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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

JERRY VALDIVIA, ALFRED YANCY,  
and HOSSIE WELCH, on their own  
behalf and on behalf of the class  
of all persons similarly situated,

Plaintiffs,

NO. CIV. S-94-671 LKK/GGH

v.

O R D E R

EDMUND G. BROWN, JR., Governor of  
the State of California, et al.,

Defendants.

\_\_\_\_\_ /

In 1994, plaintiffs commenced this action, which challenged the constitutionality of California's then-existing parole revocation system. In 2011, California began enacting legislation, commonly known as "Realignment," that significantly altered the state's criminal justice system. The question before this court is whether, in light of Realignment, this lawsuit remains the proper vehicle for ensuring that parolees receive Constitutionally-guaranteed due process protections. Having carefully considered the question, the court concludes that this case became moot as of July

1 1, 2013, when the new parole revocation system was scheduled to go  
2 fully into effect. Accordingly, for the reasons set forth below,  
3 the plaintiff class will be decertified and this matter dismissed.

4 **I. BACKGROUND**

5 **A. History of the litigation**

6 On May 2, 1994, plaintiffs filed the instant lawsuit,  
7 challenging California's parole revocation procedures under the  
8 Fourteenth Amendment. Plaintiffs' initial complaint alleged that  
9 "[t]he Defendants and by and through the Department of  
10 Corrections . . . continue a practice of revocation of parole and  
11 remand of parolees, in violation of law as alleged herein, which  
12 practice has been continuing for many years." (Complaint ¶ 48, ECF  
13 No. 1.) Class certification was sought on the grounds that "[i]n  
14 general, the common questions of law and fact involve the summary  
15 remand to prison of parolees without due consideration of the right  
16 to counsel and without due process of law, in violation of Gagnon  
17 v. Scarpelli, [411 U.S. 778 (1973)] and Morrissey v. Brewer, [408  
18 U.S. 471 (1972)]." (Id. ¶ 58.)

19 On December 1, 1994, the court certified a plaintiff class  
20 consisting of California parolees (1) who are at large; (2) who are  
21 in custody as alleged parole violators awaiting revocation of their  
22 parole status; or (3) who are in custody having been found in  
23 violation of parole. (Order, ECF No. 76)

24 The parties engaged in discovery for several years thereafter.  
25 On June 13, 2002, the court granted partial summary judgment in  
26 favor of plaintiffs, finding that California's parole revocation

1 hearing system failed to safeguard plaintiffs' procedural due  
2 process rights under Morrissey, 408 U.S. at 487-90, and Gagnon, 411  
3 U.S. at 786. The court's order emphasized that, in order to ensure  
4 adequate due process, probable cause hearings must be both accurate  
5 and promptly-held. See Valdivia v. Davis, 206 F. Supp. 2d 1068  
6 (E.D. Cal. 2002).

7 Four months later, the court ordered defendants to file a  
8 proposed remedial plan to address identified due process  
9 violations. The court also directed the parties to meet and confer  
10 so that defendants could adapt the proposed remedial plan into a  
11 proposed remedial order to be presented to the court. (Order, Oct.  
12 18, 2002, ECF No. 742.)

13 After some delay, defendants filed a proposed remedial plan,  
14 to which plaintiffs objected. (ECF No. 784.) At the hearing on  
15 plaintiff's objections, defendants indicated "that they would  
16 appreciate guidance from the court on precisely what the  
17 Constitution requires with respect to the timing and substance of  
18 the preliminary parole revocation hearing." (Order at 3, July 23,  
19 2003, ECF No. 796.) In a subsequent order, the court initially  
20 expressed its hesitation at so doing, in light of the principle  
21 that "due process is flexible and calls for such procedural  
22 protections as the particular situation demands." Morrissey, 408  
23 U.S. at 481. Nevertheless, in order to facilitate the development  
24 of an adequate remedy, the court undertook a comprehensive review  
25 of the case law surrounding the promptness of probable cause  
26 hearings in the parole context, as well as in the context of other

1 constitutional deprivations, and advised as follows:

2 [A] period of ten days strikes a reasonable balance  
3 between inevitable administrative delays and the  
4 state's interest in conducting its parole system, on  
5 the one hand, and the liberty interests of parolees,  
6 on the other. I conclude that the Constitution simply  
7 does not tolerate the state's detaining parolees for  
8 over ten days, with all the attendant disruptions such  
9 detention entails, without affording a preliminary  
10 hearing to determine whether there is probable cause  
11 for the detention. (Id. at 13.)<sup>1</sup>

12 The court then set forth the following minimum standards for  
13 probable cause hearings: that they be conducted by a neutral  
14 decisionmaker, that parolees have an opportunity to both present  
15 documentary evidence and witnesses, and to cross-examine adverse  
16 witnesses, and that the hearing's results be documented in a  
17 written report. Alternatively, defendants could hold a unified  
18 hearing that was sufficiently prompt and the content of which met  
19 the due process requirements for both probable cause and revocation  
20 hearings. (Id. at 15-16.)

21 Ultimately, the parties filed a stipulated order for permanent

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22 <sup>1</sup> It *absolutely* does not follow from this determination that  
23 detention for periods of ten days or less, without notice and a  
24 preliminary hearing, is constitutionally adequate in all  
25 circumstances. The ten day limit was a highly context-specific  
26 determination; per Morrissey, 408 U.S. at 481, it was the level of  
"procedural protections as the particular situation demand[ed]." The principal consideration in determining whether notice and hearing is sufficiently timely is that "[t]he effect of detention itself, in its disruption of the parolee's family relationship, job, and life, is sufficiently significant [so as] to require" procedural due process safeguards. Valdivia, 206 F. Supp. 2d at 1078. "The process due must include procedures which will prevent parole from being revoked because of 'erroneous information or because of an erroneous evaluation.'" Id. at 1074 (quoting Morrissey, 408 U.S. at 484).

