May 6, 2013.

ORDER

LAWRENCE K. KARLTON, District Judge.

Plaintiffs are members of two certified classes of California state prisoners who have been sentenced to life terms with the possibility of parole. See Order Amending Definitions of Certified Class (ECF No. 340) ¶ 2.[1] The first certified class of plaintiffs were sentenced to life terms for offenses that occurred before November 4, 2008. On that date, Proposition 9 increased the interval between parole hearings available to these prisoners from a default period of one year (with a maximum of two, three or five years), to a default period of fifteen years (with a minimum of three years). The second certified class of plaintiffs were sentenced to life terms for offenses that occurred before November 8, 1988. On that date, Proposition 89 gave the Governor authority to reverse any parole board decision finding a life term prisoner "suitable" for parole. Such parole board decisions had previously been final.

Plaintiffs' two surviving claims assert that Propositions 9 (Claim 8) and 89 (Claim 9), violate their rights under the Ex Post Facto Clause of the U.S. Constitution, U.S. Const., art. I, § 10.[2] Defendants move to decertify the classes.[3] They also seek summary judgment on both claims.[4] Plaintiffs oppose summary judgment on both claims, and cross-move for summary judgment on their Proposition 89 claim, or in the alternative, for a preliminary injunction on that claim.

For the reasons that follow, the court will deny all the pending motions.[5]

I. CALIFORNIA PAROLE.

Plaintiff life prisoners are eligible for parole after serving a statutorily-defined minimum number of years. See Cal. Penal Code § 3046(a) (setting minimum terms for "prisoner imprisoned under a life sentence"). The power to grant parole and set release dates lies with the Board of Parole Hearings (formerly the Board of Prison Terms).[6] In re Vicks, 56 Cal. 4th 274, 294 (2013); Lawrence, 44 Cal. 4th at 1201. Once a life prisoner is eligible for parole, it is up to the Board to determine whether he is "suitable" for parole. See Cal. Penal Code § 3041(b). Suitability is determined at a hearing before a Board commissioner and deputy commissioner. Id. The first hearing to determine suitability occurs one year before eligibility. Id., § 3041(a) (one year prior to "minimum eligible parole release date," the Board of Parole Hearings shall "normally set a parole release date"). The Board is required to find a prisoner "suitable" for parole, and to set a

release date, unless it finds that he is a current danger to the community, in which case, it must find that he is "unsuitable" for parole. Lawrence, 44 Cal. 4th at 1204 (the governing statute provides that "`the Board must grant parole unless it determines that public safety requires a lengthier period of incarceration'"). (emphasis in text), quoting In re Rosenkrantz, 29 Cal. 4th 616 (2002). Cal. Penal Code § 3041(b) (the Board "shall normally set a parole release date" at the parole hearing); Cal. Admin. Code, tit. 15, § 2281(a) ("a life prisoner shall be found unsuitable for and denied parole if in the judgment of the panel the prisoner will pose an unreasonable risk of danger to society if released from prison"). Plaintiffs' constitutional challenges arise once the Board decides whether the prisoner is either "suitable" or "unsuitable" for parole.

A. Proposition 9.[7]

If the Board finds the prisoner "unsuitable" for parole, it sets a deferral period before the prisoner will next be considered for parole. Cal. Penal Code § 3041.5(b)(3). Prior to the passage of Proposition 9, the default deferral period was one (1) year. See [former] Cal. Penal Code § 3041.5(b)(2) (1995). That is, plaintiffs were entitled to an annual parole hearing, unless the Board made written findings that a longer deferral period was warranted. Id. ("The board shall hear each case annually" after the initial parole hearing, absent a board finding "that it is not reasonable to expect that parole would be granted" during the following year or years). Even if a longer deferral period was warranted, however, the Board could only defer the next hearing for two years, or for a maximum of five years.[8] See id.

Proposition 9, "Marsy's Law," enacted in November 2008, amended section 3041.5 "to increase the time between parole hearings, absent a finding by the Board that an earlier hearing is appropriate." Vicks, 56 Cal. 4th at 283. Indeed it dramatically changed the timing and process for prisoners' parole hearings when it was enacted in November 2008. Specifically, the law increased the default interval between hearings to fifteen years (abolishing the annual review), increased the minimum deferral period to three years (from one year), increased the maximum deferral period to fifteen years (from five years), shifted the burden from the Board to the prisoner to show that the default deferral period should not be used, and then imposed a higher burden of proof, now requiring the prisoner to show by "clear and convincing" evidence that the default deferral period should not be used. Cal. Penal Code § 3041.5(b)(3); Vicks, 56 Cal. 4th at 284.

In addition, Proposition 9 expressly provided for an "advance hearing," pursuant to which a prisoner could request a parole hearing sooner than the default 15 year period would have allowed. Id., § 3041.5(d); Vicks, 56 Cal. 4th at 284-85. A prisoner can make an advance hearing request "at any time" after a denial of parole at a regularly scheduled parole hearing, and then every three years thereafter. Cal. Penal Code § 3041.5(d)(1) (advance hearing request procedure), (d)(3) (three-year restriction); Vicks, 56 Cal. 4th at 286 ("a prisoner may make his or her first request for a new hearing at any time following the denial of parole at a regularly scheduled hearing, and then may make another request every three years").

B. Proposition 89.

If the Board finds the prisoner "suitable" for parole, it sets a parole release date, using standards prescribed by law and regulation. Cal. Penal. Code § 3041(a).[9] Panel decisions granting parole are reviewed by the Board's chief counsel (or designee). Id. During the review process, the chief counsel prepares a written report on each case in which parole has been granted. Plaintiffs' Statement of Undisputed Facts in Support of Plaintiffs' Motion for Summary Judgment ("PSUF") (ECF No. 428-3) ¶ B.[10] Known as the "Executive Case Summary" (ECS), the report is an overview of the prisoner's central prison files as well as the evidence and the findings from the hearing that resulted in a parole grant. Id. Each ECS includes information about the prisoner's term, as set by the panel that granted parole, as well as the calculated release date for the prisoner based on that term. Id. At the time the offenses were committed, the Board's parole decisions were not subject to gubernatorial review. Defendants' Statement of Undisputed Facts in Support of their Motion for Summary Judgment ("DSUF") (ECF No. 425 at 47-52)[11] ¶ 20.

Article V, section 8 of the California Constitution was amended by the voters with the passage of Proposition 89 on November 8, 1988. DSUF ¶ 19. Proposition 89 added subdivision (b) to allow the Governor a 30-day period to "affirm, modify or reverse" any decision of the Board of Parole Hearings (the "Board"), "with respect to the granting, denial, revocation, suspension or parole of a person sentenced to an indeterminate term upon a conviction of murder. . . ." Id.[12]

As part of his review, the Governor receives the Executive Case Summary for the prisoner. PSUF ¶ D. The Governor's review authority is neutral, under the amendment, and allows him to review denials as well as grants of parole. Id. However, from 1991 through 2010, the Governor reviewed only three decisions denying parole, affirming all three. Id. During that same period, the Governor reversed 1,255 grants of parole made to prisoners who were convicted of murder before Proposition 89 passed. Id. ¶ E. These reversals represent more than 70 percent of the Board's grants of parole made to prisoners with murder convictions. PSUF ¶ E. At the time the Governor acted in those cases, over 90 percent of the prisoners were beyond their calculated release dates. Had the Governor not reversed the grants, those prisoners would have been immediately released; because of the Governor's reversal, however, the prisoners remained in custody. Id.

After passage of Proposition 89, named class members James Masoner, Richard W. Brown, Edward Stewart, Mario Marquez, Richard Lewis and Gloria Olson, were found suitable for parole by the Board. DSUF ¶ 21. The Governor, exercising his authority under Proposition 89, reversed the Board's decisions regarding these plaintiffs. Id.

II. STANDARDS

A. Summary Judgment.

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); Ricci v. DeStefano, 557 U.S. 557, 586, 129 S. Ct. 2658, 2677 (2009) (it is the movant's burden "to demonstrate that there is `no genuine issue as to any material fact' and that they are `entitled

to judgment as a matter of law'"); Walls v. Central Contra Costa Transit Authority, 653 F.3d 963, 966 (9th Cir. 2011) (per curiam) (same).

Consequently, "[s]ummary judgment must be denied" if the court "determines that a `genuine dispute as to [a] material fact' precludes immediate entry of judgment as a matter of law." Ortiz v. Jordan, 562 U.S. ___, 131 S. Ct. 884, 891 (2011), quoting Fed. R. Civ. P. 56(a); Comite de Jornaleros de Redondo Beach v. City of Redondo Beach, 657 F.3d 936 (9th Cir. 2011) (en banc) (same), cert. denied, 132 S. Ct. 1566 (2012).

Under summary judgment practice, the moving party bears the initial responsibility of informing the district court of the basis for its motion, and "citing to particular parts of the materials in the record," Fed. R. Civ. P. 56(c)(1)(A), that show "that a fact cannot be . . . disputed." Fed. R. Civ. P. 56(c)(1); Nursing Home Pension Fund, Local 144 v. Oracle Corp. (In re Oracle Corp. Securities Litigation), 627 F.3d 376, 387 (9th Cir. 2010) ("The moving party initially bears the burden of proving the absence of a genuine issue of material fact"), citing Celotex v. Catrett, 477 U.S. 317, 323 (1986).

However, "[w]here the non-moving party bears the burden of proof at trial, the moving party need only prove that there is an absence of evidence to support the non-moving party's case." Nursing Home Pension Fund, Local 144 v. Oracle Corp. (In re Oracle Corp. Securities Litigation), 627 F.3d 376, 387 (9th Cir. 2010).

