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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

RICHARD M. GILMAN, et al.,

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

Plaintiffs,

v.

O R D E R

J. DAVIS., et al.,

Defendants.

_____ /

On February 4, 2010, this court entered an order enjoining defendants from applying certain provisions of the "Victims' Bill of Rights Act of 2008: Marsy's Law," enacted by the California electorate as Proposition 9 of 2008. Gilman v. Davis, ___ F. Supp. 2d. ___, 2010 WL 519808 (E.D. Cal. Feb. 4, 2010). Although the court had previously granted plaintiffs' motion for class certification, certification is on appeal. As a result, and with the parties' agreement, the motion for a preliminary injunction was evaluated and granted only with regard to the named plaintiffs.

Defendants move to stay this injunction pending an appeal. In addition, numerous individual state prisoners have moved to

1 intervene in this action, seeking to have the injunction extended
2 to them. The court resolves both issues on the papers and after
3 oral argument from the represented parties.

4 **I. Background**

5 The facts underlying "Marsy's Law" are fully set forth in this
6 court's February 4, 2010 order. In summary, when California
7 prisoners have served the portion of their sentence that renders
8 them "eligible" for parole, the California Board of Parole Hearings
9 holds a hearing to determine whether the prisoner is "suitable" for
10 parole. If the prisoner is found unsuitable, the hearing is
11 "deferred" for a number of years. The provisions of Marsy's Law
12 at issue here concern these deferrals. The law amended California
13 Penal Code section 3041.5, extending the minimum and maximum
14 deferral periods, adopting a presumption of maximum rather than
15 minimum deferrals, and codifying, in part, procedures by which a
16 deferred suitability hearing may be "advanced" to a time before its
17 scheduled date.

18 The challenge to Marsy's Law was added in plaintiffs' Fourth
19 Amended and Supplemented Complaint, which was accepted by the court
20 on March 4, 2009. This complaint names eight plaintiffs. The
21 court concurrently granted plaintiffs' motion for class
22 certification. Defendants petitioned for permission to file an
23 interlocutory appeal of the class certification decision, and the
24 Ninth Circuit agreed to hear this appeal.

25 Defendants and named plaintiffs have taken the position that
26 until the class certification appeal is resolved, this case should

1 proceed only as to the named plaintiffs. Accordingly, the order
2 granting the preliminary injunction discussed and applied to only
3 the named plaintiffs. Numerous additional prisoners, however, have
4 moved to intervene in this action. Two such motions were filed
5 while the motion for a preliminary injunction was under submission.
6 Motions to Intervene by Michael L. Hughes and Raymond Scott, Filed
7 July 16, 2009 (Dkt. Nos. 200, 201). At defendants' request, and
8 with plaintiffs' counsel's consent, the court stayed the motions
9 to intervene, but otherwise held that a stay was unwarranted.
10 Order of October 15, 2009, 2009 WL 3365858, 2009 U.S. Dist. LEXIS
11 101937. When the court subsequently granted the motion for a
12 preliminary injunction, the court noted the "virtual certainty that
13 the result of [the] grant . . . will be a flood of parallel filings
14 by other prisoners." Order of February 4, 2010 at 14 n.9. In the
15 two months since that order, ten more prisoners have sought to join
16 or intervene in this action. (Dkt. Nos. 222-25, 227, 233, 241, 244,
17 251, 253). Defendants and named plaintiffs continue to contend
18 that these motions should be stayed pending resolution of the class
19 certification question.

20 As to the eight named plaintiffs, five of them are no longer
21 in custody. As summarized by plaintiffs, "Masoner was released by
22 court order; Brown obtained a court order for a new Governor's
23 review and the Governor declined to review the matter, resulting
24 in Brown's release; Lewis and Marquez were released through the
25 parole board grants and Governor decline to reviews; and Stewart
26 died just after the Governor reversed a grant of parole he had

1 achieved.”

2 Of the three named plaintiffs who remain in custody, plaintiff
3 Gilman had a parole hearing in 2009 and received a three-year
4 deferral, which the Board said was the deferral period it would
5 have selected even under the old law. Plaintiffs contend that the
6 injunction therefore will not affect Gilman until, at the earliest,
7 some time after his scheduled 2012 parole hearing. The two
8 remaining named plaintiffs are Olson and Fowler, who have
9 suitability hearing dates presently set for June and July 2010,
10 respectively. If these plaintiffs are denied parole at these
11 hearings, the injunction will determine the procedures used to
12 determine their next deferrals.

