Court of Appeals Docket No. 09-15836

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JERRY VALDIVIA, et al.,

Plaintiffs-Appellees

v.

ARNOLD SCHWARZENEGGER, et al.,

Defendants-Appellants

On Appeal from the United States District Court for the
Eastern District of California
Case No. S-94-0671 LKK/GGH

The Hon. Lawrence K. Karlton, Presiding

BRIEF OF AMICI CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES AND IN SUPPORT OF AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT
(Rule 26.1)

Pursuant to Federal Rules of Appellate Procedure 26.1(a) and 29(c), Amici Curiae make the following corporate disclosure statement:

The American Civil Liberties Union of Northern California, The Justice Policy Institute, Legal Services for Prisoners and Children, The National Council on Crime and Delinquency, and The Sentencing Project are non-profit public interest organizations, none of which have parents or stockholders.

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INTRODUCTION

Amici Curiae are national and statewide nonprofit organizations and academics with expertise in correctional matters. We respectfully submit this brief in support of Plaintiffs-Appellees and to request this Court's affirmance of the decision of the District Court.

The Consent Decree upheld below is essential to any hope of real reform of the parole system in California. It is an unfortunate but undeniable aspect of American history that the vast majority of the country's penal systems, either through benign neglect or for less benign reasons, have been impervious to reform efforts without the involvement of the federal judiciary. In fact, consent decrees have played a key role in reforming prisons and jails in more than half of the states. Consent decrees can be powerful tools to improve complex public systems and prevent their relapse into past unconstitutional practices.

The *Valdivia* Consent Decree is critical here because California's parole system is in crisis. Years of "tough on crime" initiatives have resulted in a wildly expensive system that fails to protect public safety or use public resources wisely. Fundamental deficiencies in the parole revocation process have produced the largest parolee population in the country, some of the highest recidivism rates on record, and an irrational system that releases inmates with a high risk of recidivating while incarcerating those least likely to reoffend. This level of dysfunction bleeds into other aspects of California's penal system, contributing to prison overcrowding that has reached unconstitutional proportions. Moreover, given that California has only 12% of the country's population, but accounts for a remarkable 48% of all parole revocations nationwide, California's parole system has national implications for the American criminal justice system.

This dysfunction—which has given rise to a parole system that is both constitutionally infirm and resistant to reform—underscores the risks presented by Proposition 9. Far from representing "changed circumstances" that might justify the modification of a consent decree, Proposition 9 signifies an attempt to return to a system that is incapable of complying with the Constitution. As the Supreme Court has cautioned, "a modification must not create or perpetuate a constitutional violation." *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 391 (1992).

The idea of rolling back key reforms such as the provision of counsel, the utilization of remedial sanctions, and the development of evidence-based decisionmaking flies in the face of Amici's understanding and experience regarding how parole systems actually change. In fact, these leading parole practices are essential to ensuring that California's parole system becomes and remains functional, transparent, accountable, fair, and constitutional.

AMICI CURIAE STATEMENTS OF INTEREST

Amici are comprised of a number of nonprofit organizations and academics with well-established expertise in criminal justice policy and practice. The American Civil Liberties Union of Northern California, the regional ACLU affiliate, advocates for the protection of due process rights for all persons, including those accused or convicted of criminal acts. The Justice Policy Institute is a Washington, D.C.-based organization dedicated to reducing society's reliance on incarceration as a response to social problems and to creating fairer systems of justice. Legal Services for Prisoners with Children focuses on the legal needs of prisoners and their children, and supports effective legal representation and procedural fairness for those facing parole revocation. The National Council on Crime and Delinquency, the nation's oldest criminal justice research and policy organization, has been extensively involved in reform of sentencing and parole

practices in California and in many other states. The Sentencing Project analyzes the effects of sentencing and incarceration policies, promotes rational and effective public policy on criminal justice issues, and advocates for cost-effective and humane responses to crime.

Amici also include Jeremy Travis, the President of John Jay College of Criminal Justice, is one of the nation's leading criminal justice scholars whose recent works have focused on parole and prisoner reentry issues. From 1994-2000, he directed the National Institute of Justice, the research arm of the United States Department of Justice. Jonathan Simon, Professor and Associate Dean for Jurisprudence and Social Policy at the Boalt Hall School of Law at the University of California at Berkeley, has researched and published extensively on such issues as parole reform and prison overcrowding. Professor Hadar Aviram, University of California Hastings College of the Law, has written on the impact of evidence-based parole policies on the California correctional budget and maintains a widely-read blog on the California correctional crisis. Professor W. David Ball, Santa Clara University, has conducted research, taught courses, and authored articles concerning law enforcement, sentencing, and release policies and procedures in California. Professor Sharon Dolovich, UCLA School of Law and currently a visiting professor at Georgetown University Law Center, has researched and written extensively on the law, policy, and theory of prisons and punishment. Malcolm M. Feeley, Claire Sanders Clements Dean's Professor in the Jurisprudence and Social Policy Program at Boalt Hall School of Law at the University of California at Berkeley, has authored of dozens of articles and fifteen books in criminal courts and criminal justice reform. Professor Michael Pinard, University of Maryland School of Law, has written on the reentry of individuals with criminal records and the collateral consequences of criminal convictions.

