

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,

v.

ARNOLD SCHWARZENEGGER, Governor of
the State of California, et al.,

Defendants.

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

O R D E R

TO BE PUBLISHED

Plaintiffs are a class comprising California parolees who challenged the parole revocation procedures utilized by defendants as violative of their due rights under the Fourteenth Amendment. After the court granted partial summary judgment in favor of the plaintiffs, a stipulated permanent injunction was entered in March 2004. The instant motion seeks to enforce the injunction notwithstanding the passage of Proposition 9 by California's voters on November 4, 2008. Plaintiffs assert that portions of Section 5.3 of Proposition 9 conflicts with the

1 requirements of the injunction. Defendants cross-move to modify
2 the injunction to conform to Proposition 9. The court resolves
3 the motions on the papers and after oral argument. For the
4 reasons stated herein, the court grants plaintiffs' motion and
5 denies defendants'.

6 **I. BACKGROUND AND FACTS¹**

7 **A. Procedural History**

8 This case commenced in 1994. That year it was certified as
9 a class action, the plaintiff class consisting of (1) California
10 parolees at large; (2) California parolees in custody as alleged
11 parole violators, and who are awaiting revocation of their state
12 parole; and (3) California parolees who are in custody having
13 been found in violation of parole and who have been thereupon
14 sentenced to prison custody. In June 2002, the court granted
15 plaintiffs' motion for partial summary judgment on the issue of
16 whether defendants' parole revocation procedures violated the
17 class members' due process rights. See Valdivia v. Davis, 206 F.
18 Supp. 2d 1068 (E.D. Cal. 2002).

19 At the time of the order defendants had operated a parole
20 revocation process that was constitutionally problematic for
21 several reasons. A parolee could be retaken into custody if his
22 parole officer believed that the parolee had violated his parole
23 and represented a danger of absconding or a danger to himself,

24
25 ¹Although the court and the parties are undoubtedly familiar
26 with the history of the case and the orders that have been entered
in it, a detailed review of that history is helpful to understand
the basis for the disposition of the instant motions.

1 others, or others' property. He was to receive notice of the
2 reasons for the parole hold within seven days of it being
3 placed. After the parole hold was placed, the parole officer
4 had a case conference with his supervisor to decide whether
5 there was probable cause to believe the parolee violated his
6 parole. This decision and the reasons thereof were then
7 memorialized in a report that was sent to the Board of Prison
8 Terms ("BPT"). Based on this report, the BPT created a
9 "screening offer" for the parolee, which was essentially an
10 offer of the revocation of parole for a specific term of
11 incarceration in exchange for the parolee's waiver of his right
12 to a revocation hearing. If the parolee chose not to waive his
13 right to a revocation hearing, the California regulations
14 provided for forty-five days as the time in which the hearing
15 was to occur. Although this deadline was not mandatory, the vast
16 majority of revocation hearings occurred within that timeframe.

17 This procedure, the court concluded, violated parolees' due
18 process rights as set forth in Matthews v. Eldridge, 424 U.S.
19 319 (1976), Morrissey v. Brewer, 408 U.S. 471 (1972), and Gagnon
20 v. Scarpelli, 411 U.S. 778 (1973). In those cases, the Court had
21 held that a probable cause hearing must be held promptly for
22 parolees being held in custody, and the defendants' forty-five
23 day deadline for holding revocation hearings did not meet that
24 definition under any court's formulation. The court's holding
25 was based on the parolee's right to be promptly heard when his
26 liberty interest was at stake as well as his due process

1 interest in the state making a reliable parole revocation
2 determination. Valdivia v. Davis, 206 F. Supp. 2d at 1078.

3 **B. Creation of a Remedy**

4 In October 2002, the court ordered defendants to file a
5 proposed remedial plan to address the Constitutional
6 deficiencies identified in the June order. The parties were also
7 directed to meet and confer so that the defendants could adapt
8 the proposed remedial plan into a proposed remedial order to be
9 presented to the court.

10 On July 23, 2003, the court issued an order responding to
11 the defendants' request for guidance from the court as to "what
12 precisely the Constitution requires with respect to the timing
13 and content of revocation hearings." Order, July 23, 2003 at 3-
14 4. The court expressed its hesitation at doing so since
15 procedural due process requirements are flexible as to each
16 factual situation. Nevertheless, to facilitate the development
17 of an adequate remedy, the court explained what it understood to
18 be the minimum features that the plan would need to include in
19 order to be constitutionally sound.

20 After a comprehensive review of the case law surrounding
21 the promptness of probable cause hearings in the parole context,
22 as well as in the context of other constitutional deprivations,
23 the court advised the defendants that, "a period of ten days [to
24 hold a probable cause hearing] strikes a reasonable balance
25 between inevitable procedural delays and the state's interest in
26 conducting its parole system, on the one hand, and the liberty

1 interests of the parolees, on the other."² Id. at 13.

2 Recalling that the summary judgment order rested not only
3 on the importance of the promptness of the probable cause
4 hearing but its accuracy as well, the court then set forth some
5 minimal standards for the probable cause hearings. As stated in
6 Morrissey, the parolee needed to have notice of the grounds for
7 his revocation, the probable cause hearings needed to be
8 conducted by a neutral decisionmaker and the parolee had to have
9 an opportunity to present documentary evidence and witnesses and
10 to cross-examine adverse witnesses. Finally, the results of the
11 hearing needed to be documented in a written report.

12 Alternatively, the defendants could hold a unified hearing that
13 was sufficiently prompt and whose contents met the due process
14 requirements for both probable cause and revocation hearings.

15 After months of delay by defendants in filing their
16 proposed remedial plan, caused by the defendants' appeal of the
17 court's order, withdrawal of the appeal, and failed settlement
18 negotiations with plaintiffs, the court granted defendants "one
19 last chance" to file a remedial plan by November 29, 2003.

20 Order, Nov. 5, 2003 at 4. On November 24, the parties filed a
21 stipulated motion for approval of settlement.

22 **C. The Stipulated Permanent Injunction**

23 Pursuant to the settlement, a stipulated permanent

24
25 ²The court observed that in the year since the entry of the
26 summary judgment order, the delays in holding revocation hearing
had apparently increased so that a vast majority of hearings were
not held within forty-five days.