13 **II. Stay of The Preliminary Injunction**

14 **A. Standard for Issuing a Stay**

15 The court has the inherent power to stay proceedings in cases
16 over which it presides. Rohan ex rel. Gates v. Woodford, 334 F.3d
17 803, 817 (9th Cir. 2003); Landis v. North American Company, 299
18 U.S. 248, 254 (1936). In determining whether to issue a stay
19 pending an interlocutory appeal, courts must consider:

20 (1) whether the stay applicant has made a
21 strong showing that he is likely to succeed on
22 the merits; (2) whether the applicant will be
23 irreparably injured absent a stay; (3) whether
24 issuance of the stay will substantially injure
the other parties interested in the
proceeding; and (4) where the public interest
lies.

25 Hilton v. Braunskill, 481 U.S. 770, 776 (1987). In applying these
26 factors, the Ninth Circuit has applied a “sliding scale” to

1 evaluation of the first three factors, which is defined by its two
2 extremes. Golden Gate Rest. Ass'n v. City of San Francisco, 512
3 F.3d 1112, 1116 (9th Cir. 2008). At one end, a party seeking a
4 stay may show either "a strong likelihood of success on the merits"
5 of the appeal together with "the possibility of irreparable injury"
6 in the absence of a stay. Id. (quoting Natural Res. Def. Council,
7 Inc. v. Winter, 502 F.3d 859, 862 (9th Cir. 2007)). At the other
8 end, the moving party may show that "serious legal questions are
9 raised and that the balance of hardships tips sharply in its
10 favor." Id. (quoting Lopez v. Heckler, 713 F.2d 1432, 1435 (9th
11 Cir. 1983)).

12 This standard substantially overlaps the standard for issuance
13 of a preliminary injunction. Nken v. Holder, ___ U.S. ___, ___ 129
14 S. Ct. 1749, 1761 (2009) (citing Winter v. Natural Res. Def.
15 Council, 555 U.S. ___, ___, 129 S. Ct. 365, 370 (2008)); see also
16 Golden Gate, 512 F.3d at 1115. In the preliminary injunction
17 context, the Supreme Court has recently limited the Ninth Circuit's
18 sliding scale approach, holding that a plaintiff must show that "he
19 is likely to suffer irreparable harm in the absence of preliminary
20 relief" regardless of the likelihood of success on the merits.
21 Winter, 129 S. Ct. at 374, rev'g 502 F.3d 859 (9th Cir. 2007). The
22 Supreme Court's decision in Winter did not limit the use of the
23 sliding scale approach in the stay context, however. The Court has
24 held that the two standards are similar "not because the two are
25 one and the same, but because similar concerns arise whenever a
26 court order may allow or disallow anticipated action before the

1 legality of that action has been conclusively determined." Nken,
2 129 S. Ct. at 1761. Thus, Winter did not implicitly abrogate
3 Golden Gate, and Golden Gate remains the controlling authority.

4 **B. Analysis of The Motion to Stay The Preliminary Injunction**

5 The court briefly summarizes its conclusions here, explaining
6 their basis below. Defendants have raised "serious legal
7 questions," but that defendants have not shown a likelihood of
8 success on appeal of the injunction as it applies to plaintiffs
9 Olson and Fowler. Plaintiffs apparently concede, however, that
10 plaintiff Gilman can no longer show a likelihood of irreparable
11 injury. This concession indicates that defendants are likely to
12 succeed in showing that the injunction need not extend to Gilman.

13 As to the remaining factors, defendants have shown a
14 possibility defendants have shown a possibility of injury, but not
15 that the balance of hardships tilts in their favor. A minimal
16 showing as to both the merits and irreparable injury is inadequate
17 under Golden Gate. Accordingly, the court does not stay the
18 injunction as to Olson and Fowler, but the court does stay the
19 injunction as to Gilman.

20 As to defendants' alternative request for a temporary stay
21 that would allow defendants to request further relief from the
22 Ninth Circuit, defendants have not identified any hardship they
23 will suffer prior to June 2010. Defendants may seek a stay from
24 the Ninth Circuit prior to that time.