1 injunctive relief, which the court entered. (Order, March 8, 2004  
2 ("Injunction"), ECF No. 1034.) The parties to the Injunction were  
3 the previously-certified plaintiff class and "the [defendant] state  
4 officials responsible for the policies and procedures by which  
5 California conducts parole revocation proceedings." (Injunction  
6 ¶ 8.) All of these defendants were members of the state's executive  
7 branch. Critical provisions of the Injunction include:

- 8 1. Notice of charges and rights, to be served on parolees  
9 not later than three business days from the placement  
10 of a parole hold. (Injunction ¶ 11(b)(iii).)
- 11 2. Probable cause hearings, to be held no later than 10  
12 business days after parolees are served notice of  
13 charges and rights. (Injunction ¶ 11(d).)
- 14 3. Appointment of counsel for all parolees at the  
15 beginning of the Return to Custody Assessment<sup>2</sup> stage  
16 of the revocation proceedings. (Injunction ¶  
17 11(b)(i).)
- 18 4. Expedited probable cause hearings, if appointed  
19 counsel makes a sufficient offer of proof of a  
20 complete defense to all parole violation charges.  
21 (Injunction ¶ 11(b)(i).)
- 22 5. The ability of parolees' counsel to subpoena and  
23 present witnesses and evidence to the same extent and  
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25 <sup>2</sup> "Return to Custody Assessment" refers to "the practice by  
26 which Defendants offer a parolee a specific disposition in return  
for a waiver of the parolee's right to a preliminary or final  
revocation hearing, or both." (Injunction ¶ 9(d).)

1 under the same terms as the state. (Injunction ¶ 21.)

2 6. Adequate allowance, at probable cause hearings, for  
3 parolees to present evidence to defend or mitigate  
4 against the charges and proposed disposition. Such  
5 evidence may be presented through documentary evidence  
6 or through the charged parolee's testimony, either or  
7 both of which may include hearsay testimony.

8 (Injunction ¶ 22.)

9 7. Limitations on the use of hearsay evidence at hearing  
10 in light of parolees' confrontation rights, as  
11 provided for in United States v. Comito, 177 F.3d 1166  
12 (9th Cir. 1999). (Injunction ¶ 24.)

13 8. Parole revocation hearings to be held no later than 35  
14 calendar days from the date of placement of a parole  
15 hold. (Injunction ¶¶ 11(b)(iv), 23.)

16 The Injunction also addressed topics such as provision of  
17 assistance for parolees with communicative or cognitive  
18 impairments, training of appointed counsel, and the handling of  
19 confidential information. The Injunction does not specify an end  
20 date for court supervision, providing instead that "[t]he Court  
21 shall retain jurisdiction to enforce the terms of this Order. The  
22 Court shall have the power to enforce [these terms] through  
23 specific performance and all other remedies permitted by law or  
24 equity." (Injunction ¶ 28.)

25 Defendants subsequently moved, successfully, for the  
26 appointment of a Special Master, and on December 16, 2005, the

1 court appointed Chase Riveland to that position. (ECF Nos. 1198,  
2 1213, 1245.) The Special Master has subsequently filed thirteen  
3 reports with the court addressing implementation of the Valdivia  
4 Injunction, as well as the court's subsequent orders herein. (ECF  
5 Nos. 1302, 1335, 1388, 1479, 1483, 1539, 1570, 1585, 1647, 1730,  
6 1750, 1783.)<sup>3</sup>

7 **B. Proposition 9**

8 On November 4, 2008, California voters passed Proposition 9,  
9 entitled "Victims' Bill of Rights Act of 2008: Marsy's Law."  
10 Proposition 9's amendments to the California Penal Code altered a  
11 number of the parameters for the parole revocation system that had  
12 been mandated by the Injunction. Plaintiffs moved to enjoin  
13 enforcement of portions of Penal Code § 3044 (enacted by Prop. 9)  
14 as conflicting with provisions of the Injunction; defendants cross-  
15 moved to modify the Injunction to conform to Proposition 9.  
16 Valdivia v. Schwarzenegger, 603 F. Supp. 2d 1275 (E.D. Cal. 2009).  
17 After hearing, the court denied defendants' motion, and granted  
18 plaintiffs' motion in substantial part. Id. On appeal, the Ninth  
19 Circuit held that the court had erred by failing to make an  
20 "express determination that any aspect of the California parole  
21 revocation procedures, as modified by Proposition 9, violated  
22 constitutional rights, or that the Injunction was necessary to  
23 remedy a constitutional violation . . . ." Valdivia v.  
24 Schwarzenegger, 599 F.3d 984, 995 (9th Cir. 2010). On remand, the

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25 <sup>3</sup> The Special Master's Ninth Report does not appear to have  
26 been docketed.

1 court determined that the following aspects of Cal. Penal Code §  
2 3044, as enacted by Section 5.3 of Proposition 9, were  
3 unconstitutional:

4 (1) Holding probable cause hearings no later than 15 days  
5 after the parolee's arrest for parole violations "did not  
6 guarantee a prompt probable cause hearing with all of the  
7 minimum process set forth in Morrisey." Valdivia v. Brown,  
8 No. S-94-671-LKK-GGH, 2012 WL 219342 at \*6, 2012 U.S. Dist.  
9 LEXIS 8092 at \*21 (E.D. Cal. Jan. 24, 2012).

10  
11 (2) Providing parolees with counsel on a case-by-case  
12 basis, and even then, only for those parolees who were both  
13 indigent and "incapable of speaking effectively in [their]  
14 own defense," both "deprived [parolees] of the right to  
15 notice of the right to counsel" and failed, under Gagnon,  
16 to provide for "a presumptive right to counsel when the  
17 parolee makes a colorable claim that he has not committed  
18 the alleged violations or claims colorable mitigation."  
19 Id., 2012 WL 219342 at \*8, 2012 U.S. Dist. LEXIS 8092 at  
20 \*26. The court also found that ¶ 11(b)(i) of the  
21 Injunction, under which all parolees are appointed counsel  
22 beginning at the Return to Custody Assessment stage, "is a  
23 properly tailored remedy . . . [which] addresses and  
24 relates to a Constitutional violation[.]" Id., 2012 WL  
25 219342 at \*9, 2012 U.S. Dist. LEXIS 8092 at \*28.  
26



1 (3) Modifying the decision criteria for the Board of Parole  
2 Hearings ("BPH"), e.g., by "entrust[ing]" BPH "with the  
3 safety of victims and the public" and including  
4 requirements that BPH "not be influenced by or weigh the  
5 state cost or burden associated with just decisions," was  
6 unconstitutional under Morrissey in its violation of  
7 parolees' right to a neutral decisionmaker, and under Brown  
8 v. Plata, \_\_ U.S. \_\_, 131 S. Ct. 1910 (2011) in its  
9 interference with California's constitutionally-mandated  
10 efforts to reduce its prison population. Id., 2012 WL  
11 219342 at \*10, 2012 U.S. Dist. LEXIS 8092 at \*31-32.