SUMMARY OF FACTS AND CASE

This action was filed in 1994 by a plaintiffs' class of current and future parolees challenging the constitutionality of California's parole revocation procedures. (ER 187-207.) In 2002, the district court granted partial summary judgment in favor of the plaintiffs' class, ruling that the parole revocation process violated parolees' constitutional due process rights. *Valdivia v. Davis*, 206 F. Supp. 2d 1068, 1078 (E.D. Cal. 2002). The State was ordered to produce a remedial plan to bring its process into compliance with the Constitution. (SER 1056-57.) The parties then entered into a Consent Decree that included separate probable cause and revocation hearings, provision of parolee counsel, the right of confrontation, an emphasis on non-incarceration remedial sanctions for parole violations, and specific reduction benchmarks for the parolee population. (ER 51-73.)

Compliance with the Consent Decree has been monitored by a Special Master, who has reported in detail concerning the imperfect but encouraging reform process. For the first time in decades, California's parole system features procedures that are constitutionally compliant and is exhibiting signs of functionality by employing non-incarceration remedial sanctions and evidence-based decisionmaking practices. (SER 706-90.) Progress has been made to identify and foster remedial programs, such as drug treatment and community-based initiatives, and to retrain parole personnel to consider alternatives to incarceration at appropriate points in the parole supervision process. (*Id.*)

However, in November 2008, Proposition 9 was enacted, severely abridging parolees' access to counsel and threatening other reform elements. (ER 113-20.) The district court enjoined the enforcement of Proposition 9 to the extent it conflicted with the terms of the Consent Decree. (ER 1-34.) In doing so, the

court's decision not only comported with procedural due process requirements, but also ensured that California's steps toward real parole reform would continue.

Defendants appealed. On June 29, 2009, the Criminal Justice Legal Foundation, the Crime Victims United of California, and State Senator George Runner (collectively, "Adverse Amici") submitted a motion requesting leave to file an amici curiae brief in support of Defendants' appeal.

ARGUMENT

I. CALIFORNIA'S UNIQUELY DYSFUNCTIONAL PAROLE SYSTEM UNDERSCORES THE RISKS PRESENTED BY PROPOSITION 9.

Defendants contend that Proposition 9 represents a "changed circumstance" that warrants essentially the wholesale rescission of the Consent Decree. Under *Rufo*, however, the party seeking to modify a consent decree has the burden of showing that the modification is (1) warranted by "a significant change either in factual conditions or in law" and (2) "suitably tailored" to account for the changed circumstance. 502 U.S. at 384, 391. Defendants have failed to make either showing.

Proposition 9 would lead only to a return to the circumstances that existed prior to the Consent Decree issued here: extreme dysfunction that left the State in gross violation of constitutional due process standards, out of step with the rest of the country, and unable to accomplish its most basic objectives of protecting the public (including crime victims) and ensuring the appropriate expenditure of public funds. *See Rufo*, 502 U.S. at 391 ("[A] modification must not create or perpetuate a constitutional violation.").

A. Proposition 9 Would Represent A Return To A Severely Dysfunctional Parole System.

Proposition 9 represents a significant risk of return to an unconstitutional state of affairs, as is made clear by an examination of the interrelated problematic aspects of California's criminal justice system. First, California's determinate sentencing scheme and near-automatic parole supervision for every released prisoner have resulted in a disproportionately large parolee population. In many states, a parole board or similar body determines a prisoner's release date based on an assessment of the specific characteristics of that prisoner, including "the individual nature of the crime committed, mitigating and aggravating circumstances associated with the criminal offense, past criminal history, the offender's conduct in the prison system, and proven amenability to rehabilitation over time." Utah Sentencing Commission, *A Statement Regarding Utah's Indeterminate Sentencing System* 2 (2006), *available at* http://www.sentencing.state.ut.us/Policy/IndetermSentPosition.pdf; *see also* Ryken Grattet, Ph.D., Joan Petersilia, Ph.D. & Jeffrey Lin, Ph.D., *Parole Violations and Revocations in California* 5 (2008), *available at* http://www.ncjrs.gov/pdffiles1 /nij/grants/224521.pdf.

California, by contrast, employs both a determinate sentencing scheme, under which prisoners are automatically released after a fixed amount of time, *and* nearly universal parole for every released prisoner regardless of the risk of reoffending. Joan Petersilia, *Understanding California Corrections* at p. xii (2006), *available at* http://www.ucop.edu/cprc/documents/understand_ca_ corrections.pdf; Grattet, et al., *supra*, at 5, 43-44. Ironically, this leads to a system in which "California parole caseloads probably contain some of the nation's highest risk offenders as well as . . . some of the nation's lowest risk offenders." Grattet, et al., *supra*, at 44. Furthermore, the sheer number of parolees results in a

system that is both overtaxed and incapable of protecting public safety: "California's parolee population is so large and its parole agents are so overburdened that parolees who represent a serious public safety threat are not watched closely, and those who wish to go straight cannot get the help they need." *Id.* at 5.