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1 **1. Defendant's Likelihood of Success on The Merits on**
2 **Appeal**

3 Defendants' likelihood of success on appeal is obviously tied
4 to the standards that will be used in evaluating the appeal. This
5 court's grant of a preliminary injunction will be reviewed under
6 a two step test. California Pharmacists Assc. v. Maxwell-Jolly,
7 ___ F.3d ___, 2010 WL 715401 *3 (9th Cir. Mar. 3, 2010), Perfect
8 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1157 (9th Cir. 2007).
9 "First, the appellate court must 'determine de novo whether the
10 trial court identified the correct legal rule to apply to the
11 relief requested.'" California Pharmacists Assc., ___ F.3d at ___,
12 2010 WL 715401 at *3 (quoting United States v. Hinkson, 585 F.3d
13 1247, 1262 (9th Cir. 2009) (en banc)). If this court identified
14 the proper standard, the reviewing court will then determine
15 whether this court's application thereof was "(1) 'illogical,' (2)
16 'implausible,' or (3) without 'support in inferences that may be
17 drawn from the facts in the record.'" Hinkson, 585 F.3d at 1262
18 (quoting Anderson v. City of Bessemer, 470 U.S. 564, 577 (1985)).¹

19 Defendants agree that this court correctly identified the
20 standard for a preliminary injunction. "A plaintiff seeking a
21 preliminary injunction must establish that he is [1] likely to
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23 ¹ The appellate courts have referred to this test as an abuse
24 of discretion standard, explaining that under the first step, "'[a]
25 district court would necessarily abuse its discretion if it based
26 its ruling on an erroneous view of the law'" Hinkson, 585
F.3d at 1262 (quoting Cooter & Gell v. Hartmarx Corp., 496 U.S.
384, 405 (1990)). Regardless of the nomenclature, it is clear that
the first step is a de novo review.

1 succeed on the merits, [2] that he is likely to suffer irreparable
2 harm in the absence of preliminary relief, [3] that the balance of
3 equities tips in his favor, and [4] that an injunction is in the
4 public interest.” Am. Trucking Ass’ns
5 v. City of Los Angeles, 559 F.3d 1046, 1052 (9th Cir. 2009)
6 (quoting Winter, 129 S.Ct. at 374). Defendants base their appeal,
7 and consequently their motion for the stay, on the argument that
8 this court selected the incorrect legal standards regarding the
9 merits of plaintiffs’ Ex Post Facto claims, and on the argument
10 that this court’s analysis of the four Winter factors was not
11 supported by the record.

12 **a. Legal Standards for Ex Post Facto Claims**

13 A law violates the Ex Post Facto clause when it imposes a
14 “significant” risk of increased punishment. Garner v. Jones, 529
15 U.S. 244, 255 (2000), see also California Dept. of
16 Corrections v. Morales, 514 U.S. 499, 509 (1995). Defendants argue
17 that this court made two legal errors in interpreting this rule,
18 specifically, that this court adopted too low of a standard of
19 significance and that this court erred in analyzing significance
20 without considering individual prisoners’ factual circumstances.

21 As to the first purported error, defendants contend that as
22 the Ninth Circuit has interpreted Garner and Morales, a risk is not
23 “significant” unless it can be “said with assurance” that a
24 prisoner would have received a lesser punishment under the prior
25 scheme. This “said with assurance” language was first used by the
26 Supreme Court in Dobbert v. Florida, 432 U.S. 282, 294 (1977). The

1 Ninth Circuit quoted Dobbert in Nulph v. Faatz, 27 F.3d 451, 456
2 (9th Cir. 1994), and then quoted Nulph in Brown v. Palmateer, 379
3 F.3d 1089, 1095 (9th Cir. 2004). None of these cases adopted the
4 proposition defendants attribute to them. As explained in the
5 order granting a preliminary injunction, both Brown and Nulph held
6 that a law violates the Ex Post Facto clause where “‘by its own
7 terms [it] show[s] a significant risk’” such that it creates “a
8 disadvantage that affects prisoners in general.” Brown, 379 F.3d
9 at 1095 (quoting Garner, 529 U.S. at 255); see also Order at 25,
10 2010 WL 519808 at *11. Brown and Nulph used the “said with
11 assurance” language to refer to an alternative method of showing
12 an Ex Post Facto violation: where a law is not generally
13 detrimental, a challenger may attempt to show that it has
14 nonetheless increased his particular punishment. Brown, 379 F.3d
15 at 1095 (“in absence of a disadvantage that affects prisoners in
16 general, an individual will satisfy the detriment requirement if
17 he shows that it can be said with assurance that he would have
18 received less severe punishment under the prior scheme.”) (internal
19 quotations and citations omitted). To the extent that the “said
20 with assurance” standard is higher than the “significant risk”
21 standard as applied by this court, the higher standard applies only
22 in this latter context.