1 injunction was provided to the court, which issued it by order
 2 on March 9, 2004. There are several provisions relevant to the
 3 instant motion:

- 4 1) A parole revocation hearing shall be held no
 5 later than 35 calendar days from the date of the
 6 placement of the parole hold. Stipulated
 7 Permanent Injunction ("Inj.") ¶¶ 11(b)(iv), 23.
- 8 2) Defendants shall hold a probable cause hearing no
 9 later than 10 business days after the parolee has
 10 been served with notice of the charges and
 11 rights, which shall occur not later than three
 12 business days from the placement of the parole
 13 hold. Inj. ¶ 11(d).
- 14 3) Defendants shall appoint counsel for all parolees
 15 at the beginning of the RTCA³ stage of the
 16 revocation proceedings. Defendants shall provide
 17 an expedited probable cause hearing upon a
 18 sufficient offer of proof by appointed counsel
 19 that there is a complete defense to all parole
 20 violation charges that are the basis of the
 21 parole hold. Inj. ¶ 11(b)(I).
- 22 4) At probable cause hearings, parolees shall be
 23 allowed to present evidence to defend or mitigate
 24 against the charges and proposed disposition.
 25 Such evidence shall be presented through
 26 documentary evidence or the charged parolee's
 testimony, either or both of which may include
 hearsay testimony. Inj. ¶ 22.
- 5) The use of hearsay evidence shall be limited by
 the parolees' confrontation rights in the manner
 set forth under controlling law as currently
 stated in United States v. Comito, 177 F.3d 1166
 (9th Cir. 1999). The Policies and Procedures
 shall include guidelines and standards derived
 from such law. Inj. ¶ 24.
- 6) Parolees' counsel shall have the ability to
 subpoena and present witnesses and evidence to
 the same extent and under the same terms as the
 state. Inj. ¶ 21.

The injunction was accompanied by the defendants' remedial

³RTCA refers to Return to Custody Assessment, which is "the practice by 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." Inj. ¶ 9(d).

1 plan, a primary feature of which was the use of remedial
2 sanctions or community-based treatment in lieu of the parole
3 officer finding a parole violation. Valdivia Remedial Plan at 1-
4 2. It also provided that when an expedited hearing is granted,
5 it is to be held within the sixth and eighth business day after
6 the placement of the parole hold, or as soon as possible
7 thereafter. Id. at 4. As the court held in its June 9, 2005
8 order, this plan was integrated into the Injunction and thus
9 binds the defendants.

10 **D. Proposition 9**

11 On November 4, 2008, the voters of California passed
12 Proposition 9, the "Victims' Bill of Rights Act of 2008: Marsy's
13 Law." The initiative was based on the conclusion that the rights
14 of crime victims were not adequately respected in the criminal
15 justice process, specifically mentioning perceived problems in
16 the parole consideration process for those convicted of violent
17 crimes. Declaration of Geoffrey T. Holtz in Support of Motion to
18 Enforce Injunction ("Holtz Decl.") ¶ 5, Ex. D (text of
19 Proposition 9, hereafter "Prop. 9") § 2.⁴ In its Statement of
20

21 ⁴Defendants request the court take judicial notice of the text
22 of Proposition 9 and the California Attorney General's description
23 and legislative analysis of it sent to voters. A court may take
24 judicial notice of a fact not subject to reasonable dispute, either
25 because the fact is generally known within the territorial
26 jurisdiction of the trial court or because the fact is capable of
accurate and ready determination from sources whose accuracy cannot
reasonably be questioned. Fed. R. Evid. 201(b). A court shall take
judicial notice of a judicially noticeable fact "if requested by
a party and supplied with the necessary information." Fed. R.
Evid. 210(d). Here, both of those elements have been met and the
court accordingly takes judicial notice of both documents.

1 Purpose and Intent, the proposition provides in full,

2 It is the purpose of the People of the State of
3 California in enacting this initiative measure to:

- 4 1. Provide victims with rights to justice and due
5 process.
- 6 2. Invoke the rights of families of homicide victims
7 to be spared the ordeal of prolonged and
8 unnecessary suffering, and to stop the waste of
9 millions of taxpayer dollars, by eliminating
10 parole hearings in which there is no likelihood a
11 murderer will be paroled, and to provide that a
12 convicted murderer can receive a parole hearing
13 no more frequently than every three years, and
14 can be denied a follow-up parole hearing for as
15 long as 15 years.

16 Id. § 3.

17 Proposition 9 amends the Penal Code to add section 3044,
18 which provides,

19 (a) Notwithstanding any other law, the Board of Parole
20 Hearings. . .shall be responsible for protecting
21 victims' rights in the parole process. Accordingly, to
22 protect a victim from harassment and abuse during the
23 parole process, no person paroled from a California
24 correctional facility following incarceration for an
25 offense committed on or after the effective date of
26 this act shall, in the event his or her parole is
revoked, be entitled to procedural rights other than
the following:

(1) A parolee shall be entitled to a probable cause
hearing no later than 15 days following his or her
arrest for violation of parole.

(2) A parolee shall be entitled to an evidentiary
revocation hearing no later than 45 days following his
or her arrest for violation of parole.

(3) A parolee shall, upon request, be entitled to
counsel at state expense only if, considering the
request on a case-by-case basis, the board or its
hearing officers determine:

(A) The parolee is indigent; and

(B) Considering the complexity of the charges, the
defense, or because the parolee's mental or
educational capacity, he or she appears incapable of
speaking effectively in his or her own defense.

(4) In the event the parolee's request for counsel,
which shall be considered on a case-by-case basis, is
denied, the grounds for denial shall be state
succinctly in the record.

1 (5) Parole revocation determinations shall be based on
2 a preponderance of evidence admitted at hearings
3 including documentary evidence, direct testimony, or
4 hearsay evidence offered by parole agents, peace
5 officers, or a victim.

6 (6) Admissions of the recorded or hearsay statement of
7 a victim or percipient witness shall not be construed
8 to create a right to confront the witness at the
9 hearing.