Second, the problem of an overlarge parolee population is compounded by the fact that an enormous number of California parolees return to prison within three years. *Id.* at 29. By every metric, California's parole revocation process is an outlier in relation to other states and the nation as a whole. For example, in 2006, nearly 64% of all entrants to California prisons were parolees. *Id.* In contrast, Texas—a state with a prison population of comparable size—parolees comprised only 20% of entrants. *Id.* The growth rate in the frequency of parole revocation in California has also dwarfed the national average; over the past twenty years, the nation's parole revocations have increased six-fold, while California's revocations have increased thirty-fold. *Id.* Thus, by 2007, California represented 12% of the United States population, U.S. Census Bureau, *National and State Population Estimates* (2007), *available at* http://www.census.gov/popest/states/NST-ann-est2007.html, but accounted for a staggering 48% of all parole revocations in the country, Lauren E. Glaze & Thomas P. Bonczar, U.S. Dep't of Justice, *Probation and Parole in the United States, 2007*, at 8, *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/ppus07st.pdf; *see also* Alfred Blumstein & Allen J. Beck, *Reentry as a Transient State Between Liberty and Recommitment*, *in Prisoner Reentry and Crime in America* 78 (Jeremy Travis & Christy Visher, eds., 2005) ("California, with an incarceration policy of 'catch and release' and a parole policy of 'violate and recommit,' generates a high volume of the nation's prison releases and recommitments.").

Third, California relies almost exclusively on short-term reincarceration to sanction parole violations, leading to a system that paradoxically over-punishes some parolees while under-punishing others. For example, California frequently imposes inappropriately lenient sentences when new allegations of serious criminal conduct are punished administratively as a parole violation, rather than charged as a new offense. Petersilia, *supra*, at p. xii. Parole violators are subject to a maximum sentence of only twelve months in prison, Grattet, et al., *supra*, at 6, which can hardly be considered well-suited for violent crimes such as robbery, rape, and homicide (all of which have formed the basis for administrative parole revocations in recent years), *id.* at 18. Consider this remarkable statement by one parolee, as told to researchers:

> It is a good time to commit crime if you are on parole. If I weren't on parole, I would have to be prosecuted for a new crime. But since I am on parole, they usually just send me back to prison as a parole violator, where the term is a maximum of twelve months and I will do about half that—six months, tops. Being on parole is kind of like an insurance policy against being fully prosecuted.

Id. at 124. In addition, this ongoing "churning" of parolees through short-term prison sentences places enormous administrative pressure on prisons at significant costs without advancing crime prevention or promoting steps to reduce recidivism. *See* Blumstein & Beck, *supra*; Petersilia, *supra*, at 75-76.

Thus, this "back-end sentencing" system threatens public safety by failing to charge offenses as new crimes and raises significant due process concerns by imposing what is essentially a criminal sentence despite a lack of proof beyond a reasonable doubt. *Id.* at 29. Governor Schwarzenegger, a defendant in this action, has recognized on his official website that "[t]he current parole system threatens the public safety by dedicating resources to irrelevant

issues and ignoring violent felons." Cal. Gov. Arnold Schwarzenegger, *Comprehensive Prison Reform: Reforming Parole*, *at* http://gov.ca.gov/index.php?/fact-sheet/4969/ [hereinafter *Schwarzenegger Reform*].

Moreover, parolees who commit technical or minor violations are also reincarcerated, even though non-incarceration sanctions have been proven more effective at reducing recidivism and less expensive than reincarceration. *See* Cal. Dep't of Corr. & Rehabilitation, *A Roadmap for Effective Offender Programming in California* 15 (2007) [hereinafter *Roadmap*]. Again, California lags significantly behind other states, as noted parole expert, Joan Petersilia, has observed:

> Other large states (e.g., Illinois, Ohio, New York) have managed to stabilize or reduce their prison populations by using intermediate sanctions (e.g., day-reporting centers) for parole violators. California has few such programs. In 2001 (the latest year for which information is available), California returned 18,000 purely technical violators (e.g., who failed drug tests or missed appointments) to prison. These parolees could have been kept in the community under an intermediate sanction program.

Petersilia, *supra*, at p. x. The Little Hoover Commission, an independent State oversight organization, echoes these concerns: "Parolees are a challenge for all states. But California's parole policies are simply out of sync with the rest of the nation. . . . California has created a revolving door that does not adequately distinguish between parolees who should be able to make it on the outside, and those who should go back to prison for a longer period of time." Little Hoover Comm'n, *Back to the Community: Safe & Sound Parole Policies* at p. i (2003) [hereinafter *Safe & Sound*]. This overemphasis and misuse of incarceration should

probably come as no surprise given that, for decades, decisionmakers in the California parole revocation process have been provided with "almost no guidance from either the administration or the legislature on what factors to consider in revoking parole; what kind of sanctions to impose having decided to revoke parole; whether, and under what circumstances, incarceration is appropriate; and, if incarceration is appropriate, an acceptable length of incarceration." Kara Dansky, Exec. Dir., Stanford Crim. Justice Ctr., *Contemporary Sentencing Reform in California: A Report to the Little Hoover Commission* 7 (2006), *available at* http://www.law.stanford.edu/program/centers/scjc/pdf/Little_Hoover_Commission_written_testimony.pdf [hereinafter *Contemporary Sentencing Reform*].