23 The Brown rule presumably reflects the difficulty in
24 demonstrating an Ex Post Facto violation. See Order at 24, 2010
25 WL 519808, at *12 (citing Garner, 529 U.S. at 260 n.1 (Souter, J.,
26 joined by Stevens and Ginsburg, J.J., dissenting)). A plaintiff

1 may respond to this difficulty by showing an effect on a group or
2 by showing a more drastic effect on a specific individual. This
3 legal analysis will admittedly be reviewed de novo. Defendants
4 nonetheless have not shown that reversal is likely on this ground.

5 Defendants' second legal argument is closely related. As
6 explained in the preliminary injunction order, "[n]either the
7 Supreme Court nor the Ninth Circuit have clearly addressed whether
8 a plaintiff must show that he personally faces

9 a significant risk of prolonged punishment." Order at 23, 2010 WL
10 519808, at *10. In light of the above holdings in Brown and

11 Nulph, this court held that the magnitude of risk imposed by a
12 change could be measured by the "change's effects on individuals
13 serving a particular sentence or convicted of a particular offense,
14 but not evaluation of other facts or circumstances specific to
15 individual challengers," declining to follow the Seventh Circuit's

16 contrary decision in Glascoe v. Bezy, 421 F.3d 543, 547-548 (7th
17 Cir. 2005).² Order at 24-25, 2010 WL 519808 at *11; see also

18 Weaver v. Graham, 450 U.S. 24, 33 (1981), overruled on other
19 grounds by Collins v. Youngblood, 497 U.S. 37, 41 (1990).

20 Defendants argue that for purposes of the Ex Post Facto merits
21 inquiry the court should have followed Glascoe and looked to
22 individual plaintiffs' factual circumstances.

23 In light of the uncertainty on this issue, there is some

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25 ² Although the court held that individual factors need not be
26 considered on the Ex Post Facto merits analysis, the court
considered these facts as part of the preliminary injunction
irreparable injury analysis. Order at 40-41.

1 likelihood that the Ninth Circuit will adopt defendants' position.
2 If the court had rested its decision solely on the contrary legal
3 conclusion, this would demonstrate an ultimate likelihood of
4 success on appeal. The court's prior order, however, alternatively
5 considered and applied the rule advocated by defendants and adopted
6 by the Seventh Circuit in Glascoe. Order at 25 n.11. This court's
7 application of the Glascoe rule will be reviewed on an abuse of
8 discretion standard, rather than de novo. Accordingly, the court's
9 remaining analysis in this motion assumes that the Glascoe rule
10 applies.

11 **b. Application of The Correctly-Identified Legal**
12 **Principles**

13 Defendants contend that this court erred in every aspect of
14 its application of the governing law. Specifically, defendants
15 argue that the facts did not support: (1) a finding of significant
16 risk as to the named plaintiffs as part of the merits of the Ex
17 Post Facto claim, (2) a finding of likely irreparable injury under
18 Winter, (3) the balancing of the hardships, and (4) a finding that
19 the public interest did not weigh against issuance of an
20 injunction. To succeed on the appeal, defendants will need to show
21 that this court's resolution of these issues was clearly erroneous
22 or an abuse of discretion. For the reasons stated in the prior
23 order, defendants are unlikely to show that this court erred in
24 weighing the public interest or in assessing the hardship an
25 injunction would impose upon defendants.