12  
13 (4) Finally, allowing the unconditional use of hearsay  
14 evidence in parole revocation hearings was  
15 unconstitutional, as it did not permit the balancing of  
16 "the releasee's interest in his constitutionally guaranteed  
17 right to confrontation against the Government's good cause  
18 for denying it." Id., 2012 WL 219342 at \*11, 2012 U.S.  
19 Dist. LEXIS 8092 at \*34 (quoting Comito, 177 F.3d at 1170  
20 (9th Cir. 1999)).

21 The court ultimately granted plaintiffs' motion to enforce the  
22 Injunction, though it did modify its terms to specify, consonant  
23 with Proposition 9, that parole revocation hearings were to be  
24 held no later than 45 days after placement of the parole hold.  
25 Id., 2012 WL 219342 at \*12, 2012 U.S. Dist. LEXIS 8092 at \*39.

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1           **C. Realignment**

2           From the inception of this lawsuit until the present, the  
3 California Department of Corrections and Rehabilitation ("CDCR")  
4 has been largely responsible for the parole system's functioning.  
5 BPH, a board operating under the auspices of CDCR, has been  
6 responsible for conducting probable cause and parole revocation  
7 hearings, and for functions such as issuing arrest warrants for  
8 suspected parole violators. CDCR's Division of Adult Parole  
9 Operations ("DAPO") has overseen much of the rest of the parole  
10 system.

11           This system began to change on April 4, 2011, when the  
12 Governor signed Assembly Bill 109, entitled "The 2011 Realignment  
13 Legislation Addressing Public Safety."<sup>4</sup> AB 109, *inter alia*,  
14 transferred substantial responsibilities for the parole system to  
15 county authorities, and called for state courts "to perform various  
16 parole-related functions, including . . . conducting parole  
17 discharge, retention, and revocation proceedings[,] and modifying  
18 terms and conditions of parole . . . ." (Memorandum from  
19 Administrative Office of the Courts, May 20, 2011, Decl. Ernest  
20 Galvan, Ex. 2 at 4, ECF No. 1829-3.) Subsequent legislative  
21 enactments<sup>5</sup> have narrowed the state courts' role to conducting  
22 parole revocation proceedings, and have clarified the counties' and

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24           <sup>4</sup> Cal. Stats. 2011, ch. 15.

25           <sup>5</sup> See, e.g., AB 117, Cal. Stats. 2011, ch. 39; AB 116, Cal.  
26 Stats. 2011, ch. 136; AB 17, Cal. Stats. 2011-2012, 1st Ex. Sess.,  
ch. 12; AB 1470, Cal. Stats. 2012, Ch. 24; SB 1144, Cal. Stats.  
2012, ch. 867; SB 1023, Cal. Stats. 2012, ch. 43.

1 the state's respective responsibilities in the post-Realignment  
2 parole system. Briefly, beginning on July 1, 2013, this system is  
3 expected to function as set out below.

4 DAPO will supervise the parole of individuals convicted of any  
5 of the following: (1) serious felonies (as described in Cal. Penal  
6 Code § 1192.7(c)), (2) violent felonies (as described in Cal. Penal  
7 Code § 667.5), (3) "third strikes," (4) crimes where the person is  
8 classified as a High Risk Sex Offender, and (5) crimes where the  
9 person is required, as a condition of parole, to undergo treatment  
10 by the Department of Mental Health. Cal. Penal Code § 3000.08(a).<sup>6</sup>  
11 DAPO will also continue to supervise parolees who were under its  
12 supervision prior to July 1, 2013. State courts will be responsible  
13 for hearing petitions for parole revocation and imposing parole  
14 terms for these individuals. Individuals paroled from life terms  
15 in prison will also be under DAPO supervision, and subject to the  
16 jurisdiction of BPH for purposes of parole revocation hearings.  
17 Cal. Penal Code. § 3000.1.<sup>7</sup>

18 All other individuals subject to parole will be released to  
19 Postrelease Community Supervision ("PRCS"), to be supervised by  
20 county probation departments. Cal. Penal Code § 3000.08(b). Those  
21 prisoners who were sent to county jails to complete their terms in  
22

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23 <sup>6</sup> All citations to Cal. Penal Code § 3000.08 are to the  
24 version operative on July 1, 2013.

25 <sup>7</sup> The parties have long disputed whether so-called "lifers"  
26 are members of the Valdivia class. The court has never been called  
upon to decide this issue, and finds it unnecessary to do so  
herein.

1 the initial stage of Realignment (which began on October 1, 2011)  
2 are similarly subject to PRCS, rather than DAPO parole supervision.  
3 (Viera Rose Decl. ¶ 6., ECF No. 1825.) The parties appear to agree  
4 that individuals subject to PRCS should not be considered part of  
5 the Valdivia class.<sup>8</sup> For convenience, the court will use the term  
6 "parolee" hereinafter to refer to those individuals subject to DAPO  
7 supervision after July 1.

8 If DAPO suspects a parolee of having violated the terms and  
9 conditions of parole, it may do one of the following:

10 (1) Return the parolee to custody without a warrant (*i.e.*,  
11 place a "parole hold" on the parolee). Cal. Penal Code  
12 §§ 1203.2(a), 3000.08(c), 3056; or

13 (2) Seek a warrant from the state court for the parolee to  
14 be returned to custody. Cal. Penal Code §§ 1203.2(a),  
15 3000(b)(9)(A), 3000.08(c). The state court has the  
16 authority to summarily revoke parole at this stage. Cal.  
17 Penal Code § 1203.2(a).