10 (b) The board is entrusted with the safety of victims
11 and the public and shall make its determination
12 fairly, independently, and without bias and shall not
13 be influenced by or weigh the state cost or burden
14 associated with just decisions. The board must
15 accordingly enjoy sufficient autonomy to conduct
16 unbiased hearings, and maintain an independent legal
17 and administrative staff. The board shall report to
18 the Governor.

19 Prop. 9 § 5.3.

20 Finally, the proposition contains a severability provision
21 that provides that any provision found to be invalid or
22 unconstitutional may be severed and the remaining provisions
23 given full force and effect. Id. § 8.

24 The Voter Information Guide, prepared by the Attorney
25 General, described Proposition 9 to voters and included analysis
26 by the Legislative Analyst. Defendants' Request for Judicial
Notice ¶ 1, Ex. A. On the first page of the analysis, the
Legislative Analyst summarized the estimate of the fiscal impact
of the proposition as including a net savings "for the
administration of parole hearings and revocations, unless the
changes in parole revocation procedures were found to conflict
with federal legal requirements." Id. at 58. In the more
extensive analysis, the Legislative Analyst described that the
proposition contained changes affecting the revocation of

1 parole. Id. at 59. This discussion began with the "Background"
2 section, in which the Analyst explained that, "A federal court
3 order requires the state to provide legal counsel to parolees,
4 including assistance at hearings related to parole revocation
5 charges." Id.

6 The Analyst then described some of the central elements of
7 the Injunction in this case, including the deadlines for holding
8 probable cause and revocation hearings. Id. at 60. The Analyst
9 explained that Proposition 9 extends the deadlines for holding
10 revocation procedures and restricts the appointment of counsel.
11 The Analyst then opined, "Because this measure does not provide
12 for counsel at all parole revocation hearings, and because the
13 measure does not provide counsel for parolees who are not
14 indigent, it may conflict with the Valdivia court order, which
15 requires that all parolees be provided legal counsel." Id.

16 Finally, the Legislative Analyst provided an estimate of
17 the fiscal impacts of the proposition at the state and county
18 levels, emphasizing throughout that the estimates might change
19 depending on how the proposition is interpreted by the courts.
20 Id. at 60-61. The Analyst cautioned that, "some of these changes
21 may run counter to the federal Valdivia court order related to
22 parole revocations and therefore could be subject to legal
23 challenges, potentially eliminating these savings." Id. at 61.

24 II. STANDARD

25 A. Motion to Enforce the Injunction

26 A district court has continuing jurisdiction to enforce its

1 injunction. Crawford v. Honig, 37 F.3d 485, 488 (9th Cir. 1994).
2 When an action by the state, including the passage of
3 legislation, conflicts with a federal order to remedy
4 Constitutional violations, the state act must give way to the
5 court's order. Missouri v. Jenkins, 495 U.S. 33, 55 (1990);
6 North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43, 45
7 (1971).

8 **B. Motion to Modify the Injunction**

9 Under Federal Rule of Civil Procedure 60(b)(5), a court may
10 relieve a party from its obligations under an order of the court
11 if prospective application of the order is no longer equitable.
12 See Sys. Fed'n No. 91 v. Wright, 364 U.S. 642, 646-47.
13 Modification of an injunction, including a consent decree, is
14 considered equitable when there has been a significant change in
15 relevant law or factual circumstances. Id. at 647-48; see also
16 Rufo v. Inmates of Suffolk County Jail, 520 U.S. 367, 384
17 (1992). The party seeking the modification bears the burden to
18 show that modification is warranted. Rufo, 520 U.S. at 383. If
19 it does, the court must then consider whether the modification
20 is appropriately tailored to the changed circumstance. Id.

21 **III. ANALYSIS**

22 Plaintiffs assert that portions of Penal Code section 3044,
23 as set forth in Proposition 9, conflict with provisions of the
24 permanent injunction and must be held invalid. Defendants
25 dispute this, contending that several of the provisions of the
26 Proposition identified by plaintiffs do not conflict with the

1 injunction. To the extent that they do, defendants argue, the
2 injunction should be modified to conform to the will of the
3 California electorate. The court considers each argument in
4 turn.

5 **A. Conflict Between Proposition 9 § 5.3 and the Permanent**
6 **Injunction**

7 Under the relevant law, both consent decrees and statutes
8 enacted by initiative should be interpreted according to their
9 plain meanings. See Cal. Civil Code § 1638 (governing
10 interpretation of contracts); Gates v. Rowland, 39 F.3d 1439,
11 1444 (9th Cir. 1994) (rules of contract interpretation for the
12 court's situs state govern interpretation of a consent decree);
13 Davis v. City of Berkeley, 51 Cal. 3d 227, 234 (1990). With
14 regards to both contracts and consent decrees, if the language
15 employed is clear, there is no need to search elsewhere for the
16 drafters' intent. Cal. Civil Code § 1638; Davis, 51 Cal. 3d at
17 234. Nonetheless, because the Supremacy Clause requires that
18 state law give way to contrary federal court orders or consent
19 decrees, Swann, 402 U.S. at 45, a court should "adopt an
20 interpretation [of an initiative] consistent with the statutory
21 language and purpose, [which] eliminates doubts as to the
22 provision's constitutionality." This is because the voters are
23 presumed to know the superceding effect of the United States
24 Constitution on state law. In re. Lance W., 37 Cal. 3d 873, 890
25 n. 11 (1985); see also Edward J. DeBartolo Corp. v. Fla. Gulf
26 Coast Bldg & Constr. Trades Council, 485 U.S. 568, 575 (1988)

1 (principle of statutory construction that the court will
2 construe a statute to avoid constitutional infirmity so long as
3 such construction is not "plainly contrary to" the intent of the
4 legislature); Ctr. for Bio-Ethical Reform, Inc. v, Los Angeles
5 Co. Sheriff Dep't, 533 F.3d 780, 791-92 (9th Cir. 2008) (same,
6 collecting California and other federal court of appeals cases).