These and other fundamental flaws in the California penal system have conspired to create a self-destructive feedback loop that has far-ranging legal, political, and sociological consequences:

> This system of "catch and release" makes little sense from the standpoints of deterrence, incapacitation, treatment, or cost. Parolees quickly learn that being revoked from parole doesn't carry serious consequences, and the State will have wasted the resources of the police, the parole board, and parole officers, who have to reprocess the same individuals over and over again. This constant churning of parolees also disrupts community-based treatment, since parolees who are enrolled in community treatment programs are constantly having that treatment disrupted for what, in the treatment providers' views, are predictable and minor rule violations (e.g., testing positive for drug use). Churning also encourages the spread of prison gang culture into the communities where inmates are discharged, while undercutting the deterrent effect of serving prison time. And of course, given California's overcrowding crisis, there is the high opportunity cost of occupying a limited number of prison beds that, in some cases, could be used for offenders who pose a greater risk to the public safety.

Grattet, et al., *supra*, at 7. Indeed, in 2008, the California prison system was in excess of 190% of design capacity, a level described as "extraordinary" and "almost unheard of." Op. & Order at 55, *Coleman v. Schwarzenegger* (E.D. Cal. Aug. 4, 2009) (No. CIV S-90-0520 LKK JFM P), *available at* http://www.ca9.uscourts.gov/datastore/general/2009/08/04/Opinion%20&%20Order%20FINAL.pdf. This overcrowding, in turn, has resulted in a prison medical and mental health care program that has been ruled constitutionally deficient. *Id.* at 99. The three-judge panel in *Coleman* specifically identified parole reform as a significant source of reduction in the prison population:

> We conclude that simply slowing the flow of technical parole violators to prison, thereby substantially reducing the churning of parolees, would by itself improve both the prison and parole systems, and public safety. Diversion of parole violators to community alternative sanctions programs would serve to significantly reduce recidivism. We therefore find that diverting parole violators to alternative community sanctions programs would reduce the prison population while having a positive rather than a negative effect on public safety and the operation of the criminal justice system.

Id. at 149; *see also* Grattet, et al., *supra*, at 90 ("[A]ny examination of prison crowding in California must account for the role of parole revocation in contributing to the problem.").[1]

It has also been observed that "incidences of violence and other negative consequences of overcrowding degrade the [California Department of Correction and Rehabilitation's ("CDCR")] ability to consistently operate

[1] Leading parole experts have estimated that parole practices applied in other states, such as those discussed herein, could reduce California's prison population by up to 71,000 individuals. *Roadmap*, *supra*, at 89.

rehabilitation programs in the prison environment," thereby contributing to the relative ineffectiveness of post-incarceration rehabilitation programs. *Roadmap*, *supra*, at 9. Moreover, empirical research suggests that parole agents tend to seek incarceration for minor and technical violations when alternatives to incarceration, such as local treatment and community resources, are unavailable. Grattet, et al., *supra*, at 87. In light of California's persistent lack of such alternatives, agents have predictably sought reincarceration in most instances.

B. California's Parole System Has Proven Doggedly Resistant To All Reform Efforts.

Despite these well-established difficulties, reform of California's parole system and the broader criminal justice system has not been forthcoming, even as calls for reform have become legion. *See, e.g.*, Grattet, et al., *supra*, at 115 ("California possesses a parole system that contributes to the prison overcrowding crisis and is extremely costly. And yet it does not appear to do all that it can to enhance public safety. . . . In response to these stark facts there have been repeated calls for reform and policy change."); Petersilia, *supra*, at 4 ("[T]he high cost and dramatic collateral consequences of California's approach to corrections strongly argue in favor of reform."); Jonathan Simon, *Poor Discipline: Parole and the Social Control of the Underclass, 1890-1990*, at 238 (1993) (analyzing prospects for internal parole sanction guidelines to reduce California's overuse of reincarceration for technical violations); *Schwarzenegger Reform*, *supra* ("The Governor proposes examining California's parole structure, with the goal of dramatically reducing current caseloads . . . ."); *Safe & Sound*, *supra*, at 83 ("For more than a decade the Little Hoover Commission, blue ribbon panels, and a variety of learned experts have challenged California to improve the performance of its correctional system. Most of the recommendations have been ignored."); Jeremy Travis & Sarah Lawrence, Urban Institute, *California's Parole Experiment*

(2002), *available at* http://www.urban.org/UploadedPDF/CA_parole_exp.pdf (suggesting alternatives to incarceration among other reforms); Mark Martin, *Maximum Insecurity: California's Prison System Produces Bizarre and Dangerous Results Harmful to Inmates and Public*, S.F. Chron., Aug. 27, 2006, *available at* http://sentencing.nj.gov/downloads/pdf/articles/2006/Sept2006/story18.pdf ("[A]lmost every expert who studies California's correctional system recommends overhauling both the state's sentencing and parole systems.").

Thus, although California's system is in such distress and under so many pressures, it has proven highly resistant to reform. Indeed, the system's structural components that make it such an outlier among parole regimes reinforce that California will regress to its prior dynamics without comprehensive planning and committed attention to reform.

