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 Federal Bureau of Prisons;  
 11 United States Parole Commission

12 UNITED STATES DISTRICT COURT  
 13 FOR THE CENTRAL DISTRICT OF CALIFORNIA  
 14 EASTERN DIVISION

15 Mutulu Shakur,  
 16 Plaintiff,  
 17 v.  
 18 Louis Milusnic, Warden, Bureau of  
 Prisons, et al.,  
 19 Defendant.

Case No. 5:18-cv-00628-SVW (ASx)

**DEFENDANT UNITED STATES  
 PAROLE COMMISSION'S NOTICE  
 OF MOTION AND MOTION TO  
 DISMISS;**

**MEMORANDUM OF POINTS AND  
 AUTHORITIES**

[Fed. R. Civ. P. 12(b)(1), 12(b)(6)]

Hearing Date: October 29, 2018  
 Hearing Time: 1:30 p.m.  
 Location: Courtroom 10A  
 United States Courthouse  
 350 West First Street  
 Los Angeles, CA 90012

Honorable Stephen V. Wilson  
 United States District Judge

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27 <sup>1</sup> Louis Milusnic is substituted for his predecessor, David Shinn. See Fed. R. Civ.  
 28 P. 25(d).

**NOTICE OF MOTION AND MOTION TO DISMISS**

1  
2 PLEASE TAKE NOTICE that, on October 29, 2018, at 1:30 p.m., or as soon  
3 thereafter as it may be heard before the Honorable Stephen V. Wilson, United States  
4 District Judge, in Courtroom 10A of the United States Courthouse, located at 350 West  
5 First Street, Los Angeles, California 90012, defendant United States Parole Commission  
6 will, and hereby does, move this Court for an order dismissing plaintiff Mutulu Shakur’s  
7 Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

8 Good cause exists to grant this motion. By this action, Plaintiff asks the Court to  
9 reconsider the United States Parole Commission’s denial of his request for parole by  
10 reweighing the evidence presented at his parole hearings to come to a different  
11 conclusion than the United States Parole Commission. But such second-guessing is  
12 beyond this Court’s jurisdiction. Substantive decisions to grant or deny parole are  
13 committed to the judgment of the Commission, and cannot be reviewed by district  
14 courts. The Court also lacks jurisdiction over Plaintiff’s claims to the extent Plaintiff he  
15 failed to raise them before the National Appeals Board. Moreover, even if Plaintiff’s  
16 allegations fell within the narrow scope of parole-related claims that district courts can  
17 consider, his claims should still be dismissed because Plaintiff has failed to allege  
18 sufficient facts to adequately support them.

19 This Motion is based on this Notice, the attached Memorandum of Points and  
20 Authorities, and all pleadings, records, and other documents on file with the Court in this  
21 action, and on such oral argument as may be presented at the hearing of this Motion.

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This Motion is made following the conference of counsel pursuant to Local Rule 7-3, which counsel for the United States Parole Commission initiated by letter on September 10, 2018.

Dated: September 17, 2018

Respectfully submitted,

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. Introduction**

3 Plaintiff Mutulu Shakur is serving a 60-year prison sentence for, among other  
4 crimes, participating in a racketeering enterprise and bank robbery murder. Because  
5 Plaintiff was convicted before the parole system for federal prisoners was repealed, he is  
6 one of the few federal inmates who remains eligible for parole. In April 2016, Plaintiff  
7 sought his release on “mandatory” parole. That request was denied. As provided by  
8 statute, Plaintiff had another parole hearing in May 2018, after which Plaintiff was again  
9 denied parole. Both denials were upheld by the National Appeals Board.

10 By this action, Plaintiff asks the Court to reweigh the evidence presented at his  
11 parole hearings and to reach a different conclusion than that of the United States Parole  
12 Commission. But such second-guessing is beyond this Court’s jurisdiction. Substantive  
13 decisions to grant or deny parole are committed to the judgment of the Commission, and  
14 cannot be reviewed by district courts. The Court also lacks jurisdiction over Plaintiff’s  
15 claims that he failed to raise before the National Appeals Board. Even if Plaintiff’s  
16 allegations fell within the narrow scope of parole-related claims that district courts can  
17 consider, the claims should still be dismissed because Plaintiff has failed to allege  
18 sufficient facts to adequately support them.

19 Accordingly, for these reasons, and those stated below, the United States Parole  
20 Commission requests that the Court grant this Motion and dismiss Plaintiff’s First  
21 Amended Complaint.

22 **II. The Federal Parole System**

23 “The Parole Act of 1976 was the product of nearly a decade of study and  
24 evaluation by the executive and legislative branches.” Wallace v. Christensen, 802 F.2d  
25 1539, 1542 (9th Cir. 1986) (citing S. Rep. No. 94-369, 94th Cong., 2d Sess. 1, 16,  
26 reprinted in 1976 U.S.C.C.A.N. 335, 338). The Parole Commission and Reorganization  
27 Act of 1976 included three principal elements: (1) creation of a Parole Commission to  
28 promulgate guidelines and render parole decisions; (2) formalization of procedures to

1 govern parole determinations; and (3) establishment of an appeals process. See 1976  
2 U.S.C.C.A.N. 336–37. Because the parole system was abolished by the Comprehensive  
3 Crime Control Act of 1984, it applies only to prisoners who committed offenses prior to  
4 November 1, 1987. See Fassler v. U.S. Parole Comm’n, 964 F.2d 877, 879 (9th Cir.  
5 1992).

#### 6 **A. Types of Federal Parole.**

7 Federal inmates subject to the Parole Act may qualify for one of two types of  
8 parole: discretionary parole or mandatory parole. An inmate serving a sentence longer  
9 than thirty years, including life sentences, becomes eligible for discretionary parole after  
10 ten years. 18 U.S.C. § 4205(a). A prisoner may be released on discretionary parole if the  
11 Commission determines that (1) the prisoner has substantially observed institutional  
12 rules; (2) release would not depreciate the seriousness of the inmate’s offense or promote  
13 disrespect for the law; and (3) release would not jeopardize the public welfare. 18 U.S.C.  
14 § 4206(a).