7 There are several areas in which Proposition 9 § 5.3 (Penal
8 Code § 3044) and the Permanent Injunction are in plain conflict.
9 First, Penal Code § 3044(a) provides that no parolee shall have
10 any procedural rights other than those listed in the statute,
11 notwithstanding any other law. The statute lists as procedural
12 rights the provision of probable cause hearings and revocation
13 hearings within particular timeframes, entitlement to counsel in
14 certain circumstances, and the limited use of hearsay evidence,
15 as well as specifies what shall be the evidentiary basis of and
16 policy considerations guiding the revocation decision. See Prop.
17 9 § 5.3. By purporting to be an exclusive list of the procedural
18 rights of parolees in the revocation process, Proposition 9
19 conflicts with those elements of the Permanent Injunction that
20 give additional procedural rights. These include, *inter alia*,
21 prompt notice of the basis for the parole hold, accommodation
22 for parolees' disabilities and other communication barriers,
23 ability of the parolee to present evidence at the probable cause
24 hearing, expedited probable cause hearings in certain
25 circumstances, and provision of the evidence intended to be
26 relied on by the state to the parolee's counsel. See Inj. ¶¶ 11,

1 13, 14, 18.

2 Second, section 3044(a)(3) sets forth certain circumstances
3 in which a parolee may be appointed counsel. This conflicts with
4 the Permanent Injunction, which provides counsel for all
5 parolees. Inj. ¶ 11(b)(i).

6 Third, section 3044(a)(2) sets the deadline for the parole
7 revocation at 45 days from arrest for violation of the terms of
8 parole. This conflicts with the Permanent Injunction, which
9 provides that the revocation hearing should occur within 35
10 calendar days of the parole hold, unless the parolee waives it
11 or seeks a continuance.⁵ Inj. ¶ 11(b)(iv).

12 Fourth, section 3044(b) provides that the Board of Parole
13 Hearings shall make its decisions without regard to the "state
14 cost or burden associated with just decisions." Plaintiffs
15 assert that this conflicts with the Permanent Injunction's use
16 of remedial sanctions and community based treatment in lieu of
17 revocation, where appropriate. Defendants disagree, observing
18 that neither the Permanent Injunction nor the Remedial Plan
19 integrated into it specify what factors the Board should
20 consider in making its determinations. While, strictly speaking,
21 this is true, it is such a narrow reading of the Permanent
22 Injunction as to constitute a mischaracterization of it. The

23
24 ⁵As plaintiffs point out, there is no conflict where the
25 parole revocation hearing occurs but the parolee has not been
26 placed in custody, or where the parolee has been arrested but the
parole hold is placed 10 or more days after the arrest, or where
a parole hold is placed but the parolee is released before the
revocation hearing occurs.

1 Injunction, through the Remedial Plan, provides that the
2 defendants will utilize remedial sanctions programs in lieu of
3 initiating the parole revocation process where appropriate.
4 Although the Remedial Plan does not enumerate expressly what
5 factors the defendants shall use in determining whether remedial
6 sanctions are appropriate, the Plan does provide that, "The goal
7 is to reduce the number of returns to prison for violations of
8 parole by up to 10% in 2004 and up to 30% by 2006." Inj.,
9 Remedial Plan at 2. This strongly suggests that the decision to
10 refer a parolee to a remedial sanctions program is informed, at
11 least in part, by the goal of reducing the custodial burden on
12 the state by diverting parolees for whom a return to custody is
13 not necessary in order to preserve public safety. See id.
14 Section 3044(b) appears to conflict with this goal.

15 There are other provisions of Penal Code § 3044 that could
16 be construed to contradict the Permanent Injunction, but may
17 equally validly be interpreted so as to avoid the conflict.
18 These are sections 3044(a)(5) and (a)(6), which discuss the use
19 of hearsay evidence. They provide, "Parole revocation
20 determinations shall be based on a preponderance of evidence
21 admitted at hearings including documentary evidence, direct
22 testimony, or hearsay evidence offered by parole agents, peace
23 officers, or a victim" and "Admissions of the recorded or
24 hearsay statement of a victim or percipient witness shall not be
25 construed to create a right to confront the witness at the
26 hearing." The former may suggest to a reasonable reader that the

1 only hearsay evidence that may be provided is that offered by
2 parole agents, peace officers, or victims,⁶ or that this
3 evidence may be relied on without qualification. The latter may
4 suggest to a reasonable reader that the parolee does not have a
5 confrontation right when hearsay evidence by a victim or witness
6 is admitted. If these interpretations were adopted, they would
7 conflict with the Permanent Injunction, which provides that
8 parolees may present hearsay evidence at probable cause hearings
9 and that the use of hearsay evidence is governed by "controlling
10 law as currently stated in United States v. Comito. . . ." Inj.
11 ¶¶ 22, 24, Remedial Plan at 5. The Injunction also acknowledges
12 the parolee's confrontation rights as a limitation on the use of
13 hearsay evidence. Inj. ¶ 24.

14 Despite this, these sections of Proposition 9 § 5.3 could
15 also reasonably be construed as being in accord with the terms
16 of the Injunction. See In re. Lance W., 37 Cal. 3d at 890 n. 11.
17 Penal Code section 3044(b) (5) may be read as setting forth a
18 non-exhaustive list of evidence that may be relied on if it is
19 admitted. It can reasonably be read not to limit the type of
20 evidence considered or admitted to only those categories listed.

21 Similarly, section 3044(b) (6) may reasonably be read to
22 provide that the admission of hearsay evidence against the

23
24 ⁶Proposition 9 defines "victim" as "a person who suffers
25 direct or threatened physical, psychological, or financial harm as
26 a result of the commission or attempted commission of a crime or
delinquent act." Prop. 9 § 4(e). It also includes that person's
spouse, parents, children, siblings, or guardian. Id. It apparently
does not include uncles or neighbors.