26 Defendants' argument regarding the assessment of risk to or

1 injury of the named plaintiffs warrants further discussion.³
2 Defendants argue that plaintiffs failed to make an individualized
3 showing of risk because plaintiffs only provided evidence regarding
4 named plaintiff Masoner, and thus, that no evidence supports
5 extending the injunction to other plaintiffs. The court previously
6 recognized this difficulty. Order at 41. The court held that it
7 could rely on the apparently undisputed allegations, which included
8 the dates of parole hearings and length of deferrals. Although
9 plaintiffs would have been better served by providing declarations
10 or exhibits to support these allegations, at the preliminary
11 injunction stage facts need not be supported by admissible
12 evidence. Cobell v. Norton, 391 F.3d 251, 261, 364 U.S. App. D.C.
13 2 (D.C. Cir. 2004), Sierra Club, Lone Star Chapter v. FDIC, 992
14 F.2d 545, 551 (5th Cir. 1993), see also 11A Wright, Miller and
15 Marcus, Fed. Practice & Procedure Civ. 2d. § 2949 (noting that Fed.
16 R. Civ. P. 65, unlike Fed. R. Civ. P. 56, does not require that the
17 motion be supported by affidavits setting out facts that would be
18 admissible as evidence), South Yuba River Citizens League v. Nat'l
19 Marine Fisheries Serv., 257 F.R.D. 607, 615 (E.D. Cal. 2009).⁴ As

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21 ³ Defendants have not challenged this court's conclusion that
22 a "likelihood" of injury requires no greater probability than a
23 "sufficient risk" of injury. Order at 39-40 (citing Garner, 529
24 U.S. at 255 and Winter, ___ U.S. at ___, 129 S. Ct. at 375).

25 ⁴ At oral argument on this motion, the court reiterated
26 concern over this issue. The court noted that defendants had not
challenged the factual allegations regarding the length and dates
of the named plaintiffs' referrals, and asked defendants whether
there were disputes regarding these facts. Defendants disputed the
inferences plaintiffs sought to draw from these facts--i.e.,
whether plaintiffs were likely to be granted parole soon--but not

1 explained at oral argument, such reliance appears proper where
2 defendants do not suggest that the facts are in dispute and where
3 the evidence necessary to confirm or refute these allegations is
4 firmly within defendants' control.

5 Moving from the form of the facts to their substance, the
6 parties agree that the issue is the risk of injury to the three
7 named plaintiffs who remain in custody. Because the court assumes
8 for purposes of this motion that an individualized showing is
9 required, the facts pertaining to other plaintiffs are only
10 indirectly relevant. Beginning with named plaintiff Gilman,
11 plaintiffs concede that as of Gilman's 2009 parole hearing (which
12 occurred after the operative complaint was filed), Gilman can no
13 longer show an immediate likelihood of irreparable injury. At the
14 2009 hearing, the Board denied parole and entered a three year
15 deferral. The Board explained that this deferral was adopted under
16 Marsy's law, but that it would also have entered a three year
17 deferral under the former rule. Plaintiffs concede that in light
18 of this, Marsy's law does not present an immediate risk of
19 prolonging Gilman's incarceration.⁵

20
21 the underlying objective facts. Defendants' position is unclear,
22 however, because defendants' answer (filed after the injunction was
23 granted) states that a subset of these facts are in dispute.

24 Also at oral argument, plaintiffs represented that evidence
25 supporting plaintiffs' factual allegations regarding Olson and
26 Fowler had been submitted in connection with defendants' motion to
dismiss. The court has not located any such evidence in the
record.

⁵ Insofar as these facts were not before the court on the
initial motion, it is somewhat anomalous to consider them now.
Neither party has discussed this issue. The court nonetheless

1 Plaintiff Olson has repeatedly received minimum, one year
2 deferrals. She has also previously been found suitable for parole
3 by the Board of Parole Hearings, only to have the Governor reverse
4 her grant of parole. Defendants correctly note that predicting
5 Marsy's Law's requires numerous contingent, "if-then" statements.
6 This observation, however, does not itself defeat a finding of
7 likely irreparable injury.

8 Olson's next scheduled parole hearing is for June of 2010,
9 roughly three months from now.⁶ If Olson is granted parole at that
10 time, no injunction will be necessary to prevent injury to her, and
11 Marsy's law will not have prolonged her confinement.

12 If she is denied parole at this hearing and the injunction
13 remains in force, it is likely that she will receive a one year
14 deferral, as demonstrated by the recent history of her deferrals.
15 Each one year deferral suggests that the Board found a reasonable
16 chance that Olson would be suitable for parole in one year.
17 Accordingly, relying on the Board's own assessment of Olson, it is
18 likely that Olson will be found unsuitable for parole in 2010, only
19 to then be found suitable for parole in 2011 or 2012.