If the moving party meets its initial responsibility, the burden then shifts to the non-moving party to establish the existence of a genuine issue of material fact. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986); Oracle Corp., 627 F.3d at 387 (where the moving party meets its burden, "the burden then shifts to the non-moving party to designate specific facts demonstrating the existence of genuine issues for trial"). In doing so, the non-moving party may not rely upon the denials of its pleadings, but must tender evidence of specific facts in the form of affidavits and/or other admissible materials in support of its contention that the dispute exists. Fed. R. Civ. P. 56(c)(1)(A).

"In evaluating the evidence to determine whether there is a genuine issue of fact," the court draws "all reasonable inferences supported by the evidence in favor of the non-moving party." Walls, 653 F.3d at 966. Because the court only considers inferences "supported by the evidence," it is the non-moving party's obligation to produce a factual predicate as a basis for such inferences. See Richards v. Nielsen Freight Lines, 810 F.2d 898, 902 (9th Cir. 1987). The opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts . . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no `genuine issue for trial.'" Matsushita, 475 U.S. at 586-87 (citations omitted).

B. Preliminary Injunction.

Fed. R. Civ. P. 65 provides authority to issue a preliminary injunction. However, it is an "extraordinary remedy, never awarded as of right." Winter v. Natural Resources Defense Council, Inc., 555 U.S. 7, 24 (2008).

A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest.

Rodriguez v. Robbins, ___ F.3d ___, 2013 WL 1607706 at *2, 2013 U.S. App. LEXIS 7565 at *10-*11 (9th Cir. 2013), quoting Winter, 555 U.S. at 20.

C. Class Decertification.

Class certification is proper, and therefore may withstand a motion to decertify, only "if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." General Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 161 (1982). The Federal Rules provide:

One or more members of a class may sue or be sued as representative parties on behalf of all members only if: (1) the class is so numerous that joinder of all members is impracticable ["numerosity"];(2) there are questions of law or fact common to the class ["commonality"]; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class ["typicality"]; and (4) the representative parties will fairly and adequately protect the interests of the class ["adequacy" (of representation)].

Fed. R. Civ. P. 23(a). In addition, class certification is proper only if "at least one of the requirements of Rule 23(b)" is satisfied. Ellis v. Costco Wholesale Corp., 657 F.3d 970, 979-80 (9th Cir. 2011). Here, the class was certified under Rule 23(b)(2), which provides:

A class action may be maintained if Rule 23(a) is satisfied and if: . . . the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.

Fed. R. Civ. P. 23(b)(2). The court must be satisfied that the party that bears the burden has "affirmatively demonstrate[d]" that "there are in fact sufficiently numerous parties, common questions of law or fact, etc." Wal-Mart Stores, Inc. v. Dukes, 564 U.S. ___, 131 S. Ct. 2541, 2551-52 (2011).[13]

III. ANALYSIS — EX POST FACTO CLAUSE.

The ex post facto prohibition forbids the Congress and the States to enact any law "which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed."

Weaver v. Graham, 450 U.S. 24, 28 (1981); CDC v. Morales, 514 U.S. 499, 504 (1995) ("Article I, § 10, of the Constitution prohibits the states from passing any `ex post facto law'"), Lynce v. Mathis, 519 U.S. 433, 441 (1997) ("To fall within the ex post facto prohibition, a law . . . `must disadvantage the offender affected by it,' by . . . increasing the punishment for the crime") (citations omitted). "The ban also restricts governmental power by restraining arbitrary and

potentially vindictive legislation." Id., 450 U.S. at 29. A "central concern" of the Ex Post Facto Clause is "`the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated.'" Lynce, 519 U.S. at 895-96. "Retroactive changes in laws governing parole of prisoners, in some instances, may be violative of this precept." Garner, 529 U.S. at 249-250 (involving increases in intervals between parole consideration dates).

IV. ANALYSIS — PROPOSITION 9 (Claim 8).

Plaintiffs challenge Proposition 9, as it applies to them, asserting that the law — by increasing the deferral period between parole hearings — "has created a risk of increased terms to life prisoners" in violation of the Ex Post Facto Clause. See Plaintiffs' Opposition to Defendants' Motion for Summary Judgment ("Pl. Opp. to D. SJ") (ECF No. 435) at 6.[14] Plaintiffs further argue that the availability of "advance hearings" does not cure the constitutional deficiency. Id.

A. Retrospective Increases in Intervals Between Parole Hearings.

1. Morales v. California Dep't of Corrections.

In 1994, the Ninth Circuit considered an Ex Post Facto Clause challenge to an earlier change in California parole law. See Morales v. California Dep't of Corrections, 16 F.3d 1001 (9th Cir. 1994). The change allowed the parole board to avoid the previously required annual parole hearings, and to increase the interval between hearings to up to five years, if the board found that parole was unlikely to be granted during the interval. Id., at 1004. The Ninth Circuit held that the law change, as applied retrospectively, violated the Ex Post Facto Clause:

By increasing the interval between parole hearings, the state has denied Morales opportunities for parole that existed under prior law, thereby making the punishment for his crime greater than it was under the law in effect at the time his crime was committed. . . . [A]ny retrospective law making parole hearings less accessible would effectively increase the sentence and violate the ex post facto clause.

Id., at 1004.

The Supreme Court reversed. California Dep't of Corrections v. Morales, 514 U.S. 499 (1995). It concluded that "the evident focus of the California amendment was merely `to relieve the [Board] from the costly and time-consuming responsibility of scheduling parole hearings for prisoners who have no reasonable chance of being released.'" Id., at 507 (internal quotation marks omitted). The Court rejected the Ex Post Facto challenge because the law change:

creates only the most speculative and attenuated possibility of producing the prohibited effect of increasing the measure of punishment for covered crimes, and such conjectural effects are insufficient under any threshold we might establish under the Ex Post Facto Clause.

Id., 514 U.S. at 509. In explaining its decision, however, the Court identified several factors that defeated the Ex Post Facto challenge. First, the change in law addressed in Morales applied "only to a class of prisoners for whom the likelihood of release on parole is quite remote." Id., at 510.

Second, the change in law was "carefully tailored" so that it had "no effect on any prisoner" unless the Board had first concluded, after a hearing, "not only that the prisoner is unsuitable for parole, but also that `it is not reasonable to expect that parole would be granted at a hearing during the following years.'" Id., at 511. Importantly, the Board retained "the authority to tailor the frequency of subsequent suitability hearings to the particular circumstances of the individual prisoner," Id., at 511, which included the possibility that it could conduct subsequent parole hearings annually, as was possible before the law change.[15]

Moreover, the Court noted that in addition to the safeguards it had identified, "`the Board could advance the suitability hearing.'" Id., at 512.[16] The Court found that the possibility of such an "expedited hearing by the Board — either on its own volition or pursuant to an order entered on an administrative appeal — would remove any possibility of harm even under the hypothetical circumstances suggested by respondent." Id., at 512-13.

2. Garner v. Jones.

A few years after Morales, the Eleventh Circuit was faced with a change in Georgia law that increased the interval between parole hearings from three years to eight years. See Jones v. Garner, 164 F.3d 589 (11th Cir. 1998). Fully aware of the decision in Morales, the Eleventh Circuit found that the change in law that it faced was entirely different from that effected in Morales. The grounds of distinction were, that the Georgia prisoners were not those only "remotely" likely to be paroled, unlike those in Morales; and the interval between parole hearings was not "finely tailored," as in Morales, because it was simply increased to one hearing every eight years. Jones, 164 F.3d at 590 ("After Jones was incarcerated, but before he was initially considered for parole, the Board amended its rules to require that parole reconsideration take place only once every eight years"). Finally, the Eleventh Circuit distinguished Morales after determining that the Georgia prisons' policy statements regarding "expedited" hearings were "unenforceable and easily changed, and adherence to them is a matter of the Board's discretion." Id., at 595.

The Supreme Court reversed. Garner v. Jones, 529 U.S. 244 (2000). It found that the grounds of distinction the Eleventh Circuit relied upon were not dispositive, because the question still remained "whether the amended Georgia Rule creates a significant risk of prolonging respondent's incarceration." Id., 529 U.S. at 255. The Court found that the record in that case did not show that such a risk existed. Rather, the Court held that the parole board had discretion on how often to grant a parole hearing, so long as one was held at least once every eight years. Id., 529 U.S. at 254.

Moreover, the Court concluded that prisoners had the ability to seek an advance hearing. The Court found that pursuant to its formal policies, the parole board would consider requests for advance hearings where the prisoners made a showing "of a `change in their circumstances' or upon the Board's receipt of `new information.'" Id., 529 U.S. at 257. The Court determined that it

was error for the Eleventh Circuit to not consider the effect of the availability of advance hearings on the likelihood that a prisoner's incarceration would be lengthened beyond the term imposed when the crime was committed.

3. Gilman v. Schwarzenegger

On February 4, 2010, this court granted a preliminary injunction to plaintiffs in this case. Gilman v. Davis, 690 F. Supp. 2d 1105 (E.D. Cal. 2010) (Karlton, J.). The court distinguished Morales and Garner. First, unlike the law change in Morales, Proposition 9 increased the interval between parole hearings for every member of the plaintiff class, no matter what his circumstances, no matter how quickly he may be progressing toward suitability for parole, and no matter how willing the Board might be to grant him more frequent parole hearings. The ability of the Board to "tailor" the parole hearing deferral to the facts before them — so critical to the decision in Morales — was missing in Proposition 9. See Gilman, 690 F. Supp. 2d at 1120. Even with the availability of advance hearings, class members can secure a parole hearing no more frequently than every three years.[17]

Second, the court found that class members here were not uniformly unlikely to be granted parole during the default deferral period. See Gilman, 690 F. Supp. 2d at 1120. This further distinguished these plaintiffs from those in Morales, who faced only a "remote" chance of parole.