1 parolee does not alone create a confrontation right. The
2 construction of this subsection is odd, to say the least, in
3 light of the longstanding rule that hearsay evidence shall be
4 admitted only after the importance of the confrontation right is
5 weighed against other considerations. See, e.g., Crawford v.
6 Washington, 541 U.S. 36 (2004). In other words, admission of
7 hearsay evidence does not "create" a confrontation right, but is
8 itself guided by the confrontation right. Given this, section
9 3044(b) (6) may be understood to provide that hearsay evidence
10 may be admitted, because the parolee may not necessarily have a
11 right to confrontation of every hearsay witness whose statements
12 are sought to be admitted. Whether that hearsay evidence is
13 admitted, however, is guided by the terms of the Injunction,
14 which incorporates controlling law as set forth in United States
15 v. Comito.

16 **B. Legal Effect of the Conflict Between Proposition 9 and the**
17 **Permanent Injunction**

18 To the extent that Proposition 9 § 5.3 conflicts with the
19 Permanent Injunction, the former may not be enforced. The
20 Supremacy Clause commands this result. The Supreme Court as well
21 as other courts have repeatedly reached this conclusion in
22 various contexts, including where underlying constitutional
23 violations were at issue and where the federal court's order was
24 a consent decree.

25 In Cooper v. Aaron, 358 U.S. 1 (1958), the Court explained
26 this principle when confronted with the state of Arkansas'

1 statutes and state constitutional amendments that contradicted
2 the Court's desegregation orders. The Court characterized the
3 case as "rais[ing] questions of the highest importance to our
4 federal system of government." Id. at 4. After reiterating that
5 the Fourteenth Amendment explicitly binds the states, the Court
6 "recall[ed] some basic constitutional principles that are
7 settled doctrine," in light of Arkansas's Executive and
8 Legislative branches' belief that they were not bound by certain
9 court orders. Id. at 17.

10 As the Court explained, Article VI of the Constitution
11 provides that the Constitution is the "supreme Law of the Land"
12 and its judiciary supreme in construing what the law is. Id. at
13 18 (internal citations omitted). Every state officer takes an
14 oath to uphold this Constitutional rule. Id. Consequently,
15 recalling the opinion of Chief Justice Marshall, "'If the
16 legislatures of the several states may, at will, annul the
17 judgments of the courts of the United States, and destroy the
18 rights acquired under those judgments, the constitution itself
19 becomes a solemn mockery.'" Id., citing United States v. Peters,
20 5 Cranch 115, 136 (1809). "A Governor who asserts a power to
21 nullify a federal court order is similarly restrained." Id. at
22 18-19; see also Jenkins, 495 U.S. at 57 (district court order
23 requiring the state to raise taxes beyond the state statutory
24 limit in order to fund a desegregation plan must be enforced in
25 spite of the state statute, as "[t]o hold otherwise would fail
26 to take account of the obligations of local governments, under

1 the Supremacy Clause, to fulfill the requirements that the
2 Constitution imposes on them"); Swann, 402 U.S. at 44-45 (state
3 law prohibiting bussing for desegregation purposes was invalid
4 as it contradicted federal district court's order addressing
5 school segregation).

6 In these cases, the Court also addressed the argument that
7 defendants raise here, that it is a central element of democracy
8 that the people make their own laws and a feature of the
9 California system of government that the Executive's power
10 derives wholly from the people. See Reply In Support of Mot. for
11 Summ. J. at 1, 8-9. While these both may be true, the federal
12 system requires the state -- whether in the form of legislative
13 or executive action -- to accept the limits of its authority as
14 defined by the Constitution. See Jenkins, 495 U.S. at 56-57; see
15 also Cooper, 358 U.S. at 19 ("It is, of course, quite true that
16 the responsibility for public education is primarily a concern
17 of the States, but it is equally true that such
18 responsibilities, like all other state activity, must be
19 exercised consistently with federal constitutional requirements
20 as they apply to state action.").

21 The Supreme Court has applied this principle in various
22 contexts, including when underlying violations of federal
23 constitutional rights were not at issue. See Washington v.
24 Washington State Commercial Passenger Fishing Vessel Assoc., 443
25 U.S. 658, 693-95 (1979) (treaties with tribes and federal
26 regulations interpreting them override contrary state

1 regulations); City of Tacoma v. Taxpayers of Tacoma, 357 U.S.
2 320, 340-41 (1958) (final judgment of a federal court was
3 binding on state as to question of use of navigable waters;
4 state could not enforce a contrary judgment rendered by the
5 state supreme court). Courts have also applied this rule where
6 the state action would conflict with a consent decree entered in
7 federal court. See Hook v. Arizona Dep't of Corr., 107 F.3d
8 1397, 1402-1403 (9th Cir. 1997); Stone v. City & County of San
9 Francisco, 968 F.2d 850, 861 n. 20 (9th Cir. 1992). Finally, the
10 state's action is not given special deference by virtue of
11 having occurred through the initiative process. See generally
12 Citizens Against Rent Control v. Berkeley, 454 U.S. 290, 295
13 (1981); In re. Lance W., 37 Cal. 3d at 890.

14 Consequently, the Permanent Injunction must be enforced so
15 long as it remains in effect; to the extent that Proposition 9
16 is in conflict with it, the Proposition may not be enforced.

17 **C. Interpretation of Proposition 9 As a Statement of State Law**

18 Plaintiffs offer an alternative interpretation to
19 Proposition 9 § 5.3. They suggest that it articulates the due
20 process requirements for parole revocation proceedings, under
21 state law only.⁷ This is the approach adopted by the California
22 Supreme Court in In re. Lance W., 37 Cal. 3d 873, when it
23 considered a state ballot initiative that had the possible
24 effect of contradicting prior Supreme Court orders.

25 ⁷Defendants, curiously, have not responded to this argument
26 in their Reply brief.

1 In Lance W., the California electorate had passed as a
2 ballot initiative the Truth In Evidence amendment to the
3 California Constitution. Id. at 879. Briefly, the amendment
4 allows for the admission of all relevant evidence against the
5 defendant in a criminal proceeding and therefore appeared
6 inconsistent with the exclusionary rules accompanying the search
7 and seizure provisions of the state and federal constitutions.
8 Id. at 884. Specifically, the court considered the effect of the
9 amendment on the admissibility of evidence obtained in violation
10 of another person's right to be free from unreasonable searches
11 and seizures. Id. at 879.