18 Once a parolee is in custody, DAPO determines whether there is  
19 probable cause to believe "that [he or she] has committed a  
20 violation of law or violated his or her conditions of parole." Cal.  
21 Penal Code § 3000.08(d). If it so finds, DAPO may either apply  
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24 <sup>8</sup> Defendants explicitly assert that "[i]ndividuals released  
25 to PRCS are not parolees." (Defendants' Opening 2, ECF No. 1824.)  
26 Plaintiffs implicitly concede this point, as their briefing  
addresses those elements of the parole revocation process that  
remain under the jurisdiction of DAPO and/or BPH.

1 intermediate sanctions (including "flash incarceration")<sup>9,10</sup> without  
2 involvement of the state court, or apply to the state court for  
3 parole revocation. Cal. Penal Code § 3000.08(d)-(f). Before seeking  
4 parole revocation, DAPO must determine that intermediate sanctions  
5 are "not appropriate" for the parolee. Cal. Penal Code  
6 § 3000.08(f).

7 DAPO initiates the parole revocation process by filing a  
8 petition with the state court, which must include "a written report  
9 that contains additional information regarding the petition,  
10 including the relevant terms and conditions of parole, the  
11 circumstances of the alleged underlying violation, the history and  
12 background of the parolee, and any recommendations." Id. The  
13

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14 <sup>9</sup> Cal. Penal Code § 3000.08(e) defines "flash incarceration"  
15 as "a period of detention in county jail due to a violation of a  
16 parolee's conditions of parole. The length of the detention period  
17 can range between one and 10 consecutive days." The statute also  
18 provides that "[s]horter, but if necessary more frequent, periods  
of detention for violations of a parolee's conditions of parole  
shall appropriately punish a parolee while preventing the  
disruption in a work or home establishment that typically arises  
from longer periods of detention." Id.

19 <sup>10</sup> Guillermo Viera Rosa, DAPO's Acting Associate Director,  
20 avers that, "Despite DAPO's authority to impose terms of flash  
incarceration upon parolees under its supervision on or after July  
21 1, 2013, DAPO will not utilize flash incarceration pursuant to  
Penal Code sections 3000.08 and 1203.2(g)." (Viera Rosa Decl. ¶ 9,  
22 ECF No. 1825.) Plaintiffs attack this averment on the grounds that  
it is insufficient as a matter of law to foreclose the use of flash  
23 incarceration; as no legislation prohibits DAPO's use of the  
sanction, DAPO could use it at any time. See Bell v. City of Boise,  
24 709 F.3d 890 (9th Cir. 2013) (holding that voluntary cessation of  
challenged activity that could be resumed as soon as case is  
25 dismissed does not moot plaintiffs' claims for relief). The court  
need not weigh Mr. Viera Rosa's declaration, as its decision herein  
26 does not rest on whether DAPO has permanently forsworn flash  
incarceration.

1 parolee must be "informed of his or her right to consult with  
2 counsel, and if indigent the right to secure court appointed  
3 counsel." Cal. Penal Code § 1203.2(b)(2). While a hearing on the  
4 petition is pending, "a parolee may waive, in writing, his or her  
5 right to counsel, admit the parole violation, waive a court  
6 hearing, and accept the proposed parole modification or  
7 revocation." Cal. Penal Code § 3000.08(f); see also Cal. Penal Code  
8 § 1203.2(b)(2) ("Upon the agreement by the supervised person in  
9 writing to the specific terms of a modification or termination of  
10 a specific term of supervision, any requirement that the supervised  
11 person make a personal appearance in court for the purpose of a  
12 modification or termination shall be waived").

13         The revocation hearing is to be conducted by the superior  
14 court, specifically, a "judge, magistrate, or revocation hearing  
15 officer described in Section 71622.5 of the Government Code." Cal.  
16 Penal Code § 1203.2(f). The statutory scheme does not prescribe a  
17 time frame in which the revocation hearing must be held. Upon  
18 finding that a parolee has violated parole conditions, the court  
19 has a number of alternatives, including revoking parole, returning  
20 the parolee to parole supervision with a modification of parole  
21 conditions (including a period of incarceration), referring the  
22 parolee to an evidence-based program such as a reentry court, or  
23 placing the parolee under electronic monitoring. Cal. Penal Code  
24 §§ 3000.08(f), 3004(a). With certain exceptions, e.g., for  
25 individuals previously sentenced to life terms, parolees whose  
26 parole is revoked or modified are incarcerated in county jail. Cal.

1 Penal Code §§ 3000.08(f), (h).

2 BPH's responsibilities after July 1, 2013 include:

- 3 • Determining inmate parole eligibility. Cal. Penal Code  
4 §§ 3000, 3040.
- 5 • For parolees arrested pursuant to warrants issued by  
6 BPH before July 1, 2013, reviewing their cases before  
7 DAPO may file a petition with the court to revoke  
8 their parole. Cal. Penal Code § 3000(b)(9)(B).
- 9 • If, at a revocation hearing, the state court  
10 determines that a parolee (i) has violated the law or  
11 the terms of his/her parole, and (ii) was previously  
12 sentenced to an indeterminate life sentence or a  
13 determinate sentence for certain sex crimes, BPH  
14 (rather than the court) has jurisdiction to determine  
15 how long the parolee will be incarcerated. Cal. Penal  
16 Code §§ 3000(b)(4), 3000.1, 3000.08(h).

17 **D. Current Order**

18 Upon initial review, it appeared to the court that the post-  
19 Realignment parole revocation system was sufficiently different  
20 from the system addressed by Valdivia so as to implicate mootness  
21 concerns. Accordingly, on May 6, 2013, the court issued an order  
22 directing the parties to brief the following issues:

23 (a) As of July 1, 2013, which elements of the parole  
24 system that were formerly the exclusive responsibility  
25 of defendants will now be the exclusive responsibility  
26 of county authorities and/or the state judiciary?

(b) As of July 1, 2013, which elements of the parole  
system that were formerly the exclusive responsibility

1 of defendants will now be the shared responsibility of  
2 defendants, county authorities, and the state  
3 judiciary? What will defendants', county authorities',  
4 and the state judiciary's respective responsibilities  
5 be as to these shared elements?

6 (c) Will defendants bear responsibility for elements  
7 of the parole system that are newly-created by  
8 Realignment, such as "flash incarceration"?

9 (d) Is Valdivia moot as a result of Realignment?