20 If, on the other hand, Olson is denied parole in 2010 and the
21 injunction is stayed, it is unlikely that Olson will receive a

22 _____
23 assumes that in light of plaintiffs' apparent concession the Ninth
24 Circuit may decide to consider these facts in evaluating this
court's application of the law to Gilman.

25 ⁶ Again, the court notes that the specific date was not before
26 the court on the initial motion. Nonetheless, both parties'
briefing refers to this date, and the use of a particular date
makes discussion of possible outcomes clearer.

1 further suitability hearing before 2013, for the reasons stated in
2 the prior order. For the reasons just stated, this delay is likely
3 to increase Olson's confinement.⁷

4 In light of the history of Olson's parole hearings and the
5 pattern of behavior demonstrated by the Board of Parole Hearings
6 and the Governor's treatment of other named plaintiffs, the court
7 reaffirms that Olson has demonstrated a significant risk (under
8 Garner) and a likelihood (under Winter) that Marsy's law will
9 prolong her confinement. This determination is an exercise of the
10 court's discretion. Defendants have not shown that, on review,
11 they are likely to succeed in demonstrating that this conclusion
12 is "illogical," "implausible," or without "support in inferences
13 that may be drawn from the facts in the record" and therefore an
14 abuse of discretion. Anderson, 470 U.S. at 577, see also Hinkson,
15 585 F.3d at 1262.

16 Fowler's history is similar. Fowler became eligible for
17 parole in 1993, and plaintiffs allege that he always received one

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19 ⁷ Plaintiffs also argue that Marsy's law may prolong Olson's
20 confinement even if Olson is not granted parole at any such earlier
21 hearings. Plaintiffs assert that the raw number of hearings is a
22 factor in receiving parole separate from any change in circumstance
23 or the passage of years. Thus, plaintiffs assert that even if
24 Olson receives annual hearings but is denied parole at 2010, 2011,
25 and 2012 hearings, depriving her of the 2011 and 2012 hearings will
26 nonetheless risk prolonging her incarceration, because the 2011 and
2012 hearings would make it more likely that she would receive
parole in 2013 (the earliest scheduled deferral she could receive
under Marsy's law). Unlike plaintiffs' allegations regarding the
raw facts of individual plaintiffs' histories, which are easily
verified or refuted by defendant, this allegation is not one that
the court may credit without any support. The court does not
decide whether this allegation, if proven, would support
plaintiffs' position.

1 or two year deferrals, that he had "recently" received only one
2 year deferrals, and that while the Board has never attempted to
3 grant him parole, in 2007 the hearing initially resulted in a split
4 decision, i.e., a situation in which one Board member concluded
5 that parole was proper. In the briefing on this motion, the
6 parties indicate that Fowler's next suitability hearing is set for
7 July of 2010. These facts, like those pertaining to Olson, suffice
8 to show a significant risk that if parole is denied at this
9 hearing, application of Marsy's law would significantly risk
10 prolonging Fowler's confinement.

11 For these reasons, defendants are not likely to succeed in
12 showing that this court erred in its application of the correct
13 legal principles to the facts of this case insofar as they pertain
14 to plaintiffs Olson and Fowler. Plaintiffs concede, however, that
15 defendants have shown a likelihood of success on the merits as to
16 whether plaintiff Gilman is likely to suffer injury prior to the
17 final resolution of this suit.

18 **2. Remaining Stay Factors**

19 Defendants' arguments regarding the remaining stay factors
20 largely repeat the arguments raised in opposition to the motion for
21 a preliminary injunction. Here, defendants add the argument that
22 the injunction forces defendants to maintain two separate schemes
23 for setting parole hearings and that this results in added
24 unquantified administrative expense. The court agrees that such
25 expense is likely. The court therefore acknowledges this
26 administrative overhead, as well as the cost of holding additional

1 hearings, as an injury to defendants to be considered in the
2 balance of hardships.

3 In granting the preliminary injunction, the court considered
4 the likelihood that injury would result prior to final judgment in
5 this case. For purposes of the present motion, the question is
6 whether injury will result prior to a decision from the Ninth
7 Circuit.