Finally, the court found that the theoretical availability of advance hearings were not sufficient to overcome an Ex Post Facto challenge. The court found that "[a]t the time these motions were argued, there was no mechanism in place for initiating or accepting petitions to advance a hearing." Id., at 1121. Further, the court found that an ad-hoc advance hearing system was insufficient to overcome the challenge, and that such a system itself created a significant risk of increasing the plaintiffs' incarceration because of the delays inherent in that system. Id., at 1121-22.[18] Accordingly, this court found that the changes brought about by Proposition 9 "create a risk of prolonged incarceration, and plaintiffs are likely to succeed in showing that this risk is significant despite the possible availability of advanced hearings." Id., at 1124.

The Ninth Circuit reversed. Gilman v. Schwarzenegger, 638 F.3d 1101 (9th Cir. 2011). The Ninth Circuit agreed that "the changes required by Proposition 9 appear to `create[] a significant risk of prolonging [Plaintiffs'] incarceration.'" Id., at 1108. However, even assuming that this significant risk did exist, the Ninth Circuit concluded that:

Here, as in Morales, an advance hearing by the Board "would remove any possibility of harm" to prisoners because they would not be required to wait a minimum of three years for a hearing.

Id., at 1108, quoting Morales, 514 U.S. at 513. Gilman held that a preliminary injunction in the case was not warranted because plaintiffs failed to present any evidence that the advance hearing was insufficient protection.

On appeal, plaintiffs pressed their objection that the decision whether to grant an advance hearing was purely discretionary with the Board, and that the Board could deny an advance hearing even where the prisoner had made the required showing that he was now suitable for

parole. The Ninth Circuit rejected the objection because plaintiffs failed to produce any evidence to counter the presumption "that the Board will, upon request, schedule advance hearings for prisoners who become suitable for parole prior to their scheduled hearings." Gilman, 638 F.3d at 1109-10.[19]

B. Defendants' Motion for Summary Judgment, Proposition 9.

Defendants move for summary judgment. They argue first, that Proposition 9 is the type of procedural change that is not covered by the Ex Post Facto clause, and that in any event, plaintiffs can produce no evidence showing that Proposition 9 in fact creates a "significant risk" of increasing the class members' incarceration. See Defendants' Motion for Summary Judgment ("Defendants' Motion") (ECF No. 425) at 14-20. Defendants argue second, that the availability of the "advance hearing" process "necessarily defeats plaintiffs' claim." Id., at 20-25.

In opposing defendants' motion for summary judgment, plaintiffs argue that the existence of advance hearings is insufficient to cure the constitutional violation: the Board's discretion in granting advance hearings is so broad that it could deny an advance hearing even if the prisoner showed that he was suitable for parole; Proposition 9 does not permit the fine "tailoring" of deferral periods that were critical to the decisions in Garner and Morales; and the rate of summary denials of advance hearing petitions is so high that it cannot rescue Proposition 89 from an ex post facto violation.

1. "Procedural" changes.

Defendants weakly argue that Proposition 9 effected "procedural" changes, and thus, under Morales and Garner, they are immune to challenge under the Ex Post Facto Clause. The court does not agree. Morales and Garner did not find that increasing intervals between parole hearings passed muster under the Ex Post Facto Clause because they only effected a "procedural" change. Rather, they rejected the claims because petitioners failed to show that the law increasing intervals between parole hearings — even if "procedural" — created a significant risk of increased incarceration. See Gilman, 638 F.3d at 1106 ("A retroactive procedural change violates the Ex Post Facto Clause when it `creates a significant risk of prolonging [an inmate's] incarceration"), quoting Garner, 529 U.S. at 251. The claims were not rejected merely because the changes were "procedural."

Defendants make a more energetic argument regarding "procedural" changes in their motion for summary judgment on the Proposition 89 claim, and so it is further discussed there.

2. Advance Hearings and Evidence of Significant Risk of Increased Incarceration.

Defendants assert that the availability of advance hearings necessarily defeats the Proposition 9 claim, citing Morales, Garner and Gilman. In fact, the Ninth Circuit has already ruled, in an appeal from this case, that:

as in Morales, an advance hearing by the Board "would remove any possibility of harm" to prisoners because they would not be required to wait a minimum of three years for a hearing.

Gilman, 638 F.3d at 1109. Plaintiffs assert several reasons why the Ninth Circuit's decision does not defeat their claim.

a. Discretion under Cal. Penal Code § 3041.5(b)(4).

Plaintiffs, citing Cal. Penal Code § 3041.5(b)(4), argue that advance hearings are inadequate because the Board may, in its discretion, legally decline to advance a hearing, even when the prisoner has made the required showing:

the Board's discretion in ruling on advanced hearing requests is so broad that the Board may legally deny an advanced hearing even if the prisoner establishes new information/changed circumstances and a reasonable likelihood of a parole grant.

Pl. Opp. to DSJ at 4; Plaintiffs' Statement of Undisputed Facts No. 15 (asserting that the Board "may, in its discretion, decline to advance a hearing" even if the prisoner makes the required showing, citing Cal. Penal Code § 3041.5(b)(4)).

This argument fails for several reasons. First, the language of the statute is not probative of plaintiffs' assertion that the Board does in fact deny advance hearings despite the prisoner's having made the required showing. The statute provides only that the Board "may" grant an advance hearing once the required showing is made:

The board may in its discretion, after considering the views and interests of the victim, advance a hearing set pursuant to paragraph (3) to an earlier date, when a change in circumstances or new information establishes a reasonable likelihood that consideration of the public and victim's safety does not require the additional period of incarceration of the prisoner provided in paragraph (3).

Cal. Penal Code § 3041.5(b)(4). The statute does not authorize the Board to decline to grant an advance hearing once the prisoner has made the required showing, nor is such authorization a reasonable inference from the statutory language.

Second, the Board cannot "legally" deny an advance hearing once the prisoner makes the required showing, as that would be an abuse of its discretion:

If the change in circumstances or new information establishes that there is no longer an evidentiary basis for concluding the prisoner is a current threat to public safety, the Board will abuse its discretion if it declines to advance the hearing date and find the prisoner suitable for parole.

Vicks, 56 Cal. 4th at 311;[20] see also Gilman, 638 F.3d at 1109-10 (referring to the presumption that the Board will properly exercise its discretion); Gilman v. Davis, 690 F. Supp. 2d at 1122 (rejecting plaintiffs' identical argument made at the preliminary injunction stage, this court states: "I must assume that the Board will exercise a neutral grant of discretion in a manner consistent with the Ex Post Facto Clause").

Finally, the evidence the parties have presented indicates that the Board instructs its decisionmakers to deny the advance hearing only if the prisoner fails to make the required "prima facie" showing. See, e.g., Plaintiffs' Preliminary Injunction Hearing Exhibit 35 (ECF No. 341-3) (setting forth grounds for summary denial); Preliminary Injunction Hearing Transcript (ECF No. 347) 25-28 (Testimony of Sue Facciola) ("Facciola Test.") (establishing that summary denials occur only if prisoner fails to make a prima facie case for an advance hearing). Plaintiffs have introduced no contrary evidence to show, for example, that the Board decision-makers fail to follow the instructions they received.

Accordingly, this argument is insufficient to stave off summary judgment on the Proposition 9 claim.

b. Three-year interval for advance hearings.

Plaintiffs argue that the advance hearings are insufficient because the Board "has no discretion since Proposition 9 to set a deferral period of less than three years no matter how appropriate it believes a deferral of one or two years is." Plaintiffs' Opposition at 3 n.3. The decisions in Morales and Garner turned, at least in part, on the fact that the parole board "retains the authority to tailor the frequency of subsequent suitability hearings to the particular circumstances of the individual prisoner." Morales, 514 U.S., at 511.

The California Supreme Court has clarified that "a prisoner may make his or her first request for a new hearing at any time following the denial of parole at a regularly scheduled hearing, and then may make another request every three years." Vicks, 56 Cal. 4th at 286 (emphasis added). Thus if the advance hearing follows a deferral of three years, the Board must consider granting a hearing less than three years into the future.

However, plaintiffs are correct that the request for an advance hearing can be made only once every three years. Vicks, 56 Cal. 4th at 286.[21] Thus, the Board cannot grant, for example, annual parole hearings. As such, Proposition 9 is missing a key ingredient upon which the constitutionality of the enactments in Morales and Garner turned. Plaintiffs should be permitted at trial to show that this missing ingredient in fact creates a significant risk that their incarceration will be prolonged.

c. Statistical evidence of the "safety net."

Plaintiffs assert that the advance hearing procedures fail to "catch" those prisoners who deserve advance hearings, that is, those prisoners who have moved from unsuitability to suitability for parole. Pl. Opp. to DSJ at 4-5. Plaintiffs have now presented evidence that of 119 advance

hearing petitions filed after Proposition 9, 106 of them — or over 90% — were "summarily denied." See Plaintiffs' Statement of Additional Material Facts ("PSUF-Additional") (ECF No. 435-3) Nos. 17 & 18.[22]

In essence, plaintiffs are arguing that notwithstanding the Board's legal obligation to grant an advance hearing when a prisoner makes the proper showing, the evidence shows that the Board nevertheless denies such hearings, using the summary denial process. The Ninth Circuit rejected this argument on appeal from the preliminary injunction, but it did so on the grounds that plaintiffs had "adduced no evidence that the Board has denied a request for an advance hearing where a prisoner has shown a change in circumstances or new evidence." Gilman, 638 F.3d at 1109.