10 (e) If Valdivia is not moot, in what ways should the  
11 class definition and/or the Valdivia Remedy be altered  
12 to reflect Realignment's changes to the parole system?  
13 (Order, ECF No. 1823.)

14 The parties filed opening briefs on May 28, 2013, and reply briefs  
15 on June 11, 2013, together with supporting materials.

16 Defendants' position is that the post-July 1, 2013 parole  
17 revocation system is so different from the prior system as to  
18 require the plaintiff class to be decertified, and this case  
19 dismissed. Defendants argue for dismissal on the grounds of  
20 standing, mootness, and/or abstention.

21 Plaintiffs counter that significant elements of the parole  
22 system remain under defendants' control, and accordingly, the court  
23 should continue to enforce those provisions of the Injunction which  
24 address parolees' due process rights prior to revocation hearings  
25 conducted by the state courts.

## 26 **II. STANDARD**

### **A. Justiciability vs. the court's equitable powers**

Article III, section 2 of the Constitution limits this court  
to hearing actual cases and controversies. "An actual controversy  
must be extant at all stages of review, not merely at the time the



1 complaint is filed." Alvarez v. Smith, 558 U.S. 87, 92 (2009)  
2 (citations and internal quotation omitted). "[A] dispute solely  
3 about the meaning of a law, abstracted from any concrete actual or  
4 threatened harm, falls outside the scope of the constitutional  
5 words 'Cases' and 'Controversies.'" Id. at 93.

6 Under Federal Rule of Civil Procedure 12(h)(3), "If the court  
7 determines at any time that it lacks subject-matter jurisdiction,  
8 the court must dismiss the action." Accordingly, district courts  
9 may *sua sponte* examine justiciability issues such as standing,  
10 mootness, and ripeness. See Bernhardt v. Cnty. of Los Angeles 279  
11 F.3d 862, 868 (9th Cir. 2002) ("The district court had both the  
12 power and the duty to raise the adequacy of [plaintiff's] standing  
13 *sua sponte*").

14 Plaintiffs maintain that it is defendants who bear the  
15 responsibility of demonstrating that the Injunction must be  
16 modified or terminated, and that they (plaintiffs) must be afforded  
17 notice, an opportunity for targeted discovery, and an evidentiary  
18 hearing before the court issues a ruling. (Plaintiff's Reply 13-15,  
19 ECF No. 1836.) This argument does not lie, given the court's  
20 responsibility to determine the ongoing justiciability of this  
21 action.<sup>11</sup>

22 The court acknowledges that it has the power to modify a  
23

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24 <sup>11</sup> Incidentally, *contra* plaintiffs, there is nothing  
25 "improper" about defendants' request that the court decertify the  
26 Valdivia class and dismiss this case. (Plaintiffs' Reply 13.) The  
court's May 6, 2013 Order directed the parties to brief these very  
questions.

1 consent decree in order to reflect subsequent legislative  
2 enactments. See, e.g., Railway Employees v. Wright, 364 U.S. 642  
3 (1961) (Harlan, J.) (holding that, in light of amendments to the  
4 federal Railway Labor Act that allowed previously-prohibited union  
5 shop agreements, district court could modify existing consent  
6 decree between non-union employees and railroads). As the Supreme  
7 Court observed in Wright:

8       There is also no dispute but that a sound judicial  
9       discretion may call for the modification of the terms  
10      of an injunctive decree if the circumstances, whether  
11      of law or fact, obtaining at the time of its issuance  
12      have changed, or new ones have since arisen.

13 Id. at 647. See also United States v. Swift & Co., 286 U.S. 106,  
14 114 (1932) (Cardozo, J.) ("We are not doubtful of the power of a  
15 court of equity to modify an injunction in adaptation to changed  
16 conditions, though it was entered by consent . . . . A continuing  
17 decree of injunction directed to events to come is subject always  
18 to adaptation as events may shape the need"); Taylor v. U.S., 181  
19 F.3d 1017, 1021 (9th Cir. 1999) ("[A] court always possesses the  
20 power to revisit continuing prospective orders in light of the  
21 evolving factual or legal landscape, and to modify or terminate the  
22 relief . . .").

23       Nevertheless, the justiciability inquiry, rooted as it is in  
24 Article III of the Constitution, is more fundamental than the  
25 court's equitable power to modify a consent decree. "No principle  
26 is more fundamental to the judiciary's proper role in our system  
of government than the constitutional limitation of federal-court  
jurisdiction to actual cases or controversies." Simon v. E.

1 Kentucky Welfare Rights Org., 426 U.S. 26, 37 (1976).

2       Accordingly, the court must first evaluate whether it retains  
3 jurisdiction over the post-Realignment parole revocation system;  
4 only if it so finds may it consider equitable modifications to the  
5 Injunction.

6       **B. Standard re: Mootness**

7       The Ninth Circuit has set forth the following standard for  
8 determining whether an action for injunctive relief is moot:

9       A moot action is one where the issues presented are no  
10 longer 'live' or the parties lack a legally cognizable  
11 interest in the outcome . . . . The basic question in  
12 determining mootness is whether there is a present  
13 controversy as to which effective relief can be  
14 granted. We have pointed out that courts of equity  
15 have broad discretion in shaping remedies. Thus, in  
16 deciding a mootness issue, the question is not whether  
17 the precise relief sought at the time the application  
18 for an injunction was filed is still available. The  
19 question is whether there can be any effective relief.

20 Nw. Env'tl. Def. Ctr. v. Gordon, 849 F.2d. 1241, 1244-45 (9th Cir.  
21 1988) (internal quotations and citations omitted).

22       A case that at one point presented an actual controversy  
23 between the parties may become moot due to subsequent statutory  
24 enactments. "A statutory change . . . is usually enough to render  
25 a case moot, even if the legislature possesses the power to reenact  
26 the statute after the lawsuit is dismissed." Native Vill. of Noatak  
v. Blatchford, 38 F.3d 1505, 1510 (9th Cir. 1994).

      The mere possibility that a party may suffer future harm is  
insufficient to preserve a case or controversy; the threat of  
injury must be "real and immediate," not "conjectural" or  
"hypothetical." See City of Los Angeles v. Lyons, 461 U.S. 95, 102

1 (1983); see also City News & Novelty Inc. v. City of Waukesha, 531  
2 U.S. 278, 283 (2001).