8 As this case presently stands, it appears that neither party
9 will be injured prior to the June and July 2010 suitability
10 hearings set for plaintiffs Olson and Fowler. The injunction will
11 not compel defendants to schedule or conduct any additional
12 hearings prior to that time. Plaintiffs do not contend that they
13 will be injured before then. The parties further implicitly agree
14 that if both Olson and Fowler are paroled at that time, there will
15 be no further likely injury to defendants or named plaintiffs.

16 The court therefore turns to what injuries and hardships the
17 parties will bear if either Olson or Fowler is denied parole this
18 summer. Neither party has estimated when the Ninth Circuit will
19 resolve the instant appeal. Insofar as defendants bear the burden
20 of showing entitlement to a stay, the court does not assume that
21 the Ninth Circuit will resolve the issue before Olson and Fowler
22 would potentially receive their next deferred hearings under the
23 former rule, i.e., within the year. As such, the court assumes
24 that the injunction, to the extent that it has any effect
25 whatsoever, will cause defendants to schedule and conduct
26 additional parole hearings in 2011. For the reasons stated above,

1 the court concludes that there is a sufficient likelihood that
2 Olson and Fowler would be released at such hearings. Accordingly,
3 the array (if not timing) of hardships here is the same as that
4 considered in the prior order, and the court again concludes that
5 the monetary cost to defendants is outweighed by the plaintiffs'
6 risk of prolonged unjustified incarceration.

7 Defendants argue that they will suffer additional hardship if
8 the injunction is extended to the entire class, or to individual
9 intervenors. Defendants provide no authority for the proposition
10 that the instant injunction may be stayed because of injuries that
11 might result from some possible, as yet non-existent injunction.
12 The court will consider these arguments if and when it considers
13 broadening the injunction.

14 As previously acknowledged, this is a complex case in which
15 defendants have raised serious legal questions. Defendants have
16 not, however, shown "a *strong* likelihood of success on the merits"
17 of their appeal. Golden Gate Rest. Ass'n, 512 F.3d at 1116. Nor
18 have defendants shown that "the balance of hardships tips sharply
19 in [their] favor." Id. In the long term, the injury visited on
20 defendants by the injunction is outweighed by the injury likely to
21 be visited on plaintiffs' by the injunctions' absence. In the
22 short term, defendants do not need a temporary stay from this
23 court, because defendants have not identified any hardship that
24 they will suffer while waiting for the Ninth Circuit to review this
25 court's denial of a stay. Any such temporary stay would inevitably
26 expire prior to Olson's June 2010 parole suitability hearing, and

1 as such, a temporary stay would expire before the injunction
2 visited any injury upon defendants.

3 **III. Motions to Intervene**

4 Defendants separately argue that to motions to intervene and
5 for permissive joinder should be stayed. Plaintiffs state that
6 such a stay is proper pending resolution of the appeal of class
7 certification. For the reasons stated in the Order of October 15,
8 2009, the court agrees. This stay extends solely to resolution of
9 the appeal of class certification--if this appeal is resolved prior
10 to the appeal of the preliminary injunction, the court will revisit
11 the issue at that time.

12 **IV. Conclusion**

13 For the reasons stated above, the court ORDERS as follows:

- 14 1. The order of February 4, 2010, granting a preliminary an
15 injunction (Dkt. No. 217) is STAYED SOLELY AS TO
16 PLAINTIFF GILMAN. The injunction remains in effect as
17 to plaintiffs OLSON and FOWLER.
- 18 2. All motions to intervene and/or for permissive joinder
19 are STAYED pending resolution of the appeal of class
20 certification. These include:
- 21 a. Dkt. No. 222 (Stephen Liebb)
 - 22 b. Dkt. No. 223 (Edward S. Renteria)
 - 23 c. Dkt. No. 224 (David Monroe)
 - 24 d. Dkt. No. 225 (Felix Lucero)
 - 25 e. Dkt. No. 227 (Noel Valdivia, Sr.)
 - 26 f. Dkt. No. 233 (Clement Brown)

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- g. Dkt. No. 241 (Richard Gonzales)
- h. Dkt. No. 244 (Reginald Cooper)
- i. Dkt. No. 251 (Kenneth Scott Rodgers)
- j. Dkt. No. 253 (Keith Augustine)

IT IS SO ORDERED.

DATED: April 7, 2010.


LAWRENCE K. KARLTON
SENIOR JUDGE
UNITED STATES DISTRICT COURT