12 The court recognized that the federal exclusionary rule,
13 although grounded in the guarantees of the Fourth Amendment, is
14 "defined by the United States Supreme Court." Id. at 882. The
15 state electorate is deemed "to know of the superseding impact of
16 federal constitutional provisions on state laws or
17 constitutional provisions which conflict with and restrict
18 rights guaranteed by the United States Constitution." Id. at 890
19 n. 11. Moreover, the Legislative Analyst, in the initiative
20 description sent to voters, explained that the initiative would
21 cause unlawfully seized evidence to be admitted except where
22 excluded by virtue of the federal Constitution. Id. at 890. From
23 this, the court deduced that the intent of the voters was for
24 the initiative to only alter the state exclusionary rule. Id.;
25 see also People v. Daan, 161 Cal. App. 3d 22, 28 (1984) ("As
26 Proposition 8 cannot reach the federal Constitution, only the

1 federal Fourth Amendment constraints on searches and seizures as
2 explicated by the United States Supreme Court are valid in
3 California.").

4 Here, a similar construction is necessary. Nothing in the
5 Findings or the Statement of Purpose and Intent indicate that
6 Proposition 9 was intended to set forth or amend parolees'
7 rights arising from the federal Constitution or a consent decree
8 issued by a federal court. Prop. 9 §§ 2-3. The voters are
9 presumed to know the overriding effect of the Constitution and
10 federal court judgments on contrary state laws, In re. Lance W.,
11 37 Cal. 3d at 890 n. 11, and to intend for the state laws to
12 extend only to non-conflicting federal law, whether
13 constitutional, statutory or judicial in origin. In re. Kay, 1
14 Cal. 3d 930, 942 (1970). This presumption must prevail despite
15 the fact that the relevant portions of Proposition 9 § 5.3
16 begin, "Notwithstanding any other law. . .," since there is
17 nothing in this clause to suggest that it was intended to
18 accomplish what voters are presumed to know cannot be done.
19 Finally, support for this interpretation may be found in the
20 fact that the voters were informed that certain provisions of
21 Proposition 9 may conflict with the orders of this court. See In
22 re. Lance W., 37 Cal. 3d at 890. Given this admonition, the
23 voters could reasonably have intended for the initiative to
24 define state law only.

25 In summary, the Permanent Injunction in this case contains
26 various procedural due process requirements for the parole

1 revocation process, grounded in the court's determination that
2 the prior procedures had violated the Fourteenth Amendment of
3 the Constitution. As an order of the court, the ongoing validity
4 of the Permanent Injunction remains undisturbed, notwithstanding
5 contrary state law or action by the state's executive branch.
6 This derives from the authority of this court vis-a-vis the
7 states as provided by the Supremacy Clause.

8 Proposition 9 § 5.3 (Penal Code § 3044) can be construed to
9 only set forth the procedures deriving from state law and the
10 court adopts this construction because it is reasonable and in
11 order to not invalidate a law if it may be reasonably
12 interpreted to avoid constitutional infirmity. See Edward J.
13 DeBartolo Corp., 485 U.S. at 575; Ctr. for Bio-Ethical Reform,
14 Inc., 533 F.3d at 791-92; In re. Lance W., 37 Cal. 3d at 890.
15 Accordingly, the provisions of Proposition 9 addressing the
16 parole revocation procedures, see Prop. 9 § 5.3, do not
17 supercede those set forth in the Permanent Injunction. It is the
18 responsibility of the defendants to ensure that Penal Code §
19 3044 is implemented consistent with this interpretation, unless
20 and until the decree is modified.

21 **D. Motion to Modify the Injunction**

22 Defendants move to modify the Permanent Injunction to
23 incorporate the changes to parole revocation procedures embodied
24 in Proposition 9. For the reasons explained below, the court
25 denies the motion.

26 Motions to modify a consent decree pose a number of

1 conflicting values. On the one hand is the imperative that,
2 generally speaking, there is an essential value that judgments
3 are final and binding. Any undermining of that understanding
4 diminishes the fundamental structure of litigation. Moreover,
5 when addressing stipulated judgments, unconsented to
6 modifications implicate the fundamental quality of contractual
7 obligations.

8 On the other hand, modification of even stipulated
9 judgments may be appropriate in institutional litigation, in
10 order to permit response to real world changes which effect the
11 circumstances which justified the entry of the judgment in the
12 first place. This is so because institutional judgments tend to
13 be long lasting, as the institution effected changes to meet the
14 requirements of the judgment. Accordingly, it has been held
15 that modification of a federal consent decree in institutional
16 litigation may be warranted when there is a change in factual
17 circumstances or in relevant federal law. Rufo, 502 U.S. at 383;
18 see also Fed. R. Civ. Proc. 60(b). The burden is on the movant
19 to make the showing justifying modification. Rufo, 502 U.S. at
20 383. Thus, although a consent decree resembles, in many
21 respects, a contract between the parties, it is a judicial
22 decree and thus subject to the same rules for modification or
23 recision of judicial orders generally. Id. at 378-79.

24 In Rufo, the High Court confronted a consent decree that
25 had been entered in order to address unconstitutional prison
26 overcrowding. Id. at 374. Six years later, when the prison

1 population had increased beyond initial projections, the county
2 defendant moved to modify the decree. Id. at 376. The district
3 court denied the motion, which the court of appeals affirmed.
4 Id. at 376-77.

5 When the Supreme Court reviewed, it weighed concerns of
6 the parties somewhat similar to those that have been raised in
7 this case. On one hand, a court must be flexible in modifying
8 consent decrees, particularly in cases of institutional reform,
9 because "such decrees remain in place for extended periods of
10 time." Id. at 380. As such, unforeseen circumstances may arise
11 that are out of the defendant's control and which warrant
12 modification of the decree. Id. at 381. Such flexibility is
13 particularly important, the majority explained, because
14 institutional reform decrees "reach beyond the parties directly
15 involved in the suit and impact on the public's right to the
16 sound and efficient operation of its institutions." Id.
17 (internal citation omitted).