II. CALIFORNIA'S PAROLE REVOCATION PROCESS IS INCAPABLE OF CONSTITUTIONAL COMPLIANCE WITHOUT THE PROVISION OF PAROLEE COUNSEL.

It is in this context of systemic dysfunction that the *Valdivia* litigation arose. Prior to this action, California's parole revocation process had exhibited decades of persistent noncompliance with even a minimalist interpretation of due process requirements under *Morrissey v. Brewer*, 408 U.S. 471 (1972), and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973).[2] After many years of litigation, a grant

[2] For example, Professor Jonathan Simon, criminologist and amicus, has observed that even before *Morrissey*, California's administrative revocation procedure included hearings that "were largely ceremonial, taking place months after the parolee had been reimprisoned and generally ratifying the revocation decision." Simon, *supra*, at 117. More than fifteen years after *Morrissey*, California still had made no effort to bring its procedure into compliance with the timely, bifurcated hearing requirement. *Id.* at 121.

of partial summary judgment against the State, and extensive negotiation, Plaintiffs and State officials executed the Consent Decree here in order to remedy these constitutional infirmities. In doing so, the parties agreed that California's parole revocation procedures were incapable of constitutional compliance without the provision of parolee counsel.

It is not surprising that Defendants and Adverse Amici make no attempt to prop up the pre-*Valdivia* unitary hearing procedure, which so clearly violated *Morrissey* and *Gagnon*. *Valdivia*, 206 F. Supp. 2d at 1078. Rather, their strategy appears to be to attack the other components of the Consent Decree, which Adverse Amici claim are "vastly in excess of what Supreme Court precedent requires." (Adverse Amici Br. at 2.) However, the Consent Decree embodies the framework of a comprehensive and interconnected remedial scheme, and its provisions cannot simply be viewed in isolation. The provision of parolee counsel during the revocation process is a prime example. Adverse Amici appear to consider the provision of counsel as an extravagant, but unnecessary, fringe benefit of the Consent Decree. (*See* Adverse Amici Br. at 7-8 (characterizing provision of counsel as "unnecessary cost[]").) As envisioned by Adverse Amici, Proposition 9 is nothing more than a corrective that "limit[s] state-paid counsel to cases where the Constitution actually requires counsel." (*Id.*) However, this is a gross distortion of the record.

During the negotiations that precipitated the Consent Decree, the State revealed that a significant factor in its inability to meet *Morrissey*'s requirement of timely revocation hearings involved administrative hurdles in determining which parolees were entitled to counsel under *Gagnon*, as well as the process of appointing counsel. (SER 117-19, 129-30.) Stated differently, it was determined that any remedy without the provision of parolee counsel would leave California unable to satisfy the constitutional mandate of *Morrissey* and *Gagnon*.

Accordingly, to overcome these administrative hurdles and resolve constitutional issues, the State agreed to provide counsel to all parolees. (ER 67; SER 116-17, 129-30.) Defendants and Adverse Amici do not acknowledge this history, let alone present a plan as to how Proposition 9 could be implemented to avoid reestablishing past constitutional deficiencies.

The importance of counsel to the due process rights of parolees facing revocation is further underscored by the high number of revocations based on new allegations of criminal conduct. Petersilia, *supra*, at 75. As noted above, processing such violations via the administrative revocation process has the dual distinction of representing poor policy as well as implicating due process concerns. *Id.* California's unique use of parole revocation as a back-end, parallel criminal justice system to adjudicate serious and complex cases increases the risks of inaccurate factfinding, resulting in incarceration of the wrong people. Grattet, et al., *supra*, at 19. In addition, the due process concerns regarding the "screening offer" have now been resolved by the provision of parolee counsel. *See Valdivia*, 206 F. Supp. 2d at 1077 n.16 ("Putting the parolee to such a choice without at least a determination of probable cause may itself raise due process questions.").

In fact, an effective parolee counsel program has already been shown to be a key contribution to the development of a functional parole system. According to the Special Master, the parolee counsel program was "established relatively quickly given the number of cases being processed and the expansive geography being covered." *First Report of the Special Master on the Status of the Conditions of the Remedial Order* at 10 (Sept. 11, 2006), *Valdivia* (No. CIV-94-671 LKK/GGH, Dkt No. 1302).[3] Just last year, the Special Master reported that

[3] Each of the Special Master reports cited herein have been incorporated into the record of the proceedings before the district court, CIV. S-94-671 LKK/GGH.

the counsel program "continues to provide exceptional services to parolees and to the state, through well-prepared representation, principled contribution to the state's policymaking and operational committees, and reasonable and well-structured internal oversight." *Fifth Report of the Special Master on the Status of the Conditions of the Remedial Order* at 45 (Oct. 25, 2008), *Valdivia* (No. CIV-94-671 LKK/GGH) (SER 45). As discussed below, the involvement of parolee counsel will continue to support much-needed reforms, such as helping to identify individually-appropriate treatment options and promoting objective and standard-based decisionmaking. Far from being an "unnecessary cost," parolee counsel has the capacity to help reduce costs while enhancing public safety by helping to ensure that the appropriate sanction is imposed.