However, plaintiffs have now adduced evidence from which this court can infer that the Board has denied advance hearings even where a prisoner has shown the required change in circumstances. First, as noted, 90% of advance hearing petitions are summarily denied. PSUF-Additional ¶ 17.[23] Second, plaintiffs have presented evidence that of these, some number of prisoners have shown — at least sufficiently to avoid summary judgment — that they were, in fact, suitable for parole. PSUF-Additional ¶¶ 39 & 41.[24]

Specifically, plaintiffs' evidence shows that class plaintiffs Henry Bratton and James Alexander were denied parole and given three-year deferrals. Id. Their requests for advance hearings were then summarily denied.[25] Id., ¶ 42. These plaintiffs nevertheless managed to get hearings before the three-year interval for other reasons, and both were granted parole at those early hearings. Id., ¶¶ 39 & 41. Plaintiffs do not present direct evidence that the summary denial process itself was invalid or constitutionally tainted. Accordingly, plaintiffs ask the court to infer strictly from the results — over 90% summary denials, at least some number of which were of prisoners who had in fact reached suitability — that the advance hearing process is insufficient to avoid the Ex Post Facto violation.

The court believes that it is a reasonable inference from these undisputed facts that there is something wrong with the advance hearing process. The court of course, is required to draw all reasonable inferences for plaintiffs, who oppose summary judgment on this claim. Without further development of the evidence, the court cannot say that the "something wrong" is a flaw in the advance hearing process,[26] an unwillingness on the part of the Board to grant advance hearings even when a prisoner has made the required showing, or even something having no constitutional relevance. Plaintiffs are entitled to make their case on this point at trial. Accordingly, summary judgment on Proposition 9 will be denied.[27]

V. ANALYSIS — PROPOSITION 89 (Claim 9).

Plaintiffs challenge Proposition 89 as it is applied to them, because it gives the Governor the power to reverse parole grants from the Board, which had previously been final with the Board.[28] In Johnson v. Gomez, the Ninth Circuit found that Proposition 89 "simply removes final parole decisionmaking authority from the BPT and places it in the hands of the governor." 92 F.3d at 967.[29]

The enactment was neutral, the court found, because it gives the governor the power to affirm or reverse the board, and further, "the governor must use the same criteria as" the Board. Id. The court indicated that an ex post facto challenge to Proposition 89 could succeed only if plaintiffs could show "with certainty" or "with assurance," that they would have been granted parole under the old system, in which the Board had the final say. Id., at 967 & 968. Finding that plaintiff could not make this showing, the Ninth Circuit held that Proposition 89 did not violate the Ex Post Facto Clause of the U.S. Constitution. Id., at 968.

However, after the Ninth Circuit decision in Gomez, the Supreme Court issued its decision in Garner v. Jones, 529 U.S. 244, 245-246 (2000). As this court has previously held, Garner changed or clarified the law in ways that directly affect this case. See ECF No. 218. The Supreme Court held:

In the case before us, respondent must show that as applied to his own sentence the law created a significant risk of increasing his punishment.

Garner, 529 U.S. at 255.

Accordingly, even where a statute does not facially violate the ex post facto clause, Garner establishes that plaintiffs may still be able to make an "as applied" challenge. In mounting such a challenge, plaintiffs can use "evidence drawn from the rule's practical implementation by the agency charged with exercising discretion, that its retroactive application will result in a longer period of incarceration than under the earlier rule." In addition, plaintiffs do not need to show "with certainty" or "with assurance," that Proposition 89 extended their sentences. Rather, they need only show that the law created a "significant risk" of increasing their punishment.[30]

A. Defendants' Motion for Summary Judgment, Proposition 89

Defendants argue that the change effected by Proposition 89 does not violate the Ex Post Facto Clause as a matter of law, and accordingly move for summary judgment on three legal grounds. None of defendants' arguments are persuasive.

1. Whether Proposition 89 Left Plaintiffs' Punishment Unchanged as a Matter of Law.

Defendants assert that before the enactment of Proposition 89, plaintiffs' punishment was "a lifetime in prison," and that is the punishment they are subject to after Proposition 89. Therefore, defendants argue, there is no Ex Post Facto violation, citing Collins v. Youngblood, 497 U.S. 37 (1990). This argument fails because its premise is incorrect. The sentence before the enactment of Proposition 89 was life in prison with the possibility of parole, not simply "life in prison." See, e.g., U.S. v. Paskow, 11 F.3d 873, 879 (9th Cir. 1993) ("parole eligibility is part of the sentence for the underlying offense").

It is the "possibility of parole" that is the whole focus of this claim:

As we recognized in Weaver, retroactive alteration of parole or early release provisions, like the retroactive application of provisions that govern initial sentencing, implicates the Ex Post Facto Clause because such credits are "one determinant of petitioner's prison term . . . and . . . [the petitioner's] effective sentence is altered once this determinant is changed." Ibid. We explained in Weaver that the removal of such provisions can constitute an increase in punishment, because a "prisoner's eligibility for reduced imprisonment is a significant factor entering into both the defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed." Ibid.

Lynce, 519 U.S. at 445-446.

2. Whether Proposition 89 Effects a "Procedural" Change not Covered by the Ex Post Facto Clause.

Once again, Defendants assert that plaintiffs' claims are procedural and thus, not subject to an Ex Post Facto claim. In sum, they argue that no "as applied" challenge need be considered, as Proposition 89 worked a "procedural change," and such changes are categorically not subject to review under the Ex Post Facto Clause. According to defendants, "procedural changes, even if they `disadvantage' the accused, do not violate the Ex Post Fact Clause," citing Collins, Mallett v. North Carolina, 181 U.S. 589 (1901), and Dobbert v. Florida, 432 U.S. 282, 292 (1977). Defendants read these cases too broadly,[31] as none of them categorically excludes any and all "procedural" changes from ex post facto review. To the contrary:

by simply labeling a law "procedural," a legislature does not thereby immunize it from scrutiny under the Ex Post Facto Clause. . . . Subtle ex post facto violations are no more permissible than overt ones.

Collins, 497 U.S. at 46.

Indeed, Collins clarifies language in earlier cases that defendants interpret as holding that a simple "procedural" versus "non-procedural" test would be sufficient to determine whether a law violates the Ex Post Facto Clause. For example, the Court in Dobbert wrote:

In the case at hand, the change in the statute was clearly procedural. The new statute simply altered the methods employed in determining whether the death penalty was to be imposed; there was no change in the quantum of punishment attached to the crime. The following language from Hopt v. Utah, supra, applicable with equal force to the case at hand, summarizes our conclusion that the change was procedural and not a violation of the Ex Post Facto Clause: [¶] "The crime for which the present defendant was indicted, the punishment prescribed therefor, and the quantity or the degree of proof necessary to establish his guilt, all remained unaffected by the subsequent statute." 110 U.S., at 589-590.

432 U.S. at 293-294. Collins clarifies that it is not simply the label "procedural" that governed its holding in Dobbert. Indeed, the Court has come to use the term "procedural" in this context almost as a term of art, meaning laws that are genuinely "procedural" for purposes of the Ex Post Facto Clause. Such "procedural" laws are those which do not punish behavior that was previously lawful, do not change the quantum of punishment prescribed, do not change the quantity or the degree of proof necessary to establish guilt, and do not deprive one charged with crime of any defense available according to law at the time when the act was committed. Id. at 52; Dobbert, 432 U.S. at 295.

Similarly, Gomez found that Proposition 89 did not violate the Ex Post Facto clause under the facts presented in that case, not because the enactment was "procedural," but because the prisoner was `unable to demonstrate that an increase in his punishment actually occurred." Gomez, 92 F.3d at 967.

It is clear that retrospective procedural changes can violate the Ex Post Facto Clause if they create a significant risk of increasing the prisoner's punishment. The Ninth Circuit explained that "[a] retroactive procedural change violates the Ex Post Facto Clause" when it creates a significant risk of prolonging an inmate's incarceration. Gilman, 638 F.3d at 1106 (emphasis added), citing Garner, 529 U.S. at 251. Accordingly, the court cannot simply grant summary judgment to defendants on the grounds that Proposition 89 effects a "procedural" change, without examining the real-world effect the change has brought about.

3. Whether Johnson v. Gomez Precludes an Ex Post Facto Challenge as a Matter of Law.

Gomez is a difficult case for plaintiffs, as it was also a challenge to Proposition 89, and was rejected by the Ninth Circuit. Moreover, plaintiff in Gomez made the same general argument plaintiffs make here, and the Ninth Circuit rejected it:

Johnson argues that, unlike the administrative convenience purpose of the law in Morales, the purpose and effect of the law here is to lengthen prison terms by making it more difficult for convicted murderers with indeterminate sentences to be released on parole. However, the law itself is neutral inasmuch as it gives the governor power to either affirm or reverse a BPT's granting or denial of parole. Moreover, the governor must use the same criteria as the BPT. The law, therefore, simply removes final parole decisionmaking authority from the BPT and places it in the hands of the governor. We cannot materially distinguish this change in the law from that at issue in Mallett v. North Carolina, 181 U.S. at 590. In Mallett, the Court found no ex post facto violation where the new law allowed for higher court review of intermediate court decisions, even though the petitioner would have been entitled to a final intermediate court decision at the time of his crime. Id. at 597. We therefore conclude that the application of Proposition 89 to authorize the governor's review of Johnson's grant of parole did not violate the Ex Post Facto Clause.