15 An inmate who is not released on discretionary parole may become eligible for  
16 “mandatory” parole. An inmate serving a sentence longer than forty-five years becomes  
17 eligible for mandatory parole after serving thirty years. 18 U.S.C. § 4206(d). Despite its  
18 name, “mandatory” parole is not, in fact, mandatory. See, e.g., Durfur v. U.S.P.C., 314 F.  
19 Supp. 3d 10, 12 (D.D.C. 2018) (“This case presents the question whether mandatory  
20 parole in the federal prison system is mandatory. It is not.”). Even if an inmate is eligible  
21 for mandatory parole, he will not be released if the Commission determines either  
22 (1) that the prisoner has “seriously or frequently violated institution rules and  
23 regulations” or (2) that there is a “reasonable probability” the prisoner “will commit any  
24 Federal, State, or local crime.” 18 U.S.C. § 4206(d).

#### 25 **B. Procedures Governing Parole Determinations.**

26 Parole determinations are made following three types of hearings: initial hearings,  
27 reconsideration hearings, and interim hearings. When an inmate first becomes eligible  
28 for discretionary parole and, if applicable, mandatory parole, the Commission will

1 conduct an “initial hearing.” See 28 C.F.R. § 2.13. If parole is not granted at an initial  
2 hearing, the examiner will set a “reconsideration hearing” for fifteen years from the date  
3 of the denial. 28 C.F.R. §§ 2.12(b)(3), 2.14(c)(1). A reconsideration hearing is a “full  
4 reassessment” of the inmate’s case for parole—just like an initial hearing—at which the  
5 examiner can consider all the same evidence that may be considered at an initial hearing.  
6 28 C.F.R. § 2.14(c). Between an initial hearing and a reconsideration hearing, an inmate  
7 is given regular interim hearings. 18 U.S.C. § 4208(h); 28 C.F.R. § 2.14. For prisoners  
8 serving terms greater than seven years, interim hearings are conducted every 24 months.  
9 18 U.S.C. § 4206(h)(2); 28 C.F.R. § 2.14(a)(1)(ii). The purpose of an interim hearing is  
10 to consider “significant developments or changes with the prisoner’s status” that have  
11 occurred since the previous hearings. 28 C.F.R. § 2.14(a).

12 Parole hearings are conducted by hearing examiners. See 28 C.F.R. § 2.23(a). At  
13 least 60 days before any hearing, an inmate may request disclosure of “the reports and  
14 other documents to be used by the Commission in making its determination.” 28 C.F.R.  
15 § 2.55(a); but see 28 C.F.R. § 2.55(c) (exempting certain documents from disclosure).  
16 Because interim hearings address only changes to an inmate’s circumstances, only  
17 information not relied on at a previous hearing must be disclosed before an interim  
18 hearing. 28 C.F.R. § 2.55(b) (limiting “prehearing disclosure” to “information  
19 concerning significant developments or changes in the prisoner’s status since the initial  
20 hearing or a prior interim hearing”). If the relevant documents are not disclosed at least  
21 30 days before a hearing, the inmate may waive his right to disclosure and continue with  
22 his hearing as scheduled. 28 C.F.R. § 2.55(e). If the prisoner chooses not to waive his  
23 right to the prehearing disclosure, then the hearing shall be postponed so that an  
24 appropriate disclosure can be made. Id.

25 At an initial hearing or reconsideration hearing, a hearing examiner will discuss  
26 the prisoner’s offense severity rating and salient factor score, and will review the  
27 inmate’s institutional conduct. 28 C.F.R. § 2.13(a). The examiner may take into account  
28 a wide range of evidence, including official reports of the inmate’s criminal record,

1 recommendations from prosecutors and other interested parties, any substantial  
2 information regarding aggravating or mitigating circumstances, and any additional  
3 relevant information concerning the prisoner. See 18 U.S.C. § 4207; 28 C.F.R.  
4 §§ 2.19(a), 2.19(b)(1). At these hearings, a prisoner may be represented. 28 C.F.R.  
5 § 2.13 (b). The prisoner’s representative may “offer a statement” and may provide and  
6 “additional information as the examiner shall request.” 28 C.F.R. § 2.13(c). Interested  
7 parties who oppose parole may also appear and offer a statement. Id. At interim hearings,  
8 the examiner will only consider evidence regarding “significant developments or  
9 changes in the prisoner’s status” since his or her last hearing. 28 C.F.R. §§ 2.14, 2.55(b).

10 At the conclusion of any hearing, the examiner will make a recommendation on  
11 the record and prepare a post-hearing summary. See 28 C.F.R. §§ 2.13(c), 2.23. The  
12 post-hearing summary will be reviewed by an Executive Hearing Examiner, who will  
13 make his or her own recommendation regarding parole. 28 C.F.R. § 2.23(b). If the  
14 Executive Hearing Examiner agrees with the hearing examiner’s recommendation, the  
15 recommendation is submitted to the Regional Commissioner for the final determination.<sup>2</sup>  
16 28 C.F.R. § 2.23(c). If the Regional Commissioner approves of the recommendation, the  
17 recommendation becomes the Commission’s decision. 28 C.F.R. §§ 2.23(d), 2.24(a). An  
18 inmate will be informed of the Commission’s decision through at “Notice of Action.”

### 19 **C. Appeals of Parole Decisions.**

20 A prisoner who is dissatisfied with a parole determination may appeal that  
21 decision to the National Appeals Board within 30 days of the date of the Notice of  
22 Action. 28 C.F.R. § 2.26(a)(2). The appeal must summarize the grounds for the appeal  
23 and “concisely explain the reasons supporting each ground. Id. Additionally, the prisoner  
24 may provide additional information for the Appeals Board to consider. Id. After  
25 considering the appeal, the Appeals Board may affirm, reverse, or modify the

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26  
27 <sup>2</sup> If the Executive Hearing Examiner disagrees with the hearing examiner, the case will  
28 be referred to a second hearing examiner for review. 28 C.F.R. § 2.23(c). A case will only be  
submitted to the Regional Commissioner once two examiners agree on a recommendation. Id.