Especially given the structural deficiencies discussed above, Defendants and Adverse Amici cannot simply put forward a proposal that would return California's parole system to prior circumstances that have been found to be unconstitutional. By doing so, Defendants' proposed modification represents an impermissible attempt to "rewrite a consent decree so that it conforms to the constitutional floor" and, in fact, to reestablish procedures that land markedly *below* the floor. *See Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 391 (1992). As such, Proposition 9 is not "suitably tailored" to address the underlying constitutional violations the Consent Decree was designed to remedy, but instead would "create or perpetuate a constitutional violation." *Id.* Accordingly, the proposed equitable modification of the Consent Decree should be rejected.

III. PROPOSITION 9 WOULD ROLL BACK REFORMS IMPLEMENTED UNDER THE CONSENT DECREE.

As discussed above, California's pre-*Valdivia* system was hardwired to result in a high frequency of revocations, which invariably led to one place: prison. The Consent Decree included a "remedial plan" that was designed to counteract this "punishment-only" regime by advancing parole procedures that turn instead to non-incarceration alternatives such as remedial sanctions and community-based treatment options.[4] As discussed below, such alternatives, particularly when coupled with a rational, evidence-based decisionmaking process, lead the way to real reform, protection of the public, and cost-effective policies and procedures.

However, Proposition 9 would wipe away attempts at reform through use of non-incarceration alternatives by eliminating the discretion of parole authorities to consider the appropriate response to individual violators in the context of the overall system. *See* Cal. Penal Code § 3044(b) (providing that "[t]he board is entrusted with the safety of victims and the public and shall make its

[4] Adverse Amici argue that the Consent Decree "has no substantive requirements" and that the remedial plan "requires that alternatives be considered, but not what factors go into that consideration." (Adverse Amici Br. at 21 (citation omitted).) Adverse Amici are wrong. The remedial plan provides that "the remedial sanctions/community based treatment programs that will be used are the Substance Abuse Treatment Control Units, Electronic Monitoring, Self-Help Outpatient/aftercare programs, and alternative placements in structured and supervised environments." (ER 64.) Moreover, the remedial plan featured specific reductions in the parolee population to be achieved through non-incarceration alternatives. (ER 65.) By court order in 2005, the remedial plan was incorporated into the Consent Decree, *Valdivia*, 603 F. Supp. 2d at 1279, and is not simply "attached" to the Consent Decree as Adverse Amici contend. (Adverse Amici Br. at 21.)

determination fairly, independently, and without bias and *shall not be influenced by or weigh the state cost or burden associated with just decisions*." (emphasis added)) (ER 120). It is precisely this insular incarceration-dominant focus that has resulted in the dysfunction and failure of the California parole system.

Moreover, there has been no "changed circumstance" in law or fact to justify doing away with the Consent Decree's remedial plan, as Proposition 9 would contemplate. In fact, as discussed herein, the only "change" in California since the *Valdivia* Consent Decree has been the significant first steps toward improvement and reform of this seriously troubled parole system.

A. The Remedial Plan Reflects Leading Parole Reforms That Help To Ensure Constitutional Compliance.

In an effort to provide the Court with a better understanding of the policy context in which the Consent Decree exists, Amici include a discussion of leading parole practices that are considered to be minimum components that a functional, rational, and fair parole system should include (and that California has notably lacked):

- the availability and utilization of a broad array of effective non-incarceration remedial sanctions for parole violators;
- evidence-driven parole revocation decisions based on the specific characteristics of the individual and the alleged violation; and
- evidence-based procedures that not only ensure due process rights, but are predictable so as to ensure that the punishment for violations is appropriate and promotes desired parolee conduct.

See, e.g., Am. Corr. Assoc., *Public Correctional Policy on Parole* (Jan. 14, 2004), *at* http://www.aca.org/government/policyresolution/view.asp?ID=32 [hereinafter *ACA Policy Statement*]; *see also* Nancy M. Campbell, Nat'l Inst. of Corr.,

Comprehensive Framework for Paroling Authorities in an Era of Evidence-Based Practices (2008), *available at* http://nicic.org/Downloads/PDF/Library/022906.pdf. These and other leading practices are designed to further overarching penological goals of appropriate punishment and rehabilitation. *ACA Policy Statement*, *supra*; Campbell, *supra*, at 14. Properly implemented, these practices also serve the social and political objectives of protecting public safety and ensuring that government revenues are used effectively and efficiently. *See*, *e.g.*, Petersilia, *supra*, at 4.

1. *Remedial Sanctions*

Parole experts consider non-incarceration remedial sanctions as the cornerstone to a functional system that—through rational policies based on hard evidence—reduces recidivism, protects public safety, and saves taxpayer dollars. The American Correctional Association (the "ACA"), the preeminent correctional accreditation organization, has recognized that the "maximum benefits of parole supervision" cannot be realized unless "full advantage [is] taken of community-based resources available for serving offender employment and training needs, substance abuse treatment and other related services." *ACA Policy Statement*. According to the ACA, effective parole policies include "access to community services to meet levels of offender risks and needs consistent with realistic objectives for promoting law-abiding behavior." *Id.*

A report commissioned by California's own CDCR had noted that "[r]esearch shows that effective correctional programs reduce recidivism by changing offender behavior." *Roadmap*, *supra*, at 1. The report recommended that California adopt alternative remedial measures such as the following:

- "[v]ocational education,"
- "[c]ognitive behavioral treatment . . . in the community," and

- "[i]ntensive community supervision programs that emphasize the delivery of rehabilitation treatment services, not just surveillance."