Gomez, 92 F.3d at 967.

Gomez does not end there, however. It goes on to throw a life-line to plaintiffs' claim here, thus precluding this court from dismissing their claim on summary judgment. Specifically, Gomez went on to examine the Ninth Circuit's instruction that the district court must "look to the actual effect of the new law upon the petitioner." Id. at 968. In other words, a facial challenge to the law is precluded by Gomez, but Gomez does not preclude a challenge based upon "the actual effect" of Proposition 89 on this class of plaintiffs.

The possibility of an as-applied challenge was confirmed by the Supreme Court in Garner. Under Garner, "when a law does not facially increase punishment, `the [petitioner] must demonstrate, by evidence drawn from the rule's practical implementation by the [entity] charged with exercising discretion that its retroactive application will result in a longer period of incarceration than under the earlier rule.'" Heller v. Powers-Mendoza, 2007 WL 963330, 1 (E.D. Cal. 2007) (Karlton, J.), quoting Garner, 529 U.S. at 245.

Accordingly, defendants' argument that plaintiffs' Proposition 89 challenge can be dismissed "as a matter of law" is incorrect. Instead, plaintiffs must be given the opportunity to prove at trial that Proposition 89 has created a significant risk that their punishment would be increased.

B. Plaintiffs' Motion for Summary Judgment, Proposition 89

Plaintiffs move for summary judgment on their Proposition 89 claim, asserting that the undisputed facts show that the enactment creates a significant risk that they will serve an increased term of incarceration.

1. Intent of the Legislature.

Plaintiffs cite the Ballot Pamphlet[32] to assert that the intention of Proposition 9 was to give the Governor the power to protect the public from the early release of dangerous killers. PSUF ¶ C; see also, Gomez, 92 F.3d at 966 ("The voters' intent, as indicated in contemporaneous accounts, was at least in part to give the governor authority to prevent convicted murderers from receiving parole"). Plaintiffs argue that this shows that the legislature intended to increase the punishment of "dangerous killers" already convicted and incarcerated, and that therefore the law violates the ex post facto clause "without further inquiry into the law's effect," citing Smith v. Doe, 538 U.S. 84, 92 (2003).

Once again, common sense would indicate that if a law is passed in order to increase the punishment of prisoners who have already been convicted of their crimes, then this would create an ex post facto issue. However, that does not appear to be the law. In fact, whether or not a court may look to the intent of the legislature (or the People, in the case of a Ballot Initiative), appears to depend on the type of alleged ex post facto law that is at issue.

If the issue is whether the challenged enactment is penal or civil in nature, it is well established that the courts look to the intent of the legislature: "If the intention of the legislature was to impose punishment, that ends the inquiry." Smith, 538 U.S. at;[33] ACLU of Nevada v. Masto,

670 F.3d 1046, 1053 (9th Cir. 2012) ("If the legislature did intend to impose a criminal punishment, that is the end of the inquiry — the law may not be applied retroactively").

However, if the issue is whether the enactment increases what is indisputably punishment, namely incarceration, then the court focuses on "an objective appraisal of the impact of the change on the length of the offender's presumptive sentence," rather than the intent of the legislature. Lynce, 519 U.S. at 442-43. In discussing whether a retroactive cancellation of early release credits violated the Ex Post Facto Clause, Lynce specifically rejected the "undue emphasis on the legislature's subjective intent in granting the credits rather than on the consequences of their revocation." Id., at 442.

The Lynce Court pointed out that all of its prior decisions in this context — the alleged retroactive increase in punishment — focused only on the effect of the legislation, not the intent of the legislature. Id., at 442-45. The court concluded by noting that "the Court has never addressed" whether intent alone — without a forbidden effect — would be enough to find an Ex Post Facto Clause violation. Id., at 445.

Plaintiffs are therefore incorrect in asserting that it is settled law that this court is required to find a violation based upon intent alone. Given the teaching of Lynce, and its lengthy examination of cases showing that it has never found an ex post facto violation based upon intent alone, this court does not believe it is free to grant summary judgment to plaintiffs solely on the basis of the intent of Proposition 89.

2. The creation of an additional hurdle to parole.

Plaintiffs argue that an effect of Proposition 89 is to interpose an additional hurdle that prisoners must clear before they can obtain parole, and that this additional hurdle did not exist at the time their crimes were committed. It is undisputed that when the crimes were committed, the road to parole involved convincing only the Board that the prisoner was suitable for parole.[34] After the passage of Proposition 89, another road-block was placed in the road, namely, the prisoner now has to convince the Board, and then, separately, the Governor, that he is suitable for parole.[35]

The undisputed facts also support the assertion that Proposition 89 has imposed this additional hurdle. First, while the governor reviews every grant of parole, he almost never reviews denials of parole.[36] Second, from 1991 to 2011, "the Governor reversed more than 70 percent of the grants of parole made to prisoners with murder convictions." PSUF ¶ E.[37] Had the Governor not reversed, 90% of those prisoners would have been immediately released, but because of the Governor's action, were instead held in custody. Id.[38] The question, then, is whether adding this additional hurdle creates a "significant risk of prolonging" plaintiffs' incarceration. Garner, 529 U.S. at 251.

Common sense would indicate that a prisoner has a significantly increased chance of longer incarceration if he must convince two decision-makers that he is entitled to parole, rather than just one. In addition, actual experience with the law shows that most of the time — 70% of the time — even after the prisoner convinces the first decision-maker that he is entitled to parole, the

Governor reverses that decision. The evidence presented thus shows that plaintiffs have a heavier burden to achieve parole than they would have had at the time their crimes were committed.[39]

In this context however, the court cannot simply rely on experience and common sense, or even the undisputed facts of this case. Rather, it must apply the law as determined by the Supreme Court and the Ninth Circuit. Under this binding authority, although the law clearly disadvantages plaintiffs after the fact — by now requiring them to clear two hurdles in seeking parole rather than one — there is no Ex Post Facto violation unless plaintiffs can additionally show that the law creates a "significant risk" that their incarceration will be increased. See Garner, 529 U.S. at 251 ("The question is whether the amended Georgia Rule creates a significant risk of prolonging respondent's incarceration"). That is because the earlier rule — recognizing that increasing such a burden implicated the Ex Post Facto Clause — is no longer the law.

In Thompson v. State of Utah, 170 U.S. 343 (1898), the Supreme Court held that increasing the petitioner's burden to obtain an acquittal than existed when the crime was committed, violated the Ex Post Facto Clause. In that case, the crime of which petitioner was accused was committed at a time when he had a right to a trial by twelve (12) jurors, who had to reach a unanimous verdict in order to convict him. By the time of his second trial however (his first conviction was overturned), a change in the governing law[40] permitted a trial by eight (8) jurors, who again had to reach a unanimous verdict in order to convict. The Court held:

In our opinion, the provision in the constitution of Utah providing for the trial in courts of general jurisdiction of criminal cases . . . by a jury composed of eight persons, is ex post facto in its application to felonies committed before the territory became a state, because, in respect of such crimes, the constitution of the United States gave the accused, at the time of the commission of his offense, the right to be tried by a jury of twelve persons, and made it impossible to deprive him of his liberty except by the unanimous verdict of such a jury.

Thompson, 170 U.S. at 355 (emphasis added). In other words, an Ex Post Facto violation occurred because, after the crime was committed, the law imposed a heavier burden on petitioner to obtain an acquittal: now the State had to convince only eight jurors to convict, rather than twelve.[41]

The Supreme Court overruled Thompson in Collins:

The right to jury trial provided by the Sixth Amendment is obviously a "substantial" one, but it is not a right that has anything to do with the definition of crimes, defenses, or punishments, which is the concern of the Ex Post Facto Clause. To the extent that Thompson v. Utah rested on the Ex Post Facto Clause and not the Sixth Amendment, we overrule it.

497 U.S. at 52. In Collins, the Court held that "a new law which gave an appellate court the authority to reform an improper verdict, where previously a defendant was entitled to a new trial," did not violate the Ex Post Facto Clause. That is because the Clause does not prevent the State from retroactively making it more difficult to be acquitted of a crime, so long as the law did not:

punish as a crime an act previously committed, which was innocent when done; . . . make more burdensome the punishment for a crime, after its commission; nor deprive one charged with crime of any defense available according to law at the time when the act was committed.

Id., overruling Kring v. Missouri, 107 U.S. 221 (1883), and Thompson v. Utah, 170 U.S. 343 (1898).[42]

The Collins ruling was foreshadowed by Mallett, in which the petitioner was convicted by the criminal court of a "conspiracy to cheat and defraud." See State v. Mallett, 125 N.C. 718, 34 S.E. 651, 651-52 (1899). Petitioner appealed to the superior court, which overturned the conviction and ordered a new trial. Id. 34 S.E. at 652; Mallet, 181 U.S. at 590 (Statement of Mr. Justice Shiras).[43]

At the time the crime was committed, the state had no right of appeal. Therefore, Petitioner would have been granted the possibility of an acquittal at the new trial. However, after the crime was committed, the state enacted legislation granting the state a right of appeal from decisions of the superior court. Mallett, 181 U.S. at 590 (Statement of Mr. Justice Shiras). The state exercised that right in Petitioner's case, and obtained a reversal of the Superior Court, "with directions that the sentence imposed by that court should be carried into execution." Id.