1 Commission’s decision, or may order a new hearing. 28 C.F.R. § 2.26(b)(1). A decision  
2 by the Appeals Board is final. 28 C.F.R. § 2.26(c).

### 3 **III. Statement of Facts**

#### 4 **A. Plaintiff’s Conviction and Sentence.**

5 In 1988, Plaintiff was found guilty of conspiracy to violate the Racketeer  
6 Influenced and Corrupt Organizations Act, participating in a racketeering enterprise,  
7 bank robbery, armed bank robbery, and bank robbery murder. First Am. Compl.,  
8 Dkt. 20, ¶¶ 42–44. As a result of this conviction, Plaintiff was sentenced to 60 years in  
9 federal prison.

#### 10 **B. Plaintiff’s April 7, 2016 Parole Hearing.**

11 Plaintiff’s initial hearing for mandatory parole was on April 7, 2016.<sup>3</sup> On April 20,  
12 2016, the Commission issued a Notice of Action denying Plaintiff’s request for  
13 mandatory parole (the “April 2016 NOA”). First Am. Compl. App’x 6, Dkt. 20-6. The  
14 April 2016 NOA reflected the Commission’s conclusion that Plaintiff had “seriously  
15 violated the rules of the institution” and that there was “a likelihood that [he would]  
16 commit any Federal, State or local crime.”<sup>4</sup> *Id.* The April 2016 NOA lists a number of  
17 reasons for the Commission’s determination, including Plaintiff’s multiple violations of  
18 BOP rules; his failure to take responsibility for his crimes; his repeated references to  
19 himself as a “freedom fighter,” “political prisoner,” and a “‘victim’ of the government’s  
20 counter-intelligence program”; and his use of the phrase “Stiff Resistance” in many of  
21 his writings. *Id.* The Commission found that the “combination of [Plaintiff’s] recent  
22 written statements, [his] disciplinary infractions and [his] failure to accept responsibility  
23 for [his] crimes” indicated that he had “not rehabilitated” and that there was a  
24 “reasonable likelihood” that he would commit another crime if released. *Id.* The April

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25 <sup>3</sup> Plaintiff first applied for “discretionary” parole in 2002, and between 2002 and 2014,  
26 Plaintiff received five parole hearings in accordance with the standard set forth in 18 U.S.C.  
27 § 4602(a).

28 <sup>4</sup> The Commission issued the April 2016 NOA after an April 7, 2016 initial hearing to  
determine Plaintiff’s eligibility for mandatory parole.

1 2016 NOA also scheduled Plaintiff for a statutory interim hearing during April 2018, and  
2 indicated that, at that time, Plaintiff's case would "be reviewed again pursuant to  
3 18 U.S.C. § 4206(d)." Id.

4 On May 20, 2016, Plaintiff appealed the April 2016 NOA to the Appeals Board.  
5 On November 25, 2016, the Appeals Board issued a Notice of Action on Appeal  
6 affirming the April 2016 NOA.

### 7 **C. Plaintiff's May 3, 2018 Parole Hearing.**

8 In accordance with the April 2016 NOA, Plaintiff had an interim parole hearing on  
9 May 3, 2018. First Am. Compl., Dkt. 20, ¶ 3; First Am. Compl. App'x 3, Dkt. 20-3; see  
10 also First Am. Compl. App'x 7, Dkt. 20-7. At the start of the hearing, Plaintiff read a  
11 statement in which he stated he was remorseful for the crimes he committed, and then  
12 answered questions from the hearing examiner. First Am. Compl. App'x 7, Dkt. 20-7, at  
13 1-3; see also First Am. Compl. App'x 2, Dkt. 20-2. Next, information from victims was  
14 presented, including statements made by two individuals via video conference. First Am.  
15 Compl. App'x 7, Dkt. 20-7, at 4-7. After the victim statements, Petitioner's  
16 representative addressed questions from the hearing examiner and read a letter  
17 supporting Plaintiff's release written by an Associate Warden. Id. at 7-10. Plaintiff's  
18 representative acknowledged that Plaintiff had committed what the BOP considers to be  
19 a "serious rule infraction," but argued that sufficient time had passed since the event that  
20 the Commission could reverse its previous conclusion that the violation was serious. Id.  
21 at 9. The hearing lasted approximately three-and-a-half hours. Id. at 1.

22 At the end of the hearing, the hearing examiner concluded that "there [had] been  
23 no significant developments or changes in [Plaintiff's] status as to warrant a change in  
24 the previous decision to deny mandatory parole." Id. at 10. The examiner noted that, for  
25 the same reasons identified in the April 2016 NOA, Plaintiff had "seriously violated the  
26 rules of the institution and that there [was] a reasonable probability" that he would  
27 reoffend if released. Id. While the examiner considered Plaintiff's statement, the  
28 examiner determined that Plaintiff "lack[ed] credibility." Id.

1 On May 25, 2018, the Commission issued a Notice of Action (“May 2018 NOA”),  
2 which adopted the recommendation to deny parole. First Am. Compl. App’x 3, Dkt. 20-  
3 3. Plaintiff alleges that the April 2016 NOA is incorporated into the Commission’s most  
4 recent denial of parole. First Am. Compl., Dkt. 20, ¶ 9.