### 3 **III. Analysis**

#### 4 **A. Mootness**

5 The court begins by noting that Realignment is a comprehensive  
6 legislative enactment. While "it is well settled that 'a  
7 defendant's voluntary cessation of a challenged practice does not  
8 deprive a federal court of its power to determine the legality of  
9 the practice[,]'" Friends of the Earth, Inc. v. Laidlaw Env'tl.  
10 Servs., Inc., 528 U.S. 167, 170 (2000) (quoting City of Mesquite  
11 v. Aladdin's Castle, Inc., 455 U.S. 283, 289 (1982)), the court  
12 cannot discern any voluntary cessation of unlawful conduct of the  
13 sort that would generally permit continued jurisdiction. Rather,  
14 Realignment appears to be a "statutory change" sufficient to  
15 implicate mootness. Noatak, 38 F.3d at 1510.

16 Turning to the mootness inquiry, then, "[t]he question is  
17 whether there can be any effective relief." Gordon, 849 F.2d at  
18 1245. The crux of plaintiffs' argument, in answering this question,  
19 is that they "retain a significant interest in their liberty,  
20 relationships and connections to their communities, and Defendants  
21 retain the ability to endanger those interests based on claimed  
22 violations of parole." (Plaintiffs Reply 1.) This may be true. But  
23 it is insufficient, as a matter of law, to justify the court's  
24 continued jurisdiction over this matter.

25 Realignment has established a fundamentally different parole  
26 system than the one that the Valdivia plaintiffs challenged. That

1 system was largely administrative: DAPO supervised parolees; BPH  
2 issued warrants for parolees' arrest and adjudicated their probable  
3 cause and revocation hearings; upon revocation, CDCR would  
4 incarcerate parolees in state prisons. As detailed above, DAPO and  
5 BPH's powers and jurisdiction have changed significantly in the new  
6 system. For example, DAPO will conduct probable cause  
7 determinations (in lieu of BPH's probable cause hearings).  
8 Moreover, the system features major new actors (county jails; the  
9 California state courts; public defenders' offices) who are not  
10 parties to this lawsuit. Further, the plaintiff class is  
11 significantly reduced, both in raw numbers and as a matter of law,  
12 for many categories of felons previously supervised by DAPO are now  
13 subject to Post-Release Community Supervision by county probation  
14 departments.

15       This is not Proposition 9, which tweaked features of the then-  
16 existing system by increasing the time for probable cause hearings,  
17 limiting parolees' right to counsel, altering BPH's decision  
18 criteria at parole hearings, and liberalizing the use of hearsay  
19 evidence at these hearings. The court could properly adjudicate the  
20 constitutionality of these modifications because Prop. 9 did not  
21 change the system of parole revocation itself. The steps in the  
22 parole revocation process were the same, the system was still  
23 administered by the executive branch through DAPO and BPH, there  
24 was no change to the categories of felonies subject to DAPO/BPH  
25 jurisdiction, and parolees still returned to state prison when  
26 their parole was revoked. None of this is true of the "Realigned"

1 post-July 1, 2013 parole revocation system.

2 Plaintiffs nevertheless call for the court to retain  
3 jurisdiction, arguing, "This is not a case of mootness, but of  
4 changed circumstances that require modifications to the injunctive  
5 relief that are suitably tailored to the new circumstances, and  
6 that do not 'create or perpetuate a constitutional violation.'" (Plaintiffs' Opening 11 (quoting Rufo v. Inmates of Suffolk Cnty. Jail, 502 U.S. 367, 391 (1992)), ECF No. 1829.) They contend that  
7 "after Realignment, just as before, essentially the entire parole  
8 revocation process prior to the final hearing remains under the  
9 control and oversight of the defendants," particularly DAPO. (Id.  
10 9.) Consequently, plaintiffs warn that "Defendants' plan to abandon  
11 [probable cause hearings] would return revocation proceedings to  
12 a system that this Court has already expressly deemed  
13 unconstitutional." (Id. 16.)

14 In evaluating these arguments, it is instructive to examine  
15 how plaintiffs propose that the Injunction ought to be modified to  
16 reflect the post-Realignment system. They write:

17 Plaintiffs agree that the post-July 1, 2013 revocation  
18 system changes will obviate the need for this Court to  
19 continue oversight of final revocation hearing-related  
20 functions set forth in Injunction paragraphs 20 (final  
21 revocation hearing tapes), 21 (parolee access to  
22 subpoenas and witnesses at final hearings), 23 [as  
23 modified] (45-day deadline for final hearings), and 24  
24 (use of hearsay evidence and confrontation rights at  
25 final hearings) and related orders. (Plaintiffs' Reply  
26 12.)

25 Nevertheless, while plaintiffs concede that "this Court is entitled  
26 to presume that the judges of the state court will observe due

1 process in their conduct of final revocation hearings," they go on  
2 to request that the identified paragraphs of the Injunction "be  
3 modified only as follows: the relief with respect to final  
4 revocation hearings should be limited to monitoring by Plaintiffs  
5 and the Special Master for the purpose of determining whether the  
6 Defendants in this action are interfering with or obstructing the  
7 independent performance of due process functions by the state  
8 courts." (Plaintiffs' Opening 13.) Plaintiffs' proposed order then  
9 calls on the court to (i) require defendants to maintain the  
10 current system for providing parolees with probable cause hearings  
11 ("including the BPH system of hearing officers and the provision  
12 of counsel through CalPAP") until such time as any alternate system  
13 is approved by this court, (ii) prohibit defendants from imposing  
14 "flash incarceration" on Valdivia class members until adequate due  
15 process protections are approved by the court, (iii) require  
16 defendants to submit "policies and procedures to ensure that  
17 Defendants continue to make remedial sanctions programs available  
18 through and including at the final revocation hearings after such  
19 hearings are transitioned to the state courts," and (iv) direct the  
20 parties to meet and confer on necessary modifications to the  
21 Injunction in light of the court's findings. (ECF No. 1829-31.)