Petitioner appealed to the U.S. Supreme Court, asserting that the new law was ex post facto when it was applied to him. The specifics of Petitioner's argument is not set forth in the Court's decision, but it would appear that the new law interposed an additional hurdle for Petitioner to clear before he could get his conviction overturned. At the time the crime was committed, he would have had to convince only the superior court that his conviction should be overturned, which he did. However, after he was convicted, he also had to convince the state's Supreme Court that his conviction should be overturned, which he failed to do. The U.S. Supreme Court rejected the ex post facto challenge, finding that the law:

did not make that a criminal act which was innocent when done; did not aggravate an offense or change the punishment and make it greater than when it was committed; did not alter the rules of evidence, and require less or different evidence than the law required at the time of the commission of the offense; and did not deprive the accused of any substantial right or immunity possessed by them at the time of the commission of the offense charged.

Mallett, 181 U.S. at 597.

The rule this court must apply, then, is that the mere placement of additional hurdles in the path of a prisoner seeking parole is not, by itself, a violation of the Ex Post Facto Clause. Accordingly, plaintiffs cannot be granted summary judgment on this basis. However, nothing in any of the above cases indicates that this court must ignore these additional, retrospectively imposed hurdles, if plaintiffs can show that they create a significant risk that their incarceration will be increased. Thus, plaintiffs have the right to present evidence regarding the issue at trial, and defendants have the right to rebut the case.

3. The Governor's actions.

Plaintiffs seek summary judgment because, they assert, the undisputed facts show that the Governor's exercise of his powers under Proposition 89 has resulted in increased incarceration times for plaintiffs. See Plaintiffs' SJ Motion at 5. However, plaintiffs base their assertion on a theory that has already been rejected by the Ninth Circuit.

As plaintiffs assert, it is undisputed that the Governor has reversed over 70% of the parole grants issued by the Board, almost all of which were for prisoners whose release date had already passed. After the Governor reversed the Board's decision, these prisoners remained incarcerated, although they would have been released if the Governor had not intervened. Therefore, plaintiffs argue, the undisputed facts show that these prisoners have actually had their incarcerations prolonged by the Governor's exercise of his Proposition 89 authority.

Unfortunately for plaintiffs, this perfectly logical argument fails to come to terms with the reasoning of the Ninth Circuit in Gomez, a habeas case in which a prisoner also challenged the Governor's exercise of his authority under Proposition 89.

There, as here, the Board had made a decision to grant parole under Proposition 89. Gomez, 92 F.3d at 965. There, as here, the Governor reversed the decision. Id. However, since the Board did not possess the "final power to decide," in that its decision was subject to gubernatorial review, the Ninth Circuit reasoned that there was no way to tell, "with certainty," if the Board would have granted parole if Proposition 89 did not exist:

In this case, Johnson is similarly unable to demonstrate that an increase in his punishment actually occurred. . . . Johnson's case is like Dobbert, where the petitioner could only speculate whether the jury would have imposed a life sentence had it possessed the final power to decide. Here, because the BPT's parole decision is not final until after the expiration of the thirty-day gubernatorial review period, it cannot be said with certainty that the BPT would have granted Johnson parole had it possessed the final review authority.

Id., at 967 (citations omitted).[44] In reaching this conclusion, the Ninth Circuit adopted the reasoning set forth in a footnote in Dobbert:

For example, the jury's recommendation may have been affected by the fact that the members of the jury were not the final arbiters of life or death. They may have chosen leniency when they knew that that decision rested ultimately on the shoulders of the trial judge, but might not have followed the same course if their vote were final.

432 U.S. at 294 n.7.

Accordingly, this court cannot grant summary judgment solely on the undisputed facts that the plaintiffs were granted parole by the Board and had those decisions reversed by the Governor. Plaintiffs at trial will need to establish other facts tending to show, sufficient to meet their burden of proof, that the Governor's actions created a significant risk of increased incarceration.[45]

4. The Governor's Exercise of discretion.

Finally, plaintiffs seem to argue that the Governor's exercise of discretion is so much stricter than that exercised by the Board at the time of plaintiffs' crimes, that this also violates the Ex Post Facto clause. The resolution of this question seems particularly difficult because the actual length of incarceration depends upon the discretion of the decision-maker, whether it is the Board or the Governor. We are cautioned that:

The presence of discretion does not displace the protections of the Ex Post Facto Clause, however. The danger that legislatures might disfavor certain persons after the fact is present even in the parole context, and the Court has stated that the Ex Post Facto Clause guards against such abuse.

Garner, at 253 (citation omitted), citing Miller v. Florida, 482 U.S. 423, 435 (1987).

Despite this quoted language however, Garner does not stand for the proposition that a change in the exercise of discretion is a matter for the Ex Post Facto Clause. What Garner addressed was not "that discretion has been changed in its exercise," but that "it will not be exercised at all." Id., at 254. Moreover, the case upon which Garner relies for its discretion discussion, Miller v. Florida, similarly was not concerned with how discretion was exercised, but rather the fact that discretion could no longer be exercised at all until a newly interposed, "high hurdle" had been cleared. Miller, 482 U.S. at 435.[46]

In this case, plaintiffs do not present any evidence that the Governor failed to exercise his discretion.[47] Rather, they have presented evidence that the Governor exercised his discretion in a manner that resulted in a 70% reversal rate of parole grants by the Board. This cannot in itself be enough for this court to infer that the Governor did not exercise his discretion.

Moreover, it is not enough for the court to find that there was a significant risk of increased incarceration, as measured from the time the crime was committed. At the time the crimes were committed, the punishment included a discretionary grant of parole. That is the punishment assigned by law, and that is the punishment that cannot be increased for these plaintiffs.[48] The punishment included no promise that the discretion would be exercised liberally. Even assuming that the discretion was exercised in a profoundly more restrictive manner when plaintiffs came up for parole, than it was at the time of the offense, this court knows of no authority that this is prohibited by the Ex Post Facto Clause. Indeed, it is difficult to imagine this being the rule.

In essence, plaintiffs are asserting that the State may not shift the parole decision-making authority to a person who will exercise his discretion in a stricter manner than was being exercised at the time of the offense. The court knows of no legal basis for this view.[49] To the contrary, changes in the exercise of discretion — sometime stricter, sometimes less strict — are inherent in the very concept of discretionary parole:

to the extent there inheres in ex post facto doctrine some idea of actual or constructive notice to the criminal before commission of the offense of the penalty for the transgression, we can say with some assurance that where parole is concerned discretion, by its very definition, is subject to changes in the manner in which it is informed and then exercised. The idea of discretion is that it has the capacity, and the obligation, to change and adapt based on experience. New insights

into the accuracy of predictions about the offense and the risk of recidivism consequent upon the offender's release, along with a complex of other factors, will inform parole decisions.

Garner, 529 U.S. at 253-254.[50]

Accordingly, even if it is true that the Governor is stricter in granting parole, this is not a grounds for summary judgment for plaintiffs, if the Governor is properly exercising his discretion under the law. However, plaintiffs are free to attempt to show at trial, that the Governor is not actually exercising his discretion, or that he is abusing it, solely for the purpose of denying parole to prisoners. Such a showing would tend to support the charge that the enactment, as applied, has created a significant risk that plaintiffs' punishments are being increased retroactively.

C. Plaintiffs' Alternative Motion for Preliminary Injunction.

Plaintiffs move for an order preliminarily enjoining defendants from enforcing the provisions of Proposition 89, in the event they are not granted summary judgment on the claim. Although plaintiffs have adduced sufficient evidence to survive summary judgment, the court cannot find at this point, and to a preliminary injunction standard, that plaintiffs are "likely" to succeed on the merits of their Proposition 89 claim. Accordingly, the court will deny their alternate motion for a preliminary injunction.

IV. DEFENDANTS' MOTION FOR CLASS DECERTIFICATION

Defendants assert that the remaining classes should be decertified pursuant to Wal-Mart, 131 S. Ct. 2541. Specifically, they assert that under Wal-Mart, plaintiffs do not satisfy the "commonality" requirement.

This court has previously found, and the Ninth Circuit has affirmed, that plaintiffs satisfy the numerosity, commonality, typicality and adequacy requirements of Rule 23(a). Gilman v. Davis, 2009 WL 577767 (E.D. Cal.) (Karlton, J.), aff'd mem., 382 Fed. Appx. 544 (9th Cir. 2010). Defendants do not challenge the Rule 23(a) numerosity, typicality and adequacy findings, nor the Rule 23(b)(2) findings, and they are re-affirmed here. The only issue therefore, is Rule 23(a) "commonality."

To establish commonality, plaintiffs must establish that "that there are one or more questions of law or fact common to the class." Ellis, 657 F.3d at 980 citing Fed. R. Civ. P. 23(a)(2). It is sufficient that there be one common question "apt to drive the resolution of the litigation." Wal-Mart, 131 S. Ct. at 2556 ("We quite agree that for purposes of Rule 23(a)(2) even a single [common] question will do") (internal quotation marks omitted):

What matters to class certification . . . is not the raising of common "questions" — even in droves — but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.