18 On the other hand, application of too lax a standard in
19 modification of decrees would undermine the parties' purpose in
20 entering into the decree. Id. at 383. By entering into a consent
21 decree, a party has obtained an end to the litigation and
22 avoided the risk of a more unfavorable judgment had the case
23 proceeded to trial. Id. at 382-83. Moreover, a court is
24 constrained by Rule 60(b)(5), which provides that modification
25 is only permitted when the decree's prospective application is
26 no longer equitable. Id. at 383. Thus, any modification that

1 occurs must rest on equitable concerns that have arisen since
2 the entry of the decree. Id.

3 From all this, the High Court established the rule that a
4 consent decree may be modified if a change in federal law or the
5 facts warrants it and, if so, if the modification is narrowly
6 tailored to address that change. Id. at 383. In describing the
7 effect of a change in law, it held that a federal consent decree
8 should be modified if "one or more of the obligations placed
9 upon the parties has become impermissible under federal law."
10 Rufo, 502 U.S. at 388. It may also be modified when the federal
11 law has changed to "make legal what the decree was designed to
12 prevent." Id., citing Ry. Employees v. Wright, 364 U.S. 642
13 (1961) and Firefighters v. Stotts, 467 U.S. 561 (1984); see also
14 Agostini v. Felton, 521 U.S. 203 (1997). Here, defendants have
15 not shown, nor even asserted, that there is has been a change in
16 relevant federal law that calls for the modification of the
17 Permanent Injunction.

18 Instead, defendants argue that the passage of Proposition 9
19 constitutes a change in factual circumstance warranting the
20 modification of the Permanent Injunction. Setting aside the
21 defendants' confounding of law and fact, the argument is
22 unpersuasive.

23 In explaining the standard for modification of consent
24 decrees, the Rufo Court observed that typically a change in
25 factual circumstances may require modification where the new
26 circumstances "make compliance with the decree substantially

1 more onerous" or "unworkable due to unforeseen obstacles" or
2 when "enforcement of the decree without modification would be
3 detrimental to the public interest." 502 U.S. at 384-85
4 (citations omitted); see also Jeff D. v. Kempthorne, 365 F.3d
5 844, 854 (9th Cir. 2004) (acknowledging these as the reasons
6 warranting modification of a consent decree based on changed
7 factual circumstances). Even when changed factual circumstances
8 exist, however, the court must also consider whether
9 modification of the decree would undermine its purpose. Rufo,
10 502 U.S. at 387.

11 For example, the Rufo Court cited with approval N.Y. State
12 Ass'n for Retarded Children, Inc. v. Carey, 706 F.2d 956 (2d
13 Cir. 1983), where a consent decree had been entered requiring
14 the State to remove mentally retarded persons from
15 constitutionally substandard, large facilities and place them in
16 15-person or smaller facilities by a specified date. The Court
17 of Appeals held that the decree should have been modified, upon
18 defendants' motion, to place persons covered by the decree in
19 slightly larger facilities (housing 50 persons or fewer). Id. at
20 965. Defendants had shown in their motion to modify that it was
21 extremely difficult to find small facilities to accommodate all
22 the persons covered by the decree, but that immediate placement
23 could be made if the restrictions governing the size of the
24 facilities were loosened. Id. at 966. Defendants also presented
25 expert testimony that some of the mentally retarded persons
26 covered by the decree would fare equally well in a somewhat

1 larger facility than in a smaller one. Id. at 966-67. The court
2 concluded that the unforeseen difficulty in obtaining small
3 facilities merited modification of the injunction, since the
4 modification proposed would accomplish the ultimate objective of
5 promptly providing constitutional living conditions to the
6 affected persons. Id. at 968-71.

7 In light of the rule described in Rufo, it is apparent that
8 a change in state law standing alone is not the type of change
9 in factual circumstance that renders continued enforcement of a
10 consent decree inequitable. Indeed, the history of federal
11 institutional litigation demonstrates that fact. See Jenkins,
12 495 U.S. at 56-57; Swann, 402 U.S. at 44-45. The Ninth Circuit
13 has had occasion to recognize and apply that principle. In Hook
14 v. Arizona Dep't of Corr., 107 F.3d 1397 (9th Cir. 1997), the
15 circuit held that passage of a state law to prohibit funding
16 special masters without legislative approval did not merit
17 modification of a consent decree that provided for a special
18 master. There, the district court had entered consent decrees in
19 four civil rights cases brought by prisoners and the decrees in
20 each case included appointment of a special master to monitor
21 compliance. Id. at 1399-1400. After the Arizona legislature
22 passed a statute requiring its approval of a master before
23 paying the special masters' fees, the state moved to modify the
24 consent decrees on the grounds that this change in factual
25 circumstance required modification, premised on federalism
26 principles. Id. at 1402.

1 The Circuit upheld the district court's denial of the
2 motion to modify. Id. at 1403. Applying Rufo, it held that the
3 state bears the burden to show that there is a "significant
4 change" in law or fact warranting the modification. Id. at 1402,
5 citing Rufo, 502 U.S. at 383-84. The court observed that the
6 special masters had been originally appointed in each case due
7 to the courts' inability to monitor compliance itself and the
8 state's perpetual non-compliance with court orders. Id. at 1402-
9 1403. Accordingly, the passage of the state statute did not meet
10 the Rufo standard, because the statute's passage did not alter
11 the district courts' reasons for originally appointing special
12 masters in each case. Id.; see also United States v. Wayne
13 County, Michigan, 369 F.3d 508 (6th Cir. 2004) (consent decree
14 between federal and state government should not be modified
15 because changes in state statutory and decisional law do not
16 constitute a change in factual circumstances under Rufo and Rule
17 60).

18 Nonetheless, certain language in Hook might appear to lend
19 credence to the approach urged by the defendants here, i.e. that
20 the passage of Proposition 9 indicates the California voters'
21 preference to modify parole revocation procedures in a manner
22 that, defendants contend, is constitutionally adequate.
23 Defendants argue that this suffices to warrant modification.