5 Plaintiff appealed the May 2018 NOA to the Appeals Board. First Am. Compl.  
6 App’x 4, Dkt. 20-4. Plaintiff raised several arguments on appeal, specifically that:

- 7 1. the Commission relied upon prior findings to support the May 2018 NOA  
8 and that new evidence was not considered;
- 9 2. the Commission should have viewed Plaintiff’s statement claiming  
10 responsibility for his crimes as a “significant development in [his] status”;
- 11 3. the Commission’s finding that there was a reasonable probability that  
12 Plaintiff would reoffend conflicted with the facts in the records;
- 13 4. the Commission abused its discretion by considering Plaintiff’s use of the  
14 phrase “stiff resistance” in certain writings;
- 15 5. the Commission should not have found Plaintiff’s violations of various  
16 BOP rules to be “serious” or “frequent”;
- 17 6. the Commission failed to consider certain new evidence, such as the letter  
18 from the Associate Warden;
- 19 7. the Commission improperly relied on certain statements by Plaintiff to  
20 conclude that he had not accepted responsibility for his actions;
- 21 8. the Commission should have considered Plaintiff’s desire to establish a  
22 “Truth and Reconciliation Commission” as evidence that he would not  
23 reoffend; and
- 24 9. the Commission has inadequate time or resources to conduct parole  
25 hearings.

26 First Am. Compl. App’x 5, Dkt. 20-5, at 1–4 (outlining Plaintiff’s arguments on appeal).  
27 On July 25, 2018, the Appeals Board issued a Notice of Action rejecting each of  
28 Plaintiff’s arguments and affirming the decision to deny Plaintiff’s request for parole. Id.

1           **D. Plaintiff’s District Court Action.**

2           Plaintiff initiated this action on March 28, 2018, before his most recent parole  
3 hearing. Compl., Dkt. 1. On July 30, 2018, the parties stipulated to allow Plaintiff to file  
4 his First Amended Complaint, which addresses the May 2018 NOA and the July 25,  
5 2018 denial of Plaintiff’s appeal of that NOA. Stipulation, Dkt. 16. Plaintiff’s First  
6 Amended Complaint asserts fourteen claims for relief against the Commission.<sup>5</sup> See First  
7 Am. Compl, Dkt. 20, ¶¶ 143–46, 153–91. As a result of each of the Commission’s  
8 alleged transgressions, Plaintiff alleges that he is “in custody in violation of the laws of  
9 the United States” and seeks his release from prison. Id. ¶¶ 146, 155, 158, 161, 164, 167,  
10 170, 173, 176, 179, 182, 185, 188, 191; see also id. p. 84, no. 1 (seeking order releasing  
11 Plaintiff on parole).

12 **IV. Legal Standard**

13           **A. Federal Rule of Civil Procedure 12(b)(1)**

14           A Court must dismiss a complaint under Federal Rule of Civil Procedure 12(b)(1)  
15 when it lacks subject-matter jurisdiction to hear the case. Because it is the plaintiff’s  
16 burden to establish jurisdiction, a court presumes a lack of subject-matter jurisdiction  
17 until the plaintiff proves otherwise. Stock West, Inc. v. Confederated Tribes, 873 F.2d  
18 1221, 1225 (9th Cir. 1989). A motion to dismiss under Rule 12(b)(1) may be made either  
19 on the face of the complaint or on the basis of extrinsic evidence. White v. Lee, 227 F.3d  
20 1214, 1242 (9th Cir. 2000). When allegations regarding jurisdiction are attacked by  
21 extrinsic evidence, “no presumptive truthfulness attaches to the plaintiff’s allegations,  
22 and the existence of disputed material facts will not preclude the trial court from  
23 evaluating for itself the merits of jurisdictional claims.” Augustine v. United States, 704  
24 F.2d 1074, 1077 (9th Cir. 1983) (citation and internal quotation marks omitted). Once  
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26           <sup>5</sup> The remaining claim for relief is alleged against the Bureau of Prisons and Louis  
27 Milusnic, Warden of FCC Victorville. See First Am. Compl., Dkt. 20, ¶¶ 148–51. This claim  
28 fails for the reasons stated in the Motion to Dismiss concurrently filed by the BOP and Warden  
Milusnic. See Mot. to Dismiss, Dkt. 22; see also infra n.10.



1 the movant has “present[ed] affidavits or other evidence . . . , the party opposing the  
2 motion must furnish affidavits or other evidence necessary to satisfy its burden of  
3 establishing subject matter jurisdiction.” Savage v. Glendale Union High Sch., 343 F.3d  
4 1036, 1039 n.2 (9th Cir. 2003).

5 **B. Federal Rule of Civil Procedure 12(b)(6)**

6 A court may dismiss a complaint under Federal Rule of Civil Procedure 12(b)(6)  
7 if its allegations fail to present a viable claim for relief. To survive a 12(b)(6) motion, a  
8 complaint must “contain sufficient factual matter, accepted as true, to ‘state a claim to  
9 relief that is plausible on its face.’” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). (quoting  
10 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). In assessing a complaint’s  
11 sufficiency under Rule 12(b)(6), while a court normally accepts factual allegations in the  
12 complaint as true, allegations contradicted by “matters properly subject to judicial notice  
13 or by exhibit” need not be accepted as true. Spewell v. Golden State Warriors, 266 F.3d  
14 979, 988 (9th Cir. 2001).

15 **V. Argument**

16 **A. The Court should dismiss Plaintiff’s First Amended Complaint because**  
17 **he can only obtain the relief he seeks through a petition for a writ of**  
18 **habeas corpus.**

19 An inmate who seeks to challenge the “fact or duration of his confinement,” must  
20 do so through a petition for a writ of habeas corpus. Preiser v. Rodriguez, 411 U.S. 475,  
21 489 (1973) (noting that a challenge to the fact or duration of confinement is “just as  
22 close to the core of habeas corpus as an attack on the prisoner’s conviction, [as it] seeks  
23 either immediate release from that confinement or the shortening of its duration”).  
24 Additionally, under Ninth Circuit law, a petition for a writ of habeas corpus is the  
25 “proper vehicle for obtaining judicial review of parole board decisions.” Andrino v. U.S.  
26 Bd. of Parole, 550 F.2d 519, 519 (9th Cir. 1977); see also Izsak v. Sigler, 604 F.2d 1205,  
27 1207 (9th Cir. 1979) (“Habeas corpus . . . is the proper vehicle for attacking Parole  
28 Commission action.”).