Wal-Mart, 131 S. Ct. at 2551.[51]

Here, plaintiffs have shown that there is a common question that will affect every member of both classes: whether the challenged Propositions, as applied, have retrospectively created a significant risk that their punishment will be increased, by retrospectively lengthening their terms of incarceration. Moreover, they have adduced evidence from which the court could infer that the application of these Propositions has created this risk.[52]

Among the undisputed evidence plaintiffs presented to this effect in regard to Proposition 89 is that the Governor reviews every Board decision finding that a prisoner is "suitable" for parole, but reviews almost no Board decisions finding that a prisoner is "unsuitable" for parole. See PSUF ¶ D. In addition, plaintiffs' undisputed evidence shows that the Governor has reversed over 70% of the Board's decisions that prisoners were "suitable" for parole, but that of the few "unsuitable" determinations he reviewed, he affirmed 100% percent of them. Id., ¶¶ D & E.

As for Proposition 9, plaintiffs have shown that the Board's previous ability to carefully "tailor" the frequency of parole hearings as been removed as to all plaintiffs, as discussed above. They have also shown that the 90% or greater summary dismissal rate of advance hearing petitions affects the class members as a whole, as discussed above.

A declaration that the Governor has not properly applied Proposition 89, and an injunction requiring him to do so, would affect every member of the class, regardless of whether he has even reached his parole eligibility date. If plaintiffs can establish that the application of Proposition 89 has created a significant risk that their terms of incarceration would be increased — and especially if they can show that their sentences were increased to life without the possibility of parole — then the relief plaintiffs seek would eliminate the significant risk of increased punishment. Accordingly, the court will not decertify the remaining classes.

VII. CONCLUSION

For the foregoing reasons:

1. Plaintiffs' motion for summary judgment or, in the alternative, a preliminary injunction on Claim 9 (regarding Proposition 89) (ECF No. 428), is DENIED;

2. Defendants' motion for summary judgment on Claims 8 (regarding Proposition 9) and 9 (ECF No. 425), is DENIED;

3. Defendants' motion to decertify the remaining classes (ECF No. 426), is DENIED; and

4. All currently scheduled dates in this matter are CONFIRMED.

IT IS SO ORDERED.

[1] The classes were certified pursuant to Fed. R. Civ. P. 23(b)(2), which permits class members to "opt out" at the discretion of the court. See, e.g., Linney v. Cellular Alaska Partnership, 151 F.3d 1234, 1242 n.6 (9th Cir. 1998)

("This court has held that the option to opt-out is discretionary in cases, like this one, brought under Rule 23(b)(2)"). There appears to be no reason to deny these requesters the right to opt out in this case, and accordingly their pending requests to opt out of this class (ECF Nos. 450 & 474), are hereby GRANTED.

[2] The operative complaint here is the "[Corrected] Fourth Amended/Supplemental Complaint" ("Complaint") (ECF No. 175). See ECF No. 183 (authorizing this complaint to be filed). Plaintiffs have abandoned Claims 1, 3 and 6 (Due Process). See Plaintiffs' Opposition to Summary Judgment ("Pl. Opp. to SJ") (ECF No. 435) at 1. This court granted judgment on the pleadings for defendants on Claims 2, 4, 5 and 7 (ECF No. 420) (May 31, 2012).

[3] On March 4, 2009, this court granted plaintiffs' motion for class certification (ECF No. 182), and the Ninth Circuit affirmed that order on interlocutory appeal (Dkt. No. 257). Gilman v. Schwarzenegger, 382 Fed. Appx. 544 (9th Cir. 2010)(unpublished table decision). On April 25, 2011, this court modified the class definitions to their current configuration. ECF No. 340. The classes for Claims 1, 3 and 6 have already been decertified. ECF No. 445 (September 7, 2012).

[4] On February 4, 2010, this court denied defendants' motion to dismiss the Proposition 89 challenge (ECF No. 218). Gilman v. Davis, 2010 WL 434215 (E.D. Cal. 2010) (Karlton, J.). The court acknowledged that the Ninth Circuit had already rejected a facial challenge to Proposition 89, citing Johnson v. Gomez, 92 F.3d 964 (9th Cir. 1996), cert. denied, 520 U.S. 1242 (1997). However, the court determined that Garner v. Jones, 529 U.S. 244 (2000) provides for "both facial and as applied Ex Post Facto challenges." Accordingly, the court denied the motion to dismiss, leaving plaintiff free to make an "as applied" challenge to Proposition 89. On May 31, 2012, this court denied defendants' motion for judgment on the pleadings on the Proposition 89 challenge. (Dkt. No. 420). Defendants had argued that the claim was time-barred.

[5] Plaintiffs' requests to seal documents (ECF Nos. 427 & 439), all of which pertain to confidential Executive Case Summaries of prisoners, were granted in separate orders.

[6] "The Board of Parole Hearings replaced the Board of Prison Terms in July 2005." In re Lawrence, 44 Cal. 4th 1181, 1190 n.1 (2008).

[7] The California Supreme Court recently decided, in a habeas case, that Marsy's Law does not violate the Ex Post Facto Clause of the U.S. Constitution, on its face, or as applied to the petitioner. In re Vicks, 56 Cal. 4th 274 (2013). Although Vicks' conviction pre-dated Marsy's Law, the court "decline[d] to undertake an analysis of whether Marsy's Law violated ex post facto principles as it is being applied to life prisoners whose commitment offenses occurred before the passage of Marsy's Law; Vicks did not raise this contention below, and the evidence of which he seeks judicial notice does not provide a basis for this court to address the issue." Id. at 317. Accordingly, the question that is before this court is the very question the California Supreme Court declined to rule upon. In any event, while this court accords great respect to a constitutional decision of the state's highest court, this court is not bound by its interpretation of the federal Constitution. See Bittaker v. Enomoto, 587 F.2d 400, 402 n.1 (9th Cir. 1978), cert. denied, 441 U.S. 913 (1979).

[8] The five year deferral possibility applied to prisoners convicted of murder, and was added to the law in 1994. Cal. Penal Code § 3041.5(b)(2) (1995). Before that, deferrals could be for two, three or a maximum of five years, pursuant to several amendments to Section 3041.5. See Cal. Penal Code § 3041.5(b)(2) (1991) (reflecting 1990 amendments); Cal. Penal Code § 3041.5(b)(2) (1987) (reflecting 1981 and 1982 amendments).

[9] The considerations include the desire to impose "uniform terms for offenses of similar gravity and magnitude with respect to their threat to the public," compliance with the sentencing rules that the Judicial Council of California may issue, sentencing information relevant to the setting of parole release dates, the number of victims of the crime, as well as mitigating and aggravating factors. Cal. Penal Code § 3041(a); see also, See Cal. Admin. Code tit. 15, §§ 2289 (computation of parole date); Cal. Admin. Code tit. 15, §§ 2282 (base term), 2283 (aggravation of the base term); 2284 (mitigation of the base term); 2285-86 (enhancements for firearms use and for other reasons).

[10] The court cites the respective parties' statements of undisputed facts when the opposing party has not disputed the asserted fact.

[11] Page numbers refer to the CM/ECF page number, not the internal document page number.

[12] The amendment provides:

No decision of the parole authority of this state with respect to the granting, denial, revocation, or suspension of parole of a person sentenced to an indeterminate term upon conviction of murder shall become effective for a period of 30 days, during which the Governor may review the decision subject to procedures provided by statute. The Governor may only affirm, modify, or reverse the decision of the parole authority on the basis of the same factors which the parole authority is required to consider. The Governor shall report to the Legislature each parole decision affirmed, modified, or reversed, stating the pertinent facts and reasons for the action.

Cal. Const. Art. V, § 8(b).

[13] Plaintiffs have already met their burden to establish that class certification is proper. Nevertheless, in this Circuit, it again bears the burden on this motion, even though it is defendants' motion:

as to the class-decertification issue, Marlo, as "[t]he party seeking class certification [,] bears the burden of demonstrating that the requirements of Rules 23(a) and (b) are met."

Marlo v. United Parcel Service, Inc., 639 F.3d 942, 947 (9th Cir. 2011).

[14] It is undisputed that the enactment is retrospective, that is, it applies to prisoners whose offenses occurred before Proposition 9 was enacted.

[15] Another point noted by the Court was its conclusion that it was purely speculative whether an earlier release date can be secured by more frequent parole hearings. Morales, 514 U.S. at 513. That is because it held that, even if parole were granted at the initial hearing, the actual release date could be set years after the parole hearing, depending on the Board's calculation of his "base term," the base term being calculated from a matrix used by the Board.

[16] This possibility was "suggested" by the California Supreme Court in In re Jackson, 39 Cal. 3d 464, 475 (1985) ("it is conceivable that the Board could advance the suitability hearing and order immediate release"). It was also "indicated" by the CDC in a footnote to its Supreme Court Reply Brief, Petitioner's Reply Brief in CDC v. Morales, at 3 n.1, 1994 WL 707994 ("the practice of the Board is that it will review for merit any communication from an inmate asking for an earlier suitability hearing").

[17] For example, if a prisoner is denied parole and has his next parole hearing deferred for the default interval — fifteen years — he can seek an advance hearing at any time thereafter. However, if his requested advance hearing is denied (or granted, but parole is denied), he can only seek another advance hearing every three years, until the fifteen year deferral is completed.

[18] This court rejected plaintiffs' argument that the Board was free to simply deny an advance hearing even if a prisoner had made the required showing. See Gilman, 690 F. Supp. 2d at 1122 (the court "must assume that the Board will exercise a neutral grant of discretion in a manner consistent with the Ex Post Facto Clause").

[19] Plaintiffs also objected that: there was "`no mechanism or procedure in place for the Board to initiate a review or to accept, consider or rule on a prisoner's request [for an advance hearing,'" but they adduced no evidence that the Board "denied or failed to respond to requests for advance hearings;" an advance hearing will not be held within a year of the request, but failed to adduce any evidence to that effect; and prisoners would not be able to establish

changed circumstances warranting earlier parole, but they failed to show that the task differed from the ordinary request for parole, in which the prisoner must show changed circumstances warranting parole.