Id. According to the report, numerous other states have reduced recidivism by implementing these programs:

> Based on the reduced recidivism that offenders experience with these programs, other states, including Kansas, Michigan, Ohio, Oregon, Pennsylvania, and Washington, offer a full menu of rehabilitation programs and services to their offender populations.
>
> But California does not. . . . Perhaps this is why California's adult offender recidivism rate is one of the highest in the nation.

Id.; *see also* Grattet, et al., *supra*, at 23 ("The expansion of evidence-based intermediate sanctions should both reduce recidivism and save expensive prison beds for the most violent criminals.").

Indeed, a number of states have revamped their penal systems under the principle that criminal punishment should entail the "'least restrictive (punitive) sanction' possible to maintain public safety." Vanessa Barker, *The Politics of Imprisonment: How the Democratic Process Shapes the Way America Punishes Offenders* 87 (2009) (quoting Norval Morris, *The Future of Imprisonment* 59 (1974)) (alteration in original). For example, Washington has applied this principle to great success, and now has one of the nation's lowest incarceration rates: "Washington diverts offenders away from prison and toward probation, noncustodial sanctions, and community supervision. . . . State officials have limited to a certain degree restrictive and punitive sanctions, the deprivation of liberty; they have done so not by decreasing punishment but by increasing reliance

on community sanctions." *Id.* at 88. Predictably, before the *Valdivia* Consent Decree, California's experience was quite different:

> [Washington's] cluster of practices stands in opposition to California, which has tended to lavish the prison on all kinds of criminal offenders, parole violators, first-time offenders, nonviolent offenders, along with repeat and violent offenders. . . . Criminal justice in California embodies and invokes the infliction of pain to restore order.

Id. at 87.

Tellingly, even Texas—another "tough on crime" state facing a prison overcrowding crisis—has recently and dramatically shifted course, rejecting a "more prisons, more prisoners" policy in favor of a rational blend of non-incarceration alternatives. Justice Reinvestment, *Overview*, *at* http://justicereinvestment.org/states/texas. These new policies will "expand the capacity of treatment programs and residential facilities that are projected to *increase public safety* and avert the projected growth in the prison population at a *net savings to the state*." *Id.* (emphasis added).

2. *Evidence-Based Decisionmaking*

Another key component of leading parole practices is an evidence-based approach to decisionmaking. This approach seeks to evaluate and respond to the particular circumstances of a parolee, as well as standardize the reactions of the system's decisionmakers to encourage non-incarceration alternatives when appropriate. *See* Grattet, et al., *supra*, at 22; David Fialkoff, *Standardizing Parole Violation Sanctions*, NIJ J., June 2009, at 18, *available at* http://www.ncjrs.gov/pdffiles1/nij/226873.pdf. The ACA's policy statement includes this concept in its first recommendation: "Establish procedures to provide an objective decision-making process, incorporating standards of due process and

fundamental fairness in granting of parole that will address, at a minimum, the risk to public safety, impact on—and views of—the victim, and information about the offense and offender . . . ." *ACA Policy Statement*, *supra*.

To further those goals, parole experts advocate the development of a "parole violation matrix," a powerful tool for guiding parole revocation policy toward the most effective interim steps and outcomes. As explained by leading researchers:

> The parole division and the parole board should adopt policy-driven approaches to parole violations using a decision-making matrix and graduated community-based sanctions. This tool would allow parole officials to respond consistently to parole violations, using a well-developed range of intermediate sanctions. The response should reflect the original risk level of the parolee coupled with a proportionate response to the seriousness of the violation. Every major study on California's prison system published since the 1980s has recommended the use of such a tool, but it has never been implemented, even though such instruments are used in over 20 other states.

Grattet, et al., *supra*, at 22.

Ohio is among those states that have successfully employed a matrix, which directs parole decisionmakers to resort to alternative sanctions at escalating steps before revoking parole. Fialkoff, *supra,* at 18. Available sanctions include "restrictive conditions on parole, increased structured supervision, substance abuse testing and monitoring, reprimands and halfway house placement." *Id.* at 18-19. Researchers have found that, when coupled with remedial sanctions, the matrix's decisionmaking process has led to significant reductions in recidivism. *Id.* at 19. Ultimately, the policy of progressive and targeted sanctions has "led to a better matching of services based on an individual offender's risks and needs." *Id.* In

addition, the "looming certainty of more restrictive sanctions may also help focus an offender's attention on the benefit of actively participating in treatment." *Id.*

Where implemented, these reforms have led to marked reductions in parole revocation. For example, Georgia's revocations decreased 11%, and New Jersey saw a drop of 22%. Peggy B. Burke, Nat'l Inst. of Corr., *Parole Violations Revisited* 31, 45 (2004), *available at* http://www.nicic.org/pubs/2004/019833.pdf. Reforms have also resulted in a decrease in technical violations, such as in Kansas where the percent of total admissions from technical violations fell from 45% to 39%. *Id.* at 37.