1 By his First Amended Complaint, Plaintiff challenges the Commission’s denials  
 2 of his requests for parole and asks the Court to order his release from custody. First Am.  
 3 Compl., Dkt. 20, p. 84, no. 1 (seeking order releasing Plaintiff on parole); see also id.  
 4 ¶¶ 146, 155, 158, 161, 164, 167, 170, 173, 176, 179, 182, 185, 188, 191 (alleging that  
 5 Plaintiff is “in custody in violation of the laws of the United States”). Accordingly,  
 6 Plaintiff may only bring his claims, if at all, as a petition for a writ of habeas corpus.  
 7 Because Plaintiff has instead filed a complaint, the Court should dismiss this action.

8 **B. The Court should dismiss Plaintiff’s First Amended Complaint to the**  
 9 **extent it lacks jurisdiction over his claims.**

10 1. The Court lacks jurisdiction to review decisions entrusted to the  
 11 discretion of the Commission.

12 Federal courts lack jurisdiction to consider challenges to the Commission’s  
 13 discretion in making decisions involving “the exercise of judgment among a range of  
 14 possible choices or options.” Wallace, 802 F.2d at 1552; Benny v. U.S. Parole Comm’n,  
 15 295 F.3d 977, 982 (9th Cir. 2002) (“Judgments ‘involving a broad range of factors’ that  
 16 the Commission takes into account in arriving at its decision are committed to the  
 17 Commission’s discretion and are unreviewable even for abuse of discretion.”). Under 18  
 18 U.S.C. § 4218(d), the Commission’s decisions to “grant or deny an application or  
 19 recommendation to parole any eligible prisoner” are “actions committed to agency  
 20 discretion” and, therefore, the denial of a request for parole cannot be reviewed by the  
 21 district courts.<sup>6</sup> Wallace, 802 F.2d at 1545 (“[S]ubstantive decisions to grant or deny  
 22 parole . . . may not be reviewed even for abuse of discretion.”); accord Yamamoto v.  
 23 United States Parole Comm’n, 794 F.2d 1295, 1299 (8th Cir. 1986) (“Congress clearly  
 24 intended that parole eligibility determinations would remain a matter of discretion with  
 25 the Parole Commission.”); Garcia v. Neagle, 660 F.2d 983, 988 (4th Cir. 1981) (“In  
 26

27 <sup>6</sup> This statutory entrustment to the Commission’s discretion also precludes review under  
 28 the Administrative Procedures Act. See 5 U.S.C. 701(a)(2); see also Webster v. Doe, 486 U.S.  
 592, 601 (1988).

1 unmistakable terms, the Parole Act specifically commits the decision to grant or deny  
2 parole to the unreviewable discretion of the Parole Commission.”). Among other things,  
3 the evaluation of the evidence properly before the Commission is almost entirely within  
4 its discretion. Roberts v. Corrothers, 812 F.2d 1173, 1179–80 (9th Cir.1987); Wallace,  
5 802 F.2d at 1551 (explaining that “the relevance of the information considered by the  
6 Commission is a matter committed to its discretion”). In accordance with these  
7 principles, this Court lacks jurisdiction to consider Plaintiff’s Fifth through Fifteenth  
8 Claims for Relief, because these alleged claims challenge the Commission’s decision to  
9 deny Plaintiff’s request for parole.

10 In his Sixth, Fourteenth, and Fifteenth Claims for Relief, Plaintiff challenges  
11 certain evidence the Commission allegedly relied on in denying Plaintiff’s request. See  
12 First Am. Compl., Dkt. 20, ¶ 163 (challenging Commission’s consideration of Plaintiff’s  
13 2013 BOP rule violation); ¶ 187 (challenging Commission’s consideration of Plaintiff’s  
14 allegedly “protected non-violent political speech”); ¶ 190 (challenging Commission’s  
15 consideration of evidence Plaintiff contends was “irrelevant”). Deciding whether to rely  
16 on certain evidence is entrusted to the Commission’s discretion, and the Court lacks  
17 jurisdiction to reevaluate those decisions. Additionally, an allegation that the  
18 Commission relied on evidence that is supposedly irrelevant is exactly the type of  
19 discretionary decision that cannot be reviewed. See Wallace, 802 F.2d at 1551  
20 (explaining that “the relevance of the information considered by the Commission is a  
21 matter committed to its discretion”). As a result, the Court lacks jurisdiction over  
22 Plaintiff’s Sixth, Fourteenth, and Fifteenth Claims for Relief, and should dismiss them.

23 Moreover, Plaintiff, in his Fifth and Seventh through Thirteenth Claims for Relief,  
24 challenges the Commission’s conclusions that Plaintiff had “seriously” violated  
25 institutional rules and that there was a “reasonable probability that [Plaintiff would]  
26 commit any Federal, State, or local crime.” See First Am. Compl., Dkt. 20, ¶ 160  
27 (challenging Commission’s determination that a rule violation was “serious”); ¶ 166  
28 (challenging Commission’s determination that Plaintiff had committed “frequent” rule

1 violations);<sup>7</sup> ¶¶ 169–178 (challenging Commission’s determination that there was a “a  
 2 reasonable probability” Plaintiff would reoffend); ¶ 181 (challenging Commission’s  
 3 conclusion that Plaintiff failed to present facts warranting reconsideration of the  
 4 Commission’s prior denials); ¶ 184 (alleging that Commission treated Plaintiff’s request  
 5 for parole “more harshly” than other inmates’). Through each of these claims, Plaintiff  
 6 asks that the Court step into the Commission’s shoes and reinterpret the evidence the  
 7 Commission relied on in denying Plaintiff’s request for parole. The law plainly forbids  
 8 this second guessing of the Commission’s judgment. See 18 U.S.C. § 4218(d). Each of  
 9 these claims is, therefore, beyond this Court’s jurisdiction, and should be dismissed. See  
 10 Roberts, 812 F.2d at 1179–80; Wallace, 802 F.2d at 1551.

11 2. The Court should decline to exercise jurisdiction to the extent  
 12 Plaintiff did not raise certain claims in his administrative appeal.