[20] The failure to grant an advance hearing is reviewable in court for a "manifest abuse of discretion." Cal. Penal Code § 3041.5(d)(2).

[21] "If the request is denied, the inmate may not make another request for three years. Similarly, if the Board holds an earlier parole suitability hearing — `a hearing described in subdivision (a)' — rather than denying the request, and it declines to set a parole date after the hearing, the inmate may not make another request for three years after this more recent decision of the Board." Vicks, 56 Cal. 4th at 286.

[22] In addition, eight were denied following a "full review," and five were granted. Of the five that were granted, three advance hearings were scheduled, and two had not been scheduled. PSUF-Additional ¶¶ 17 & 18.

[23] Plaintiffs rely on Summary Exhibit 37 from the April 6, 2011 preliminary injunction hearing, conducted after the Ninth Circuit's decision in Gilman, for this fact. Defendants do not dispute this fact.

[24] These exhibits were also admitted at the April 6, 2011 preliminary injunction hearing. Defendants do not dispute the facts asserted, although they argue that the subsequent findings of suitability could just be the result of different decision-makers reaching different decisions. On this summary judgment motion, the court draws the reasonable inference that these prisoners established to the satisfaction of the Board that they were "suitable" for parole, and that they did so at an earlier time than they could have done under the advance hearing procedure.

[25] Plaintiffs include class plaintiff Billy Counts in this group. PSUF-Additional ¶ 40. However, Counts' request for an advance hearing was made after he had already been granted an earlier (one-year) deferral, and his request was denied after he had already been granted parole. The court cannot draw any inference from this case that the advance hearing process fails to "catch" prisoners who have moved to suitability.

[26] For example, it may be unnecessarily complex, preventing unrepresented prisoners from successfully navigating it.

[27] Obviously, the court is not finding that plaintiffs have proven their position; rather, the court is simply saying that the factual posture is such as to permit them to prove their assertion at trial.

[28] It is undisputed that the enactment is retrospective, that is, it applies to prisoners whose offenses occurred before Proposition 89 was enacted.

[29] The Board of Parole Hearings, is an Executive Branch agency whose members are all appointed by the governor, with the consent of the state senate (Cal. Gov. Code § 12838.4).

[30] The Governor already had the authority to grant a reprieve, pardon, or commutation of the sentence of any prisoner. See Cal. Const. Art. V, § 8(a). Plaintiffs therefore argue that Proposition 89 only added the power to lengthen incarcerations, by reversing grants of parole. However, it also added the power to shorten an incarceration, by giving the Governor a new option, namely, granting parole even though the Board did not authorize it (however, there is no evidence in the record that this has ever happened). In this way, in theory, while a Governor might decline to commute a sentence entirely (thus releasing the prisoner into the population without supervision), the Governor might, at least theoretically, be willing to grant parole (and its consequent supervision) to that same prisoner.

[31] In any event, this court has already rejected defendants' argument in the motion to dismiss this claim, and it is now the law of the case. See Gilman v. Davis, 2010 WL 434215 at *3-*4.

[32] "In California, `[b]allot summaries . . . in the "Voter Information Guide" are recognized sources for determining the voters' intent.'" Perry v. Brown, 671 F.3d 1052, 1090 n.25 (9th Cir.) (quoting People v. Garrett, 92 Cal. App. 4th 1417, 1426 (2001)), cert. granted, 133 S. Ct. 786 (2012).

[33] However, if the legislature's intent "was to enact a regulatory scheme that is civil and nonpunitive, we must further examine whether the statutory scheme is "`so punitive either in purpose or effect as to negate [the State's] intention' to deem it `civil.'" Id.

[34] And, as discussed above, they were able to make their case every year, rather than once every fifteen years.

[35] In fact, the hurdle is even greater than might otherwise appear, since it appears the prisoner does not even have the right to make his case to the Governor.

[36] It is undisputed that from 1991 to 2011, the Governor reviewed only three (3) denials of parole, and he affirmed all three. PSUF ¶ D. During the same period, the Governor reversed 70% of Board decisions finding the prisoner "suitable" for parole. PSUF ¶ E.

[37] Plaintiffs also assert: "The evidence establishes a significant risk that prisoners with murder convictions will do more custodial time after Proposition 89 than they would do if the old law still applied." Plaintiff's SJ Motion at 9 (ECF No. 428-1). However, the undisputed evidence does not show this. The only evidence in plaintiffs' statement of undisputed facts relates to parole decisions under the new law. Plaintiffs have asserted in their Reply brief that the Board's suitability finding was 6.1% under the old law and the new law. However this assertion is not included in the Statement of Undisputed Facts, and defendants have had no opportunity to dispute or concede it.

[38] Plaintiffs also assert that 70 percent of challenges to the Governor's reversals "resulted in the prisoner obtaining relief." The court is not clear as to what the assertions means, and in any event, the assertion does not explain how that affects this case.

[39] It may well be that the frequency of reversal will vary from Governor to Governor, that however, does not affect the risk of prolonged incarceration.

[40] When petitioner's crime was committed, Utah was a territory, and thus was considered bound by the Sixth Amendment. At the time, it was thought that the Sixth Amendment required a twelve-person jury. By the time of petitioner's second trial, Utah had become a state. At the time, it was thought that States were not bound by the Sixth Amendment, and therefore no longer required to use twelve-person juries. Later cases established that the Sixth Amendment does apply to the States, but that it does not require twelve-person juries. Williams v. Florida, 399 U.S. 78, 103 (1970) (after petitioner was convicted by 6-person jury and sentenced to life in prison, Court holds that "the 12-man panel is not a necessary ingredient of `trial by jury,' and that respondent's refusal to impanel more than the six members provided for by Florida law did not violate petitioner's Sixth Amendment rights as applied to the States through the Fourteenth").

[41] Viewed another way, petitioner now had to convince 1 out of 8 jurors to acquit, rather than only 1 out of 12.

[42] Thompson was overruled to the degree it held that retroactive procedural statutes violate the Ex Post Facto Clause unless they "`leave untouched all the substantial protections with which existing law surrounds the person accused of crime,'" Lynaugh, supra, at 959 (quoting 170 U.S., at 352).

[43] The superior court determined that the criminal court had allowed facts to be used against Petitioner even though the law prohibited their use, and because the trial judge failed to submit to the jury the question of whether the prosecution was barred by the statute of limitations. Mallett, 34 S.E. at 652.

[44] The Supreme Court clarified that the standard here is whether the enactment creates a "significant risk" of increased incarceration, rather than a "certainty" of increased incarceration. See Garner, 529 U.S. at 251.

[45] For example, plaintiffs may be able to show that the Board's rate of parole grants did not change once Proposition 89 was enacted. This would undermine any speculation that the Board became more lenient only because it knew that the final decision-maker, the Governor, could reverse their decision.

[46] As the Court stated:

Nor do the revised guidelines simply provide flexible "guideposts" for use in the exercise of discretion: instead, they create a high hurdle that must be cleared before discretion can be exercised.

Miller, 482 U.S. at 435.

[47] Plaintiffs have produced no undisputed evidence that the Governor refuses to exercise his discretion at all, nor that he reversed parole grants regardless of the circumstances, and without considering the factors he is required to consider. The court assumes, without deciding, that such conduct would illegally increase the penalty prescribed by law by changing the penalty from "life with the possibility of parole" to "life without the possibility of parole." Nor is there evidence that the Governor is using proscribed criteria to make his parole decisions, such as "no parole unless at least 20 years have been served," or "no parole unless Haley's Comet is in the sky." The court assumes, without deciding, that such conduct would illegally increase the penalty to "life without the possibility of parole for the first 20 years," or "life with only a very remote possibility of parole."

[48] The Ex Post Facto Clause

forbids the imposition of punishment more severe than the punishment assigned by law when the act to be punished occurred. Critical to relief under the Ex Post Facto Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated.

Weaver, 450 U.S. at 30-31 (emphases added).

[49] Plaintiffs implicitly seem to agree with this analysis. Plaintiffs' only request for relief set forth in the Complaint is that the Governor review parole decisions "based on the same factors the Board is required to consider, as required by [Proposition 89]." Complaint ¶ 5. In effect, plaintiffs seek an "obey the law" injunction. There is no request that the law be declared in violation of the ex post facto clause, or that the Governor be required to decrease his reversal rate, or that he be required to review more parole denials. The only request sought is that the Governor be required to exercise his discretion as set forth in Proposition 89. Unfortunately for plaintiffs' summary judgment motion, nothing they have submitted shows — beyond any genuine dispute — that the Governor is not already doing so. Rather, their evidence permits the court to draw the reasonable inference that the Governor is simply reaching different conclusions than the Board.

[50] At oral argument, the Court pondered whether the real-world impact of politics on the Governors' decisions could play a role in his parole decisions, since the Board is more insulated from such considerations, whereas the Governor may feel under pressure to opt for longer punishment to avoid the wrath of the voters. Ultimately, however, this pressure is what democracy is all about. Equally important, it only addresses how the Governor chooses to exercise his discretion, a matter that, as Garner explains, is contemplated by the very nature of "discretion."

[51] Quoting Nagareda, Class Certification in the Age of Aggregate Proof, 84 N.Y.U.L. Rev. 97, 131-132 (2009).

[52] At the extremes, the court could infer that their terms were retrospectively increased from life with the possibility of parole, to life without the possibility of parole.