24 In considering whether modification was merited, the Hook
25 court applied the Rufo factors within the context of the
26 "federalism concerns" it noted as being implicated by

1 institutional injunctions. Hook, 107 F.3d at 1402. It observed
2 that the Supremacy Clause requires state law to give way when it
3 conflicts with the Constitution or federal statute or with an
4 essential part of a federal court's remedial scheme. Id., citing
5 Stone, 968 F.2d at 862. In holding that modification was not
6 justified, the Hook court apparently concluded that the
7 modification did not meet the Rufo factors and that the elements
8 of the consent decree at issue also were necessary to the
9 remedial scheme, per Stone. Id. at 1402-1403.

10 Hook, however, cannot be interpreted to hold that any
11 portion of the consent decree not strictly necessary to
12 remedying the constitutional violation may be modified out of
13 the decree at any time. The Rufo standard, guided by the
14 language of Rule 60(b), is straightforward in what elements must
15 be present for modification to be appropriate. Because Hook
16 might be read to impose standards outside of the Rufo factors,
17 and because the Hook facts fully met the Rufo standards, such
18 language is simply dicta. Moreover, I now explain with the
19 greatest respect, that the dicta cannot guide subordinate
20 courts.

21 The Rufo court expressly recognized, as many other courts
22 have, that a government entity may enter into a consent decree
23 that is broader than the minimum necessary to remedy a
24 Constitutional violation. The Rufo court explained,

25 [W]e have no doubt that, to save themselves the time,
26 expense, and inevitable risk of litigation petitioners
could settle the dispute over the proper remedy for

1 the constitutional violations that had been found by
2 undertaking to do more than the Constitution itself
3 requires (almost any affirmative decree beyond a
4 directive to obey the Constitution necessarily does
5 that), but also more than a court would have ordered
6 absent the settlement.

7 Rufo, 502 U.S. at 389 (internal citations omitted); see also
8 Suter v. Artist M., 503 U.S. 347, 354 n. 6 (1992); Local No. 93
9 v. City of Cleveland, 478 U.S. 501, 525 (1986); Jeff D., 365
10 F.3d at 851-52; Gilmore v. People of the State of Cal., 220 F.3d
11 987, 1005 (9th Cir. 2000). Instead, in order to be valid the
12 remedy as a whole must "flow from" the constitutional violation
13 identified by the court. Milliken v. Bradley (Milliken II), 433
14 U.S. 267, 282 (1977); see also Rufo, 502 U.S. at 389.

15 Here, defendants have not borne their burden to show that
16 the Permanent Injunction should be modified due to a significant
17 change in factual circumstances. They have not shown that the
18 passage of Proposition 9 makes compliance with the injunction
19 substantially more onerous, unworkable, or otherwise no longer
20 in the public interest. See Rufo, 502 U.S. at 384-85 (citations
21 omitted); Jeff D., 365 F.3d at 854. Instead, the defendants
22 appear to suggest that Proposition 9 offers a constitutionally
23 adequate alternative for remedying the deficiencies in the
24 parole revocation process that the court held were present in
25 2002. Without more, this does not merit modification of the
26 decree. See id.; cf. Carey, 706 F.2d 956 (modification
appropriate because it would effectively achieve the purpose of
the consent decree and compliance with the decree had become

1 prohibitively difficult).

2 Defendants' position that the Permanent Injunction should
3 be altered because it includes provisions that are not strictly
4 necessary to address the plaintiffs' due process violations
5 holds no force. As the Supreme Court, Ninth Circuit, and other
6 courts have recognized, a consent decree is not invalid simply
7 because it contains elements that may be broader than those
8 required by federal law. See, e.g., Rufo, 502 U.S. at 389-90;
9 Jeff. D., 365 F.3d at 851-52. The court determined when it
10 entered the Stipulated Permanent Injunction that it represented
11 a valid remedy to the constitutional violations extant at the
12 time, and the defendants have presented nothing to suggest that
13 that determination was in error.⁸ See Milliken II, 433 U.S. at
14 282 (federal court decrees must be "aimed at eliminating a
15 condition that [violates] the Constitution or . . . flow[s] from
16 such a violation"); Jeff. D., 365 F.3d at 852 (consent decree
17 valid where it "came within the general scope of the pleadings
18 and furthered the objectives upon which the complaint was
19 based"). The consent decree was a bargained solution that the
20 defendants entered into freely; as part of the bargain, each
21 party may have gained or lost elements of a remedial plan that
22 may or may not have been part of a final judgment, had the case
23 proceeded to trial. As plaintiffs point out, at the time the
24 consent decree was entered, California Penal Code § 3056 allowed

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26 ⁸Nor, given the passage of time to appeal, could they.

1 the state very broad discretion in retaking a parolee into
2 custody. See also In re Etie, 27 Cal.2d 753, 758 (1946) ("The
3 authority under whose legal custody a paroled prisoner remains
4 (Pen. Code § 3056) has broad power to suspend or revoke parole
5 without notice.") Hence, at the time defendants entered into the
6 consent decree, the decree was in conflict with state law. Under
7 Rufo and related authority, it cannot be the case that conflict
8 with a new state law suffices to merit modification of the
9 decree.⁹

10 IV. CONCLUSION

11 Accordingly, the court ORDERS as follows:

- 12 1. Plaintiffs' motion to enforce the Permanent Injunction
13 is GRANTED as provided herein. To the extent that
14 there is no conflict between the Permanent Injunction
15 and Proposition 9 § 5.3 (Penal Code § 3044), no order
16 is necessary. To the extent that they are in
17 conflict, as identified herein, the Permanent
18 Injunction SHALL supercede California Penal Code §
19 3044.

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23 ⁹Because the defendants have not shown that there has been a
24 change in pertinent law or fact that merits a modification of the
25 Permanent Injunction, the court need to reach the question of
26 whether Proposition 9 is "suitably tailored to the changed
circumstance" or whether defendants' proposed modification is
simply an attempt to "rewrite [the] consent decree so that it
conforms to the constitutional floor." Rufo, 520 U.S. at 391; see
also Jeff D., 365 F.3d at 854.

1 2. Defendants' motion to modify the Permanent Injunction
2 is DENIED.

3 IT IS SO ORDERED.

4 DATED: March 26, 2009.

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7 
8 LAWRENCE K. KARLTON
9 SENIOR JUDGE
10 UNITED STATES DISTRICT COURT
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