B. The Consent Decree's Remedial Plan Represents A Critical First Step On The Road to Real Reform.

These leading parole practices are taking hold under the Consent Decree and would be rolled back under Proposition 9. For example, in June 2007, the Special Master reported that the State had established a database that provided parole revocation decisionmakers with up-to-date information concerning community resources that might provide avenues for alternative sanctions. *Third Report of the Special Master on the Status of the Conditions of the Remedial Order* at 20 (June 4, 2007), *Valdivia* (No. CIV-94-671 LKK/GGH, Dkt. No. 1388) [hereinafter *Special Master Third Report*]. This database was designed to respond to the concern that, for years, parole agents and supervisors "have been handicapped in suggesting remedial sanctions because of their lack of knowledge about what services might exist in any particular community." *Id.* Slowly but surely, the emphasis on alternative remedial sanctions has increased both the availability and utilization of those programs in California. *See Fourth Report of the Special Master on the Status of the Conditions of the Remedial Order* at 8-9 (Apr. 28, 2008), *Valdivia* (No. CIV-94-671 LKK/GGH, Dkt. No. 1479); *Sixth Report of the Special Master on the Status of the Conditions of the Remedial Order*

at 12-14 (Apr. 23, 2009), *Valdivia* (No. CIV-94-671 LKK/GGH, Dkt. No. 1539) [hereinafter *Special Master Sixth Report*].

As noted above, the decisionmakers in California's parole system—the Parole Board and agents—have historically been provided with almost no guidance as to what corrective action to impose in response to a violation. *Contemporary Sentencing Reform*, *supra*. In the years after the *Valdivia* decision, the parties have made this aspect of reform a main focus of the remedial measures intended to effectuate the Consent Decree. This effort has centered on the development of a "decision-making matrix that would encourage the use of community-based alternatives to incarceration in response to parole violations," and Defendants have incorporated it into their means of complying with the remedial sanctions portion of the Consent Decree. *Special Master Third Report* at 18-19. The Special Master detailed the rationale:

> The development of structured decision-making for parole agents when considering how to respond to violations of parole has dramatically reduced the number of returns to prison for low risk technical violations in many jurisdictions throughout the country. By reaching agreement through a structured decision-making process, parole agents, supervisors and parole board members share an articulated philosophy of sanctioning that can be evaluated and monitored. Typically it results in the creation of an array of intermediate sanctions that are used before the most costly, and often least effective, sanction of incarceration is used. . . . If the experience of other jurisdictions is a guide, this process could have one of the most significant effects on this population.

Id. at 19. The results of recent test programs were sufficiently positive for the State to advocate the application of the matrix statewide. *Special Master Sixth Report* at 30-31. According to the Special Master: "The decision-making

instrument [i.e., the matrix] provides the type of data needed by Paroles Division managers to ensure that the actions taken in the revocation process are aligned with current research regarding what reduces recidivism and thereby enhances public safety." *Id.* at 34.

As these developments demonstrate, California is finally taking significant steps toward implementation of leading parole practices that can give rise to an effective system that is transparent, accountable, and observant of fundamental rights. It is only through continued commitment to reform that such a system can be created and sustained.

CONCLUSION

It is unfortunate but undeniable that litigation has been a necessary prod for penal reform in state after state—and California perhaps most of all. *See, e.g.*, Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. Rev. 550, 569 (2006); Malcolm M. Feeley & Edward L. Rubin, *Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons* (1998). The consent decrees resulting from such litigation have produced enormously important positive change. Schlanger, *supra*, at 561; James B. Jacobs, *Judicial Impact on Prison Reform*, *in Punishment and Social Control: Essays in Honor of Sheldon L. Messinger* 63 (Thomas G. Blomberg & Stanley Cohen eds., 1999).

In closing, Amici reiterate that Proposition 9 risks returning California's parole system to its prior unconstitutional status. Moreover, the steps toward reform triggered by the Consent Decree promise change that will promote public safety and effective use of public resources, consistent with leading practices across the country. Accordingly, we respectfully urge this Court to affirm the decision below.

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CERTIFICATE OF COMPLIANCE

U.S. Court of Appeals Docket Number: 09-15836

I, Wendy Musell, certify that pursuant to Federal Rules of Appellate Procedure 29(c)(5) and 32(a)(7)(C), and Ninth Circuit Rule 32-1, the forgoing Brief of Amicus Curiae in Support of Plaintiffs-Appellees and in Support of Affirmance is proportionately spaced, has a typeface of 14 points, and contains 6,862 words.

Date: September 9, 2009 By: /s/ Wendy Musell

CERTIFICATE OF SERVICE

U.S. Court of Appeals Docket Number: 09-15836

I hereby certify that on September 9, 2009, I electronically filed the foregoing:

BRIEF OF AMICI CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES AND IN SUPPORT OF AFFIRMANCE

with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: September 9, 2009 By: /s/ Wendy Musell