13 Before challenging a parole decision, an inmate must exhaust his administrative  
 14 remedies. Ruwiwat v. Smith, 701 F.2d 844, 845 (9th Cir. 1983); accord Fuller v. Rich, 11  
 15 F.3d 61, 62 (5th Cir. 1994) (“A prisoner challenging a Parole Commission decision is  
 16 required to exhaust his administrative remedies before seeking habeas relief in federal  
 17 court under 28 U.S.C. § 2241.”).<sup>8</sup> Though the exhaustion requirement is not based in  
 18 statute, it “furnishes the district court with a method to exercise comity toward  
 19 administrative agencies and to promote efficient use of judicial resources while  
 20 protecting the rights of parties who have come before the court seeking relief.”  
 21 Morrison-Knudsen Co. v. CHG Int’l, Inc., 811 F.2d 1209, 1223 (9th Cir. 1987). When  
 22 deciding whether a failure to satisfy a prudential exhaustion requirement warrants  
 23 dismissal, the Court should consider whether (1) agency expertise is necessary to  
 24

25 <sup>7</sup> Contrary to Plaintiff’s allegations, the Commission did not conclude in either the  
 26 April 2016 or the May 2018 NOA that Plaintiff had “frequently” violated institution rules. See  
 27 First Am. Compl. App’x 3, Dkt. 20-3; First Am. Compl. App’x 6, Dkt. 20-6.

28 <sup>8</sup> Both Ruwiwat and Fuller discuss the exhaustion requirement in the context of a petition  
 for a writ of habeas corpus. Even though Plaintiff has not brought this action as such a petition,  
 he must do so in order to challenge the denial of his request for parole. See, supra § V.A.

1 generate a proper record and reach a proper decision; (2) excusing the requirement  
2 would encourage the deliberate bypass of the administrative scheme; and  
3 (3) administrative review would allow the agency to correct its own mistakes and  
4 eliminate the need for judicial review. Puga v. Chertoff, 488 F.3d 812, 815 (9th Cir.  
5 2007); see also Jiau v. Poole, 590 F. App'x 689, 690 (9th Cir. 2015) (affirming dismissal  
6 of habeas petition based on petitioner's expulsion from Residential Drug Abuse  
7 Treatment Program due to failure to exhaust administrative remedies).

8 While Plaintiff appealed the May 2018 NOA to the Appeals Board, not all of the  
9 claims that Plaintiff alleges in his First Amended Complaint were raised in that appeal.  
10 Specifically, Plaintiff failed to raise the claims alleged in his First, Third, Sixth, and  
11 Thirteenth through Fifteenth Claims for Relief before the Appeals Board. Compare First  
12 Am. Compl., Dkt. 20, ¶¶ 144–145, 154, 163, 184–190, with First Am. Compl. App'x 4,  
13 Dkt. 20-4; see also First Am. Compl. App'x 5 at 1–4 (identifying the grounds for  
14 Plaintiff's appeal of the May 2018 NOA). Plaintiff's failure to exhaust these claims  
15 should result in their dismissal. First, Plaintiff's failure to raise these claims in his appeal  
16 deprived the Appeals Board of the opportunity to address these claims. This is especially  
17 important regarding Plaintiff's First Claim for Relief, which challenges the  
18 Commission's interpretation and application of 18 U.S.C. § 4206(a) and § 42016(d), and  
19 his Third Claim for Relief, which alleges that certain pre-hearing procedures were not  
20 followed before Plaintiff's April 2016 and May 2018 hearings. See First Am. Compl.,  
21 Dkt. 20, ¶¶ 144–45, 154. Had Plaintiff raised these claims in his appeal, the Appeals  
22 Board could have provided justifications for the actions, developed a record, and  
23 possibly alleviated the alleged need for judicial intervention. Plaintiff's failure to raise  
24 these claims in that forum should preclude their consideration here.

25 Additionally, Plaintiff's Sixth and Thirteenth through Fifteenth Claims for Relief  
26 all challenge the evidence relied on or the conclusions arrived at by the Commission in  
27 denying Plaintiff's requests for parole. See, supra § V.B.1. The Appeals Board should  
28 have been permitted to address these questions in the first instance. By circumventing

1 the administrative review process, Plaintiff deprived the Appeals Board of that  
2 opportunity. Accordingly, the Court should decline to extend jurisdiction over Plaintiff's  
3 First, Third, Sixth, and Thirteenth through Fifteenth Claims for Relief.

4 **C. To the extent the Court has jurisdiction, it should dismiss Plaintiff's**  
5 **First Amended Complaint because Plaintiff has failed to state his**  
6 **claims.**

7 As stated above, the Court lacks jurisdiction to review Commission decisions that  
8 involve "the exercise of judgment among a range of possible choices or options."  
9 Wallace, 802 F.2d at 1552. A court may, however, consider the narrow questions of  
10 whether, in reaching a parole decision, the Commission (1) acted outside the scope of its  
11 authority or (2) violated the Constitution. Feldman v. Perrill, 902 F.2d 1445, 1449 (9th  
12 Cir. 1990). While nearly all of Plaintiff's claims challenge the Commission's exercise of  
13 discretion and, therefore, are beyond this Court's jurisdiction, to the extent Plaintiff  
14 purports to allege that the Commission acted beyond the scope of its authority or  
15 violated the Constitution, however, those claims fail.

16 1. Plaintiff has failed to adequately allege that the Commission acted  
17 outside the scope of its authority.

18 Plaintiff's only claim that arguably alleges that the Commission acted "outside"  
19 the scope of its authority is his Fourth Claim for Relief. Plaintiff alleges in his Fourth  
20 Claim for Relief that, in denying Plaintiff parole in 2016 and 2018, the Commission  
21 relied on evidence that it "had not relied upon in Plaintiff's 2014 and previous parole  
22 hearings," supposedly in violation of 28 C.F.R. § 2.55(b). First Am. Compl., Dkt. 20,  
23 ¶ 157. As an initial matter, 28 C.F.R. § 2.55(b) applies only to "statutory interim  
24 hearings conducted pursuant to 28 C.F.R. § 2.14," and therefore was inapplicable to  
25 Plaintiff's April 2016 hearing, which was Plaintiff's initial hearing for mandatory parole.