22       Nothing more clearly demonstrates the mootness of this action  
23 than the fact that such extensive measures would be necessary to  
24 reconcile the Injunction with the post-July 1, 2013 system. In  
25 enacting Realignment, California's legislature has fundamentally  
26 altered the structure of the state's parole system. Realignment

1 introduces new actors, adds to and subtracts from defendants'  
2 responsibilities, redefines what constitutes a "parolee," and  
3 incorporates wholly-new elements such as flash incarceration. The  
4 magnitude of the change is significant enough that this court  
5 cannot, as plaintiffs suggest, simply identify those components of  
6 the old system that recur in the new system, and try to reconcile  
7 the Injunction with those components. To do so risks bringing the  
8 new system grinding to a halt. Although this court is empowered to  
9 modify the Injunction to ameliorate unconstitutional conditions,  
10 this power is not a license to jumble together the old and the new  
11 in the hopes that a functioning, constitutional system will result.  
12 Whether the new system provides adequate due process must be  
13 demonstrated in practice, without untoward judicial interference  
14 until the need for intervention is clear.

15       Moreover, continuing to enforce the Injunction risks intruding  
16 on the prerogatives of the state courts. Abstention from  
17 unwarranted interference with state court proceedings is a well-  
18 settled principle. See, e.g., O'Shea v. Littleton, 414 U.S. 488,  
19 500 (1974) ("This seems to us nothing less than an ongoing federal  
20 audit of state criminal proceedings which would indirectly  
21 accomplish the kind of interference that Younger v. Harris[, 401  
22 U.S. 37 (1971)] and related cases sought to prevent"); Los Angeles  
23 Cnty. Bar Ass'n v. Eu, 979 F.2d 697, 703 (9th Cir. 1992) ("We  
24 should be very reluctant to grant relief that would entail heavy  
25 federal interference in such sensitive state activities as  
26 administration of the judicial system"); E.T. v. Cantil-Sakauye,



1 682 F.3d 1121, 1124 (2011) (“[T]he district court properly  
2 concluded that ‘[P]laintiffs’ challenges to the juvenile dependency  
3 court system necessarily require the court to intrude upon the  
4 state’s administration of its government, and more specifically,  
5 its court system’”). Defendants assert that “any due process  
6 concerns that arise as a result of DAPO’s conduct will be directly  
7 reviewed and addressed by the superior courts.” (Defendants’  
8 Opening 2.) For this court to, e.g., require defendants to maintain  
9 the current system for providing parolees with probable cause  
10 hearings (including, as plaintiffs request, “the BPH system of  
11 hearing officers and the provision of counsel through CalPAP”)   
12 would certainly interfere with the system of due process review  
13 envisioned by the state.

14       The court acknowledges that immense resources have been  
15 devoted to this case, and that it is well-settled that “[o]nce a  
16 defendant has engaged in conduct the plaintiff contends is unlawful  
17 and the courts have devoted resources to determining the dispute,  
18 there is Article III jurisdiction to decide the case as long as  
19 ‘the parties [do not] plainly lack a continuing interest . . . .’”  
20 Demery v. Arpaio, 378 F.3d 1020, 1026 (9th Cir. 2004) (quoting  
21 Friends of the Earth, 528 U.S. at 192). But it is the court’s  
22 considered judgment that California’s new parole revocation system  
23 is so substantially different from the prior system that neither  
24 party retains any continuing interest. In bringing this action,  
25 plaintiffs sought to safeguard their due process rights in an  
26 administrative system; defendants were the parties responsible for

1 that system's functioning. The post-Realignment parole revocation  
2 system involves a complex interplay between the state's executive  
3 and judicial branches, as well as county authorities. Acknowledging  
4 that "the question is not whether the precise relief sought at the  
5 time the application for an injunction was filed is still  
6 available, the question is whether there can be any effective  
7 relief," Gordon, 849 F.2d at 1245, it does not appear to the court  
8 that continued enforcement of the Injunction can provide "any  
9 effective relief" for plaintiffs. While plaintiffs retain a  
10 continuing interest in safeguarding their constitutional rights,  
11 the functioning of the system has changed to such a degree that  
12 Valdivia no longer provides a viable means for providing those  
13 safeguards.

14 None of this is to say that the constitutionality of the new  
15 parole system is immune from challenge. It may well be, e.g., that  
16 DAPO's probable cause "determinations" represent a "rever[sion] to  
17 a wholly internal review process for assessing probable cause"  
18 (Plaintiffs' Opening 22) of the type that this court found  
19 unconstitutional in 2002. Nevertheless, for the reasons set forth  
20 above, any such infirmities will have to be addressed, if at all,  
21 in a subsequent lawsuit or lawsuits.

22 **B. Plaintiffs' remaining arguments**

23 Plaintiffs make a number of fact-specific arguments for why  
24 the court should continue to exercise jurisdiction over this case,  
25 as follows:

- 26 • The vast majority of cases will be resolved by DAPO

1 without ever proceeding to final revocation hearings  
2 in the state court, thereby depriving plaintiffs of  
3 due process protections. (Plaintiffs' Opening 1-2, 5.)  
4 This argument rests on the Special Master's finding  
5 that, of late, 94% of parole revocation cases have  
6 resolved prior to any final revocation hearing. (Id.  
7 9.)

- 8 • Despite defendants' averments that they do not intend  
9 to deploy flash incarceration, plaintiffs offer  
10 evidence suggesting that DAPO not only can, but will,  
11 "flash incarcerate" parolees. This evidence includes  
12 draft CDCR documents describing and authorizing the  
13 use of this sanction, as well as the fact that the  
14 state's new Parole Violation Disposition Tracking  
15 System software captures data regarding flash  
16 incarceration

17 These dangers are, at this point, entirely speculative, and as  
18 such, implicate both mootness and ripeness concerns. To present a  
19 continuing case or controversy, the threat of injury must be "real  
20 and immediate," not "conjectural" or "hypothetical." Lyons, 461  
21 U.S. at 102 (1983). "A claim is not ripe for adjudication if it  
22 rests upon contingent future events that may not occur as  
23 anticipated, or indeed may not occur at all." Texas v. United  
24 States, 523 U.S. 296, 300 (quoting Thomas v. Union Carbide Agric.  
25 Prods. Co., 473 U.S. 568, 580-81 (1985)). No one can yet know how  
26 the post-Realignment parole revocation system will function in

1 practice. One cannot infer from the relatively small number of  
2 cases proceeding to revocation hearings before BPH under the old  
3 system that similarly small numbers will proceed to hearings before  
4 the courts under the new system. Moreover, plaintiffs' argument is  
5 premised on the assumption that the new system will not provide  
6 adequate due process protections prior to final revocation  
7 hearings, a finding the court explicitly declines to make.  
8 Similarly, regardless of whether DAPO is prevaricating in its claim  
9 that it will not use flash incarceration, it would be premature for  
10 the court to rule on the measure's constitutionality, both because  
11 it is a single element of a complex new system and because its use  
12 by DAPO "may not occur at all." Texas, 523 U.S. at 300.