26 While Plaintiff's May 2018 hearing was a "statutory interim hearing," Plaintiff has  
27 not identified any evidence that Plaintiff contends the Commission relied on at that  
28 hearing in violation of 28 C.F.R. § 2.55(b). Rather, all of the evidence that Plaintiff

1 alleges was improperly considered at his May 2018 hearing was considered at his April  
2 2016 hearing, and, therefore, was properly considered again in May 2018. See First Am.  
3 Compl., Dkt. 20, ¶ 157. Additionally, the May 2018 NOA demonstrates that the hearing  
4 examiner's focus was on what changes, if any, in Plaintiff's circumstances may have  
5 warranted his release. See First Am. Compl. App'x 3, Dkt. 20-3, at 1 (finding "no  
6 significant development or changes" in Plaintiff's case). In fact, Plaintiff admits that the  
7 May 2018 NOA only addressed one new piece of evidence: Plaintiff's statement at the  
8 hearing. First Am. Compl., Dkt. 20, ¶ 10. Accordingly, Plaintiff's Fourth Claim for  
9 Relief should be dismissed because Plaintiff has not alleged sufficient facts to support a  
10 claim that the Commission acted beyond the scope of its authority.

11 2. Plaintiff has failed to adequately allege that the Commission violated  
12 the Constitution.

13 Plaintiff purports to allege constitutional violations in his Third, Fourth, Sixth,  
14 Thirteenth, and Fourteenth Claims for Relief. Yet Plaintiff has failed to allege sufficient  
15 facts that, if accepted as true, would establish any violation of the Constitution. As a  
16 result, these claims should be dismissed.

17 *a. Plaintiff's Third Claim for Relief.*

18 In his Third Claim for Relief, Plaintiff alleges that the Commission deprived him  
19 of due process by supposedly failing to provide him with certain disclosures before his  
20 April 2016 and May 2018 hearings, as required under 18 U.S.C. § 4208(b).<sup>9</sup> First Am.  
21 Compl., Dkt. 20, ¶¶ 74, 154.

22 Section 4208(b) states in part that, at least 30 days before a parole hearing, a  
23 prisoner shall be provided with "(1) written notice of the time and place of the  
24 proceeding, and (2) reasonable access to a report or other document to be used by the

25 \_\_\_\_\_  
26 <sup>9</sup> The other provision Plaintiff attempts to rely on, 28 C.F.R. § 2.55(a), simply requires  
27 that each prisoner "be given notice of his right to request disclosure of the reports and other  
28 documents to be used by the Commission in making its determination" at least 60 days before a  
parole hearing. From Plaintiff's allegations, it appears clear that he was aware of his right to  
request certain disclosures.

1 Commission in making its determination.” Yet § 4208(b) also expressly provides that a  
2 prisoner may waive his right to these disclosures. See 18 U.S.C. § 4208(b) (“A prisoner  
3 may waive such notice . . . .”). Moreover, the statute also specifies that, if a prisoner does  
4 not waive his or her right to disclosure, the parole hearing shall be continued. See id.  
5 (“[I]f notice is not waived the proceeding shall be held during the next regularly  
6 scheduled proceedings by the Commission at the institution in which the prisoner is  
7 confined.”). Accordingly, by continuing with his April 2016 and May 2018 hearings as  
8 scheduled, Plaintiff waived his right to challenge the Commission’s alleged failure to  
9 make timely disclosures.

10 Even if Plaintiff had not waived his right to challenge the alleged lack of  
11 disclosure, Plaintiff fails to state a constitutional violation for the additional reason that  
12 he has not alleged that he was prejudiced by the alleged untimely disclosure. See Vargas  
13 v. U.S. Parole Comm’n, 865 F.2d 191, 194 (9th Cir. 1988) (affirming dismissal of claim  
14 arising from alleged violations of Commission’s regulations where plaintiff “did not  
15 present evidence . . . to the court to show that [the regulatory violation] caused  
16 prejudice). Like the plaintiff in Vargas, Plaintiff has not alleged that the Commission’s  
17 alleged failure to disclose certain information before the Plaintiff’s April 2016 and  
18 May 2018 hearings prejudiced him in any way. Without alleging prejudice, Plaintiff has  
19 not stated a claim arising from the violation of these regulations, and his Third Claim for  
20 Relief should be dismissed.

21 *b. Plaintiff’s Fourth Claim for Relief.*

22 As noted above, in his Fourth Claim for Relief, Plaintiff alleges that the  
23 Commission violated 28 C.F.R. § 2.55(b) by denying Plaintiff’s requests for parole in  
24 2016 and 2018 based on “numerous facts and allegedly adverse evidence” that the  
25 Commission supposedly did not rely on in earlier parole hearings. First Am. Compl.,  
26 Dkt. 20, ¶ 157. Again, this claim fails both because 28 C.F.R. § 2.55(b) did not apply to  
27 Plaintiff’s April 2016 hearing and because Plaintiff has not identified any evidence that  
28 the Commission relied on at the May 2018 hearing that it did not rely on previously. See,



1 supra § V.C.1. Accordingly, Plaintiff has failed to state a constitutional violation with  
2 regard to the Commission’s consideration of evidence at the April 2016 or May 2018.

3 *c. Plaintiff’s Sixth Claim for Relief.*

4 In his Sixth Claim for Relief, Plaintiff alleges that the Commission deprived him  
5 of due process by considering Plaintiff’s 2013 violation of BOP telephone use rules in  
6 denying his requests for parole. First Am. Comp., Dkt. 20, ¶ 163. Again, Plaintiff has not  
7 alleged how the Commission’s reliance on the BOP’s finding that Plaintiff had violated  
8 institution rules regarding telephone use supposedly violated due process.<sup>10</sup> Additionally,  
9 the Commission is expressly permitted to consider an inmates “institutional conduct” in  
10 evaluating whether release on parole is appropriate. See 28 C.F.R. § 2.13(a); see also 18  
11 U.S.C. § 4206(d) (prohibiting release on mandatory parole if inmate has “seriously or  
12 frequently violated institution rules and regulations”). Accordingly, because the  
13 Commission was entitled to consider Plaintiff’s 2013 violation of BOP rules in making  
14 its parole determination, Plaintiff has failed to state a due process violation.

15 *d. Plaintiff’s Thirteenth Claim for Relief.*

16 In his Thirteenth Claim for Relief, Plaintiff alleges that the Commission deprived  
17 him of “equal protection” by supposedly “treat[ing] Plaintiff’s eligibility for release on  
18 parole far more harshly than the manner in which it adjudicated all other parole cases.”  
19 First Am. Compl., Dkt. 20, ¶ 184. To allege an Equal Protection violation, Plaintiff must  
20 allege that he was intentionally treated differently from others similarly situated and that  
21 there was no rational basis for the difference in treatment. See Village of Willowbrook v.  
22 Olech, 528 U.S. 562, 564 (2000). Plaintiff has failed to state a claim for deprivation of  
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24 <sup>10</sup> To the extent Plaintiff alleges that the Commission’s supposed reliance on Plaintiff’s  
25 rule violation deprived him of due process because Plaintiff contends that the finding that he  
26 violated the rule is supposedly defective, that argument fails for the reasons stated in the Motion  
27 to Dismiss concurrently filed by the BOP and Warden Milusnic, namely that Plaintiff’s claim  
28 regarding the March 2013 disciplinary action is barred by the “favorable termination” doctrine  
and that, even if the claim were not barred, Plaintiff has failed to allege sufficient facts to  
support any of the supposed defects with the disciplinary action. See Mot. to Dismiss, Dkt. 22,  
4:4–8:9.

1 equal protection because Plaintiff has not identified a single “similarly situated” inmate  
2 whose request for parole was treated differently than his. See Ventura Mobilehome  
3 Communities Owners Ass’n v. City of San Buenaventura, 371 F.3d 1046, 1055 (9th  
4 Cir.2004) (conclusory allegations of Equal Protection violation, unaccompanied by  
5 allegations identifying others similarly situated or alleging how they are treated  
6 differently from plaintiff, are insufficient to withstand motion to dismiss). Instead,  
7 Plaintiff’s Thirteenth Claim for Relief contains merely unsupported legal conclusions  
8 and, when those legal conclusions are ignored as they must be, the claim fails.

9 *e. Plaintiff’s Fourteenth Claim for Relief.*

10 In his Fourteenth Claim for Relief, Plaintiff alleges that the Commission  
11 committed “First Amendment Retaliation” by considering Plaintiff’s “protected non-  
12 violent political speech” in its decisions to deny his requests for parole. First Am.  
13 Compl., Dkt. 20, ¶ 187. In order to state a claim of First Amendment retaliation, a  
14 prisoner must allege that (1) “a state actor took some adverse action against an inmate  
15 (2) because of (3) that prisoner’s protected conduct, and that such action (4) chilled the  
16 inmate’s exercise of his First Amendment rights, and (5) the action did not reasonably  
17 advance a legitimate correctional goal.” Rhodes v. Robinson, 408 F.3d 559, 567–68 (9th  
18 Cir. 2005) (footnote omitted). Plaintiff’s claim for First Amendment retaliation fails  
19 because he has not alleged facts to establish at least three of the required elements for  
20 this claim.

21 First, Plaintiff has not alleged that his request for parole was denied “because” of  
22 his allegedly protected speech. Rather, his request for parole was denied because the  
23 Commission concluded, based on all of the evidence, both that Plaintiff was likely to  
24 reoffend if released and that that Plaintiff had seriously violated BOP rules. First Am.  
25 Compl. App’x, Dkt. 20-3; First Am. Compl. App’x, Dkt. 20-6. The Commission did not  
26 arrive at the first conclusion because of Plaintiff’s speech, but because, in the  
27 Commission’s judgment, Plaintiff’s speech reflected a sentiment that he was not  
28 responsible for his crimes. First Am. Compl. App’x, Dkt. 20-6. The Commission is

1 entitled to take Plaintiff’s own words into account when evaluating the possibility for  
2 recidivism. See 28 C.F.R. § 2.19(b)(1). Moreover, Plaintiff’s speech had no impact on  
3 the Commission’s conclusion that he had “seriously” violated institutional rules which,  
4 standing alone, is sufficient to deny mandatory parole. See 18 U.S.C. § 4206(d). As a  
5 result, Plaintiff has not alleged that his speech was the cause of the denial of his requests  
6 for parole.

7         Second, Plaintiff has not alleged that the denial of his requests for parole “chilled”  
8 his exercise of his First Amendment rights. Rather, Plaintiff has continued to voice his  
9 opinions that he is a political prisoner and a victim of government counter-intelligence  
10 after his previous requests for parole were denied.

11         Finally, Plaintiff does not allege that the Commission’s consideration of his  
12 statements “did not reasonably advance a legitimate correctional goal.” See Rhodes, 408  
13 F.3d 567–68. Rather, the need to consider all relevant evidence in order to make proper  
14 parole determinations is a legitimate correctional goal. See 28 C.F.R. § 2.19(b)(1)  
15 (permitting a hearing examiner to take into consideration “such additional relevant  
16 information concerning the prisoner (including information submitted by the prisoner) as  
17 may be reasonably available”). Accordingly, Plaintiff has failed to state a claim for First  
18 Amendment retaliation and, as a result, this claim should be dismissed.

19 **VI. Conclusion**

20         For the reasons stated above, the United States Parole Commission requests that  
21 the Court grant this Motion and dismiss Plaintiff’s First Amended Complaint.

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1 Dated: September 17, 2018

Respectfully submitted,

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