13 Next, plaintiffs argue that defendants have failed to present  
14 "sufficient evidence for the Court to determine whether  
15 modification or termination of the remedy, or any parts of it,  
16 would 'create or perpetuate a constitutional violation.'" (Plaintiffs' Reply 14 (citing Rufo 502 U.S. at 391)). Plaintiffs  
17 miss the point that, as of July 1, 2013, the court no longer has  
18 jurisdiction to determine whether there is an ongoing  
19 constitutional violation in this matter. The court has reached that  
20 conclusion based on the statutory scheme enacted by the California  
21 legislature,<sup>12</sup> not on the basis of factual evidence adduced by the

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23  
24 <sup>12</sup> This is not to say that the court has no concerns about  
25 the new system. Under the post-Realignment system, it appears  
26 entirely possible for a parolee to be detained for an indefinite  
period of time, without notice of charges or a probable cause  
hearing, before DAPO finally files a petition for parole revocation  
with the state court. An indeterminate interval may again pass

1 parties. Again, it is the court's view that any constitutional  
2 infirmities of the post-Realignment parole revocation system must  
3 be addressed in subsequent litigation.

4 Finally, there is the matter of plaintiffs' supplemental reply  
5 to the court's May 6, 2013 Order, filed on June 27, 2013. (ECF Nos.  
6 1841, 1842.) The parties should note that, in general, the court  
7 disapproves of the filing of supplemental briefing without leave.  
8 Plaintiffs could have sought leave, and in so doing, apprised the  
9 court and defendants of the relevant issues; if the court found the  
10 issues raised to be meritorious, it would have then set an  
11 appropriate briefing schedule. The parties are cautioned that  
12 failure to follow these steps in the future may be grounds for  
13 sanctions.

14 Plaintiffs' supplemental reply raises the issue of how the  
15 state will handle parole supervision and revocation for those  
16 inmates due to be released from state prison pursuant to the June  
17 20, 2013 Order of the Three Judge Court in Coleman v. Brown, No.  
18 2:90-cv-0520-LKK-JFM (E.D. Cal.) (ECF No. 4662) and Plata v. Brown,  
19 No. 3:01-01351-TEH (N.D. Cal.) (ECF No. 2659). Plaintiffs contend:

20 [A]ssuming the defendants do not disregard the Court's  
21 June 20 Order in the Plata/Coleman matter, more than  
22 5,000 class members will be released on parole between  
now and the end of 2013, and they will not be subject to

---

23 before the state court holds a revocation hearing. In the meantime,  
24 the parolee may have lost custody of his children, his job, his  
25 home and/or his car. The parolee will have no redress if the state  
26 court ultimately finds that there was no basis for revoking parole.  
Despite the probable unconstitutionality of such procedures, these  
harms remain hypothetical, not actual, and as such, may not be  
addressed in this action.

1 Realignment processes. Rather, they will be supervised  
2 by the Valdivia defendants – and not by the counties.  
3 And they will be returned to state prison – and not to  
4 county jail – upon a finding that their conditions of  
5 parole were violated. The state courts have no  
6 jurisdiction under A.B. 109 and its clean-up bills to  
7 return a person to state prison for a parole violation.  
8 See Cal. Penal Code §§ 3000.08(f), (g) (version  
9 operative July 1, 2013). The anticipated process,  
10 therefore, must be within the CDCR and/or Board of  
11 Parole Hearings. These class members, therefore, will be  
12 subject to revocation proceedings and hearings by the  
13 Valdivia defendants – and not by the state courts. (ECF  
14 No. 1841.)

15 Fortuitously, at the time that plaintiffs' filed their supplemental  
16 briefing, the court was conducting a bench trial in the matter of  
17 Gilman v. Brown, No. 2:05-cv-830-LKK-CKD (E.D. Cal.). On Monday,  
18 July 1, 2013, Jennifer Shaffer, the Executive Officer of BPH, was  
19 called as a witness in that trial. After she was sworn in, the  
20 court asked Ms. Shaffer whether parole violations among those  
21 inmates released pursuant to the Order of the Three Judge Court  
22 would be handled under the prior parole revocation system, or the  
23 current one. Ms. Shaffer responded that, according to her  
24 understanding, petitions to revoke these inmates' parole would be  
25 filed with the state courts, which would then handle them. It is  
26 evident that, by virtue of her position, Ms. Shaffer is in a  
position to testify competently regarding BPH's responsibilities.  
Moreover, she testified under oath. For the reasons set forth  
above, this court has already determined that state court  
jurisdiction over parole revocation hearings is sufficient to moot  
this case. Accordingly, based on Ms. Shaffer's testimony, the  
court finds that the contentions raised by plaintiffs' supplemental

1 briefing provide an inadequate basis for the court's continued  
2 exercise of jurisdiction over this matter. In other words, Valdivia  
3 is moot.

4 **IV. CONCLUSION**

5 The court hereby orders as follows:


6 [1] The court FINDS that this case is moot. Accordingly,  
7 the court DECLINES to adopt the Thirteenth Report of the  
8 Special Master on the Status of Conditions of the Remedial  
9 Order (ECF No. 1783.) A forthcoming order will address the  
10 parties' outstanding requests to seal documents.

11  
12 [2] The parties and the Special Master are DIRECTED to file  
13 final motions, if any, for fees and costs within twenty-  
14 eight (28) days of the date of entry of this order. Upon  
15 resolution of these motions, the court will decertify the  
16 class and dismiss this case.

17 IT IS SO ORDERED.

18 DATED: July 2, 2013.

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26

  
LAWRENCE K. KARLTON  
SENIOR JUDGE  
UNITED STATES DISTRICT COURT